Rhodes University v Student Representative Council of Rhodes University

The constitutionality of interdicting non-violent disruptive protest

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Section 17 of the Constitution of the Republic of South Africa, 1996 enshrines the right to assemble, peacefully and unarmed, and the Regulation of Gatherings Act 205 of 1993 enables the exercise of this right peacefully and with due regard to the rights of others. The recent student protests across South Africa have occasioned litigation seeking to interdict protest action, which the universities claim is unlawful. Overly broad interdicts, which interdict lawful protest action, violate the constitutional right to assembly and have a chilling effect on protests. In a decision of the High Court of South Africa, Eastern Cape Division, Grahamstown, a final interdict was granted interdicting two individuals from, among other things, disrupting lectures and tutorials at Rhodes University and from inciting such disruption. In this note, the constitutionality of interdicting non-violent disruptive protest is discussed and analysed, using Rhodes University v Student Representative Council of Rhodes University and Others *(1937/2016) [2016] ZAECGHC 141.*

In recent years, student protests – related to #FeesMustFall and others – have become commonplace on university campuses across South Africa. These protests, while generally peaceful, have sometimes involved serious unlawful activity and acts of violence, including arson, intimidation and damage to property.[1] As a result, many universities have obtained interdicts to restrain unlawful protest action.[2] Although criminal charges may be brought against those who commit crimes in the course of a protest, interdicts are often seen as being more effective, because the application procedure for an interdict is far speedier. The *Rhodes*[3] case began with student protests against gender-based violence at Rhodes University and the publication, on Facebook, of the '#RU Reference List' (the List) that named certain students as rapists.[4] Student protesters at Rhodes University engaged in a number of non-violent disruptive acts, ranging from blockading roads and access to the university

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to interrupting lectures, along with more definitively unlawful acts such as intimidation and assault.[5] The university responded by interdicting a range of protest activity, including the disruption of lectures and 'academic progress'. Consequently, the *Rhodes* case presents a unique opportunity to consider what protection should be afforded to non-violent disruptive protest action that does not rise to the level of clearly unlawful activity.

Legal background

Although a number of rights are implicated in protest action, including the rights to freedom of assembly, expression and association as well as political rights, this discussion will largely focus on the right to freedom of assembly. Section 17 of the Constitution[6] affords everyone the right to assemble, demonstrate, picket and present petitions, provided they do so peacefully and unarmed. When interpreting section 17, the Constitutional Court has given the right broad and generous application to afford everyone a right to assemble or gather for any lawful purpose, provided they do so unarmed.[7] This right and protection is only lost if those gathering do not intend to be peaceful.[8]

While violent protest is not protected under section 17, the Constitutional Court has nonetheless found that a protester should be afforded constitutional protection even if there is sporadic violence at the gathering, provided that the individual concerned remains peaceful.[9] This means that violent protesters may lose constitutional protection without impugning the protection afforded to peaceful protesters who are also present. This generous interpretation of the right to freedom of assembly extends the protection of section 17 to a wide range of protest action, arguably including non-violent disruptive protest. However, as with the other rights contained in the Bill of Rights, section 17 can be justifiably limited in terms of section 36 of the Constitution. It is important to note that while violent protesters do not impugn the constitutional protection afforded to others, violent protesters themselves lose protection and may be subject to prosecution if their actions rise to the level of criminal activity.

The enabling legislation for the right to freedom of assembly, the Regulation of Gatherings Act[10] (RGA), regulates how assemblies and gatherings may take place. The RGA applies to demonstrations (defined as the assembly of fewer than 15 people) and gatherings (defined as the assembly of 15 or more people on a public road or in a public place). Consequently, the RGA often does not apply to protests that take place on university property. However, the RGA can still provide guidance about lawful protest action since it outlines what conduct is prohibited and permissible at gatherings.[11] Specifically, the RGA prohibits possessing weapons, inciting violence, and attempting to compel people to join a gathering or demonstration; thereby delineating what constitutes 'armed and non-peaceful' protest.[12] While the RGA does not prohibit barring entrances to buildings or access to premises, it places an obligation upon marshals to take reasonable steps to prevent protesters from denying access.[13] Notably, the RGA does not prohibit protesters from disrupting business and other activities.

Beyond legislative restrictions, the right to protest is not absolute and must be exercised with 'due regard for the rights of others'.[14] This was confirmed and developed in *Hotz*,[15] a case related to the #FeesMustFall protests and which involved non-violent disruptive and violent protest action. The University of Cape Town applied for an interdict when students, during a protest that has come to be known as 'Shackville', erected a structure that blocked a university road and obstructed traffic, engaged in acts that damaged university property, and assaulted staff.[16] The law provides that a party

may be granted a final interdict if they have a clear right that has been injured or a reasonable apprehension of such injury being committed and there is no other suitable alternative remedy available.[17] Here, the university's rights to, among others, ensure the safety of its staff and control access to its property had been infringed by the student protest.[18] While the students conceded the unlawfulness of their actions, they argued that their conduct was justifiable and not wrongful.[19] The Supreme Court of Appeal recognised the historical importance of 'civil disobedience' in combatting unjust regimes, but did not decide whether protest akin to this would be justifiable and lawful.[20] Consequently, the legal protection afforded to protest action that is not violent, but still disrupts or prevents normal activity, remains murky. This issue arose repeatedly during the #FeesMustFall student protests and, specifically, in the *Rhodes* case.

Non-violent disruptive protest is not a new phenomenon, nor is it unique to the student protests. Disruptive protest tactics were used to resist the apartheid government, despite its attempts to ban and suppress any forms of protest.[21] In a democratic South Africa the status of this form of disruptive protest is unclear, since protest is now afforded constitutional protection.[22] The student protests, which were litigated through numerous interdicts, provide an opportunity to examine how the law treats disruptive protest action. Though some action during the student protests was clearly unlawful (such as damage to property, intimidation and violence), this note will focus on the non-violent disruptive protest activities that took place, such as interrupting lectures and tutorials, barricading university buildings, and otherwise hindering academic activities. These activities fall into a grey area that is not presumptively unlawful and the *Rhodes* case may be the first opportunity the Constitutional Court has to clarify the issue.

The facts

In April 2016, the List, which named a number of past and present students who had allegedly sexually assaulted or raped other students, was published.[23] The List quickly became a symbol of rape culture to students at Rhodes University, sparking a number of protests.[24] These protests culminated in a large group of students converging on student residences on 17 April 2016, and kidnapping and assaulting some of the individuals identified in the List.[25] Following this, students barricaded entrances to the campus, comprising two public roads and a private road.[26] The Student Representative Council of Rhodes University (SRC) called for an 'academic shutdown'.[27] This 'shutdown' was effected by protesters physically chaining doors as well as interrupting lectures and being disruptive in test venues and libraries.[28]

On 29 April 2016 Rhodes University administration responded by obtaining an interim interdict that prevented students at the university from participating in, facilitating or encouraging unlawful activities on campus.[29] The interdict applied to three named individuals, Sian Ferguson, Yolanda Dyantyi and Simamkhele Heleni (the named students), and to the broad classes of 'students and persons *associating themselves with or engaging* in unlawful activities' on campus (emphasis added).[30] This meant the interdict not only applied to specified people who were previously involved in the protests but could also be used against future protesters. The interdict prohibited a number of listed activities that the university considered 'unlawful', including hindering access to campus, disrupting lectures and tutorials, and damaging the university's property and reputation.[31] The interdict also prevented protest action that would interfere with the academic progress of the university. The interim interdict thus prohibited both protest action that was clearly unlawful (causing

damage to property, assault and intimidation) *and* protest action that was merely disruptive (the disruption of lectures and tutorials), the legal status of which is less clear.

The named students opposed the finalisation of the interdict. In addition, 37 academic staff members of Rhodes University applied to intervene and also opposed the finalisation of the interdict. Both groups chose to focus on the ambit of the interdict.

Both the intervening staff and named students focused on the parts of the interdict that applied to activity that was not clearly unlawful, and challenged the constitutionality of the interdict in this regard.[32] The named students argued that the interdict was overly broad and vague and, as a result, interdicted lawful and protected protest action. The intervening staff argued that the class of persons the interdict applied to was overly broad and had been used to threaten staff who encouraged students to disrupt, thus infringing the staff's right to freedom of expression and academic freedom.[33] Specifically, Rhodes University threatened to prosecute a staff member for telling her students to 'put up your hand and ask about rape culture, disrupt'.[34] The case thus turned on whether the interdict had unjustifiably infringed the parties' rights to freedom of expression, right to freedom of assembly and, in the case of lecturers, their academic freedom. It was further contended that the university's failure to meaningfully engage with the protesters also rendered the interdict unconstitutional.[35]

In addition, the named students disputed the allegations that they had engaged in or associated with unlawful activities. These students all confirmed that they had been involved in some protest action, but contended that this involvement was lawful. The named students did concede, however, that where protest action had amounted to criminal conduct, it should not be protected.[36]

The judgment

Judge Lowe had to consider two issues when deciding the case: firstly, whether the conduct being interdicted was constitutionally protected, and, secondly, whether there was a valid basis for granting an interdict.

In deciding whether the interdict should stand, the court considered whether the requirements for a final interdict had been met, namely that the university had a clear right that had been injured or was reasonably apprehended to be injured, and that there was no alternative remedy available.[37] The court applied the precedent set in *Hotz*, which meant that the unlawfulness of the protest action and the likelihood of the protest action being repeated was also considered.[38]

The court found that the university did have certain rights that warranted the protection of an interdict, including its rights to control access to and prevent unlawful conduct on its property, as well as to ensure that staff are able to perform work.[39] Though the students and staff suggested remedies which they considered to be suitable alternatives to an interdict, for instance criminal charges or disciplinary proceedings, the court found that none of the alternatives was a proper or effective alternative to an interdict.[40] Consequently, the court found the university had a clear right, and that an interdict was the only suitable remedy available.[41] As a result, the case turned on the injury caused by the interdicted parties and the lawfulness of their actions.

The court found that there had been an injury to the university's rights in a general sense, where the protest action had involved unlawful and unprotected activities such as kidnapping.[42] The court also held that section 17 did not protect protest action that interfered with the rights of other students, and found that such action could be interdicted.[43] The determinative consideration was whether the party being interdicted had engaged in protest action that was not

protected. Since each party had engaged in different actions, the court had to consider each individually.

The Student Representative Council (SRC) had elected not to oppose the interdict. The court held that the SRC's call for an 'academic shutdown' was protected under section 17, provided that it did not incite violent protest action.[44] The interim interdict against the SRC was discharged.

It was alleged that the named students had participated in the protests and engaged in unlawful activity. None denied participating in the protests, but all denied involvement in unlawful activity. The court found that all the named students had associated with the unlawful activities of kidnapping, assault and inciting violence. The court further found that Ferguson and Dyantyi had participated in the disruption of lectures at the university.[45] Ferguson had posted on Facebook, calling for a certain lecture to be disrupted peacefully, while Dyantyi was part of a group of students that disrupted a lecture and prevented its continuation.[46] Ferguson and Dyantyi argued that disruption of lectures is not unlawful, but rather falls within constitutional protection, provided that it is peaceful.[47] The court assumed that disruption of lectures was unlawful and held that disrupting lectures was not a form of constitutionally protected protest action.[48] The court confirmed the interdict against the students but reduced the scope significantly.

Including the classes of students and others 'engaging in unlawful protest activity' under the interim interdict was arguably the most tenuous part of the order, and the reason why staff members sought to intervene in the application.[49] The court found that the interdict applied to individuals who had not acted unlawfully or associated themselves with unlawfulness, and thus were still entitled to constitutional protection.[50] The court therefore held that the interdict infringed their rights and that the classes referred to were vaguely and broadly defined.[51] The interdict against both classes was discharged.

The court ultimately decided to reduce the scope of the interdict quite drastically and restricted its application to only Ferguson, Dyantyi and Heleni.[52] All three students were interdicted from clearly unlawful activities such as kidnapping, assault and inciting violence. Heleni was also interdicted from interfering with access to the university. Most notably, Ferguson and Dyantyi were also interdicted from disrupting, and inciting disruption of, lectures and tutorials at Rhodes University.

Appeal to the Constitutional Court

Following the high court decision, the named students unsuccessfully applied to the Supreme Court of Appeal for leave to appeal.[53] The students have since approached the Constitutional Court for leave to appeal the final interdict.[54]

In their application, the named students raised important issues relating to whether Lowe's interpretation of the law and his findings might infringe the right to protest. They contend that they should not have been interdicted from specific unlawful acts, including kidnapping and assault.[55] The high court had granted the interdict on the basis that the students had associated themselves with unlawful conduct during the protests. However, the students contend no connection was established between themselves and these unlawful acts, and that their mere participation in the protests (or even taking a leadership role in the protests) does not imply association with any unlawful acts committed by others during the protests.[56]

Ferguson and Dyantyi also contend that they should not have been interdicted from disrupting lectures and tutorials because such conduct is not unlawful.[57] Instead, they argue, temporary

disruption of a class to express a grievance or view is an exercise of their constitutionally protected rights to freedom of assembly and expression.[58] They submit that disruption of a class is not unlawful unless it completely breaks up the class.[59] The high court had assumed that disruption of lectures and tutorials was unlawful without meaningfully considering the issue.[60]

At time of writing, the Constitutional Court has not yet heard the application.

Comment

The high court decision is something of a mixed bag, which leaves important issues ripe for consideration by the Constitutional Court, if the appeal is heard. Before discussing these issues, however, it is worth noting the significance of the *Rhodes* judgment as precedent for future protest cases, particularly those concerning academic environments and participants.

Recognition of academic freedom

A noteworthy aspect of the judgment is the reliance that the intervening staff placed on their right to academic freedom in challenging the interim interdict. Academic freedom, at the core of which is the right of individuals to carry out research and teaching without interference, is protected as part of the right to freedom of expression in our Constitution.[61] This protection recognises our recent past under which academic freedom was severely restricted, and any academic thought, speech and writing that criticised the unjust system of apartheid was supressed.[62] Academic freedom acts as a defence against forced conformity, ensuring that we achieve the kind of open and democratic society envisioned by our Constitution.[63] It benefits not merely the individuals involved in academia but also our society as a whole, since academia plays an important role in our society through knowledge creation and dissemination.[64]

Despite its importance, the right to academic freedom has not yet been given much content by our courts. This case marks the first time that the right to academic freedom has been considered within the context of interdicts against protest action. The interim interdict not only limited the rights of students to freedom of assembly and expression but also limited the right of academic staff to academic freedom, in that the university had used the interdict to threaten a lecturer who sought to engage students on rape culture with contempt proceedings.[65]

In its decision, the court demonstrated an understanding of the importance of academic freedom:

> [A]cademia 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.[66]

Although the court did not explicitly find that the interim interdict infringed academic freedom, it was highly critical of how the interdict had been used against a lecturer.[67] The court refused to finalise the interim interdict against the class of 'others engaging in unlawful protest activity', which included academic staff.

Restrictions on interdicting classes

At a more general level, the *Rhodes* decision sets important parameters as to whom an interdict may apply to. The overly broad and vaguely defined classes named in the interdict left room for potential abuse and resulted in a chilling effect on protest action throughout Rhodes University.[68] This chilling effect was not restricted to protests concerning the List, but ended up also impacting later protest action.[69] In framing the respondents in the interdict so broadly, Rhodes University relied, in part, on

a growing trend to grant interdicts against unnamed classes and groups of protesters.[70] This framing attempts to address the difficulty in identifying and naming all individuals who have engaged in unlawful protest, particularly when protests are protracted and diffuse across university campuses. Other universities have similarly relied on this difficulty to justify broad interim interdicts.[71]

In *Rhodes*, however, Lowe clearly delineated the grounds on which an interdict may be granted against unnamed individuals. Previous cases had allowed interdicts to apply to unnamed individuals by interdicting a class, provided that the members of that class were ascertainable.[72] The decision in *Rhodes* limits the potential abuse of this allowance by excluding future conduct as a determining factor.[73] This restricts the university's ability to use the interdict as a pre-emptive measure to prevent and sanction future protesters through contempt of court proceedings.[74] Instead, the interdict may only apply to individuals who belong in a class *prior* to the granting of the interdict.[75] This means that, in the *Rhodes* case, the students or staff who disrupted lectures after the granting of the interdict would not violate it.

The lawfulness of non-violent disruptive protest

One of the judgment's greatest shortcomings is that it assumes that certain forms of non-violent disruptive protest are unlawful and incompatible with peaceful protest, without meaningfully engaging with the constitutional protection afforded to such acts. While case law on violent protest action is plentiful and discussed at length in the *Rhodes* case, precedent around disruptive protest action is sparse. This is perhaps because, in previous cases, disruptive protest action has been accompanied by violence and the interdicts have applied to individuals who participated in or aligned themselves with violent protest.[76] However, *Rhodes* was entirely unique in interdicting lawful – albeit disruptive – protest action and applying it to individuals who were not involved in violent protest action. By assuming that disrupting lectures and tutorials was unlawful, the court missed an opportunity to recognise the importance of non-violent disruptive protest action and develop the law to protect this action.

Disruptive but non-violent protest action has a long and proud history in South Africa, dating back to peaceful resistance during apartheid.[77] These forms of resistance were often outlawed by the government in an attempt to stymie the anti-apartheid struggle.[78] It is against this backdrop that the right to assemble and demonstrate was recognised and included in both the interim Constitution[79] and the final Constitution.[80] However, the right, in both iterations, only applied to peaceful and unarmed action. Fortunately, in interpreting it, the courts have given the wording a generous interpretation which, at a minimum, protects 'non-violent' protest action.[81] Beyond this, *Garvas* hints at a positive content of the right that protects protest action, even where there has been sporadic violence.[82] Furthermore, in the RGA the legislature elected to permit certain acts of disruption, such as barricading streets, indicating a level of permissiveness towards non-violent disruptive protest. Arguably, the definition of peaceful protest under section 17 is broad enough to include a range of legitimate protest action, including non-violent disruptive protest. The court in *Rhodes* seemed to acknowledge this when it stated:

> M]ass 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.[83]

However, despite this dicta, the court went on to refer to a call for 'peaceful disruption' of a lecture as oxymoronic and to assume that disrupting lectures and tutorials was unlawful.[84] Although it was agreed by both sides that the disruption of lectures and tutorials was a non-violent protest action and the participants were unarmed, the court nonetheless classified it as 'unlawful' protest action and interdicted it. This finding and assumption of unlawfulness is inconsistent with the generous interpretation afforded the section 17 right and its historical context. Furthermore, there does not appear to be any basis, in case law or legislation, that classifies such conduct as unlawful. When measured against section 17, the non-violent disruptive protest action in the *Rhodes* case was constitutionally protected and the infringement of this right ought to have been considered in the judgment. This is not to say that all disruptive protest action is permitted and cannot be subjected to an interdict, but merely that the court ought to take cognisance of the constitutional protection it is afforded.

The question is then, how should the court have dealt with interdicting constitutionally protected protest action? At the high court level, Lowe interpreted *Hotz* to have developed the criteria for an interdict to include the constitutional protection.[85] To do this, the court developed the criteria of 'injury' to the university's rights and held that, because the students had engaged in violent protest action that was not constitutionally protected, they had injured the university's rights.[86] Unfortunately, framing the criteria in this manner does not provide a mechanism to deal with a situation where students might engage in protest action that is protected but also injures the university's rights and may possibly justify the granting of an interdict. As a result, the approach adopted in *Rhodes* lacks the sophistication needed to deal with the involvement and possible limitation of constitutional rights in the context of interdicts.

The right to assembly is not absolute and can be limited under certain circumstances. In the context of interdicts, judges are empowered to develop the common law in a manner that limits the right to assembly, provided the limitation is in line with section 36 of the Constitution.[87] This enables the judge to strike an appropriate balance between the rights of the various parties. As shown above, an interdict that restrains individuals from disrupting lectures and tutorials clearly limits the right to freedom of assembly, the scope of which extends to disruptive protest.

The court in *Rhodes* would have needed to carefully examine whether the limitation was in accordance with section 36 of the Constitution, which requires that any limitations placed on rights must be reasonable and justifiable in an open and democratic society.[88] The degree of the limitation of the right must be proportional to the purpose sought by the limitation, as well as its importance and effect, while also considering whether there are less restrictive means to achieve the same purpose.[89]

The Constitutional Court has already stressed the importance of the right to assembly in *Garvas*.[90] Freedom of assembly enables vulnerable and marginalised people to express their grievances and to protect and advance their rights.[91] Disruptive protest is a particularly effective way to draw attention to shared grievances and exercise the right to freedom of assembly. Indeed, the effective exercise of the right to freedom of assembly necessitates some level of disruption to everyday life.[92] To this end, Rhodes University has a constitutional obligation to tolerate protest on its campus and with it, tolerate some disruption of its operations and activities. An interdict that restrains individuals from any disruption in a lecture or tutorial would be exceedingly invasive of the right to freedom of assembly. The Constitutional Court has urged that the exercise of this right may not be limited 'without good reason'.[93]

In granting the interdict, the court sought to protect the legitimate interests of the university, particularly the common law rights of a property owner, but it did not give adequate consideration to the constitutional protection afforded to non-violent disruptive protest. Consequently, the court's development of the common law, which appears to make any disruption unlawful and subject to be interdicted, cannot be justifiable under section 36. In order to balance the competing rights, the court would have needed to adjust the relief it granted to the university to be the least restrictive formulation needed to protect the university's interests. This could have been achieved through a narrower interdict that, for example, set out to curtail the level of disruption without restricting all disruption. By limiting the scope of the interdict to allow for some disruption, the interdict would have been less invasive of the right to freedom of assembly while effectively protecting the university's interests, and thus a proportional and justifiable limitation of the right to freedom of assembly.

In determining the scope of the interdict, the court would have had to consider the extent of disruption that the university is obliged to tolerate. A useful suggestion in this regard is made by the named students in their application for leave to appeal to the Constitutional Court. Relying on *DA v Speaker, National Assembly*,[94] the students suggest that the court distinguish between permanent disruption (which 'incapacitates' the lecture or tutorial) and temporary disruption (which allows for the expression of a grievance).[95] This strikes a more appropriate balance between the rights of the parties, enabling the exercise of the right to freedom of assembly with due respect and care for the rights of others.

Conclusion

The *Rhodes* case and the #FeesMustFall protests more generally have raised important questions around the right to freedom of assembly and protected forms of protest action. While the *Rhodes* decision attempted to grapple with these issues, there remains much uncertainty. We wait to see whether the Constitutional Court will weigh in on the issue and bring clarity to the legal status of non-violent disruptive protest.

Postscript

After this article was accepted, the Constitutional Court handed down a judgment on the appeal and we wish to highlight the salient points of the judgment in this postscript. Although the court granted the students leave to appeal, the court only upheld the appeal in respect of costs.[96] Acting Justice Kollapen, writing for the majority, agreed with the named students that the case raised novel constitutional issues but dismissed their appeal on the grounds that the case did not 'justify a ventilation and consideration of such issues'.[97] As a result, the Constitutional Court judgment did not deal with the substantive constitutional issues outlined in the named students' appeal and leaves us without much-needed clarity on the legality of disruptive protest.

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Notes

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