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

CASE NO: 4357/16

In the matter between:

AFRIFORUM NPC

First Applicant

MARCUS CHRISTIAAN PAWSON

Second Applicant

and

JOHANNES PIENAAR

Respondent

JUDGMENT DELIVERED ON 8 JULY 2016

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[1.] The first applicant is Afriforum NPC, a non-profit company which is described in the founding affidavit as a non-profit organisation with its main purpose being the promotion and

advocacy of democracy, equality and civil, human, minority and constitutional rights. It claims to be a well-known public interest litigant. The second applicant (“Mr Pawson”) is an adult male employed by Afriforum as the Head of Local Government Affairs.

[2.] The respondent, (“Mr Pienaar”) is an adult male who describes himself as a supporter of certain of the actions of the Open Stellenbosch (“OS”) movement and more recently Fees Must Fall Movement (“FMF”).

[3.] OS is a movement that allegedly started in April 2015 in Stellenbosch. It is described as “*A collective of students and staff working to purge the oppressive remnants of apartheid in pursuit of a truly African university.*” Their aim at this stage is the removal of Afrikaans as a leading medium of instruction at Stellenbosch. The language policy at Stellenbosch is seen by Mr Pienaar, and allegedly others, as being exclusive and oppressive. The OS movement is supported by movements such as FMF, the Economic Freedom Fighters Students Command (“EFFSC”), The South African Students Congress

(“SASCO”), and the Stellenbosch Students Representative Council (“SRC”).

[4.] FMF is a movement which started at the historically black universities and then spread to all of South Africa’s universities. It is aimed at protesting against financial exclusion of poor, largely black students, on the basis of affordability and outsourcing of labour at universities. Mr Pienaar claims that conflict is apparent at universities across the country and that it is part of a broader movement to move the universities towards the realisation of the ideals laid down in our Constitution.

[5.] From the utterings of Mr Pawson and Mr Pienaar it is apparent that they both claim to be fulfilling constitutional aspirations, but they do so from diametrically opposed cultural and political perspectives.

[6.] Mr Pienaar alleges that whilst Afriforum is not a registered political party, it is a political organisation. It has a political purpose, and it achieves its aims publicly, through demonstrations, on social media and in the main stream

media. It has engaged the African National Congress on the issues challenging the university campuses. It is enmeshed in politics and uses its voice to speak out on a range of social and political issues which Afriforum believes demonstrate that Afrikaners are in need of and deserve special protection.

[7.] Mr Pawson denies that Afriforum is a political organisation. However, he admits that it acts in the interest of various groupings and not exclusively for Afrikaners. It speaks for such groupings. It opposes the groups mentioned by Mr Pienaar mainly because they seek to violate the constitutional rights of Afrikaans speaking students and because of alleged violence caused during their “violent protests”. Upon a conspectus of all the facts I agree with Mr Pienaar that Afriforum is a political organisation.

[8.] Upon a conspectus of all the parties, role players and circumstances of this case the context of applicants’ cause of action was deeply mired in politics upon the Stellenbosch University campus. Any university that aspires to help students grow, should aim to expose them to challenging ideas. The world outside the university may often offend

them. They therefore need to learn to fight back using peaceful protests, rhetoric and reason. Adult persons outside university are expected to have learned this already.

- [9.] Mr Pienaar is such a person. He claims to have assisted OS students who had been arrested, assaulted or subjected to what he describes as abusive and totalitarian practices. As a result he has drawn criticism from Afriforum and its supporters. He is part of a loose alliance called Protest Observers Alliance (“POA”), a group formed on Facebook by him and other individuals, with a view to mobilise individuals to areas where protest action is taking place. Their aim is to observe and record what transpires; and where necessary to mobilise doctors, lawyers or trauma counsellors. POA has approximately 260 members across the country and has mobilised observers at protests on the campuses of the University of the Free State, Potchefstroom, Mahikeng, Pietermaritzburg, Cape Town and Stellenbosch. Mr Pienaar alleges that he did not participate in the protests after forming the POA. Its members try to diffuse violence and prevent human rights violations when violence breaks out.

[10.] It is common cause that, on 3 March 2016, Mr Pienaar posted the following statement on his Facebook page:

"I witnessed Afriforum supporters threaten to rape women today and then when they found out that the one protestor was a rape survivor mocked her by shouting 'don't rape her again she's been done.' I will just leave this here for all you guys who told me about the good work Afriforum is doing."

[11.] Applicants allege that this statement was defamatory, and falsely suggested that supporters of Afriforum had threatened to rape women on that day. Mr Pawson denies that any Afriforum supporter threatened anyone with rape. He alleges that he is unaware of any rape survivor that was in the vicinity of the area of conflict and that he did not hear any supporter or member of Afriforum indicating that someone should not be raped again as they might have been raped before. He states that six other employees of Afriforum were all in the vicinity of a statue, and/or busy washing the statue at the time of the incident, and that all of them confirm that no "*rape survivor*" or victim of rape was identified by anyone on the scene. What they confirm is that Mr Pawson merely indicated that

respondent was hurting a woman and nothing more happened. All of them confirm that respondent's statement is blatantly false.

[12.] Two observations arise. Firstly, that a material dispute of facts exists between the parties as to what Mr Pienaar observed and commented on. Secondly, the publication of Mr Pienaar's statement, if it was defamatory, does not refer to either of the applicants. However, a requirement for Mr Pienaar to be held liable for the delict of defamation is that the applicants must allege and prove that the statement complained of refers to the applicants personally. [See *Goodall v Hoogendoorn, Ltd* 1926 AD 11 at 15].

[13.] It is also common cause that, on 7 March 2016, another post appeared on respondent's Facebook page reading as follows:

"Look at how Marcus Pawson from Afriforum uses rape to intimidate a rape survivor. This happened on Thursday and this is what Afriforum is desperately trying to cover up with spurious criminal charges and fake civil action."

[14.] A video was posted with this text. Mr Pawson alleges that it is inaudible and that he could not hear the word “rape” (or any similar word) anywhere in it. As appears below, alleged eye witnesses to the event deposed to affidavits confirming Mr Pawson’s use of the word “rape”. Material disputes of fact again arise. In any event Mr Pawson alleges the publication is vexatious and unfounded.

[15.] On 6 March 2016 Mr Pienaar posted the following on his Twitter account:

“Watch how @MarcusAfr of @Afriforum uses rape to intimidate a rape survivor.”

Mr Pawson states that @MarcusAfr is his personal twitter account and @Afriforum is the official twitter account of Afriforum.

[16.] It is also common cause that, on 8 March 2016, and via his Twitter account, Mr Pienaar posted the following statement:

“Well @Afriforum supporters get to shout rape threats and the media focus on the mud on the statue.”

This statement too does not refer to the applicants.

[17.] Pursuant to these publications, on 14 March 2016, applicants filed papers claiming an urgent order that respondent remove the postings from his Facebook and Twitter accounts within two hours of the court’s order; as well as any other posting on his Facebook and Twitter accounts to the effect that any of the applicants support, condone, incite, commit or threaten/threatened anyone with the crime of rape or any other crime of a sexual nature. The applicants also sought an interdict against respondent posting any statement on Facebook or Twitter or any other form of social media, or from making or spreading any statement in any other way via any other medium, to the effect that any of the applicants support, condone, incite, commit or threaten/threatened anyone with the crime of rape or any other crime of a sexual nature pending the finalisation of an action for defamation and possible further interdicts to be instituted by the applicants against respondent within 30 days of the Court’s order. The

applicants required this order to have immediate effect and enforceability.

[18.] The first-mentioned order above is a final order. The second would have final effect on Mr Pienaar. In the alternative to such orders the applicants sought a *rule nisi* incorporating the relief in the orders above which should operate with immediate effect and enforceability pending a return date as an interim order. As the issues were fully ventilated before me on the basis of a full set of papers filed by both sides it would serve no purpose to consider granting the alternative relief. What needs to be considered is whether the applicants are entitled to the mandatory interdict claimed in their first prayer and the prohibitory (interim) interdict claimed in their second.

[19.] There is no dispute that the Mr Pienaar posted the four statements above. Disputes of fact have arisen on the affidavits in relation to the incident which gave rise to the postings and which is referred to therein.

[20.] A final interdict may only be granted if the facts averred in the applicants' affidavits which have been admitted by the

respondent, together with the facts alleged by the respondent justify such order. (See *Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (AD) at 634 H – I.*) Insofar as a final interdict is prevented by a genuine or *bona fide* dispute of fact the applicants may seek an interim interdict pending the finalisation of an action for a final interdict. In order to obtain this they would have to show (a) a *prima facie* right; (b) a well-grounded apprehension of irreparable harm if the relief is not granted; (c) that the balance of convenience favours the granting of the interim interdict; (d) that they have no other satisfactory remedy.

[21.] In the practice note filed on behalf of applicants their counsel correctly predicted that Mr Pienaar would attempt to justify his conduct as fair comment. I assume in this regard that where the respondent sets up a defence excluding unlawfulness, he must state sufficient particulars to enable the Court to evaluate the defence and to exercise its wide discretion in considering whether an interim interdict should be granted. A respondent's *ipse dixit* that such a defence is available to him will not suffice. (See *Hix Networking Technologies CC v*

System Publishers (Pty) Ltd and Another 1997 (1) SA 391 (A).)

[22.] Mr Pienaar alleges that during February 2016 the Stellenbosch SRC obtained permission from the University to launch an “*End Rape Culture*” campaign (“ERC”) which was intended to draw attention to certain incidents on campus which had, in the view of the SRC, led to what they described as a ‘*rape culture*’ being experienced on campus by women and trans women. The respondent uses the word “womxm” in his affidavit; as does the ERC campaign, in order to respect the fact that gender identity is not binary, and the compartment between “*man*” and “*women*” is not watertight. The term “*rape culture*” refers to an institutional treatment of rape as a phenomenon as being a problem for women to solve, rather than a social problem requiring men to take responsibility for their behaviour.

[23.] The SRC claimed that the following incidents on campus led to the campaign, *inter alia*,

- 23.1 sexist and derogatory comments by members of a men's residence during a performance of "*Molassesêr*";
- 23.2 the ineffectiveness of university social services in reducing the incidents of rape on campus, and the way they treat rape cases;
- 23.3 under-reporting of rape cases by the university in order to protect the institutional culture;
- 23.4 the neglect of equal representation of women in their organisational structure which is overwhelmingly male and white.

[24.] The SRC sought and obtained permission from the University to campaign against rape culture and in this pursuit to write "*End Rape Culture*" in chalk on the statue of JS Marais and all over the campus.

[25.] Afriforum, which is not a student organisation, arranged to visit the campus of the University of Stellenbosch on 3 March 2016. According to Mr Pawson the purpose of this visit was to

celebrate its heritage and to clean up the campus and various features on the campus that had recently been damaged by, *inter alia*, the OS. The statue of Mr J H Marais, a large benefactor of the University a century ago, was amongst the features on the campus that had been allegedly damaged by the OS movement, and the EFF. Mr Pawson states that he was present at the statue on 3 March 2016 and helped to clean it. He alleges that a crowd of protestors, whom he presumed to be from the OS movement, tried to stop the representatives of first applicant from cleaning the statue. Mr Pienaar was among the protestors. Mr Pawson alleges that Mr Pienaar pretended to shield a woman who was standing with her back to the statue. No one was attacking the woman and she was not in any type of danger. Mr Pawson states that it was clear to him that Mr Pienaar was pulling some publicity stunt as he knew that the incident was being filmed.

[26.] A commotion resulted, when protestors attempted to prevent members of Agriforum from cleaning the statue. Protestors and Afriforum members became physically engaged. Mr Pienaar was pushed “*closer to/against the women*”.

Without naming Mr Pienaar, Mr Pawson allegedly shouted that Mr Pienaar was hurting the woman. He claims that there is video footage available on which his shouts are clearly audible. However, the authenticity of this video was placed in dispute. It was filmed by a certain Willem Nikolaas Swanepoel. He filed a confirmatory affidavit stating no more that he had read Mr Pawson's affidavit and confirmed the content insofar as it referred to him. This was insufficient, in my view, to prove the authenticity of the video. Mr Pawson claimed that Mr Pienaar had left his position next to the statue after the commotion and had slapped Mr Pawson. Allegedly this can clearly be heard in the video. However, Mr Pawson does not allege that it can be seen.

[27.] In answer to Mr Pawson, Mr Pienaar alleges, without contradiction in Pawson's replying affidavit, that a separate campaign to the End Rape Culture campaign, namely the EFF student's command, had obtained permission from the University and the Stellenbosch municipality to march on 3 March 2016 to protest the victimisation of students by the University, after seven students had been summonsed to

disciplinary hearings. A reactive gathering was then organised by Afriforum via text message.

[28.] Mr Pienaar annexed a pamphlet headed “Afriforum Jeug” which stated the following:

“Kuiersaam met Afriforum Jeug by JANNIE MARAIS – STANDBEELD en verhoed dat die EFF hom afbrand.”

The date referred to was 3 March 2016 at noon. The place was Rooiplein. Readers were urged to “*versprei die boodskap.*” On the morning of 3 March 2016 Afriforum reached an agreement with the university whereby they were permitted to gather peacefully on the grass near the statue. From the content of their pamphlet it was apparent that a confrontation between members of the EFF and Afriforum was reasonably foreseeable although the grass area to which Afriforum were limited was approximately 40 meters from the statue.

[29.] According to Mr Pienaar (again without contradiction) the university gave a press release on the same day, stating the following:

“No evidence of planned arson.

An invitation is doing the rounds on social media for people to protect the JH Marais statue on the Rooiplein against arson today. This invitation may be linked to the protest march planned for 12:00 until 14:00. At this time there is no evidence to substantiate such serious allegations. The organisers of the protest march followed the application process and permission was granted by the Stellenbosch Municipality.

The campus community is reminded that the University acknowledges the right of staff and students to peaceful protest, provided that the administrative and academic activities are not disrupted; that actions do not lead to any risks to the safety of staff and students, or university property; and that the rights of students to study or attend classes are not infringed upon. Arson, violence and intimidation are criminal acts, and such activities are viewed in a very serious

light. An appeal is made to please avoid spreading rumours or fuelling animosity on social media.”

[30.] Mr Pienaar alleges that he called on observers to be present in order that, should violence erupt, there would be independent observers present who had a record of what in fact transpired. He attended the protest on behalf of the POA. He noted EFF marchers, singing struggle songs and carrying placards, marching past the JH Marais statue, towards the Rooiplein stairs. A movement of young Afrikaans students was on Rooiplein. They bore placards reading “*Afriforum doesn’t speak for me.*”

[31.] By that time Afriforum members had already left the grass area and were moving towards the statue. As the marchers went past the statue one of them took a “*Vote EFF*” poster and attached it to the statue with Prestik. Afriforum members moved closer towards the statue, apparently in order to remove the poster. One of the OS students, M. S., moved to stand in front of the chalk sign on the statue calling to “*end rape culture.*” She stood in front of the statue with her hands in the air crossed over her head.

[32.] Afriforum supporters started to grope her and touch her, with calls to rape her, which were audible to nearby observers. She cried out "*Why are you touching me? Don't touch me!*" Mr Pienaar moved to assist her. He stood in front of her, between her and the Afriforum members and used his body to shield her. Certain persons pointed out to Afriforum supporters that Melissa was a rape survivor. One of the supporters called out "*Don't rape her, she's already been done.*" Mr Pienaar alleges that he heard Mr Pawson calling out "*He's raping her, he's raping her.*" When Mr Pawson saw the cameras he changed his chants to "*He's hurting her, he's hurting her.*";

[33.] Mr Pienaar alleges that the video footage provided by the applicants does not show all that happened that day. He refers to the content of affidavits by the following eye witnesses which support his own version.

[34.] Ms S. stated that she is studying for a Master of Arts degree at the University of Stellenbosch. She is a gender rights activist, secretary for LeBiGay Stellenbosch, and a member of the

Womxns Empowerment SRC General Committee at Stellenbosch. She is also involved in the OS movement and the End Rape Culture Campaign in Stellenbosch. The latter was started to draw attention to the pervasive culture of misogyny and rape which its members believe pervade the University. Examples of rape culture on campus are set out in Mr Pienaar's affidavit.

[35.] Ms S. is also a rape survivor. She has been diagnosed with post-traumatic stress disorder as a result of that ordeal. She is easily triggered by sexually aggressive actions directed at her by men.

[36.] Ms S. alleges that the different movements at Stellenbosch are part of a larger, national movement which goes under two banners, namely: Fees Must Fall and Rhodes Must Fall. As a result, students from different universities are in contact with each other and stand in solidarity with each other.

[37.] She is also a supporter of the campaign known as "*Die Volksveraaiers*", which was started by white students at Stellenbosch who distance themselves from what is seen as

Afriforum's attempts to speak on behalf of all white students. Part of this campaign includes students putting up photographs of themselves on social media and holding placards which read "*Afriforum does not speak for me.*" This campaign is a reaction to Afriforum's opposition to attempts by certain students to "decolonise the university (a movement which is generally called "*decolonisation of the mind*"). This entails calling upon the university to change its language policy by eradicating Afrikaans as a medium of instruction, as well as removal of statues and paintings of people that the movement believes are part of the colonial and apartheid past. Afriforum strongly opposes any such attempts. They see the movement as a "*war on Afrikaans*". Tensions therefore run high between the students and the two camps.

- [38.] Ms S. goes on to state that, on 3 March 2016, the Student Command of the EFF held a march for the 7 students who had been suspended by the university. The march was organised with permission of the university. Ms S. joined the march at approximately 13h00, on Merriman Street. They marched across Victoria to the Administration A building. The EFFSC

coalition diverted towards the Rooiplein when they heard that Afriforum was surrounding the Jan Marais statue.

[39.] As the marchers passed the statue one of the EFFSC members placed a poster with Prestik on the statue and continued the march. Other students placed a poster, stating “Afriforum does not speak for me,” above the first poster. Afriforum supporters expressed outrage. A group of students then stayed at the statue, according to Ms S. in order to deescalate the situation. Ms S. felt that she wanted Afriforum to know that they did not speak in the name of all white people. Be that as it may the second poster was pulled off. Ms S. found a new one and replaced it. A man then grabbed her by her bag and tried to pull her off the statue forcibly. She was bumped into several times by men who shoved her aside. She had asked them to step back as she felt unsafe. She alleges that the men were all part of the Afriforum group.

[40.] One of these men pushed his leg into her buttocks. She told him that he was touching her buttocks and that she felt severely uncomfortable. He replied that he really did not care about her comfort as the statue meant more. He persisted in

his conduct despite her protestation. This made her feel sexually vulnerable and violated. Ms S. then stood up against the statue with her arms around it to prevent Afriforum's supporters from pulling off the poster.

[41.] At that stage two other protesters, Nosi Nicole Matiwane and Nicola Bruns were also pressed up against the statue. Ms S. and Ms Matiwane repeatedly put up posters. They were repeatedly abused by the men around them. At one stage a certain Pieter de Villiers from Helshoogte Koshuis, one of the Stellenbosch residences, came over to Ms S. and Ms Matiwane and said, "*End rape culture, don't rape her.*" Ms S. feels that he spoke in a threatening manner, "*in her face and aggressively*". He was laughing when he made his comment. In context she believes this was clearly meant to terrify the two women involved.

[42.] At some stage some of the crowd wrote on the statue "*end rape culture*". The posters were ripped down by a crowd of angry Afriforum supporters. A large group of Afriforum supporters attempted to scrub the statue clean. Ms S. threw herself in front of the end rape culture poster and refused to

move. A group of men continued to scrub and press through and over Ms S.'s body, even though she was screaming and crying. People were urging them to stop. A certain Mr Tiaan Esterhuizen of Afriforum shouted "*I will not leave her alone*". Mr Esterhuizen appears to be one of the deponents of a confirmatory affidavit filed on behalf of applicants and an employee of Afriforum. He does not elaborate on events in his affidavit. Nor did he file an affidavit in reply.

[43.] Ms S. states that the Afriforum supporters poured soap over her face and body and left bruises and scratches on her skin. They touched her in places which she felt were sexually inappropriate such as on her breast and torso. She was shouting that Afriforum condones rape culture. Mr Pienaar then moved between Ms S. and the Afriforum supporters. Ms S. alleges that Mr Pawson then started yelling "*Look at him. He's raping her. He's raping her!*" All of this triggered traumatic memories in her mind. She started to scream and her friends pulled her away. Nevertheless she returned. A man in a green cap started laughing loudly and telling his friends "*Don't rape her, she has already been done.*" The

Afriforum Youth leaders ignored her protest and continued cleaning the statue.

[44.] On the same afternoon Ms S. laid charges of sexual assault against Mr Pawson and other Afriforum supporters, whose identities were unknown to her. She also advised the police that other women had been assaulted in a similar fashion and provided their names. All of the cases were being investigated.

[45.] Nicola Jo Bruns also deposed to a supporting affidavit. She stated that she was studying for an MA degree. She was a journalist at FM92.6 and Cape Talk. She was involved in advocacy journalism, the OS movement, and the End Rape Culture campaign in Stellenbosch. She was also a supporter of the campaign known as “Die Volksveraaiers”. She was present at the Jan Marais statue on the day in question. Afriforum supporters attacked female students verbally and physically in a sexual manner. She heard members of Afriforum shout the words “*just don’t rape her*” and “*be careful not to rape her*” at Ms S. and Ms Matiwane. The gestures and mannerisms of the men were threatening and abusive. When

Ms S. and Ms Matiwane refused to move away from the statue, members of Afriforum, who had fetched buckets of soapy waters and sponges to clean the statue, started dousing the womens' bodies with the sponges, touching them in an inappropriate manner, and laughing at them.

[46.] Mr Pienaar attempted to shield Ms S. from the Afriforum men who were inappropriately touching her. When Ms Bruns attempted to do the same one of the Afriforum members groped her rear and told her that she was a worthless woman. She repeatedly shouted that they should stop touching her. The man hit her on her shoulder and in the area of her breasts. She suffered a panic attack and had to be carried away by fellow students. Ms Bruns was one of the person's named by Ms S. when she laid charges.

[47.] Ms Liana Maheso also deposed to a supporting affidavit. She stated that she was studying for a BA degree. She was involved with the OS Movement. She was part of the EFF march. She saw a commotion at the JS Marais statue. When she arrived there Ms S. was pinned against the statue. Ms Maheso video'd the incident. From where she was standing it

looked as if Afriforum male supporters were trying to remove Ms S. from the statue; as well as the words “*end rape culture*” which were written on it.

[48.] One Afriforum supporter was washing Ms S. as well as the statue. Mr Pienaar stepped in to protect Ms S. from the Afriforum men. They in turn became angry and started to yell and push Mr Pienaar. The man who had been doing the washing, referred to above, climbed over Ms S. onto the statue and started to wash. In the process he threw water over Ms S. and Mr Pienaar. An Afriforum member wearing an army green cap pushed her away. In doing so he touched her breast. A confrontation between them ensued. Brandon Como dragged the man away from her. When she looked back she saw Mr Pawson pushing and manhandling Mr Pienaar. Ms S. was pinned against the statue by men who were pushing each other. She was screaming.

[49.] Mr Pawson started to shout “*he is raping her, he is raping her, help her, he is raping her!*” Ms S. was visibly upset. She moved from the spot where she was standing. She was soaking wet and in tears. The man with a green cap and blue

shirt then said “*She is already done, don’t rape her.*” When Ms Maheso informed him that Ms S. was a rape survivor he walked away laughing.

[50.] Brandon Como stated that he is employed by the university as Manager of Student Governance and Societies. He saw the content of a letter from the university confirming that Afriforum only had permission to gather on the grass. In his official capacity he was at the JS Marais statue on 3 March. He heard Mr Pawson shouting “*He’s raping her, he’s raping her*”. The comment appeared to be directed at Mr Pienaar who was standing in front of Ms S. in order to protect her from a group of people who were forcefully attempting to clean the statue. Mr Pawson’s statement was blatantly untrue. When Mr Como asked Mr Mr Pawson why he was screaming those words, he replied that it because “*they are also doing it to them.*” Mr Como also confirmed that Ms S. became extremely emotional.

[51.] George Xander Von Berg stated that he is studying for a BCom degree. He is a social justice activist and supports the OS Movement as well as the End Rape Culture Movement.

He is also a supporter of the group which calls itself “*Die Volksveraaiers*.” On 3 March 2016 he was present at the JS Marais statue during protest action by various groups. He witnessed the Afriforum supporters shouting slogans at Ms Matiwane such as “*Stop rape. Don’t rape her.*” and “*Mens sou dink hulle wil verkrag word.*” (*You would think they want to be raped.*)

[52.] Devereux Damon Moses stated in his affidavit that he is studying for a Master’s degree in education at the University of Stellenbosch. He was present at the protests by various groups at the Marais statue. He witnessed Afriforum supporters shouting various slogans at Ms Matiwane including “*Mens sou dink hulle wil verkrag word.*”

[53.] The ventilation by Afriforum supporters of their support for whatever the JC Marais statue stood for – on respondent’s version – went beyond the boundaries of lawful conduct. Applying the rule in *Plascon-Evans* to determine an application for a final interdict the case falls to be determined on respondent’s version. This shows that Afriforum supporters sexually assaulted Ms S., Ms Matiwane and Ms Bruns and

sexually intimidated them. Respondent's affidavits also show that Mr Pawson and one Pieter de Villiers sexually intimidated Ms S. and Ms Matiwane by shouting rape related comments. This behaviour of Mr Pawson and the supporters of Afriforum, as described in respondent's affidavits, embody the phenomenon which the "*End Rape Culture*" campaign justifiably seeks to eliminate. Whether or not Afriforum supporters threatened to rape Ms S. in the literal sense of the word, they nevertheless did inflict their rape culture on her and other women present.

[54.] In order to obtain their temporary interdict the right to be set up by the applicants need not be shown by a balance of probabilities. It is sufficient if it is *prima facie* established though open to some doubt. The facts as set out by the applicants, together with any facts set out by the respondent which the applicants cannot dispute must be taken and consideration given to the inherent probabilities whether the applicants could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. Serious doubt is thrown upon the case of the applicants by respondents affidavits described above.

Applicants therefore cannot succeed in obtaining temporary relief. [See *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

[55.] Respondent's affidavits establish conclusively that, by attending upon the campus of the University of Stellenbosch, Afriforum deliberately entered a public and very politicised domain. Their object was to engage in ventilating their political differences with student groups on the campus. The courts have held that certain legal consequences arise in these circumstances; when regard is had both to the right of freedom of speech as it existed in the common law, and the right to freedom of expression which is entrenched by section 16 of the Constitution. Section 16(1) thereof expressly entrenches freedom of the press and other media. I would include social media such as Facebook and Twitter in the latter category.

[56.] In the matter of *The Citizen 1978 (Pty) Ltd & Others v McBride* 2011 (4) SA 191 (CC) at paragraphs 99 and 100 the Constitutional Court stated that:

“More than 50 years ago, within the then-constrained perimeter of racially-defined public life, a court noted that in this country’s political discussion, ‘(s)trong epithets are used and accusations come readily to the tongue. The court also found that allowance must be made ‘ because the subject is a political one, which had aroused strong emotions and bitterness’ of which readers were aware, and that they ‘would not be carried away by the violence of the language alone.

These words are still apt today. Public discussion of political issues has if anything become more heated and intense since the advent of democracy. A constitutional boundary is the express provision in the Bill of Rights that freedom of expression does not extend to hate speech. Another is the legitimate protection afforded to every person’s dignity, including their reputation. But, so bounded, it is good for democracy, good for social life and good for individuals to permit maximally open and vigorous discussion of public affairs.”

[57.] In the political dynamics on the campus of Stellenbosch University it is almost inevitable that any response to Afriforum

by the Open Stellenbosch Movement, the Protest Observers Alliance and the End Rape Culture Campaign would be emotional, bitter and would employ violent language.

[58.] In *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) the Constitutional Court stated at paragraph 133 that:

“Political life in democratic South Africa has seldom been polite, orderly and restrained. It has always been loud, rowdy and fractious. That is no bad thing. Within the boundaries the Constitution sets, it is good for democracy, good for social life and good for individuals to permit as much open and vigorous discussion of public affairs as possible.”

[59.] In accordance with these judgments Mr Pienaar is entitled to a certain amount of latitude in describing the confrontation that took place between Afriforum and students on the campus. It was political, emotional, bitter and liable to be described in violent language.

[60.] A statement is defamatory if it would “*tend to lower the plaintiff in the estimation of right thinking members of society generally.*” (Per Lord Atkin in *Simm v Stretch* [1936] 2 All ER 1237 (HL) at 1240). It must be accepted, however, that all right thinking or reasonable members of society subscribe to the norms and values of the Constitution. (See *Sokhulu v New African Publications Ltd t/a ‘The Sowetan Sunday World* 2001 (4) SA 1357 (W) at para 7.

[61.] A reasonable reader would read Mr Pienaar’s statements in the context of the events in relation to which they were made. He or she would accommodate the *patois* employed in the assertion of the End Rape Culture Campaign. The meaning of the words used must be determined not in isolation but against the established factual maxtrix of this particular case. (See *De Villiers v Schutte* 2001 (3) SA 834 (C) at 839 D-E).

[62.] In *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 CC at para 28 the Constitutional Court made the point that it is not just that which is already tolerable that must be tolerated, “... *but also ... those that offend, shock or disturb ... such are the demands of*

that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.

[63.] By thrusting themselves into the public eye, and by entering the premises of Stellenbosch University in order to confront student groups with opposing political views, Afriforum opened themselves to public scrutiny. They must consequently display a greater degree of tolerance to criticism than ordinary individuals. (Compare *Cele v Avusa Media Limited* [2013] 2 All SA 412 (GSJ). Afriforum's promotion of a political confrontation by pamphlet, and by the follow-up action of its members, resulted in violence erupting on the campus: which on the basis of the application of the rule in *Plascon-Evans*, involved Afriforum's supporters committing assault, sexual violence, sexual aggression and intimidation, and expressing of rape culture in an egregious form. The consequence was the employment of the language of the End Rape Culture Campaign by its protagonist against apparent perpetrators of rape culture. According to the cases cited above Mr Pienaar's robust political riposte constitutes an exercise of freedom of expression which, in my view, does not involve defamatory statements concerning the applicants.

[64.] The protection of the dignity of the women violated by Afriforum supporters is of paramount importance under the Constitution. The comment on these unlawful acts in the present publications cannot give rise to a remedy for the applicants based on a violation of their own dignity.

[65.] The comment made by Mr Pienaar were fair within the context of the acts described by the witnesses who deposed to affidavits in support of Mr Pienaar.

[66.] The applicants have failed to establish that the publications in issue will be unlawful in that the respondent has no valid defence in the defamation proceedings; or that the applicants will be irreparably injured if the interdict is not granted. Mr Pienaar's assertions, claims, statements and comments could be countered most effectively and just as quickly as this urgent application, by refuting them in public meetings, on the internet, on radio and television and in the newspapers.

[67.] Applicants can meet political criticism in the political arena by responding to respondent's political comments on social

media with their own rebuttal, as the Constitutional Court suggested in the *DA* case is appropriate in a free and open democracy. Afriforum can and has in some case issued public statements, responded on social media, addressed questions regarding the apparent conduct of its supporters.

[68.] In all the circumstances the applicants have not established a *prima facie* right to have Mr Pienaar's publication taken down from social media; less so have they established a clear right. Nor have they established a well-founded apprehension of irreparable harm. The harm of which they complain has been done. The post has been posted, shared and viewed. The internet world has moved on. They can avail themselves of other remedies such as those referred to above, and damages via a defamation action.

[69.] The first post made by Mr Pienaar, on 3 March 2016, neither refers to the applicants nor to their members. The second post, on 7 March 2016, describes how Mr Pawson uses rape to intimidate a rape survivor, Ms S.; but with reference to a video as the source of Mr Pienaar's authority; and he encourages readers to view it. Through the applicants may

disagree with him, it is political comment and therefore protected speech. Mr Pienaar is not saying that Mr Pawson incited people to rape. This same comment applies to the posting on 6 March 2016. The content of the posting on 8 March 2016, to the effect that rape was shouted as a word that threatened female students, was borne out by respondent's affidavits.

[70.] In the *HiX Networking Technologies* case the Appellate Division stated that attempts to restrain publication must be approached with caution. The appropriate stage for this consideration, insofar as applications for interim interdicts are concerned, would be the point at which the balance of convenience is determined. At that stage consideration should be given to the fact that the person allegedly defamed will, if the interdict is refused, nonetheless have a cause of action which will result in the award of damages. This should be weighed against the possibility that the denial of the right to publish is likely to be the end of the matter as far as the media is concerned. In the exercise of its discretion in granting or refusing an interim interdict, regard should be had, *inter alia*, to the strength of the applicants' case; the seriousness of the

defamation; the difficulty the respondent has in proving, in the limited time afforded to it in cases of urgency, the defence which it wishes to raise and the fact that the order made, in substance though not in form, amounts to a permanent interdict. These remarks are apposite in the present matter. In the circumstances the balance of convenience favours the respondent.

[71.] The orders sought by the applicants have a chilling effect on political free speech. The limitations sought are oppressive and unjustified. There is no merit in the application for either the mandatory interdict or the interim interdict.

[72.] In all the circumstances the application is dismissed with costs.

DONEN AJ