CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 280/16

In the matter between:

ALEXANDRIA HOTZ	First Applicant
MASIXOLE MLANDU	Second Applicant
CHUMANI MAXWELE	Third Applicant
SLOVO MAGIDA	Fourth Applicant
ZOLA SHOKANE	Fifth Applicant

and

UNIVERSITY OF CAPE TOWN	Respondent

Neutral citation:	*Hotz and Others v University of Cape Town* [2017] ZACC 10
Coram:	Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J
Judgments:	The Court
Decided on:	12 April 2017
Summary:	Right to education — Right to freedom of expression — Right to assembly, demonstration, picket and petition — Right to freedom of association Remedial powers of the Constitutional Court — Exercise of judicial discretion in awarding costs — Instances in which an appeal court may interfere with a discretionary order — Application of the *Biowatch* principle on costs — Failure to

exercise discretion judicially in the constitutional context — Application to tender further evidence — Further evidence unnecessary to determine the issue on costs.

ORDER

On appeal from the Supreme Court of Appeal:

1. Condonation for the late filing of this application is granted.
2. The application for leave to file a replying affidavit and to tender further evidence is dismissed.
3. Leave to appeal is granted only against the order of the Supreme Court of Appeal upholding the High Court's order on costs.
4. The appeal on costs is upheld.
5. The costs order of the High Court against the applicants, confirmed by the Supreme Court of Appeal, is set aside.
6. Each party is to pay its own costs in the High Court, Supreme Court of Appeal and in this Court.

JUDGMENT

THE COURT (Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J):

Introduction

[1] The widespread student protests in higher learning institutions including the student protest at the University of Cape Town (UCT/University), pursuant to the "#FeesMustFall" movement, were in pursuit of the realisation of the overarching objective of a free education. The movement attracted national attention for its achievements, which include a 0% fee increase for the year 2016 and increased government funding for universities. The protests also affected almost one and all in other ways, for example, quality time for learning was lost; properties were destroyed; injuries were sustained; many students were arrested and others excluded from campuses; some students were excluded from furthering their studies; life was lost and costs in litigation were incurred as a result of the protestors' unlawful conduct.

[2] This application for leave to appeal is a sequel to the student protest at UCT, in early 2016. It was brought on an urgent basis against the decision of the Supreme Court of Appeal (SCA).[1] That Court upheld the order for a final interdict by the High Court of South Africa, Western Cape Division, Cape Town[2] (High Court) against the applicants, who were part of a group of students that had participated in the student protest under the names "#RhodesMustFall" and "#FeesMustFall".[3] The SCA's decision did not involve the legitimacy of the protest but focused on whether the High Court correctly granted a final interdict.

[3] The Chief Justice directed the parties to file written submissions solely on whether the High Court exercised its discretion judicially in granting a costs order against the applicants. The parties complied with the directions. After the written

[1] *Hotz v University of Cape Town* [2016] ZASCA 159; [2016] 4 All SA 723 (SCA) (SCA judgment), per Wallis JA (Navsa JA, Bosielo JA, Theron JA and Mathopo JA concurring).

[2] *University of Cape Town v Davids* [2016] ZAWCHC 56; [2016] 3 All SA 33 (WCC) (High Court judgment), per Allie J. The High Court made final the rule *nisi* granted against the applicants on 17 February 2016. In terms of that rule (the interim interdict), the 16 respondents including the 17th respondent − those persons who associate themselves with unlawful conduct at any of the University's premises − were provisionally interdicted and restrained from entering any of the University's premises and from committing any acts that impeded and prevented the University's rendering of services or making decisions (High Court judgment at para 1).

[3] SCA judgment above n 1 at para 1.

submissions were filed, the applicants sought leave to file a replying affidavit and to tender further evidence.

[4] At issue is the urgency of this matter, the appropriateness of the grant of a final interdict, the costs order of the High Court as confirmed by the SCA and whether leave to file a replying affidavit and to tender further evidence should be granted. The applicants also seek condonation for the late filing of this application.

Background facts

[5] The UCT student protest of about 200 to 300 people, called "Shackville", concerned primarily two issues: the difficulties experienced by many students, predominantly black students, in paying fees and problems relating to finding suitable accommodation for them to pursue their studies. A group of protesters erected a shack on UCT's premises in the middle of Residence Road. The construction of the shack and the blockading of other roads on campus obstructed traffic in and around the University. The protesters painted slogans on the War Memorial at the campus. Portraits and paintings were removed from the University buildings and burnt. Attempts by the University management to move the protest to another location, away from the site where roads were obstructed, failed.

Litigation history

High Court

[6] UCT launched an urgent application when a member of the campus security received a threat of arson directed at the University's buildings. It obtained an interim interdict against several people (some registered students and others not – including the applicants).[4] On the return date of the rule *nisi* UCT applied, successfully, for confirmation of the rule *nisi* against the five applicants only. The High Court granted

[4] High Court judgment above n 2 at paras 27-8.

the final interdict[5] and ordered them to pay UCT's costs jointly and severally, including the costs of two counsel. It subsequently granted the applicants leave to appeal to the SCA.

Supreme Court of Appeal

[7] Before the SCA, the issue was not about the legitimacy of the protests. The applicants accepted that the appeal was about the unlawfulness of their actions.[6] In fact, in their written submissions before the SCA the applicants accepted that they were "in the midst of protest action which went beyond the [boundary] of peaceful and non-violent [protest] and thus rendered themselves subject to disciplinary processes that [UCT] initiated against the students".[7] Notably, this acquiescence narrowed the dispute between the parties. The applicants however argued that their actions must be seen against the backdrop of their struggle for social justice.[8]

[8] The SCA outlined the law regarding the requisites of a final interdict. It took note of the approach of the protesters: that they were entitled, in furtherance of their protest, to erect the shack and maintain it for an indefinite period. Their conduct, the Court held, infringed UCT's rights and was unlawful.[9] The Court held that UCT's apprehension of the recurrence of the harm was reasonable given the vehemence with which the protestors expressed their complaints against the University and its management. Unless the final interdict was granted, the SCA remarked, the protestors would continue with their conduct. The Court rejected the applicants' suggestion of internal disciplinary action as an alternative remedy.[10]

[5] Restraining the five applicants (respondents a quo) from entering the University premises unless they had obtained UCT's consent; interfering with rendering of university services; erecting unauthorised structures on the campus; destroying, damaging or defacing the university property; participating in or inciting others to participate in unlawful conduct or protest action on the campus and inciting violence.

[6] SCA judgment above n 1 at paras 1-2.

[7] Id at para 31.

[8] Id at para 2.

[9] Id at para 32.

[10] Id at para 78.

[9] Whilst UCT was entitled to final relief, the Court held, the High Court's order was broad because it limited the applicants' rights and effectively excluded them from the University campus.[11] The SCA varied the terms of the final interdict granted by the High Court but confirmed the costs order – ordering the five applicants to pay UCT's costs jointly and severally, including costs of two counsel.[12] The SCA held that fairness required each party to pay its own costs on appeal.

In this Court

[10] The applicants seek leave to appeal the decision of the SCA on an urgent basis. They seek condonation for the late filing of their application and leave to file a replying affidavit to deal with the contentions in UCT's answering affidavit and to tender further evidence. The applicants submit that the matter implicates students' rights countrywide especially the rights to education, freedom of expression, assembly, demonstration, picket and petition as well as the right to freedom of association. They say that the High Court and the SCA failed to assess properly and determine the issues within the context of their constitutional rights with the consequence that it deviated from the long-established practice in the exercise of judicial discretion on costs. The applicants also attack the SCA's decision on procedural grounds, among other things, that the Court made findings on evidence that was improperly placed before it.[13]

[11] Id at para 79.

[12] The substituted order included the following:

> "1 [The five applicants] are interdicted and restrained from—
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> 1.1 erecting any unauthorised structures on [UCT's] premises;
>
> 1.2 destroying, damaging or defacing any of [UCT's] premises;
>
> 1.3 participating in, or inciting others to participate in any unlawful conduct and/or unlawful protest action at any of [UCT's] premises; and
>
> 1.4 inciting violence."
>
> 2 That the ninth, eleventh, twelfth, thirteenth and fourteenth respondents are to pay the applicant's costs jointly and severally, including the costs of two counsel."

[13] These related to video footage, which – according to the applicants – the SCA found to be receivable in evidence without it being viewed by the Court or authenticated before it.

[11] The applicants contend that the SCA, having modified the High Court's order, ought to have found that they were successful because, had they not challenged the High Court's order, they would have had to comply with an order so far-reaching in scope that their rights would have been undermined. They maintain that not all of them were involved in acts of destroying, damaging or defacing UCT's properties. They contend that the SCA should have considered the items that were defaced and held that some of the items represented objectionable colonial symbols that provoked the actions of the students. According to the applicants, their actions were covered by the doctrine of necessity. They submit that the costs order is irrational in the circumstances of this case. That order, they say, is a slap in their collective face.

[12] UCT opposes the application. It contends that the matter does not implicate this Court's jurisdiction. On the merits it says that there are no prospects of success and accordingly asks that the application for leave to appeal be dismissed with costs.

[13] This matter has been determined without written submissions on the merits and without hearing oral argument.[14] The written submissions filed were confined solely to whether the High Court exercised its discretion judicially in granting costs against the applicants.

Leave to appeal

[14] Constitutional issues are implicated because the matter invokes certain rights including the rights to education,[15] freedom of expression, to assembly, demonstration, picket and petition as well as the right to freedom of association.[16]

[14] Rule 19(6)(b) of this Court's rules provides that "Applications for leave to appeal may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself".

[15] Section 29(1) of the Constitution provides:

> "Everyone has the right—
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> (a) to a basic education, including, adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

[16] Section 17 of the Constitution provides:

While the prospects of success on the merits are poor, the applicants' complaint about the High Court's failure to exercise judicial discretion when mulcting them with costs does bear prospects of success. The SCA confirmed the High Court's costs order without determining whether the discretion was exercised judicially. The interests of justice warrant granting leave to appeal to determine whether the High Court's costs order is irrational as contended for by the applicants. In the circumstances, I would grant leave to appeal.

Urgency?

[15] The applicants aver that a significant degree of urgency attends this application because the "matter concerns the exercise of constitutional rights and the manner in which the boundaries of the exercise ought to be interpreted, particularly in the context of student protests". They have, however, not established urgency, particularly why this matter is more urgent than any other matter where constitutional rights are implicated. The fact that UCT's initial application in the High Court was brought on urgency does not render this application urgent. The basis for urgency in that Court was established. Here not. The lodgement of this application belatedly, as I mention shortly, also illustrates the lack of urgency in this matter.

Condonation

[16] The SCA judgment was delivered on 20 October 2016. This application was lodged on 17 November 2016 instead of 10 November 2016. The reason for the delay, the applicants explain, is that a courier service collected the application in Cape Town on Thursday, 10 November 2016 instead of Wednesday, 9 November 2016 and delivered it on Friday, 11 November 2016. When the correspondent attorney in Johannesburg attempted to lodge the papers on Monday, 14 November 2016, the Registrar of this Court refused to accept the application because there was no application for condonation and no judgment of the High Court.

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

[17] The explanation advanced for the delay is reasonable. The delay is not long and has not prejudiced UCT. It is in the interests of justice to condone it.

Merits

[18] The High Court granted a final interdict against the five applicants[17] and discharged the rule *nisi* against the other applicants[18] because, the Court held, UCT had failed to make a case for relief against them. The applicants ask this Court to set aside the decisions a quo with costs including costs of three counsel where so employed.

[19] The SCA's decision on the merits, upholding the High Court's order granting a final interdict, is unassailable. The applicants somewhat accept that it was appropriate for the High Court to interdict some of the applicants who were involved in acts of destroying, damaging or defacing UCT's property. Also, in their submissions to the SCA the applicants accepted that they were "in the midst of protest action which went beyond the boundary of peaceful and non-violent [protest] and thus rendered themselves subject to disciplinary processes".

[20] The applicants contend, however, that the SCA should have considered and held that some of the items concerned represented objectionable colonial symbols that provoked the actions of the students. The order of the SCA was effectively aimed at restraining the applicants from committing unlawful acts at the UCT campus. That order does not, as was the case with the High Court order, preclude any of the applicants from entering any of UCT's campuses, nor does it prevent them from engaging in lawful forms of protest. There is also no merit in the procedural challenge mounted by the applicants against the SCA judgment. The defence of necessity, in the

[17] These applicants were cited a quo as the 9th, 11th, 12th, 13th and 14th respondents. There were other respondents in favour of whom the rule *nisi* was discharged. See below n 18.

[18] Respondents a quo: 1st to 4th respondents; 6th to 8th respondents and 15th to 17th respondents. The 17th respondent constitutes unnamed persons.

circumstances of this case, is tenuous. The applicants' appeal, on the merits, must fail.

Costs

[21] Section 172 of the Constitution vests in courts wide remedial powers when dealing with constitutional matters.[19] In terms of this provision a court may make any order – including a costs award – that is just and equitable. Since an award of costs is a discretionary matter, the discretion must be exercised judicially, having regard to all the relevant circumstances.[20]

[22] It is now established that the general rule in constitutional litigation is that an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs.[21] UCT is recognised as a public institution in terms of the Higher Education Act.[22] The rationale for this rule is that an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights.[23] But this is

[19] *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 97.

[20] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138 (*Affordable Medicines*).

[21] Id. See also *Biowatch Trust v Registrar, Genetic Resources* [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (*Biowatch*).

[22] 101 of 1997. Section 1 of the Act defines "higher education institution" as—

> "any institution that provides higher education on a fulltime, part-time or distance basis and which is—
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> (a) merged, established or deemed to be established as a public higher education institution under this Act;
>
> (b) declared as a public higher education institution under this Act; or
>
> (c) registered or provisionally registered as a private higher education institution under this Act."

Section 32 of the Act affords public higher education institutions the opportunity to make an Institutional Statute which gives effect to any matters not expressly prescribed by the Act. The Institutional Statute must be published by way of notice in the Government Gazette. In the introduction of UCT's Institutional Statute, gazetted on 20 September 2002, it recognises itself as a public higher education institution.

[23] *Biowatch* above n 21 at para 23.

not an inflexible rule.[24] In accordance with its wide remedial powers, this Court has repeatedly deviated from the conventional principle that costs follow the result.[25]

[23] The rationale for the deviation was articulated by this Court in *Affordable Medicines* where Ngcobo J remarked:

> "There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."[26]

[24] The clearer approach to costs on constitutional matters was set out by this Court in *Biowatch*. The Court, per Sachs J, set out three reasons for the departure from the traditional principle:

> "In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the

[24] Id at para 24.

[25] See, for example, *AB v Minister of Social Development* [2016] ZACC 43; 2017 (3) BCLR 267 (CC) at para 329; *Minister of Home Affairs v Rahim* [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC) at para 35; *Sali v National Commissioner of the South African Police Service* [2014] ZACC 19; 2014 (9) BCLR 997 (CC); (2014) 35 *ILJ* 2727 (CC) at para 97.

[26] *Affordable Medicines* above n 20 at para 138.

> constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."[27]

[25] In *Trencon*[28] this Court dealt with the power of an appellate court to interfere with the High Court's order. It held that the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was discretion in the true sense[29] or whether it was a discretion in the loose sense. The distinction in either type of discretion, the Court held, "will create the standard of the interference that an appellate court must apply".[30] This Court remarked, per Khampepe J, that "[a] discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it". In such instances, the ordinary approach on appeal is that the "the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially . . .".[31] This type of discretion has been found by this Court in many instances, including matters of costs . . .".[32] The question remains whether the

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[27] *Biowatch* above n 21.

[28] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*).

[29] The Appellate Division in *Media Workers Association of South Africa v Press Corporation of South Africa Ltd* (*Perskor*) [1992] ZASCA 149; 1992 (4) SA 791 (AD) at 800E (*Media Workers Association*) described the essence of a discretion in the true sense. It held that "if the repository of power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him". See *Trencon* above n 28 at para 84.

[30] *Trencon* above n 28 at para 83.

[31] See *Giddey N.O. v JC Barnard and Partners* [2006] ZACC 13 at para 19; See also *Trencon* above n 28 at para 88, where Khampepe J remarked:

> "When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—
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> > 'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'."

[32] *Trencon* above n 28 at para 85.

High Court, in considering the relevant circumstances and available options, judicially exercised its discretion in mulcting the applicants with costs.

Appropriateness of the High Court's costs order

[26] The applicants submit that the costs order against them, in light of the totality of the evidence as well as the context and circumstances of this case, constituted misdirection by both the High Court and the SCA. They seek an order setting aside the orders with costs including costs of three counsel, where available.

[27] UCT submits that the High Court's costs order is entirely consonant with the principles in relation to costs. There is no basis, it argues, for this Court to interfere with the High Court's exercise of discretion. The University now argues that the applicants' limited financial resources was not a consideration which militated against the granting of costs against them. Were it so, they submit, a party without means could litigate or defend a case without any justification for doing so – with immunity from a costs award.

[28] It is established that a court of first instance has discretion to determine the costs to be awarded in light of the particular circumstances of the case.[33] Indeed, where the discretion is one in the true ~~s~~sense, contemplating that a court chooses from a range of options, a court of appeal will require a good reason to interfere with the exercise of that discretion. A cautious approach is, therefore, required. A court of appeal may have a different view on whether the costs award was just and equitable. However, it should be careful not to substitute its own view for that of the High Court because it may, in certain circumstances be inappropriate to interfere with the High Court's exercise of discretion.[34]

[33] See, for example, *Affordable Medicines* above n 20 at para 138.

[34] See *Media Workers Association* above n 29 at paras 800D-E.

[29] The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.[35] The "nature of the issues" rather than the "characterisation of the parties" is the starting point.[36] Costs should not be determined on whether the parties are financially well-endowed or indigent.[37] The University was thus correct that the applicants' limited financial resources is not a consideration which militated against the granting of costs.

[30] Section 17 of the Constitution provides: "[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions". This Court, in *Garvas*,[38] explained clearly the meaning and scope of this provision. Mogoeng CJ aptly said that section 17 means that—

> "everyone who is unarmed has the right to go out and assemble with others to demonstrate, picket and present petitions to others for any lawful purpose. The wording is generous. It would need some particularly compelling context to interpret this provision as actually meaning less than its wording promises. There is, however, nothing, in our own history or internationally, that justifies taking away that promise.
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> Nothing said thus far detracts from the requirement that the right in section 17 must be exercised peacefully. And it is important to emphasise 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 their constitutional protection. This proposition has support internationally. As the European Court of Human Rights noted:
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> > '[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 behaviour.'

[35] *Biowatch* above n 21 at para 16.

[36] Id.

[37] Id.

[38] *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*).

> This means that it is appropriate to proceed on the basis that section 17 of the Constitution means what it generously says."[39]

[31] The starting point is to have regard to the nature of the issues. The issues that led to the protest related, generally, to the right to education. A group of students including the applicants embarked on a protest seeking to vindicate their rights including the rights to education in terms of section 29 of the Constitution and to assemble and demonstrate in terms of section 17 of the Constitution. Their right to assemble and demonstrate ceased when their demonstration or protest became violent, thus violating the rights not only of the University but also of others at the campus.

[32] It is common cause that during the protest, tyres were carried onto the campus and used to fuel fire in which the University's artworks and other objects were burned; the bust of Jan Smuts and the War Memorial were defaced; rubbish bins were burned and used to block certain entrances; a shuttle bus was set alight and acts inciting violence were committed by the students. Some of the misdemeanours during the protest appear to be attributable to the applicants.[40] Self-help, as this Court has pointed out, is inimical to a society in which the rule of law prevails.[41] Destruction of property, particularly in our learning institutions, cannot be tolerated. The High Court is correct that it could not have been within the contemplation of the drafters of the Constitution that section 17 be used to justify hooliganism, vandalism or any other unlawful and illegitimate misconduct.[42] There can be no doubt that the protestors' conduct went beyond the boundary of peaceful and non-violent protest. The University had no choice but to approach the High Court for an order restraining the group from conducting themselves unlawfully during their protest.

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[39] Id at paras 52-3.

[40] See SCA judgment above n 1 at paras 47, 48, 53 and 57.

[41] See *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 11.

[42] See High Court judgment above n 2 at para 62.

[33] What I have said above does not detract from the fact that in determining appropriate costs the High Court was required to locate the costs award in a constitutional setting, by identifying the nature of the issue, as a starting point.[43] It is common cause that the group of protesters, including the applicants, were engaged in a "#FeesMustFall" protest because they could not, among other things, afford the university fees. At the heart of the protest, as the applicants contended, was a "seething" sense of injustice that prevails among university students and South Africans at large at the failure of the state and universities to provide free, quality and decolonised education to South Africans. This issue had the effect on the protesters' right to education in terms of section 29 of the Constitution. The issue involved was of concern not only to the protestors at UCT, including the applicants, but also to other students generally in other universities in South Africa.

[34] Whilst the applicants' conduct went beyond the boundary of a peaceful protest, the constitutional context should have been taken into account. It cannot be gainsaid that the issue they raised was of genuine constitutional import. Although the applicants were unsuccessful, the Court should have considered the chilling effect the costs order would have on the litigants, in the context of constitutional justice. The Court erred in not doing so.

[35] It is correct that there are exceptions to the general rule that in constitutional litigation an unsuccessful litigant in proceedings against the state ought not to be mulcted with costs as they may have a chilling effect on them. One of the exceptions, that justify a departure from the general rule, is where the litigation is frivolous or vexatious.[44] Here, the applicants' opposition to UCT's application in the High Court was clearly not frivolous or vexatious. The High Court made final the rule *nisi* granted against the applicants on 17 February 2016. In terms of that rule (the interim interdict), the 16 respondents including the 17th respondent − those persons who associate themselves with an unlawful conduct at any of the University's

[43] See *Biowatch* above n 21 at para 16.

[44] Id at para 24.

premises − were provisionally interdicted and restrained from entering any of the University's premises. Notably, the terms of the interim relief sought by the University were somewhat broad in that it had the effect of excluding the applicants from entering the premises of the University.[45]

[36] At the risk of repetition, the applicants were neither frivolous nor vexatious in opposing the University's application. This is also illustrated by the SCA's remarks where Wallis JA pointedly said:

> "It follows that the university was entitled to a final interdict. However, in my view it was not entitled to an order in the broad terms that it sought and was granted by the High Court. The core problem with that order, as I see it, was that it effectively excluded the [applicants] from the university campus, which is, as I have pointed out, traversed by public roads and constitutes a public place, unless they had written consent from the Vice-Chancellor or his delegate to be there.
>
> That order plainly infringed [the applicants'] right of freedom of movement guaranteed in section 21(1) of the Constitution. It also restricted their right to exercise their right of freedom of association with others who shared their view of the problems facing the university in particular, but more generally all universities in South Africa as well as broader social issues. And it constituted a substantial intervention in their social lives. If permission were given for one of them to attend a lecture, they would not be able to join their fellow students for coffee afterwards without obtaining express permission. They could not decide on the spur of the moment to attend an interesting talk or event on campus. Without permission they could not attend a sporting function or meet a friend or collect someone from a residence before going out on a social occasion. The fifth [applicant], who had made complaints about sexual abuse she had suffered on campus, unconnected with the protests, would be unable to ascertain directly whether anything was being done in regard to her complaints.
>
> It is unnecessary to multiply examples. When these problems were put to counsel for the university he readily accepted that the order made would need to be crafted more narrowly."[46]

[45] See High Court judgment above n 2 at para 1.

[46] SCA judgment above n 1 at paras 79-81.

[37] As expected, the narrowing of the High Court order signifies not only that the applicants were not frivolous or vexatious but also the measure of their success. In this regard, the SCA said the following:

> "Reverting then to the order made by the court below, in my view the evidence establishes a right to an interdict in the terms set out in paragraph 1.3.2 to 1.3.5 of that order. Such an order would focus upon preventing the [applicants], on pain of facing contempt of court charges, from repeating the conduct that justified the grant of an interdict in the first place. In those circumstances the university would have succeeded in vindicating its rights and obtained the protection it sought from the court, while the [applicants] would have succeeded in having certain of the restrictions imposed upon them removed."[47]

It follows that the High Court erred in not applying the general principle set out in *Biowatch* and in failing to realise that the exceptions to this general principle were not applicable in the circumstances of this case. Had the High Court exercised its discretion judicially by taking that consideration into account, it would not have mulcted the applicants with costs. Since the High Court did not exercise its discretion judicially, this Court is entitled to interfere with the costs award.

[38] Having held that the University was not entitled to an order in the broad terms that it sought and was granted; that the core problem with that order is that it effectively excluded the applicants from the University campus – including public areas; that the order plainly infringed the applicants' right of freedom of movement guaranteed in section 21(1) of the Constitution[48] and also restricted the exercise of their right of freedom of association with others; that the order constituted a substantial intervention in the applicants' social lives and that the applicants attained a measure of success, the SCA nonetheless upheld the costs order of the High Court

[47] Id at para 83.

[48] Section 21(1) provides:

> "Everyone has the right to freedom of movement."

without a reasoned explanation for doing so. In my view, the SCA should have upheld the appeal on costs.

[39] The applicants were among the group of student protesters, approximately 200 to 300 students, who acted in concert in bringing a shack structure onto UCT's campus. This "group" of student protestors, acting in concert, sought to vindicate their rights to education, freedom of association, freedom to demonstrate and freedom of expression. Disappointingly, their conduct however went beyond the boundary of peaceful and non-violent protest – by damaging the University's property. The destruction of property and incitement of violence is discordant with our constitutional dispensation. It needs to be stressed that the destruction of property cannot be countenanced. The students responsible for these transgressions must be held accountable through appropriate legal means.

[40] In conclusion, on a consideration of all relevant circumstances, justice and fairness would best be served if each of the parties were ordered to pay their own costs not only in the SCA, but also in the High Court. In this Court, the applicants have succeeded in part and lost in part. I would, taking into account all the relevant considerations mentioned above, order each party to pay its own costs, also in this Court.

Replying affidavit and further evidence

[41] After the written submissions were filed following the Chief Justice's directions, the applicants lodged an application to file a replying affidavit and tender further evidence and sought costs if the application is opposed. This evidence includes the Student Disciplinary Appeal Tribunal ruling dated 3 November 2016. In my view, the further evidence sought to be introduced is not necessary in order to determine the issue of costs in this case. That issue must be considered on the evidence at the Court's disposal and on broad general lines and not on lines necessitating consideration of additional evidence. The applicants have not made out

a case for the filing of the replying affidavit. It is, in the circumstances, not in the interests of justice to grant the applicants permission to do so.

Order

[42] The following order is made:

1. Condonation for the late filing of this application is granted.
2. The application for leave to file a replying affidavit and to tender further evidence is dismissed.
3. Leave to appeal is granted only against the order of the Supreme Court of Appeal upholding the High Court's order on costs.
4. The appeal on costs is upheld.
5. The costs order of the High Court against the applicants, confirmed by the Supreme Court of Appeal, is set aside.
6. Each party is to pay its own costs in the High Court, Supreme Court of Appeal and in this Court.

For the Applicants:	T Masuku, T Sidaki and R Matsala instructed by Godla and Partners
For the Respondent:	A Katz SC and M Maddison instructed by Fairbridges Wertheim Becker