Ferguson and others v Rhodes University

Constitutional Court of South Africa

Judgment date: 07/11/2017 *Case No*: CCT187/17

Before: MTR Mogoeng Chief Justice, RMM Zondo Deputy Chief Justice, E Cameron, J Froneman, CN Jafta, M Madlanga, NZ Mhlantla Justices, F Kathree-Setiloane, J Kollapen and DH Zondi Acting Justices

Appeal *– against costs orders – limitation on power of appellate courts to interfere with costs orders unless court making costs order failing to exercise its discretion judicially –* in casu*, Constitutional Court entitled to interfere – in a case where* Biowatch *principle applicable, High Court making no adverse costs order in main application but granting costs against applicants in respect of an unsuccessful application for leave to appeal – in absence of a finding that the application for leave to appeal was frivolous, vexatious, or brought in bad faith, costs in the leave to appeal application fell to be dealt with on same basis as in the main application – failure to do so a failure to exercise discretion as to costs judicially.*

Costs *– constitutional litigation – general costs rule in constitutional litigation – principles applicable to costs awards in constitutional litigation discussed – approach of an appellate court to interference with an exercise of discretion by a court of first instance discussed.*

Editor's Summary

Applicants were members of an organisation whose primary aim is to campaign against rape culture and gender-based violence at the Respondent University. They had participated in a protest highlighting this issue and pointing to the lack of effective measures taken by the University to combat the problem. The protest action led to some unlawful conduct including the kidnapping and assault of two male students who were suspected of rape or sexual assault, the disruption of classes at the University, damage to and destruction of University property, and the erection of barricades at the entrance to the University. The University approached the High Court and obtained an urgent interim interdict. The relief granted was extremely wide in its scope as well as in its designation of whom the relief covered and was extended to. Applicants opposed the granting of final relief and sought the discharge of the interim interdict. On the return day the High Court confirmed the interdict against Applicants, but to a considerably limited extent as compared to the original relief granted. The High Court concluded that fairness justified an order that the parties each pay their own costs. Applicants applied for leave to appeal. The High Court dismissed this application and ordered Applicants to pay the University's costs of the application for leave to appeal. Applicants thereafter applied for leave to appeal to the Supreme Court of Appeal. That application was also dismissed with costs.

Applicants then approached the Constitutional Court.

In the Constitutional Court, Applicants challenged the High Court's decision on the merits in respect of the grant of the final interdict and the decision to award costs against Applicants in the application for leave to appeal.

The Constitutional Court unanimously dismissed the appeal on the merits but upheld the appeal against the costs order. The High Court, it found, had failed to exercise its discretion judicially when awarding costs against Applicants. The Constitutional Court set aside the cost orders of the High Court and the Supreme Court of Appeal in the application for leave to appeal, and ordered that each party pay its own costs in the High Court, Supreme Court of Appeal and in the Constitutional Court.

The Court reaffirmed the principle it had laid down in *Biowatch Trust v Registrar*, *Genetic Resources* 2009 (10) BCLR 1014 (2009 (6) SA 232) (CC). That principle was concerned with the "chilling effect" cost orders could have on parties seeking to assert their constitutional rights. This was particularly necessary in a society characterised by disparities in resources and inequality of opportunities. The assertion of constitutional rights was inextricably linked to the transformative process the Constitution contemplated. Nevertheless, the *Biowatch* principle also permitted exceptions. It did not go so far as to immunise all constitutional litigation from the risk of an adverse cost order. The *Biowatch* case had been concerned with State conduct. However, the principle that emerged from it was not confined to litigation involving the State in the narrow sense of the word. In *Hotz v University of Cape Town* 2017 (7) BCLR 815 (CC), the Court had applied the principle to a university as a public institution. In the instant case the High Court had failed to apply the principle. Applicants were asserting their constitutional rights of freedom of expression and association in challenging the interim interdict, which was ultimately found to be overly wide. Those circumstances activated the *Biowatch* principle. Thus, despite the High Court granting a costs order consistent with what *Biowatch* required, to the extent that the High Court premised its order on the consideration of fairness alone, this constituted an error on its part even though the result arrived at was the same. In dismissing the application for leave to appeal, the High Court said that it was "thoroughly unpersuaded that there [was] any prospect of appeal success". It did not describe the application for leave to appeal as frivolous or vexatious, nor did it describe it as an exercise in bad faith. The High Court then found itself "unpersuaded" that in regard to the application for leave to appeal Applicants should "be benefitted by the *Biowatch* principle". The High Court had not properly exercised its discretion with regard to costs. Accordingly, it was open to the Constitutional Court to interfere with that exercise of discretion. In the absence of a finding that the application for leave to appeal was frivolous, vexatious, or brought in bad faith, the High Court should have dealt with costs in the leave to appeal application on the same basis as it did in the main application.

Judgment

Kollapen AJ:

Introduction

[1] Universities play an important enabling, facilitating, and critically reflective role in most democratic societies. They are often the locus for the birth and incubation of new ideas and provide in many ways the enabling environment where a society can engage in dialogue about the kind of future it wishes to embrace. This process can often be robust. It involves a contestation of ideas and ideologies and, at times, the passion and emotion with which a social issue is embraced may well lead to conflict that plays itself outside the bounds of the Constitution. This is such a case where a necessary and important campaign against gender-based

violence, including rape, resulted in conduct that made serious inroads into the rights and liberties of others.

[2] The three applicants approach this Court seeking leave to appeal against an order of the Supreme Court of Appeal[1] which refused them leave to appeal against an order of the High Court of South Africa, Eastern Cape Division, Grahamstown ("High Court").[2] Rhodes University ("Rhodes"/"the University") had succeeded in obtaining an urgent interim interdict against a number of respondents, including the applicants, who were involved in student protests on the University's campus. The High Court subsequently granted an order making the interim interdict final – albeit in a form and scope considerably different from the original interdict granted.

[3] What falls to be considered is whether the granting of the final interdict including an adverse cost order against the applicants in the application for leave to appeal in the High Court as well as in the Supreme Court of Appeal was constitutionally appropriate and if not, what relief this Court should consider granting.

Background facts

[4] In April 2016, a structure known as the Chapter 2.12 Movement, comprising predominantly of students at Rhodes, embarked on a campaign to highlight the issue of rape culture and gender-based violence on the University's campus. The campaign was described by the High Court as addressing an issue that was "deeply emotional, relevant and challenging".[3] It, however, led in some instances to unlawful conduct that included the kidnapping and assault of two male students who were suspected of rape or sexual assault, the disruption of classes at the University, damage to and destruction of University property, and the erection of barricades at the entrance to the University.[4] It was alleged that the applicants were part of the group that was involved in such conduct, associated themselves with such conduct, and, in some instances, led the students in their actions.

[5] There is no dispute that the offending conduct that initiated the litigation did in fact occur. What was, and remains, in dispute was the role of the applicants in such conduct and whether the High Court was correct in granting final relief against them on the basis that their participation was sufficiently established to justify the relief that was granted.

Litigation history

[6] On 20 April 2016, the University approached the High Court and obtained an urgent interim interdict.[5] The Court accepted oral evidence in

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1 Order of the Supreme Court of Appeal dated 2 July 2017.
2 *Rhodes University v Student Representative Council of Rhodes University* [2017] 1 All SA 617 (ECG) (High Court judgment).
3 *Id* at para [6].
4 *Id* at para [74].
5 *Id* at para [3].

support of the relief sought and granted. The relief granted was extremely wide in its scope as well as in its designation of whom the relief covered and was extended to.[6] The first respondent was cited as the "Student Representative Council of Rhodes University"; the second respondent was cited as the "Students of Rhodes University engaging in unlawful activities on the applicant's campus"; whilst the third respondent was cited as "Those persons engaging in or associating themselves with unlawful activities on the applicants' campus". In these proceedings, the relief sought is pursued only by the applicants. They were cited as the fourth, fifth, and sixth respondents, respectively, in the High Court. We refer to them here as the "applicants".

[7] The applicants opposed the granting of final relief and sought the discharge of the interim interdict. The High Court also made an order admitting the "Concerned staff at Rhodes University", a body comprising academics at the University, as an intervening party in the application. The intervening party did not take issue with the factual matrix advanced by the University but sought the discharge of the interim interdict on the grounds that it was unconstitutional and unlawful.

[8] The High Court's judgment, delivered on 1 December 2016, dealt in some detail with the factual issues and concluded that the applicants were all involved in some of the unlawful conduct that was the subject of the interdict.[7] It proceeded to confirm the interdict against the applicants, but to a considerably limited extent as compared to the original relief granted. Furthermore, at the instance of the applicants and the intervening party, the Court discharged, in its entirety, the interim interdict that was granted against the first, second, and third respondents.

[9] The High Court found that the applicants were partially successful in limiting the relief sought against them and remarked that they were fortunate to escape an adverse cost order due to the shifting nature of their evidence.[8] The Court, however, concluded that fairness justified an order that the parties each pay their own costs.

[10] The applicants applied for leave to appeal against the High Court's order. This application was dismissed by the High Court on 24 March 2017 and the applicants were ordered to pay the costs of the respondent.

[11] The applicants subsequently applied for leave to appeal to the Supreme Court of Appeal. Their application was dismissed on 2 July 2017 with costs.

In this Court

[12] The applicants submit that the matter raises significant constitutional issues impacting on the rights to freedom of expression and protest as en-

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6 *Id* at paras [141]–[142].
7 *Id* at paras [147] and [150]–[152].
8 *Id* at para [156].

capsulated in sections 16[9] and 17[10] of the Constitution, respectively. They challenge the factual basis upon which the High Court satisfied itself of their involvement in the unlawful conduct and contend that the interdict was issued on the basis that the University considered them to be the leaders of the student protest. They argue that they were therefore rendered guilty by association. In addition, they question the legal basis upon which both the High Court and the Supreme Court of Appeal awarded costs against them in respect of the application for leave to appeal in both courts.

[13] The respondent, in opposing the application for leave to appeal, denies that the relief granted in the High Court impermissibly intrudes upon the applicants' rights in terms of sections 16 and 17 of the Constitution, to the extent that the protections afforded in sections 16 and 17 do not extend to unlawful conduct. On the facts, their stance is that the involvement of the applicants in the interdicted unlawful conduct went beyond association and extended to actual involvement. Finally, on costs, the respondent submits that the decision of the applicants in persisting to pursue the matter is "premised on their attempts to mislead the Court" and, as such, justifies such cost orders.

Leave to appeal

[14] The nature of the legal issues underpinning the dispute between the parties indeed raises constitutional issues impacting on a number of rights, including the rights to freedom of expression, to assemble and protest, to education, and to property. In addition, the question of costs is inimical to the right of access to courts and to justice. In my view, whatever the strength of the case on the merits may be, the interests of justice, in so far as they relate to the question of costs, would justify the granting of leave to appeal.

Merits

[15] The legal issues as well as the factual issues were thoroughly interrogated by the High Court and the judgment reflects a detailed consideration of both the law, as set out in *Garvas*,[11] as well as the facts. The Court considered fully the scope of the interim relief and after examining what one can only

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9 S 16 of the Constitution reads:
"(1) Everyone has the right to freedom of expression, which includes –
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extend to –
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

10 S 17 of the Constitution reads:
"Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

11 *South African Transport and Allied Workers Union and another v Garvas and others* (*City of Cape Town as Intervening Party and Freedom of Expression Institute as amicus curiae*) [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*).

describe as the full spectrum of case law on the issue, proceeded to discharge the interdict in respect of the first, second, and third respondents.

[16] In dealing with the case against the applicants, the High Court accepted that the interim interdict was "unduly broad" and parts of it were not "sustainable or justified".[12] It omitted those parts from the final order it made. For the rest, and this is the nub of the applicants' case, the Court considered the role played by each of the applicants in the events of April and May 2016 and, while it delineated their leadership role in the protests, it also carefully explored and dealt with the actual conduct that was attributable to each of them in relation to those protests.[13] The Court highlighted, in each instance, where the conduct went beyond mere association and constituted actual involvement.

[17] In this Court, the applicants contend that the matter involves novel issues of constitutional law that have never been considered before by this Court. They include in this characterisation "the distinction between lawful and unlawful speech and conduct in protest settings, and the question of whether, and under what conditions, an otherwise lawful protestor associates him or herself with the unlawful conduct of someone else in the same protest". While these may well constitute novel issues, I am not convinced that this is a case that justifies a ventilation and consideration of such issues. The factual findings of the High Court deal with both the nature of the speech it regarded as being unlawful as well as the unlawful conduct on the part of the applicants beyond their role in associating themselves with the crowd. In the end, the granting of the final interdict was, in part, premised on what the Court found to be the acts of actual involvement on the part of the applicants.[14] For these reasons, I am compelled to conclude that the appeal falls to be dismissed on the merits.

Costs

[18] While costs are traditionally dealt with at the tail end of the litigation process and invariably in the concluding segment of a court's judgment, they nevertheless continue to be considerably significant. This is especially in respect of how access to justice is pursued and levered, as well as in what may be described as the broader constitutional project where the Constitution – as a living tree – is given life and meaning through the development of a jurisprudence that is rooted in an understanding of the context and purpose of the Constitution.[15]

[19] This Court in *Biowatch* observed what it called the "chilling effect" cost orders could have on parties seeking to assert their constitutional rights –

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12 High Court judgment above fn 2 at para [153].
13 *Id* at paras [97]–[109] and [112]–[115].
14 *Id* at paras [146]–[147].
15 The metaphor of the "living tree" is derived from the practice of traditional African societies. The tree was where people would meet to resolve disputes. The metaphor has been incorporated into the design as well as the emblem of this Court and was intended to reveal the Court's "ethos and culture as a source of protection for all". See also *Edwards v Canada* (*Attorney General*) [1930] AC 124 at 136.

even where unsuccessful.[16] One can do no more than endorse this observation, particularly in a society characterised by such disparities in resources and inequality of opportunities. The assertion of constitutional rights is inextricably linked to the transformative process the Constitution contemplates. On the other hand, the *Biowatch* principle also permits exceptions and does not go so far as to immunise all constitutional litigation from the risk of an adverse cost order.[17]

[20] While *Biowatch* dealt squarely with state conduct, I do not understand the scope of the principle that emerged as being confined to litigation involving the state in the narrow sense of the word. In *Hotz*, this Court applied the principle, without the need to extend its scope, to a university as a public institution:

> "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. UCT is recognised as a public institution in terms of the Higher Education Act. 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. But this is not an inflexible rule."[18]

I cannot imagine in the context of the present facts, why the *Biowatch* principle should not find application. The High Court in dismissing the application for leave to appeal considered it to be an applicable and operative principle, a conclusion with which I am in full agreement. The High Court, however, failed to apply the principle, a matter to which I will return later.

[21] To the extent that the applicants ask this Court to interfere with the cost orders of the High Court and the Supreme Court of Appeal – the making of which involved the exercise of a discretion – this Court's power to do so is limited. In *Trencon*, this Court held:

> "In order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. That distinction is now deeply-rooted in the law governing the relationship between appeal courts and courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or

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16 *Biowatch Trust v Registrar*, *Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para [23].

17 See *Affordable Medicines Trust v Minister of Health of RSA* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para [138] where this Court held:

> "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."

See also *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) at para [18] where this Court held:

> "[The *Biowatch* principle] does not mean risk-free constitutional litigation. The Court, in its discretion, might order costs, *Biowatch* said, if the constitutional grounds of attack are frivolous or vexatious – or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs."

18 *Hotz v University of Cape Town* [2017] ZACC 10; 2017 (7) BCLR 815 (CC) (*Hotz*) at para [22].

> whether it was a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply.
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> A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is 'true' in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.
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> In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options.
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> In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded."[19]

Do the orders of the High Court and the Supreme Court of Appeal warrant interference by this Court?

[22] In the proceedings that culminated in the final interdict being granted against the applicants, the basis for the cost order was the overriding consideration of fairness.[20] While the applicants take issue with the merits of that order they do not take issue with the costs component of the order and, if indeed one has regard to the judgment as a whole, it was probably the only appropriate order to make. The applicants, together with the intervening party in the High Court, had been successful in effecting the discharge of the interim interdict against the first, second, and third respondents. In addition, they had achieved a measure of success in limiting the scope of the interdict that was ultimately granted against each of them.

[23] The High Court remarked that the applicants were fortunate to avoid an adverse cost order being made against them on account of the shifting nature of their evidence which, it regarded as disingenuous.[21] However, it nevertheless considered the order it ultimately made justified on the basis of fairness. Clearly, it was open to the High Court to consider an adverse cost order if it was of the view that the circumstances justified it and that the conduct of the applicants had somehow brought them outside the protection of the *Biowatch* principle. It did not do so, and the question of

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19 *Trencon Construction* (*Pty*) *Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) at paras [83] and [85]–[87].

20 High Court judgment above fn 2 at para [157].

21 *Id* at para [156].

whether the applicants were fortunate or not then becomes academic. The principle of fairness was the basis upon which the cost order was made, and fortune, or otherwise, could hardly have been a relevant consideration in the exercise of the Court's discretion.

[24] Thus the Court applied the criterion of fairness in making its determination on costs, despite the fact that the *Biowatch* principle was clearly applicable. The applicants were asserting their constitutional rights of freedom of expression and association in challenging the interim interdict, which was ultimately found to be overly wide. In my view, those proceedings activated the principle enunciated in *Biowatch* with regard to costs. Thus, despite the High Court granting a cost order that is consistent with *Biowatch*, to the extent that it premised its order on the consideration of fairness alone, this constitutes an error on its part even though the result arrived at was the same.

[25] That background is necessary, in my view, to provide some context to the High Court's decision on costs in the application for leave to appeal. In dismissing the application for leave to appeal, the High Court said that it was "thoroughly unpersuaded that there is any prospect of appeal success". The Court did not describe the application for leave to appeal as frivolous or vexatious nor did it describe it as an exercise in bad faith. When dealing with the costs occasioned by the application for leave to appeal, the High Court in brief remarks said that it was "unpersuaded that the [a]pplicants should on the relevant facts of the matter at this stage, and having regard to their application for leave to appeal, be benefitted by the *Biowatch* principle".

[26] Clearly, the High Court was alive to the principle in *Biowatch* but took the view that the applicants should not benefit from it. Under these circumstances, it is difficult to understand the reasoning of the High Court, as it does not emerge clearly from the judgment. In the main application, the High Court premised its order on the principle of fairness and none of the parties takes issue with that. It can hardly then be open to the High Court, in the leave to appeal proceedings, to refer to findings made in its judgment (one assumes in the main application) to justify an adverse cost order. It simply begs the question – if those findings did not justify an adverse cost order in the main application, how could they now be used to justify an adverse cost order in the application for leave to appeal? In addition, and in the absence of those findings being set out in the judgment in the application for leave to appeal, one is left speculating what those findings are and whether they justify a departure from the *Biowatch* principle.

[27] Under these circumstances, I am not persuaded that the discretion with regard to costs was properly exercised. Accordingly, there exists a basis for this Court's interference. All things being equal, my view is that in the absence of a finding that the application for leave to appeal was frivolous, vexatious, or brought in bad faith, the High Court should have dealt with costs in the leave to appeal application on the same basis as it did in the main application.

[28] At the end of the day, and while this was clearly not the intention of the High Court, one needs to be careful not to create a perception that the

A applicants were being admonished for seeking leave to appeal. It was, of course, their right to do so, and they were able to mount an arguable, but ultimately unpersuasive case, in their favour.

Conclusion

B [29] It would thus be appropriate if the parties were ordered to bear their own costs, in both the application for leave to appeal in the High Court as well as in the Supreme Court of Appeal.

Order

C [30] The following order is made:

1. Leave to appeal is granted only against the order of the Supreme Court of Appeal upholding the High Court of South Africa, Eastern Cape Division, Grahamstown's order on costs in the application for leave to appeal in the High Court.

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2. The appeal on costs is upheld.
3. The cost orders of the High Court and the Supreme Court of Appeal in the application for leave to appeal are set aside.
4. Each party is to pay its own costs in the High Court, Supreme Court of Appeal and in this Court, in respect of the application for leave to appeal.

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(Mogoeng CJ, Zondo DCJ, Cameron, Froneman, Jafta, Madlanga, Mhlantla JJ, Kathree-Setiloane and Zondi AJJ concurred in the judgment of Kollapen AJ.)

For the applicants:
The Socio-Economic Rights Institute Law Clinic

For the respondent:
Huxtable Attorneys

The following cases were referred to in the above judgment:

Southern Africa

Affordable Medicines Trust v Minister of Health of RSA
2005 (6) BCLR 529 ([2005] ZACC 3;
2006 (3) SA 247) (CC) – ***Dictum* at para [138] affirmed** 7

Biowatch Trust v Registrar, Genetic Resources 2009 (10) BCLR 1014
([2009] ZACC 14; 2009 (6) SA 232) (CC) – **Reaffirmed and Applied** 7

Hotz v University of Cape Town 2017 (7) BCLR 815
([2017] ZACC 10) (CC) – **Followed** 7

Lawyers for Human Rights v Minister in the Presidency
2017 (4) BCLR 445 ([2016] ZACC 45;
2017 (1) SA 645) (CC) – ***Dictum* at para [18] affirmed** 7

Rhodes University v Student Representative Council of Rhodes University
[2017] 1 All SA 617 (ECG) – **Reversed on appeal** 3