REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: **1937/2016**

Date heard: **3 November 2016**

Date delivered: **1 December 2016**

In the matter between:

RHODES UNIVERSITY Applicant

and

STUDENT REPRESENTATIVE COUNCIL
OF RHODES UNIVERSITY First Respondent

STUDENTS OF RHODES UNIVERSITY
ENGAGING IN UNLAWFUL ACTIVITIES
ON THE APPLICANT'S CAMPUS Second Respondent

THOSE PERSONS ENGAGING IN OR
ASSOCIATING THEMSELVES WITH
UNLAWFUL ACTIVITIES ON THE
APPLICANT'S CAMPUS Third Respondent

SIAN FERGUSON Fourth Respondent

YOLANDA DYANTYI Fifth Respondent

SIMAMKELE HELENI Sixth Respondent

and

CONCERNED STAFF AT RHODES UNIVERSITY Interveners

JUDGMENT

LOWE, J

Introduction:

[1] Applicant in this matter ("the University") sought and was granted an interim interdict, operating with immediate effect, against Respondents arising from what the University complained was unlawful protest action between 17 and 20 April 2016.

[2] The relief was sought (and granted) against three named Respondents (Fourth, Fifth and Sixth Respondents), the Student Representative Counsel of the University ("the SRC"), and also against the General Body of Students of the University "*engaging in unlawful activities on the Applicant's campus*" (Second Respondent) and "*Those persons engaging in or associating themselves with unlawful activities on the Applicant's campus*" (Third Respondent).

[3] The matter was brought as one of extreme urgency on the basis of oral evidence (later supplemented by a number of affidavits and photographs), launched on 20 April 2016, the order being granted by Jacobs AJ on the same

date, the order giving directions as to service and authorizing Applicant to provide evidence by affidavit filed by Friday, 29 April 2016.

[4] The order in its terms which reflects the relief sought in the Notice of Motion, in the main, is set out below:

"1. THAT a Rule Nisi do issue calling upon the Respondents to show cause, if any, on Tuesday 31st May 2016 why a final order in the following terms should not be granted:

1.1 Restraining the Respondents from participating in, encouraging, facilitating and/or promoting any unlawful activities on the campus of the Applicant which activities shall include, but not be limited to:

1.1.1 Interfering with access to, egress from and the free movement on the Applicant's campus of all members of the Rhodes University community and all others who have lawful reason to move on to, off and upon the said campus;

1.1.2 Kidnapping, assaulting, threatening, intimidating or otherwise interfering in any manner with the free movement, bodily integrity and psychological and mental wellbeing, and any other constitutional rights of any members of the Rhodes University community on the Applicant's campus;

1.1.3 Disrupting, obstructing or in any other manner interfering with the academic processes of the Applicant, which shall include but not be limited to lectures, tutorials, practical tests and use of the Applicant's library facilities and laboratories;

1.1.4 In any manner interfering with the academic and/or administrative staff of the Applicant while on the Applicant's campus;

1.1.5 Disrupting, obstructing or in any other manner interfering with the ordinary functioning of the Applicant's residence system;

1.1.6 Causing any damage to the Applicant's property;

1.1.7 Acting in any manner which occasions any unlawful damage to the reputation of the Applicant.

1.1.8 Directing any Respondent opposing this application to pay the costs thereof.

2. THAT the order set out in prayers 1.1. 1 – 1.1.7 operates as a temporary interdict, pending the return date

3. THAT the Applicant be and is hereby granted leave to amplify the oral evidence adduced by way of affidavits to be filed by Friday 29th April 2016.

4. THAT the Order be served on the Respondents by way of:

4.1 Placing a copy of this Notice of Motion and Order of Court on the Rhodes University webpage and Student Zone Website;

4.2 Emailing a copy of the application directly to the First Respondent;

4.3 Affixing copies of this application to various notice boards at the main entrances to the Applicant's campus;

4.4 By the South African Police Services upon any individuals participating in unlawful activities as set out in paragraph 1.1;

4.5 By service upon the Fourth, Fifth and Sixth Respondents by the South African Police Services, Grahamstown."

[5] It is important to immediately set out that this matter has nothing to do with the "#Fees Must Fall" issues that have arisen at South African University's since March 2015, the subject matter of much debate in the media. As in *Hotz and Others v University of Cape Town* (730/2016) [2016] ZASCA 159, this appeal is not about the merits or legitimacy of those protests nor does it purport to make any judgment on the views of the students and their supporters, University administrators, the politicians and others involved in the events relating thereto.

[6] What this matter involves is the deeply emotional, relevant and challenging issue of rape and gender violence, which the Chapter 2.12 Movement had as

its fundamental core, a predominantly but not solely student organization at the University.

[7] On 17 June 2016 the Fourth, Fifth and Sixth Respondents filed a notice of intention to oppose the application.

[8] On 12 July 2016 a group of the University staff, 37 in number and incorporating a considerable number of respected academics ("the intervening staff"), filed a Notice of Motion asking for leave to intervene in the Main Application and seeking the discharge of the interim interdict referred to above. The founding affidavit in the application was dated 9 July 2016.

[9] The Fourth, Fifth and Sixth Respondents' answering affidavits were in the main dated 12 July 2016, coming shortly after that of the intervening staff. This was followed by a considerable exchange of papers and affidavits the eventual papers, incredibly and unnecessarily, being 1153 pages in length. It would not be going too far to say that the matter in fact got thoroughly out of hand, the affidavits being replete with argument which ought to have been restricted to the heads and not burdened the papers. Argument took a full day, and I am glad to say counsel restricted themselves to the true issues.

[10] The First Respondent filed no papers and was not represented in argument.

The Parties Overall Contentions:

<u>The University</u>

[11] The University contends that on the night of 17 April 2016 a large crowd of protesting students gathered to search for certain men named in what is referred to as the "Reference list", the crowd forcing their way into five residences being Jan Smuts, Goldfields, Cullen Bowles, Calata and Graham. (*I should mention that this is a list of people posted on the Facebook page of the SRC comprising 11 names of current and past Rhodes students, it being alleged that they were rapists.*) The group of students was moving from one residence to another "*pulling out the students and really humiliating them, taking photographs, and it was a significant public display of rapists*"

according to the oral evidence of Dr. Mabizele the Vice Chancellor of the University. I should comment that the existence of this list is common cause, it being admitted in answer, although the exact place of its publication on Facebook is not, it being referred to by Respondents as a University Social Media Platform used for online discussions and debates and intended to be a parody of a list of references that is supposed to be appended to student assignments. The list, *say Respondents,* contains names of students who were "widely suspected of having committed rape or sexual assault, but the list itself did not allege this." Fourth, Fifth and Sixth Respondents say that they do not know who posted the list.

[12] The University contends that certain male students were seized by the crowd, assaulted, threatened and humiliated. One of the male students it is alleged, Mr. Gcakasi, managed to escape the crowd but the University alleges that two students, Mr. Myoyo and Mr. Manyenyeni, were held against their will overnight and were subjected to further assault and abuse. It is further alleged that the Vice Chancellor, other students and staff were also threatened and assaulted by the crowd as it was constituted from time to time.

[13] The University alleges that Fourth and Fifth Respondents were the leaders of this crowd, Fifth Respondent particularly playing an active and direct roll in kidnapping and assaulting the male students.

[14] The University alleges that on the night of Tuesday, 19 April 2016 a "mob" forced their way into Piet Retief residence in search of a further male student, assaulting and intimidating students and staff who attempted to prevent them from gaining access, the crowd led by Sixth Respondent, who proceeded, it is alleged, to threaten the warden of the residence, Mr. Benyon, by inviting him to the township where he would be burnt alive.

[15] It is also alleged that the protesters erected barricades at the entrances to the University campus including Prince Alfred Street (a private road), South Street (a public road) and Lucas Avenue (a public street). These barricades, it is said, consisted of University furniture, signage ripped from the ground, sandbags, building material, rubble and other objects. In this it is alleged that Sixth Respondent played a role.

[16] The University alleges that on 10 May 2016 and after the interim interdict was granted, unknown protesters proceeded to chain the access doors to several University buildings demonstrating the ongoing threat of unlawful restrictions to access and free movement on campus.

[17] The University also alleges that between Monday 18 April and Wednesday, 20 April 2016 groups of students disrupted lectures, often resorting to physical threats and intimidation directed against lecturers and students. This was the result, it is alleged, of the SRC calling for a complete "academic shutdown" of the University.

[18] The University alleges that these protests caused damage to University property and disruption to the University administration, including furniture used in the construction of barricades, signage damaged, refuse bins and pot plants capsized, and tyres on at least two vehicles slashed. It is also alleged that on the morning of 20 April 2016 an identified group of students forced their way into the offices of the Vice Chancellor and the Registrar. They proceeded, so it is alleged, to ransack the offices by upending furniture and scattering official papers.

[19] In its reply, and for reasons explained therein, and which were accepted, the Applicant introduced new evidence. The intervening staff do not dispute this evidence or its admissibility stating "*that there is no factual dispute between us and the University*". I will refer more fully in due course to the fact that the intervening staff's opposition, which was unfortunately very broadly stated, sought the dismissal of the entire interdict including as against Fourth, Fifth and Sixth Respondents, but nevertheless making it very clear that the only question that they were interested in was a legal one: that is whether the interdict sought and granted is constitutional, particularly on three grounds, the vagueness thereof; that it unjustifiably infringed their right to protest, freedom of expression and academic freedom, and that it was inappropriate in the absence of an attempt to first meaningfully engage with the lecturers or the protesters.

[20] The Fourth to Sixth Respondents' attitude to this new evidence was that it did not specifically implicate them and it was unnecessary for them to respond accordingly.

[21] The University alleges that the Fourth to Sixth Respondents' accounts of the protests and their involvement constitute a shifting version which has changed substantially from that set out initially, something to which I will revert in due course.

The Intervening Staff:

[22] The intervening staff, as I have already said, are all members of staff at the University. They state that their interest in the proceedings arises from the vagueness and broadness of the interim interdict and allege that it can be used to threaten staff who are engaging with students on their concerns regarding rape and gender-based violence at the University and the protest action that they have embarked upon to challenge such violence. They allege that responsible members of staff sought to engage with and counsel students on these issues in an effort to deal with same including through protest and other awareness raising actions.

[23] They allege that the interim interdict had been used to threaten staff, who were engaging students in the manner set out.

[24] More importantly, the intervening staff do not join issue factually, but concentrate on the legal question as to whether the interdict is constitutional and lawful on the three grounds referred to above, being vagueness, infringement on the right to protest, freedom of expression, academic freedom and the absence of any prior attempt to meaningfully engage with the protesters spearheading the complaints.

[25] The concept of engagement, say the intervening staff, is that the University ought to have engaged with both students and the lecturers, and ought to have done so before seeking an interdict.

[26] They argue that it is not clear from the interdict itself what it prohibits and what it allows and that it has a stifling effect on true engagement. They talk of disruptive pedagogy.

[27] It is perhaps important to mention that whilst this group seeks the discharge of the interdict in its entirety they say explicitly that to the extent that individuals are guilty of criminal conduct they encourage holding them to account. They argue however that this is not what the interdict does and that there are alternative remedies at the University's disposal.

[28] They argue that they had been advised that costs would only be awarded against them if they were vexatious in their opposition. They say they act in the public interest and seek to ensure that anti-protest orders do not unjustifiably limit the rights of academics and students. They have launched their opposition through pro bono attorneys, as they allege that the lecturers cannot afford legal representation, they coming to court however as a measure of last resort.

[29] It is worth mentioning that one of the concerned lecturers, indeed the main deponent, received an unwise unfortunately worded letter from the University's attorney alleging extraordinarily that her conduct amounted to encouragement of the disruption of the academic process and that it was in violation of the terms of the interdict, she being required to desist therefrom. A written undertaking was sought failing which contempt proceedings were reserved. After further consultation between the University and its attorney subsequently, a letter was dispatched to the lecturer in which it was suggested by the University that it had been asked to withdraw the letter, presumably by the person threatened thereby. It is alleged rather strangely that the letter itself previously sent, had no legal consequences and was merely "an advisory letter", whatever that may be. This followed, nevertheless, with a statement that the letter was withdrawn. This is regrettable on a number of levels, and no doubt added fuel to the fire and certainly was part of what persuaded the intervening staff to in fact proceed to intervene.

[30] The University in answering the allegations of the intervening staff denied that they had any direct and substantial interest in the application, rather oddly suggesting that this was because they were not at risk of being held in contempt of the interdict for their “lawful activities”. It would seem that the point the University took was that the interdict would only apply to a class of persons who were engaged in or associated themselves with the unlawful activities that were prohibited by the interdict. This notwithstanding that the University admitted the letters and threats to the intervening staff’s deponent. The University simply joined issue with the intervening lecturers, denied that they were entitled to the relief sought and denied that the interim interdict unjustifiably restricted freedom of expression or the rule of law.

[31] It would seem, accordingly, that I should accept that as between the intervening staff and the University there are no disputes of fact, and only by the intervening staff the expression of what they referred to as points of law relevant to the legal basis for and appropriateness of the interdict as it stands on the one hand, and on the other their suggestion that whilst they support students guilty of unlawful conduct being brought to account, there are other ways of doing this than by way of interdict.

[32] I should say immediately, 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 amongst others. I do not understand the University to directly impugn the motivation in this regard of the intervening staff, but rather to join issue with three points raised, contesting same. It would seem to me, having regard to the timeline of the filing of affidavits, and having regard to the breadth of the interdict sought and granted, the confirmation of which is persisted in, and the fact that there are two report categories of Respondents who are only broadly identified, that they raise important issues for consideration in this matter.

[33] The University persisted however in denying that there is any merit in the intervening staff's opposition alleging that there is nothing in the interdict that prohibits "constructive and even robust engagement and dialogue of issues of sexual violence on the campus", the University in a further affidavit denied that the deponent's actions were labelled as being in contempt of the interdict, but rather that they deserved criticism.

[34] Whilst not overtly being unduly critical of the intervening staff, the University clearly regarded the intervention as unfounded, and perhaps even unwise, and labelled it as an attempt to prevent the Applicant from protecting its staff, students and property, thereby they exposing themselves to an adverse costs order. It was on this tone that the battle lines were drawn.

[35] Whilst I will deal with this more fully when it comes to costs, I should say immediately, that in the tradition of academic comment and appropriate action in the context of our Constitution, the role and input from academia generally deserves respect and careful consideration providing it remains within the realm of academic, relevant and necessary comment and contribution. This warrants being jealously guarded. Despite the overbroad nature of the relief sought, I accept that the main thrust of the intervening staffs' contribution was directed only at the three issues which I have already summarized.

[36] It also should be said that at the time that the affidavits in the application to intervene were served, it was not clear what approach would be taken by the Fourth, Fifth and Sixth Respondents, whose affidavits were filed shortly thereafter. In that context, it was certainly relevant and even helpful in a proper determination of the matter to have the views and perspectives of certain of the academic staff. It is true that, like the remaining affidavits in this matter, things got out of hand, and that the affidavits unnecessarily traversed material which should have been restricted to argument, beyond indicating that these arguments would be made. This contributed to an extremely prolix set of papers. This was unnecessary and undesirable and I am happy to say a different approach was taken by counsel in argument although this traversed a full day.

[37] In summary it was argued for the intervening staff that the right to freedom of expression, and the right to academic freedom and particularly to crucial rights in this matter were interrelated with the right to protest, and because the entitlement within our society to speak out freely, discuss issues critically, and dialogue differences, however unpopular they may be, is central to our constitutional project as it was put.

[38] The intervening staff took the view that the University wished to unjustifiably limit these rights seeking to restrain any action by any person which action it considered unlawful. This it was argued was made plain by the attempt on the part of the University to utilize the interim interdict to silence its own staff, disperse students singing, and generally quell any action no matter how peaceful such action, being, taken to promote awareness of gender-based violence on its campus.

[39] The argument joined issue with what was perceived as an attempt by the University, in seeking a final interdict, to go far beyond that to which it was entitled, in a draconian order.

[40] The argument was that certain of the conduct interdicted and which was sought to be made final, would finally interdict that which would ordinarily have a consequence no higher than a civil action for damages, this now being elevated to a potential committal for contempt of court, a vastly different remedy with much more serious consequences.

[41] The relief, it was argued, should be declined as the terms of the interdict are vague and inappropriately overbroad as violating the principle of legality provided for in S 1(c) of the Constitution; that the interdict sought unjustifiably to infringe the staff and the main deponent rights to protest and to exercise their freedom of expression and particularly the right to academic freedom, this being an impermissible limitation, and quite separately, that there were other less restrictive means available to achieve the same purpose. Lastly it was urged that there were alternative remedies that the University could employ.

[42] It was urged upon me that each of these reasons were individually sufficient to support the discharge of the interim interdict let alone resist its confirmation.

[43] Whilst that argument was substantially expanded in the Heads of Argument, what I have set out above is the main thrust thereof and I will refer to this as may be necessary more fully hereafter.

The Individual Respondents:

[44] The Fourth, Fifth and Sixth Respondents immediately point out that the protests in this matter involved at least 200 people, the vast majority of whom were the University's students.

[45] Issue is joined with the University firstly along the same lines as that of the intervening staff set out more fully above, the relief being, so it was argued, far-reaching, ill-defined, and in parts constitutionally unsound, and secondly on the facts relevant to each of Fourth to Sixth Respondents.

[46] It was pointed out that on its face the relief sought interfered with the constitutional right to assemble, picket and demonstrate, pointing to the fact that the University conceded in its main Heads of Argument that it was only entitled to restrict "unreasonable" interference with access to the campus and tendered an amendment to that effect. It was pointed out that the University also offered in its main Heads of Argument to restrain only "unjustifiable" interference with freedom and movement on its campus. It was further pointed out that although seeking an interdict restraining Respondents from "disrupting, obstructing or in any other manner interfering" with its academic process, the University conceded in its Heads of Argument that all it was really entitled to was to interdict restraining "protests that prevent teaching and learning from occurring". It was argued that the difference between the two forms of relief sought and conceded was critical.

[47] It was argued in summary that the breadth of the relief sought in the interdict was an attempt by the University to lay the basis for policing its own student body.

[48] It was argued that final interdicts were intended to enjoin defined conduct on the part of specific persons which invades clear rights where there is a reasonable apprehension that this conduct would be repeated, but were not designed to police crowds, or to regulate the behaviour of the public at large.

[49] It was pointed out that the University's affidavits mostly refer not to individuals but to undefined groups, mobs and crowds and to "vigilante campaigns".

[50] It was argued, as did the intervening staff, that the University is not entitled to an interdict against mobs and crowds but only against individuals or when strictly necessary , and only against a definite class of ascertainable persons.

[51] Importantly it was argued in the Heads of Argument, and in detail in oral argument, that the University had failed to make out a case for the relief that it sought against any individual including Fourth, Fifth and Sixth Respondents or any ascertainable class of persons.

[52] It was conceded that the University was able to demonstrate some unlawful activity which took place in the course of the protests on its campus, but it was argued that this was not to be laid at the door of Fourth, Fifth and Sixth Respondents. It was said that this relief sought was in the face of there being no facts established against any individual or ascertainable group, this being so broad as to interfere with S 16 and 17 of the Constitution.

[53] To put this in to context, the Fourth to Sixth Respondents were said to be young women who campaign against rape and sexual violence, one of them claiming to have been a victim of rape and that they were part of a spontaneous protest against rape which arose on 17 April 2016, this a justifiable cause. It was in the context of the University's concession that rape and sexual violence are prevalent on its campus, that it was suggested that not enough had been done to combat this scourge, and that ingrained aspects of the University's culture promote and exacerbate an environment in which no reasonable woman can feel completely safe.

[54] Fourth to Sixth Respondents say that it was in this context that they joined the spontaneous protests that took place between 17 and 20 April 2016.

[55] It was conceded that Fourth to Sixth Respondents were unable to state that every single person in the protest acted completely lawfully at all times, but argued that this was an impossible standard and that the individual Respondents were not to be tainted by unlawfulness simply because they were part of the crowd which acted unlawfully, referring to *South African Transport and Allied workers Union and Another v GARVIS and Others* 2013 (1) SA 83 (CC) [53] where the following was said: "*Nothing said thus far detracts from the requirement that the right in S 17 must be exercised peacefully. And it is important to emphasize that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose the constitutional protection. This proposition has support internationally. As the European Court of Human Rights noted:'(A)n 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 behavior.' This means that it is appropriate to proceed on the basis that is 17 of the Constitution means what it generously says.*" This has an important and in my view obvious impact on the relief sought against Second and Third Respondents.

[56] It was suggested that Fourth to Sixth Respondents were unable to speak to everything that had happened and what was a widespread and extensive gathering, but it was argued had been open and frank about their individual participation and in the assertion that to the best of their knowledge the protests were peaceful and lawful.

[57] The Fourth to Sixth Respondents repeatedly denied any unlawful activity on each of their parts or having associated themselves therewith, seeking to bring themselves within the Garvis exception.

[58] It was argued that the University's allegations were threadbare in this regard, and that inadequate attempt had been put up to individually identify them with specific unlawful activity.

[59] It is common cause that Fourth Respondent posted a Facebook message encouraging students to “peacefully disrupt a lecture” and is alleged to have played a vaguely defined “leadership role” in the protests. She admits that in the context of a spontaneous gathering, as she calls it, she took on a role of communicating the protesters’ grievances to university’s management, which it is argued is certainly not unlawful.

[60] It was alleged that the University was not able to establish specific conduct on her part or in what manner her “leadership” role of the protest rendered anything she did unlawful. In respect of the alleged kidnapping, assaults and intimidation which the University relies upon, it was pointed out that she was not alleged to have actually been guilty of any of the above. It is not alleged that she interfered with the University’s administration or access to its campus or the functioning of its residence system. The University sought nevertheless an interdict preventing her from doing such things.

[61] In respect of the Fifth Respondent it was alleged that she had “kidnapped” Mr. Manyeyeni from his room, which she denied. I will revert to this in due course in the context of the fact that this is a major dispute of fact between the parties, partly supported by video evidence. It was further alleged that she “kidnapped” Mr. Myoyo from his room which she denied, although conceding that she was at the residence at the time, but denies causing him to accompany her – another deep dispute which I will revert to. It was further alleged that she posted a Facebook message claiming to have “disrupted academic process”, she admitting the message in explaining that she interrupted a lecture to engage the participants about rape culture at the University during the course of the protest, but claiming this to have been perfectly lawful and within her constitutional right to demonstrate.

[62] In respect of Sixth Respondent the allegation against her is that she “invited” one of the University staff (Mr. Benyon) to “the Township” where he would be burnt. This she denied, she saying that she commented as an aside to a friend that if Mr. Benyon were in a Township he would be burnt. She says this was not a threat and could not have been reasonably interpreted as such. Assuming that I may find that the threat was issued, it was argued that it has long been held that wide latitude is given to political speech in protest settings

and that I should be slow to restrain speech even if angry and conveying hostility. See *Hotz* (*supra*) [67] - [68]. Even if accepted it was argued that such a statement was to be interpreted as an idle utterance not actionably unlawful.

[63] It was argued that the University had otherwise not alleged Sixth Respondent to have been involved in the protests but sought an interdict against her in the full breadth thereof.

[64] In respect of these disputes of fact, the University and its affidavits argued (frequently and in my view impermissibly) that if I were unable to determine the factual disputes these should be referred to the hearing of oral evidence in respect of the facts that Fourth to Sixth Respondents had disputed. When raising this with Mr. Smuts SC for the University, he made it very clear that the University had stepped back herefrom, being of the view that the disputes would be determined in the University's favour, and that it sought no referral to oral evidence.

The Proper Approach to Final Interdictory Relief:

[65] The requirements for a final interdict are: a clear right; injury actually committed or reasonably apprehended; no other suitable alternative remedy.

[66] Motion proceedings such as this are not designed to resolve factual disputes. Unless concerned with interim relief, such applications are all about the resolution of legal issues based on common cause facts. In the absence of special circumstances they are not used to resolving factual issues because they are not designed to determine probabilities.

[67] In *Plascon – Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623(A) 634-635, the rule was established that where in motion proceedings disputes of fact arise on the affidavits a final order can be granted only if the facts averred in Applicant's affidavits, which have been admitted by the Respondent, together with the facts alleged by the latter, justify such order. It may be different if the Respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched, all

so clearly untenable that the Court is justified in rejecting them merely on the papers. *National Director of Public Prosecutions v Zuma* 2009 (2) SA 279 SCA [26].

[68] It should be emphasized that whilst generally undesirable to attempt to decide an application on affidavit where there are material facts in dispute, it is equally undesirable for a court to take all disputes of fact at face value which would enable a Respondent to raise fictitious issues of fact in avoidance. It is necessary then to examine the alleged disputes and determine whether they are real or can be satisfactorily resolved without the aid of oral evidence.

[69] In Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) [13] the following was said: "*A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court would generally have difficulty in finding that the test is satisfied. I say generally because factual averments seldom stand apart from a broader matrix of circumstances, all of which need to be borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the noyances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them.*"

[70] As in this matter neither party sought the referral of disputes to oral evidence. I am entitled to deal with the application on the undisputed facts. Thus if

notwithstanding that there are facts in dispute, I am satisfied that Applicant is entitled to relief in view of the facts stated by Respondents together with the facts in Applicants' affidavits, which are admitted or have not been denied, I am entitled to make an order giving effect to such finding. The onus plays no role in this. In so doing a robust approach may be taken in certain circumstances to decide the issues on the affidavits. This must be cautiously adopted as the disputes on affidavit in an application should not be settled on the probabilities solely. In practice a robust approach is adopted only where the allegations on one or other side, are so clearly false or intrinsically improbable that a court could say that an oral hearing would not disturb the balance of probabilities. *Civil Procedure in the Supreme Court: Harms* B56-B-64.

The Background Legal Matrix:

[71] I must determine, against the background of long accepted legal principles whether the interim interdict granted in this manner (as a matter of urgency) should be made final or whether it should be dismissed.

[72] In so doing, and as in *Hotz* (*supra*) the consideration of the matter against Fourth, Fifth and Sixth Respondents must turn on whether the action of the individual Respondents was unlawful and whether there was, when the interim interdict was granted, a reasonable apprehension that this would recur. In accepting that this must be seen against the background of legitimate protests against the undeniable scourge of rape and sexual violence, I am nevertheless concerned with the factual situation which arose in this matter and not with subsequent events on various campuses. To some extent, this requires a consideration of the provisions of S 16 and 17 of the Constitution.

[73] This must also be seen against the background that all three individual Respondents accept that they were participants in the protests whilst attempting to avoid any connection with the unlawful conduct alleged.

[74] It must also be seen against the background that there can be no doubt whatsoever on a proper construction of the papers, the annexures thereto and the video footage which I was shown during argument, that there were

unlawful actions and activities, certainly including the kidnapping (properly so described) of two male students by a group who were certainly protesters, for some considerable period and held against their will. It is also clear that there was disruption of lectures and academic activities on campus, the question being whether that disruption was unlawful or part of a legitimate although robust protest effort. Finally, it must be accepted on a proper approach to the papers that there was unlawful obstruction of access to and egress from the University by vehicular traffic at three roads, one private and two public, identified in the papers.

[75] It is of course a different matter as to the extent to which the individual Respondents participated herein – to which I will return.

[76] However unlike the *Hotz* matter, it is also necessary for me to consider interdict orders against groups of people in the context of the interim interdict granted in this matter.

[77] Once an 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 as was contended for by Respondents, this being as has been held 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. *Hotz* (*supra*) [29].

[78] It is also not in dispute that the University has rights which it is entitled to seek to protect in these proceedings relating to: control and manage access to the property; ensure that it is allowed to properly manage and control unlawful conduct on its property; must be able to ensure that staff are permitted to carry out their work in the interests of the students; ensure the safety of those students and staff and other members of the public legitimately on its property; and must be able to protect its own property.

[79] In the context of injury actually committed or reasonably apprehended it must be accepted on the common cause facts in this matter that the protests went beyond the boundaries of peaceful and non-violent action at least in respect of kidnapping, unlawful barricading of entrances and damage to University

property, even if limited in extent. It should be said that this common cause concession in general, although not incorporating Fourth to Sixth Respondents in that concession, the protest action itself, there can be no doubt, overstepped the bounds of peaceful and nonviolent protest on occasions.

[80] I say this in the context of S 17 of the Bill of Rights and the Constitution which guarantees the right to “peacefully and unarmed” assemble, demonstrate, picket and present petitions.

[81] In respect of the above-mentioned elements of unlawfulness in the protests, the Fourth, Fifth and Sixth Respondents initially attempted disingenuously to put this in issue stating that to the best of their knowledge there had been no unlawful activity. When faced with the inevitable need to concede same they attempted to distance themselves individually from it. I will deal in due course with the disputed areas but emphasize that the unlawful actions referred to above during the protests could not be legitimately or realistically disavowed on a proper approach nor was it suggested to the contrary in argument on their behalf. What is different from the *Hotz* matter (*supra*) [32] is that as I understand it, the Respondents seek to distance themselves from the unlawful activity whilst aligning themselves with the protest, and arguing that robust protests are perfectly legitimate, still seeking to avoid linking themselves individually with such unlawful activity which may have occurred but which they do not concede in their affidavits, but only in argument to the extent mentioned.

[82] In general accordingly, it must be accepted that there was an infringement of rights, actual or apprehended, and at the time the interdict was sought a very real apprehension that this may be repeated. As I have said, Fourth, Fifth and Sixth Respondents participated in the protests to a greater or lesser extent and in the activity surrounding same as I will set out more fully, and whilst the extent thereof is in dispute I have no doubt that generally the University reasonably apprehended that unless an interdict was granted the involved students would continue with their protest activities in the same vein, and that destruction of property, disruption of lectures and blockading of roads would occur.

[83] The mere presence at the protests to a greater or lesser extent by Fourth to Sixth Respondents may well not be sufficient to justify an order against them having regard to the fact that none of them are able to legitimately deny that this occurred, nor could they finally disavow their involvement directly therein, or in reality seek to distance themselves from it. This on the basis of *Hotz* (*supra*) [31] - [34] may justify the grant of a final interdict against them individually. The exact extent of that interdict is another matter to which I will revert. In so saying, I am acutely aware of the content of the Garvis Judgment at [53] that an individual who has no intention of acting other than peacefully at a demonstration is not by any means necessarily deprived of the right to peaceful assembly and the S 17 protections simply because there is some sporadic violence or other punishable acts committed by others in the course of that demonstration.

[84] I am more than satisfied that in the circumstances pertaining at the time the University had suffered a limited infringement of its rights and that it reasonably apprehended that in the absence of an interdict this would continue.

[85] As to the possibility of another remedy, this is easily and simply disposed of.

[86] The existence of an adequate alternative remedy is such that it must be such as to afford the injured party, in this case the University, a remedy that gives similar protection to an interdict against the injury that was occurring or apprehended. That alternative remedy must be a legal remedy that is one that a court may grant and if need be enforce by execution or contempt of court. That the problem may be resolved by extra-curial means is no justification for refusing to grant an interdict. It is the purpose of an interdict to put an end to the conduct in breach of Applicants rights and seek enforcement of this. The alternative remedy and suggestion that there must be prior engagement is thus misconceived. I should say specifically that to engage constructively may be desirable or even preferable, but whilst this may be encouraged it is most certainly not a bar to the granting of an interdict.

[87] As was stated in *Hotz*: [39] the understanding of the nature and purpose of an interdict is rooted in constitutional principles. S 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, chaos and anarchy'. 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 enforcement to unlawful conduct. To do so is 'the very antithesis of the rule of law*'.

[88] As to the issue of protest action, this is not of itself by any means unlawful as was pointed out in *HOTZ* as follows: " *[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 S 17, by way of the right to assemble, demonstrate 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, '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. 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, 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 Residence Road is a public road and the University property is therefore a public place. 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 been involved in burning rubbish bins to prevent 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."

As to the freedom of expression the following was set out in HOTZ *: "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 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 Langa CJ explained the reason for this:

'S 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subS 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. 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."

[89] I would add to the above that mass protest continues to be an important form of political engagement and is an essential role player in any liberal

democracy. Meaningful dialogue may well require the collective efforts of demonstrators, picketers and protesters. Crowd action albeit loud, noisy and disruptive is a direct expression of popular opinion. This is what is protected in S 17 of the Constitution. The content of that right has already been referred to above but I would add to this that these must be peaceful to be legitimate and S 17 in no way countenances the protection of protests that are not peaceful involving for example assaults and the intimidation of the general public or for that matter the interference with the rights of other students. Even if a generous interpretation is given to the proviso of peaceful protest, this does not in my view justify unlawful activity such as kidnapping and the destruction of property. Perhaps more controversial is whether, if given a broad and generous definition and if some members of an assembly act violently, the majority remaining peaceful, that protest remains protected. In the light of the quotation above from the judgment of the constitutional court in Garvis [53] (supra), it must be accepted that S 17 being given a generous interpretation, an individual does not cease to enjoy those constitutionally protected rights just because of sporadic violence by others, or other punishable acts, in the course of the demonstration providing that the individual in question remains peaceful in his or her own intentions or behavior. The Association of the crowd in this matter with the activities of those acting unlawfully relevant to the kidnapping detailed above is however undeniable, and this is such as to include Fourth and Fifth Respondents on the facts of this matter. See however the *Bill of Rights Handbook Currie and De Waal*: 6th ed 377 - 395.

[90] It was argued that the interdict would have a chilling effect on the right to protest in respect of rape and gender violence and did in fact have same. It must be remembered, that in *SATAWU v GARVIS* (*supra*) the Constitutional Court held that whilst the provisions of the Regulation of Gatherings Act 205 of 1993 had a chilling effect on the right to freedom of assembly by increasing the cost of organized protest action, this limitation was nevertheless justifiable as a proportionate measure to protect the rights of victims of riot damage: "*When a gathering imperils the physical integrity, the lives and sources of livelihood of the vulnerable, liability for damages arising therefrom must be borne by the organizations that are responsible for setting in motion the events which gave rise to the subject loss.*"

[91] All in all, accordingly, S 17 contains vital protection to amongst other things the right to assemble, demonstrate, picket and petition, supported by other constitutionally protected rights, freedom of opinion, the right to freedom of expression, association and the like. As was pointed out above however, the exercise of those rights is subject to constitutional regulation in a particular manner, in this matter the right to demonstrate limited by the fact that this must be exercised peacefully and unarmed. The key, as was pointed out, is that the right must be exercised in a manner that respects and protects the foundational value of human dignity of other people and the rights of others enjoyed under the Constitution. In *GARVIS* (*supra*) [63] the Constitutional Court emphasized that assemblies, pickets and demonstrations are an essential feature of a democratic society and an essential instrument of dialogue(stating the right to freedom of assembly was central to our constitutional democracy and existed primarily to give a voice to the powerless), but nevertheless stressed that these must be peaceful and unarmed.This entitles a restriction on unlawful behavior and demonstrations that impinge on the rights of others. Whilst it was argued 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 integral to a democratic state but the court held "*I agree with the court below that members of the public are entitled to protection against behavior that militates against the rule and the rights of others*", and in my book, this must include the rights of the other students and staff on University property. It must, however also be remembered, that the Constitutional Court pointed out that the right to assembly provides an outlet for frustrations of the powerless which included groups that do not have political or economic power and other vulnerable persons (amongst which one must no doubt include those subject to rape and gender violence) the right in many cases being the only mechanism available to them to express their legitimate concerns. It is accepted that this is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms, as the Constitutional Court held. There is a close interrelation between the various freedom rights and their importance to our democracy. Garvis (supra)[64-66].

[92] The kidnapping of students from their residence, they being held in the midst of a crowd for some considerable period, the barricading of roads and destroying of University property were unlawful activities beyond the protection of S 17.

[93] As I understood the Fourth, Fifth and Sixth Respondents' affidavits, it was essentially an disingenuous assertion that they had done nothing wrong. There was no expression of contrition nor undertaking not to engage in such activities in the future. Of course they were at all times entitled to exercise the freedom of expression and protest, picket and demonstrate lawfully within the limits of S 17. They argue that the University was attempting to limit that right by the breadth of the order granted, and now sought to be made final, to which I will return in due course. Against this background, I must accept that but for the granting of the interim interdict, however chilling that may have been, and even if this was impermissibly beyond that which ought to have been granted, without some interdict even of lesser breadth, it is probable that the unlawful activity would have continued. This does not however legitimise the order of itself.

[94] I am quite satisfied that there was no reasonable alternative adequate remedy in the absence of any undertaking that the conduct would not be further pursued. None of the possibilities referred to in the papers constituted an alternative adequate remedy as this should be understood. None of the alternatives were proper or effective alternatives to the grant of an interdict. Criminal charges such as Respondents suggest, may have proceeded against those acting unlawfully but these and the University's disciplinary procedures, would have been protracted and would not have affected ongoing unlawful activity. The mediation and prior engagements suggested by the intervening staff, whilst these may have been desirable, would not in the absence of undertakings, have in any way served the purpose of an interdict.

[95] I now turn to considering the direct involvement such as it may be of the Fourth to Sixth Respondents, and thereafter to what relief, if any, is justified and to what extent.

The Individual Respondents' Actual Involvement:

[96] In this regard Applicant contends that Fourth to Sixth Respondents' accounts of the protest and the involvement change substantially from the version set out in the answering affidavit. There is some merit in this assertion and some shifting of ground on their part.

[97] An example is the initial denial of the kidnapping of the male students, the residences being merely picketed and the male students engaged in conversation. In essence it was alleged that both men came to the gathering of their own free will to see what was happening and left of their own accord unharmed and uninjured, that they were not detained or held against their will. In supplementary affidavits Fourth to Sixth Respondents claim no knowledge of whether the two men had been detained against their will overnight. Fourth Respondent admitted that she was present when Mr. Myoyo was taken from his room in the residence but denied involvement in kidnapping or otherwise coercing him.

[98] There was a change of stance in respect of the disruption of lectures. Initially the three maintained that small groups went into lectures and classes and attempted to convince others to join them but asserted that it was not an attempt to prevent lectures from continuing, but faced with a clear pattern of disruptions aimed at preventing classes from continuing, they changed their ground somewhat stating that the "*answering affidavit does not dispute that lectures were disrupted*". They persisted, however, in stating that none of them, nor people with whom they associated, were involved in those disruptions and that those that were should be disciplined. Dealing with evidence that Fourth Respondent incited others to disrupt lectures and Fifth Respondent participated in those disruptions, Sixth Respondent's supplementary answering affidavit admitted their involvement to the extent that Fourth Respondent posted a Facebook message saying "*Can a group of people please (peacefully) disrupt Ecos B? Lectures are continuing there as normal*". It was denied that "peacefully" disrupting a lecture was unlawful,

Fourth Respondent continuing to deny actually having disrupted a lecture at all. In respect of fifth respondent it was alleged (and apparently admitted) that Fourth Respondent posted a Facebook page message which stated “We’re currently at Eden Grove blue lecture room and we disrupted and stopped an academic process”. Fifth Respondent confirms having been present at that time but alleges that she entered the classroom with about 30 other students and sought to engage the lecturer and then the class about rape culture at Rhodes University. Their intention was to hold a brief discussion and then leave, she says. She says whilst the lecturer remained in the classroom the majority of students present left, some staying behind and participating in the discussion, there being some singing of struggle songs. She emphasizes that this was a “peaceful attempt to draw attention to the protesters’ demands”.

[99] Whatever the truth may be relevant to Fourth to Sixth Respondents’ involvement, there can be no doubt that they were involved in the protests to a greater or lesser extent, that Fourth Respondent was certainly a leader and communicator in respect thereof, whilst Fifth Respondent played the greatest role of the three.

[100] The high watermark of the case against Fourth Respondent is that she was a leading figure in the protests, and particularly of that where the kidnapped men were held, posted the Facebook message relevant to the disruption of the lecture and made intentional efforts to prevent others from learning teaching or researching on campus.

[101] In respect of Fifth Respondent the high watermark is that she played a role in the incitement of crowd action relevant to the kidnapping of Mr Mnyenyeni and Mr. Myoyo, she having admitted that she was present when Mr. Myoyo was removed. In my view the video evidence of the taking of Mr. Manyenyeni is inconclusive either way, save that it is clear that he was fetched from his room and hardly went voluntarily, and that the two men were held in a group of protesters and certainly were not being invited to leave of their own accord, nor were they allowed to do so. In respect of the disruption of lectures, it is clear that Fourth Respondent played a role therein and was involved on at least one occasion in the direct disruption of a lecture.

[102] In respect of Sixth Respondent the high watermark of Applicant's case is that she led a crowd of protesters who forced their way into Piet Retief residence on the night of 19 April 2016 and uttered words which were perceived as a threat by the warden, Mr. Benyon relevant to his being burnt alive in whatever terms and context this may have been said. Whilst there is a dispute in this exact regard, there can be no doubt that Mr. Benyon was justifiably frightened and intimidated when faced with this crowd in whatever context the words were used. Sixth Respondent claims that she used the words "in jest" and that the remarks were an "aside" to a friend, they were loud enough to be heard by the person to whom they referred, being heard by Mr. Benyon, and his sub-warden. There can be no doubt that the protesters were emotional and were perceived to be aggressive.

[103] The remaining complaint and involvement of Sixth Respondent was that she was assisting in the construction of the barricade of burning objects at Prince Alfred Street, this supported by a short video clip.

[104] On an analysis of the papers, Mr. Wilson for the individual Respondents argued that in essence no unlawful protest activity had occurred, and that the individual Respondents, whom he represented, had not acted unlawfully, and certainly not outside the parameters of S 17 of the Constitution.

[105] He argued that the Fourth Respondent's Facebook message concerning the peaceful disruption of lectures, and her vaguely defined leadership role was not unlawful. Her admission, he argued, was limited to the context of an entirely spontaneous gathering where she did not take a "leadership role" but took on a role communicating the protesters' grievances to the University's management which was in fact, he argued, laudable.

[106] He pointed out that the University could not by reference to specific conduct assert how this alleged "leadership" rendered anything unlawful and that no one said she had actually kidnapped, assaulted or intimidated anyone. It was not specifically alleged that she interfered with the University's administration or access to its campus, or the functioning of the residence system, or that she unlawfully damaged its reputation or vandalized its property.

[107] In respect of Fifth Respondent, Mr. Wilson argued that she actually denied having kidnapped Mr. Manyenyeni, or dragged him out by his collar as had been alleged, he pointing out that in the video footage that I was shown she was “nowhere to be seen”. He argued that the video footage showed Mr. Manyenyeni leaving his room without any coercion and that accordingly these allegations fell to be rejected. In respect of the kidnapping of Mr. Myoyo he argued that this had been denied by Fifth Respondent, the allegation against her that she had said “brother let us go” being the only real allegation in this regard. Fourth Respondent conceded that she was present at the residence but denied coersion saying she was physically incapable of doing so, this of course avoiding that she had been part of a group, it being alleged that her version was highly creditworthy as no specific conduct had been alleged against her in this regard concerning the kidnapping. The remaining allegation of substance against Fifth Respondent was the Facebook message referred to above relevant to the disruption of an academic process. Whilst the message was admitted it was argued that her explanation of the interruption of the lecture in the context in the absence of an intention to prevent teaching and learning from occurring was not unlawful nor did it exceed the bounds of her constitutional right to demonstrate. He argued that she had not been directly accused of assaulting threatening or intimidating anyone or that she damaged any property.

[108] In respect of Sixth Respondent once again he argued that this was certainly in respect of her involvement in the crowd that approached Mr. Benyon, she attempting to sanitize the comment about the fact that he would be burnt in whatever context this was said. He argued that this was an idle threat made in a protest situation, was not credible and not unlawful. He pointed out that the University failed to allege anything else Sixth Respondent did during the protests of 17 and 20 April 2016 as being unlawful.

[109] In short, it was Mr. Wilson’s argument that on the basis of the allegations made, the broad wide-ranging relief was entirely unsustainable, although not conceding that any relief at all should be given in respect of these Respondents.

[110] As already mentioned there was then a sustained and detailed attack on the vagueness of the relief sought and granted in the context of S 17 of the Constitution.

[111] In this context, Mr. Smuts SC in reply argued strongly that there was more than sufficient general allegation against Fourth to Sixth Respondents to justify relief against them having regard to their admitted involvement in various of the activities which I have set out above. He argued that it was not necessary for the University to tie them in individually any more than it had done, and that insofar as there were disputes of fact as to the extent of their involvement, this must necessarily on a robust approach clearly be determined in the University's favor. He argued that the relief was then fully justified on any basis.

[112] In my view, it is clear that in respect of Fourth Respondent she certainly posted on Facebook the oxymoronic, 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 peacefully) and accordingly in a manner that interfered with its continuing. That this interfered with the students in the lectures entitlement to the 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.

[113] In respect of Fifth Respondent it seems to me the position is more aggravated. There can be no doubt that the two men referred to were indeed kidnapped and forced from the 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 am also completely satisfied on a

proper approach to the papers that Fifth Respondent was involved in this as a participant, if not a leader, and associated herself closely with the kidnapping concerned.

[114] In respect of the disruption of academic process this is admitted although sanitized 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.

[115] In respect of Sixth 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 categorized 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 Sixth 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.

The Second and Third Respondents’ Challenge in Principle:

[116] In an illuminating set of Heads of Argument drafted by Mr Stubbs for the Intervening Staff and urged upon me by Ms De Vos SC, several points were taken, amongst which were that the interdict is inappropriately broad in its scope failing adequately to disclose the persons who are the subject of the interdict prohibitions, and secondly that it fails, with the necessary precision required of an order of court, to disclose what it requires those to whom it applies to do or refrain from doing.

[117] The Heads set out quite correctly that it is a 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. In *ex parte Consolidated Fine Spinners and Weavers Ltd v Govender* (1987) 8 ILJ 97 (D) referred to with approval in *Durban University of Technology v Zulu*

and Others 1693/16 P 2016 ZAZPHC 58 (27 June 2016), it was pointed out that the inability of Applicants to identify particular perpetrators does not afford any justification in for granting an order against a number of people including persons against whom no cause of action has been established. Importantly the court pointed out that the practical exigencies of the situation also do not afford justification for such course however desirable this may appear to be.

[118] This is a fundamental principle which cannot be overlooked.

[119] It is pointed out that in this particular matter this is a real issue, the University contending that the mode of citation of Second and Third Respondents was necessitated by the fact that the so-called "mob activities" made identification of individual protesters exceedingly difficult. It is alleged that the students protesting complicate the prospect of identification by operating as a leaderless collective.

[120] The University argues that our law does not prohibit making final orders against unnamed persons merely as have they not been identified by name; that Respondents only need to be defined in a manner that makes them "identifiable" or "ascertainable"; that in recent months courts throughout the country have shown an increased willingness to grant interdicts against unnamed groups of protesters; that having regard to the foreign law on the point the test to be employed is simply that "*the description used must be sufficiently certain as to identify both those who are included and those who are not*".

[121] The University also argued as I understood it that the description of Second and Third Respondents fits the current requirements that whether a person was or was not engaged in unlawful activities prohibited, is objectively ascertainable from their conduct even if not yet identified and that as to whether or not an individual formed part of the Second or Third Respondents can be determined at any contempt proceedings, and rather oddly that anyone who was engaged in unlawful activities at the time would know who they are. I have certain difficulties with the submissions as will appear hereafter.

[122] In *Durban University of Technology v Zulu* (*supra*) a matter that came before Lopes J in respect of the Applicant, an institution of higher learning, with five campuses in and around the Durban area and two in Pietermaritzburg, in relation to student dissatisfaction which had been ongoing since the campuses were re-opened in January 2016. This came to a head on 17 February 2016 and there was widespread disruption on the campuses which showed no signs of abating. The unrest included a number of acts of vandalism during which property of the Applicant was damaged. An interim order had been granted restraining the protesters. The learned Judge referred to the difficulty of granting an interdict in any form against students in circumstances where they had not been identified and no unlawful conduct or breach of the Applicant's rights by them was alleged. He referred to the stringent consequences of the breach of a court order which opened those to whom the order was subject to be charged with contempt. Lopes J held that in the matter before him there were undoubtedly students who vehemently opposed the use of violence, causing damage to Applicant's property and that the suggestion that they had been interdicted by the High Court from behaving unlawfully and requiring them to observe a perimeter interdict, may well invoke a sharp reaction of indignation and properly so, no allegations have been made against him specifically. They could not, said the Learned Judge, be viewed as an identifiable group the commonality of being students being wholly insufficient to form the basis for collective responsibility.

[123] The Learned Judge referred to the *Consolidated Fine Weavers* matter (*supra*) in which the Applicants were not in a position to identify individual perpetrators of various unlawful acts, they being employees in two separate groups of workers at the factories involved in a so-called illegal strike. As already referred to earlier in this judgment I drew attention to the fact that the *Fine Weavers* matter pointed out that the inability of the Applicants to identify the perpetrators did not afford any justification, for granting an order against a number of people including persons against whom no cause of action had been established, regardless of the practical exigencies of the situation. In that matter, the learned Judge considered the submission that the Respondents should be considered as a group, the group conduct to be restrained and that the fact that there may have been individual members who

did not perpetrate acts complained of did not warrant refusal of the relief. The learned Judge was of the view that there was insufficient evidence to establish membership of the group in the sense contended for, the only common factor amongst the workers against whom relief was sought being that they had stayed away from work the day before the application.

[124] In *MONDI Paper (a division of Mondi Limited) v Paper Printing Workers Union and Others (1997) 18 IL J 84 (D)*, Nicholson J in a matter involving strike action and sabotage quoted extensively from *Consolidated Fine Spinners* (*supra*) and pointed out that in any subsequent criminal proceedings, pursuant to an order earlier given, 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. The learned Judge pointed out that with this reversal of onus runs counter to every notion of criminal justice and the onus of proof. This is all the more so having regard to the fact that contempt of court proceedings apply the criminal standard of proof. He referred to innocent non-participants having orders granted against them without evidence, and whilst not condoning unlawful activity, found that this latter consideration outweighs the former evil.

[125] The University has attempted to meet this argument by qualifying the group in each instance with those being engaged in unlawful activity or associating themselves with the unlawful activity. This seems to me to be a distinction without a difference, and a patent attempt to avoid the crux of the matter.

[126] Lopes J expressed his sympathy with the difficulty which the Applicant faced, especially having regard to damage to property and unlawful intimidation, but declared that these were not reasons to grant an order against persons against whom no individual allegations of conduct had been made. He stated that even were the interdict to have a salutary effect, this was not a basis for sweeping up innocent persons in the preventative net of an interdict.

[127] In *City of Cape Town v Yawa* [2004] 2 All SA 281 (C) Budlender AJ refused an interdict against unnamed persons who may in the future seek unlawfully to occupy certain property without the consent of the owner. The interdict was

refused because the Respondents were not identified and because they did not constitute an ascertainable or identifiable group of persons properly before the court and against whom an effective order could be made. He referred to and relied upon *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C) where the Applicants sought an eviction order against nine named Respondents and other unnamed Respondents, consisting altogether of some 150 people, who were allegedly unlawfully occupying a piece of land. In that matter Conradie J (as he then was) held that one of the essential tests for determining whether a particular act is to be classed as a judicial act is whether there is a *lis inter partes*, he stating that '*a failure to identify Defendants or Respondents* would seem to be destructive of the notion that a Court's order operates only *inter* partes. An order against Respondents not identified by name (or perhaps by individualized description) in the process commencing action or (in very urgent cases, brought orally) on the record would have the generalized effect typical of legislation. It would be a decree and not a Court order at all. (At 634 F-I).

[128] Budlender AJ held that each case must be considered on its own facts and merits and that there was no immutable rule laid down by the cases that an application directed at unnamed Respondents was always impermissible. He held that he accepted that the fact that individuals comprised unidentified Respondents was not of itself an absolute bar to the proceedings, appearing to accept that if there was an ascertainable group, even though the names might not be known, it may be concluded on appropriate facts and circumstances that an effective order might be given against sufficiently identified parties. (At 283).

[129] In this matter, the inability of the University to ascertain who comprised the vast group of individuals against whom it seeks an interdict, is freely conceded by it. It argues that the interdict can be wholly pre-emptive, the individuals concerned to be ascertained by their conduct in the future. This seems to me to entirely put the cart before the horse. A person who acted unlawfully subsequent to an order having been given but who did not act unlawfully prior to the order being given should not in any circumstances be subject to proceedings in respect of contempt of court.

[130] In *Illegal Occupiers Of Various Erven, Philippi v Monwood Investment Trust Company* [2002] 1 All SA 115 (C), the court pointed out that parties in legal proceedings must be clearly identified. In stressing that each case must be dealt with on its merits, but pointing out that as long as the Respondent parties were not properly identified and joined in the proceedings thereby, that they were not properly before the court. The court referred with approval to *Kayamandi* (*supra*) stating that just because notification had been given to a group of individuals by way of a *rule nisi*, did not of itself make them parties to that litigation nor did they merely by virtue of having been notified of the litigation become liable to be punished for contempt of court for failure to comply with any order which is eventually made. The full bench held not surprisingly that the Constitution had not changed this basic requirement of our law.

[131] In *The University of Cape Town v Davids* [2016] 3 ALL SA 333 (WCC an interim interdict was granted against the Respondents preventing them from entering any of Applicant's premises and from committing any acts which impeded and prevented Applicant's rendering of services or making decisions. The Applicant had been driven to seek the interdict due to various acts committed by Respondents during the student protests. This had involved the Applicant bringing a shack structure onto the campus and erecting this in the path of the traffic flow. Statues had been spray-painted with red and there had been an invasion of a residence hall, together with the removal of certain University assets, paintings, portraits and the like and the setting alight of two University vehicles. Opposing the grant of an interdict, the Respondents contended that the constitutional rights to freedom of association, freedom to demonstrate, freedom of expression and right to dignity would all be severely restricted if the interdict were granted. It is worth setting out that this is the decision of the court below in the *Hotz* matter. When confirmation of the interim interdict was pursued this was sought only against certain of Respondents, against others of the Respondents the interdict was withdrawn and against others discharged by the court. Allie J pointed out that the constitutional rights relied upon by Respondents were not unlimited and were subject to horizontal application in that those rights are to be exercised with due regard to those self same rights of other persons. In considering the

relief sought against unnamed persons who were meant to constitute the Seventeenth Respondent in that matter, Allie J held that she was not persuaded to grant Applicant the relief against unnamed persons and discharged the rule against those Respondents because the description was too broad, vague and ill-defined. This aspect of the matter was not considered in the appeal. In so far as I can establish the citation of the "ill-defined" party in *Davids* is almost identical to the citation of Second and Third Respondents in this case.

[132] The argument for Fourth to Sixth Respondents was as follows: "*The reasons for refusing relief against such vaguely defined parties are embedded in the fundamental principles of our law. There must be parties to a lawsuit. These parties must be identified by name or individualized description. It is permissible to cite parties as a group, but the group must be definite or ascertainable, and the cause of action must be made out against each of the members of the group."* This argument relied upon the same authorities to which I have referred. The submission continued as follows: *"This does not mean that each of the individual members of the group has to be identified by name. The classic example of group citation is an application for eviction. All of the occupiers of a piece of land are cited, by reference to their being resident on the land. A cause of action is then made out by alleging that no one present on the land has an entitlement to be there. Where some people are unlawfully in occupation of the property, and others are not, then unlawful occupiers are identified by name and excluded from the relief.*" The heads go on to concede that the latter form of citation is permissible because the occupiers of the land in such case constituted an identified and identifiable group of persons who are properly before the court and against whom an effective order can be made. See *Monwood* (*supra*) para [15].

[133] It is argued, however that Second and Third Respondents do not constitute such a group and are not identified or an identifiable group of persons properly before the court. It is pointed out that the University concedes that it does not know who these people are and it is unclear to whom is referred as the "mob" or "crowd". It is argued that if indeed this means the crowd of people that participated in the protests between 17 April and 20 April 2016, on the University campus, and who committed unlawful acts; this is not the class against which the University actually seeks relief, it being much wider than

this. It is not clear who was present at the protests or who was engaged in unlawful conduct save insofar as I have already dealt with this in respect of Fourth to Sixth Respondents. It is pointed out that if it were shown in contempt proceedings that the person charged with contempt had in fact not been involved in the earlier protests, they could not be found guilty of contempt of court. That this is so is perfectly clear, and it illustrates the difficulty which the University faces.

[134] Our courts do not grant ineffective relief. A court also does not grant relief in circumstances where there is reasonable uncertainty about what that order means, or to whom it applies. *Eke v Parsons* 2016 (3) SA 37 (CC) [73-74].

[135] In *Abahlali Basemjondolo and Others v Ethekwini Municipality and Another* 2015 (4) All SA 190 (KZD) the Court expressed concerns about granting vague relief against unidentified Respondents, expressing that the implementation of such relief would effectively amount to "*self-help which is in violation of the provision of s 1 (c) of the Constitution 108 of 1996*".

[136] In a further argument in this matter it was pointed out that given such a widely termed interdict which amounts to a global interdict in vague terms, the University would be able to police protest on its campus whether or not it could be established that those who would face contempt proceedings had committed any prior unlawful conduct. It was argued that this was relief which went far beyond the scope of what an interdict was meant to enjoin, being specific unlawful conduct by identified persons, reasonably apprehended. It was contrary to the enforcement of the principle of legality in subjecting a person to arbitrary and subjective decisions or conduct of an adversary. *Lesapo v Northwest Agricultural Bank* 2000 (1) SA 409 (CC) para 18.

[137] To illustrate this, I refer to Third Respondent. The introductory description and the heading, would be such as to include lecturers, administrative staff and the like merely by "associating" with "unlawful activities" in the broad context in which this is sought. This hardly has to be said to be perceived as absurdly wide. I do not understand the papers, apart from the complaint (strange as it was) against the Deponent for the interveners, to even come close to

suggesting that the lecturers or staff had associated themselves unlawfully or become involved unlawfully with the protest action.

[138] Had Applicant taken the time and trouble to fully identify and delineate those against whom it really sought relief, to bring this within the concession correctly made by Respondents as to defined groups, which group would have to be definite or ascertainable from its description and the circumstances relied upon (such as the example given above relevant to the occupiers of a piece of land) this may well have been different, as each case must certainly be considered on its own facts and merits.

[139] The reference by Applicants to the authorities in the United Kingdom relies upon what is referred to as a landmark judgment in *Bloomsbury Publishing Group PLC versus News Group Newspapers Ltd* [2003] EWHC 1205 (CH). This and the other English authority referred to, establishes no more than that the description of parties whose names are unknown, but who are linked to a actionable complaint, is that the description of these persons used must be sufficiently certain as to identify both those who are included and those who are not. It was said that if that test is satisfied and it does not matter that the description may apply to no-one or two, more than one person, nor that there is no further element of subsequent identification whether by service or otherwise. The court went on to hold that if an order was made in the form sought there was no injustice to anyone but considerable potential for injustice to the claimants if the order was not granted. It must be said; that this judgment was in the context that certain copies of a book awaiting publication had been taken from the printer, without authority and offered to the press at varying prices. The single issue which came before the court was that the orders against a person or persons who had offered the publishers of certain newspapers a copy of the book and requiring them to do up same, should be continued. This is a wholly different situation to the one at hand and in my view thoroughly distinguishable. Here we talk about the potential limitation of a hugely wide group of people and as to the constitutional entitlements more fully described above without in any way making the description of that group and the participants therein by any means ascertainable. I am far from

persuaded that these authorities either support the allegation made, or if they do, are applicable in the context of this matter.

[140] The difficulty is compounded by the fact that as the matter was brought initially by oral evidence, the description of Second and Third Respondents was not set out in that oral evidence before the presiding Judge. In the affidavits filed to supplement, there was no description of these. All that one has to rely upon then is the few words in the heading to the papers purporting to be the description thereof.

[141] This only has to be stated for it to be apparent that the interdict sought and granted was way outside that covered in the papers. Firstly in its very wording it defined the activities referred to as unlawful without recognizing that certain of the aspects sort to be interdicted were protected constitutional rights. Secondly the description of Second and Third Respondents was so wide as to defy proper description or definition, this not being limited to the very basis of the application, that relating to rape and gender violence protest, nor was it linked thereto in any way, but sought to limit what was categorized as unlawful activity such as "*in any other manner interfering with the academic processes of the Applicant*", this is of itself patently inappropriate relief, such interference in various circumstances being perfectly lawful. The words "unlawful activities" in the header to the main restraint (1.1) sought to categorize all the activities thereafter referred to as unlawful when this could not possibly be the case.

[142] In any event, by virtue of the failure to describe the person sought to be interdicted with any exactitude at all, took away from the argument that this was relief that could be granted against these two classes of people, they being defined or ascertainable in the context in which I have set out above. There is simply no such description adequately set out or to find relate to the activities actually intended to be interdicted and referred to, and considerably vague as to what this might or might not include.

[143] In argument Mr Smuts said that the words "unlawful" could be removed from the commencing paragraph 1.1 and inserted where appropriate into the sub-paragraphs below.

[144] A further difficulty in Applicant's way in this regard is the Garvis exception. If a protest or demonstration includes some who act unlawfully, this does not by any means 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, as part of the group may well remain within the bounds of lawful protected fundamental rights. Those acting unlawfully directly or associating themselves directly with the unlawfulness are the only persons that may be legitimately restrained.

[145] In my view, the arguments advanced on behalf of Second and Third Respondents, and separately Fourth to Sixth Respondents on this issue with which I agree, must prevail. The consequence of this is that the relief sought in respect of Second and Third Respondents must be dismissed, the interim interdict against them discharged.

The Appropriate Relief against Fourth to Sixth Respondents:

[146] I have already concluded in some detail that Fourth to Sixth Respondents were involved to a greater or lesser extent as I have referred to above in the matter which formed the basis of Applicant's complaint.

[147] As there can be no doubt that as identified certain of their conduct was certainly unlawful and fell outside their constitutional entitlement when balanced against the competing entitlement of others, the University is entitled to a final interdict. The question is whether it is entitled to an order in the terms that were sought in and granted by the court below.

[148] In my view there is merit in some of the submissions made on Respondents behalf in this regard.

[149] I will deal with each of the Respondents individually.

[150] Fourth Respondent undoubtedly sought the disruption of a lecture albeit allegedly "peacefully", this clearly envisaging and encouraging that the lecture

room be invaded, the lecture stopped and a discussion be had in its place as to rape and gender violence, and if this did not happen voluntarily that those present should be persuaded to participate or if they were unwilling, it made it impossible for the lecture to continue. This undoubtedly goes beyond the S 17 constitutional entitlement or that relating to other constitutional rights such as the freedom of expression. There is also no doubt that she played a leading role, if not a leadership role, in the initial protest and certainly acted as one of the people conveying the groups' views. That of itself, and had the protest remained peaceful, would have been perfectly acceptable. As it happened, I accept on a proper approach to the papers that this protest became completely out of hand, and that this crossed the line involving the unlawful activities referred to above, with which Fourth Respondent associated herself.

[151] In respect of the Fifth Respondent, I accept on a proper approach to the papers that she was involved to a substantial extent in the unlawful activities surrounding the kidnapping of Mr Manyenyeni and Mr Myoyo, undoubtedly the most serious of the transgressions threatening the safety and physical freedom of these two men and no doubt causing them extreme stress and fear. She was also clearly a leader of the protest action as set out above, and participated in encouraging the disruption of a lecture on the same basis as set out in respect of Fourth Respondent, all of which goes way beyond her constitutional entitlement contended for.

[152] In respect of Sixth Respondent her role was more limited, relating to the incident with Mr Benyon, and some limited role in the barricading of the street, which I have already summarized above which clearly constitutes an unlawful threat in whatever context.

[153] Nevertheless there is some merit in Fourth to Sixth Respondents complaining that the order is unduly broad. In my view the order is indeed very far-reaching and I have set out below in the order granted the extent to which it is in my view sustained on the facts which I have accepted as set out above. The order speaks for itself in this regard, and I have clearly omitted that which was not sustainable or justified.

The First Respondent:

[154] As I have said First Respondent did not enter into the dispute. It would seem to me that the First Respondent's role in the above was limited to a call for a complete cessation of the academic process. This is not unlawful, in my view, and in my view might well be a legitimate S 17 protest action, as long as it does not incite non-peaceful or armed protest. In the result the interdict against it falls to be discharged, with no order as to costs.

Costs:

[155] As to costs, dealing firstly with the intervening staff in respect of Second and Third Respondents, it seems to me that in respect of the relief sought against those Respondents the intervening staff have been successful. Having regard to what I have said about the structure of their opposition however and that they sought the dismissal of the entire interdict this not restricted to the central issue concerning Second and Third Respondents, and whist I do not intend to visit any costs penalty upon them for seeking that the entire order be dismissed, i consider it just and equitable that they and Applicant each pay their own costs.

[156] In respect of Fourth to Sixth Respondents, they have individually been successful in somewhat limiting the relief sought against them. Applicant spread the relief that it sought too widely in the circumstances of the matter, and was unable, in seeking a final order, to realistically contend the contrary. It should be said that Fourth to Sixth Respondents should consider themselves fortunate to escape a costs order having regard to the shifting nature of their evidence which I consider to be disingenuous. However the fact that they have been partially successful and are no doubt in straightened circumstances financially, is to be taken into account.

[157] Fairness suggests that in respect of Applicant, Fourth, Fifth and Sixth Respondents each party should pay their own costs.

The Order:

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

(a) The Fourth, Fifth and Sixth Respondents are interdicted and restrained:

(i) from kidnapping, assaulting, threatening, intimidating and inciting violence in respect of any member of the Rhodes University community on the Applicant's campus, and from entering any University residence for this purpose;

(ii) from destroying or damaging any of the Applicant's property;

(b) in respect of Fourth and Fifth Respondents they are interdicted and restrained, in addition to the above:

(i) from disrupting lectures and tutorials at the Applicant's University, and from inciting such disruption;

(c) In respect of Sixth Respondent in addition to her being interdicted as above she is:

(i) Interdicted and restrained: from interfering with access to or egress from and free movement on or off Applicant's campus of all members of the Rhodes University community and all others who have lawful reason to move on to and off the University campus;

(d) The remaining aspects of the interim interdicts against Fourth, Fifth and Sixth Respondents are discharged.

(e) The interim interdicts granted by the court below against First, Second and Third Respondents are discharged;

(g) The parties shall each pay their own costs.

M.J LOWE

JUDGE OF THE HIGH COURT

Obo the Applicant:	Adv. Smuts SC and Adv. C McConnachie
Instructed by:	Huxtable Attorneys 22 Somerset Street Grahamstown (Ref: Owen Huxtable)

Obo the Fourth to Sixth Respondents:	Adv. S Wilson and Adv. I de Vos
Instructed by:	Legal Resources Centre 116 High Street Grahamstown (Ref: Cameron/Cecile)

Obo the Interveners:	Adv. A.M De Vos SC and Adv. M.D Stubbs
Instructed by:	Legal Resources Centre 116 High Street Grahamstown (Ref: Cameron/Cecile)

49