

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 2648/2016

In the matter between:

UNIVERSITY OF CAPE TOWN

Applicant

and

DE WAAL HUGO

Fifth Respondent

In re the matter between:

UNIVERSITY OF CAPE TOWN

Applicant

and

SANCHIA DAVIDS

First Respondent

KIRSTEN WHITFIELD

Second Respondent

MOGEZI MAYEPI

Third Respondent

NEO REILOE MANCAPA

Fourth Respondent

DE WAAL HUGO

Fifth Respondent

ITUMELENG NKULULEKO MOLEFE

Sixth Respondent

DUMISANI NCUBANI

Seventh Respondent

ATHABILE NONXUBA

Eighth Respondent

ALEX HOTZ

Ninth Respondent

PAM DHLAMINI

Tenth Respondent

MASIXOLE MLANDU

Eleventh Respondent

CHUMANI MAXWELE	Twelfth Respondent
SLOVO MAGIDA	Thirteen Respondent
ZOLA SHOKANE	Fourteenth Respondent
BRIAN KAMANZI	Fifteenth Respondent
RU SLAYEN	Sixteenth Respondent
THOSE PERSONS WHO ASSOCIATE THEMSELVES WITH ANY UNLAWFUL CONDUCT AT ANY OF THE UNIVERSITY'S PREMISES	Seventeenth Respondent

**APPLICANT'S APPLICATION FOR LEAVE TO APPEAL AGAINST THE ORDER OF
26 FEBRUARY 2016 DISCHARGING THE RULE NISI, ISSUED ON 17
FEBRUARY 2016, AS AGAINST THE FIFTH RESPONDENT**

TAKE NOTICE that the applicant intends to apply for leave to appeal to the Supreme Court of Appeal, alternatively the Full Bench of the Western Cape Division against the whole of the judgment and orders in Case Number 2648/2016, delivered by the Honourable Mr Justice Blignault on **FRIDAY 26 FEBRUARY 2016**.

TAKE NOTICE FURTHER that the application will be made on a date and time to be arranged between the Registrar and the parties' attorneys after the provision of reasons for the orders made by the above Honourable Court.

TAKE NOTICE FURTHER that the applicant contends that there are reasonable prospects of success in an appeal, as contemplated by section 17(i)(a)(i) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act"), and also that "*there is some other compelling reason why the*

appeal should be heard” as contemplated by section 17(i)(a)(ii) of the Superior Courts Act inasmuch as:

1. The learned Judge erred in discharging the rule nisi issued by Ms Acting Justice Williams on 17 February 2016 (‘the interim order’) as against the fifth respondent on the basis of the fifth respondent’s assertion that he was not involved in the violent protest actions at the campus of the applicant on 16 February 2016 and that he was merely an innocent bystander without due consideration of the evidence, *inter alia*, as to
 - 1.1. the reasonable suspicion of the South African Police Services (‘the SAPS’) that the fifth respondent had committed the offences of public violence and malicious damage to property; and
 - 1.2. the fact that the National Prosecuting Authority (‘the NPA’) had considered the evidence placed before it by the SAPS and has deemed that there is sufficient *prima facie* evidence to sustain the charges against the fifth respondent and for the investigation and prosecution against him to proceed.
2. The learned judge erred in failing to pay due regard to the fact that the SAPS, effected the arrest of the fifth respondent on charges of public violence and malicious damage to property, exercising its powers in terms of section 40(1) of the Criminal Procedure Act 51 of 1977 (‘the CPA’) which provides, *inter alia*, as follows -

‘A peace officer may without warrant arrest any person

- (a) who commits or attempts to commit any offence in his presence;*
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1¹, other than the offence of escaping from lawful custody.’*

3. Further, the provisions of -

3.1. section 198(1) of the Constitution of the Republic of South Africa, 1998 (‘the Constitution’) provide that the security services of the Republic of South Africa consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution; and

3.2. section 205(3) of the Constitution, provides that the objects of the SAPS are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

4. The learned judge erred in failing to consider that the SAPS, exercising its powers under the CPA, as read together with the provisions of section 198(1) section 205(3) of the Constitution, deemed the actions of the fifth respondent, on 16 February 2016, to be sufficiently serious to warrant his arrest and detention on charges of public violence and malicious damage to property.

5. The learned judge erred in failing to pay regard to the principle set out in cases such as *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA) and

¹ Public violence and malicious injury to property are offences listed in Schedule 1 of the CPA.

MEC for Health, Province of the Eastern Cape and Others v Kirland Investments (Pty) Ltd 2014 (3) SA 481 (CC) to the effect that executive and administrative action is to be regarded as valid and lawful unless and until set aside by a competent court of law, and accordingly that the arrest and detention by the SAPS on 16 February 2016 on charges of public violence and malicious damage to property were and are to be regarded as lawful as such.

6. The learned judge failed to attach due weight to the fact that there were a number of students participating in the protest action on 16 February 2016, which included attacks on its students, staff and members of the public, and which culminated in violence and the destruction of the applicant's property, yet only eight students were arrested of which the fifth respondent was one.
7. The fifth respondent in his replying affidavit, in his application in terms of Rule 6(12)(c) of the Uniform Rules of Court, which affidavit he relied upon in the proceedings to anticipate that return date of the interim order, intimated that the mere fact that he stated that he was not involved in the violent protest actions and that as a consequence that there were no grounds for his arrest and detention, constituted sufficient evidence for this Court to find that his arrest and detention were as a fact unlawful.
8. The learned judge erred in discharging the interim order on the basis of the fifth respondent's denial of his involvement in the protest action, in that the logical conclusion of the discharge is that any arrested or detained person would be entitled to be released and would be entitled to claim damages for unlawful arrest on no more than that person's

assertion that she or he was not involved in the offences for which she or he had been arrested and detained.

9. Further, it is common cause between the applicant and the fifth respondent that when the fifth respondent appeared before the Wynberg Magistrates' Court on 17 February 2016, the charges against him were not withdrawn. Instead he was released on bail.
10. As such, the learned judge ought to have accepted that the NPA had considered the evidence placed before it by the SAPS and that it deemed that there is sufficient evidence to sustain the charges against the fifth respondent and for the investigation and prosecution to proceed.
11. Further, the learned judge erred in failing to take into account the evidence tendered by the applicant that its attorney of record had been advised by the senior prosecutor dealing with the criminal proceedings against, *inter alia*, the fifth respondent that -
 - 11.1. on the basis of the information contained in the dockets, the NPA was at that stage inclined to proceed with the prosecution against all of the first eight respondents, including the fifth respondent; and
 - 11.2. she specifically confirmed that in her *prima facie* view the NPA has sufficient evidence in respect of each of the eight respondents, who had been arrested on 16 February 2016, to positively link them to the charges of public violence and malicious damage to property.

12. Further, the fifth respondent did not take issue with the content of the evidence tendered by the applicant in regard to the statements of the senior prosecutor, nor did he dispute the veracity of her statements. He merely suggested, without bringing a strike out application, that the evidence was inadmissible hearsay evidence, in circumstances where it had been tendered in urgent proceedings and it was as such admissible. Bearing in mind the fact that the proceedings were instituted as a matter of extreme urgency and that the NPA stated that it was not prepared to provide the applicant with statements or specific information contained in the dockets in respect of the charges against the fifth respondents on the basis that the investigation was on going and that granting the applicant access to the docket at that stage could potentially jeopardise the investigation, the learned judge ought to have exercised his discretion and allowed the evidence tendered by the applicant to be admitted, notwithstanding that the evidence constituted hearsay evidence.
13. The evidence ought to have been admitted and evaluated in light of the principles set out in -
 - 13.1. *Prinsloo and another v Newman* 1975 (1) SA 481 (A) at 492G and 495A and *Minister for Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA) at para 11, that the duty of a police officer who has arrested a person for the purpose of having him prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not;
 - 13.2. *Carmichele v Minister of Safety and Security and another* 2001 (4) SA 938 (CC) para 63, where it was held that the police have a clear duty to bring to the

attention of the prosecutor any factors known to them relevant to the exercise by the magistrate of his discretion to admit a detainee to bail; and

- 13.3. The fact that the fifth respondent tendered no evidence to show that the above principles have not been adhered to.
14. As such, the learned judge ought to have accepted that the fifth respondent's arrest was lawful and therefore that the SAPS had sufficient lawful grounds to arrest and detain the fifth respondent as a consequence of his actions during the protests and that the NPA acted upon the relevant facts brought to its attention by the SAPS in determining whether the prosecution should continue and further that the relevant factors were in turn placed before the Magistrate in determining the issue of bail.
15. Further, the learned judge erred in failing to apply the principles set out in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC), that until the fifth respondent's arrest and continued prosecution are set aside by a competent court, as a matter of law, the arrest and continued prosecution of the fifth respondent are to be regarded as lawful and that the arrest and charges against him are based on a reasonable suspicion that he was involved in acts of public violence and malicious damage to property.
16. The learned judge failed to pay due regard to the principles of separation of powers in terms of which the Court was required to accept the decisions of the SAPS and the NPA insofar as the charges against the fifth respondent are concerned, more particularly in the

absence of any objective evidence upon which to impugn the decisions of the SAPS and the NPA.

17. As such the learned judge ought to have found that there was a reasonable and justifiable basis for the applicant to believe that the fifth respondent was involved in the violent protest action on 16 February 2016 and that in light thereof, that his presence on the campus constituted and constitutes a continuing and credible threat to the operations of applicant as well as the safety and security of its students, staff and property.
18. That being so, the learned judge ought to have found that until the arrest and prosecution of the fifth respondent have been set aside by a competent court, that there is a reasonable suspicion that the fifth respondent has committed and accordingly may commit an injury to the applicant's staff, students and property, sufficient for the granting of final relief.
19. The effect of the learned judge's finding that a decision by the SAPS and the NPA to pursue criminal charges of the fifth respondent for, *inter alia*, public violence, is not sufficient basis upon which to grant interdictory relief, is that the applicant would be required to conduct an independent investigation into the criminal conduct of which the fifth respondent is accused; and that before it may obtain interim and/or final relief against him, the applicant would have to obtain independent evidence to the effect that the investigation and prosecution of the fifth respondent on charges of public violence and malicious damage to property is sustainable.
20. This, in turn, would require the applicant to undertake the functions which are specifically assigned by section 205(3) of the Constitution, to the SAPS.

21. This too offends against the principles of separation of powers in that the applicant, as a publicly funded institution of higher education, is an organ of state, and as such is prohibited from arrogating to itself functions which the Constitution has assigned to another organ of state.

22. Further, and in any event the learned judge failed to consider the improbabilities in the evidence presented by the fifth respondent.
 - 22.1. In the statement annexed as DH1 to his founding affidavit in the reconsideration application the fifth respondent states that on his way back from a party in Observatory he observed smoke and went to investigate what was happening on the lower campus, that he observed that a bus had been set alight and that he came to the conclusion that *'some escalating incident had likely taken place'*;

 - 22.2. It is thus reasonable to conclude that he was aware that the protests had potentially turned violent;

 - 22.3. The fifth respondent then decided to return to the campus, after he had observed a bus being burned and after he had concluded that the protests had escalated and had potentially turned violent;

 - 22.4. Given that the protests on that day were widely publicised online and on social media and given the fifth respondent's presence on campus on that day and his stated admitted previous involvement, albeit peaceful, with protest actions at UCT

it does not bear scrutiny that the he would return to campus merely to obtain further information;

- 22.5. On the objective probabilities, it is more likely that the fifth respondent returned to lower campus with a view to taking part in the protest action, even if were it to be accepted that he had not already been involved by that time;
- 22.6. This is borne out by the fact that the fifth respondent states that he observed a group of protestors, followed them and then deliberately crossed the police cordon in order to join the protestors;
- 22.7. The fifth respondent further provided two differing versions of how he came to cross the police cordon. In his founding affidavit in the reconsideration application he states that the walked through the police cordon yet in his replying affidavit he states that the walked around the police cordon; and
- 22.8. In addition, his version that the protest was peaceful is entirely at odds with all the evidence that served before Williams AJ on 17 February 2016 and the evidence which served before the Court;
23. On a proper consideration of all the evidence the learned judge ought to have accepted the version of the applicant and rejected that of the fifth respondent in that the probabilities favoured the applicant and not the fifth respondent.
24. For these reasons the applicant seeks leave to appeal to the Supreme Court of Appeal, alternatively the Full Bench of the Western Cape Division against the whole of the

judgment and orders in Case Number 2648/2016, delivered by the Honourable Mr Justice Blignault.

TAKE NOTICE FURTHER that due to the urgency of the matter, the applicant seeks leave to appeal prior to the Court handing down reasons for its judgment. The applicant reserves the right to supplement this application for leave to appeal subsequent to the Court handing down full reasons.

DATED AT CAPE TOWN THIS DAY OF FEBRUARY 2016

FAIRBRIDGES WERTHEIM BEKKER

Per:

**TO: THE REGISTRAR
 HIGH COURT
 CAPE TOWN**

AND TO: