

University of the Free State

Report by Independent Panel on
the Conduct of Private Security
Companies and Police on the
Bloemfontein and Qwaqwa
Campuses during October 2017

9 APRIL 2018

Table of Contents

INTRODUCTION	3
TERMS OF REFERENCE	4
INVESTIGATIVE PROCESS.....	7
EVIDENCE	10
CONFIDENTIALITY	10
CONSTITUTIONAL AND STATUTORY FRAMEWORK	11
<i>The Regulation of Private Security Providers</i>	<i>15</i>
<i>The Regulation of the Police</i>	<i>21</i>
UFS AS AN ORGAN OF STATE AND ITS LIABILITY.....	26
THE GENERAL DUTIES OF A PRIVATE SECURITY COMPANY	28
THE USE OF FORCE.....	33
ANALYSIS.....	35
<i>Chronology of Events.....</i>	<i>38</i>
<i>Decision to Call Private Security</i>	<i>44</i>
<i>Deployment of Security Personnel.....</i>	<i>47</i>
<i>PSCs' Compliance with UFS Protocols.....</i>	<i>49</i>
<i>Was the Conduct of the PSCs Reasonable?</i>	<i>51</i>
<i>Use of Force and Whether This Was Warranted</i>	<i>53</i>
<i>Racial Barriers.....</i>	<i>54</i>
<i>Use of PSCs for Guarding Property and Monitoring Protests, Demonstrations and Pickets ..</i>	<i>56</i>
<i>General Remarks on the Use of Security Services During Protests.....</i>	<i>60</i>
<i>Establishing a New Culture of Protest.....</i>	<i>66</i>
RECOMMENDATIONS	68
<i>Provide Assistance to Students and Staff who suffered Harm.....</i>	<i>68</i>
<i>Arrange Dedicated Counselling Sessions.....</i>	<i>69</i>
<i>Adopt a Policy and Protocols on Counselling Services.....</i>	<i>69</i>
<i>Engage a Dedicated Specialist PSC Unit</i>	<i>70</i>
<i>Address Disparities between the Bloemfontein and Qwaqwa Campuses</i>	<i>71</i>
<i>Approach External Bodies for Support and Assistance</i>	<i>71</i>
<i>Establish a Mechanism for Meaningful Engagement.....</i>	<i>73</i>
<i>Towards a Progressive Protest Policy</i>	<i>75</i>
ANNEXURES	81
<i>Annexure A – Biographies of Panellists</i>	<i>81</i>
<i>Annexure B – List of Interviewees and Participants (in no particular order)</i>	<i>84</i>
<i>Annexure C – Chronology of Events.....</i>	<i>87</i>
<i>Annexure D – Report on Damage to UFS Infrastructure</i>	<i>92</i>
FOOTNOTES	100

INTRODUCTION

1. The University of the Free State (UFS), as with most organs of state and public institutions concerned with human rights, safety and security of both persons and property, uses its own internal Campus Security Services (CPS) as well as external private security companies (PSC) in addition to relying on the South African Police Services (SAPS; the police) where necessary.
2. In the context of the student protests at two UFS campuses during October 2017 (ie Bloemfontein and Qwaqwa) and the extensive damageⁱ caused to university property, the security functions performed by both the PSCs and the police were escalated resulting in various practical and policy consequences.
3. Among the consequences of the escalation of security functions that were raised during the investigation/review were the following: the almost immediate repression of legitimate student protests, demonstrations and pickets; various injuries inflicted on innocent bystanders, students who participated in the protests (two students on the Qwaqwa campus were shot with live ammunition and severely injured) and a lecturer on the Bloemfontein campus (who was injured with a fire extinguisher during in an altercation with a student protester); the prevention of further damage to property; and the negative impact this had on the image and reputation of the UFS.
4. Students who legitimately protested and innocent bystanders called into question the various policy decisions taken regarding when and how the security functions were escalated, the appropriate use thereof against unarmed students and the

excessive use of force during the period 17 – 25 October 2017 on the Bloemfontein and Qwaqwa campuses respectively. They expressed grave concerns for their safety and security on the two UFS campuses and submitted that the UFS management failed properly to regulate the standards and behaviour of security personnel and police on the two campuses with due regard to human rights norms.

5. A particular question that arose in the context of the investigation/review is whether there are adequate regulatory measures, proper standards and oversight in relation to the use of PSCs and police within the university environment.
6. The UFS executive management team, led by the vice chancellor and rector, Professor Francis Petersen, and supported by the president of the central SRC (Bloemfontein campus) on behalf of the student body, Mr Asive Dlanjwa, considered the events that unfolded during October 2017 and expressed serious concerns about the alleged excessive use of force and the conduct of personnel from the two PSCs that were deployed (Mafoko Security Patrols (Pty) Ltd and Zero Tolerance (Pty) Ltd) and the police, as well as the implications thereof for human rights and safety and security for students, staff and property.

TERMS OF REFERENCE

7. The vice chancellor and rector, in keeping with the mission to provide the UFS with an effective system of independent and objective oversight, engaged the services of the Mr Ashraf Mahomed and Ms Nomfundo Walaza during November 2017, with the view to forming an independent panelⁱⁱ that would conduct an

investigation into the handling by the PSCs and police of the student protests at the Bloemfontein and Qwaqwa campuses during October 2017.

8. The vice chancellor and central SRC president requested the investigation/review to focus on the practical and policy consequences and recommendations relating to the series of events that took place during October 2017, including the circumstances leading up to and following these events.
9. After some consultation, the period 18 – 20 October 2017 in the original terms of reference was expanded to 17 – 25 October to cover events on both campuses sufficiently.
10. According to the terms of reference provided, the panel was appointed to investigate the incidents that took place at the Bloemfontein and Qwaqwa campuses, including but not limited to:
 - 10.1. The circumstances under which the UFS management decided to call in private security onto the Bloemfontein and Qwaqwa campuses.
 - 10.2. Establishing the chronology of the student public protest (including their behaviour) that started at noon and culminated in the late afternoon of 20 October 2017 on the Bloemfontein campus when the university dispersed students who were engaged in protest action and appointed security company Mafoko Security Patrols (Pty) Ltd.
 - 10.3. Establishing the chronology of the student public protest (including their behaviour) that started in the afternoon and continued into the evening of

19 October 2017 on the Qwaqwa campus when students who were engaged in protest action were dispersed by the private security company Zero Tolerance (Pty) Ltd.

- 10.4. Whether the relationship and cooperation between SAPS, private security and UFS campus security was such as to provide a cohesive and efficient deployment of security personnel.
11. In particular, the panel was requested to establish:
 - 11.1. Whether the PSCs complied with both the written and verbal instructions/protocols of UFS management.
 - 11.2. Whether the nature of the actions of the PSCs was reasonable taking into account all circumstances during the time of the student protest action.
 - 11.3. What levels of force were used by the PSCs during the mentioned incidents and whether such force was warranted under the circumstances at the time of the student protest action.
12. The panel was further requested to make recommendations in relation to:
 - 12.1. The deployment of private security on the university campuses in cases of violent student protest.
 - 12.2. The manner in which university management needs to proceed to fulfil its obligations in relation to all students and employees of the university in cases of violent student protest.

- 12.3. Ways of establishing trust between management and students engaged in student protests.
13. In addition, during discussions with the rectorate, the panel was requested to make recommendations on how UFS might establish a new culture of protest that would avoid the use of PSCs or the police.
14. In establishing the scope of the investigation/review, the panel was guided by whether the facts and circumstances were considered *prima facie* relevant and have some value in constructing the narrative, in the sense that they had a direct and substantial bearing on the actual events.

INVESTIGATIVE PROCESS

15. An open invitation was extended throughout the university community for all parties and stakeholders to come forward and present their versions or to submit written reports and documents relating to the events that unfolded on the two campuses during the period under review.
16. The fact-finding investigation took place on: 13 and 15 November 2017 in Bloemfontein and on 14 November in Qwaqwa; 28 and 29 November 2017 in Qwaqwa and 30 November and 1 December 2017 in Bloemfontein; and in Cape Town on 9 December 2017 with the president of the SRC (Bloemfontein campus).
17. It was conducted in a formal and structured yet relaxed atmosphere while remaining true to the principles of fairness and transparency. Interviewees were

encouraged to make written submissions where appropriate and particularly in cases where they might wish to supplement oral testimony.

18. The deputy director of the Institute for Reconciliation and Social Justice at UFS, Mr JC van der Merwe, was appointed by the vice chancellor and rector, Professor Petersen, to serve as the liaison for the panel and provided the list of participants for the interviews.ⁱⁱⁱ The panel is immensely indebted to Mr Van der Merwe for his time and efforts in facilitating the investigation/review and to the participants for their commitment to helping the panel to understand the events that unfolded.
19. The interviews (mainly with students) were conducted in an ethical, professional and impartial manner. The panel recognises that staff were undoubtedly impacted by the events that unfolded during October 2017 on both campuses. However we were not able (within the time period) to conduct extensive interviews with staff who were traumatised other than the staff mentioned in the report. We recognise this as somewhat of a limitation and can only urge the UFS to identify and provide the necessary assistance to the staff in the form of counselling, if needed.
20. To assist the investigation/review, the interviews were recorded with the intention of ensuring a measure of accuracy in the capturing of the narratives.
21. Interested parties and members of the media were permitted to be present as observers, with the consent of the interviewees and subject to certain guidelines to ensure the integrity of the process.

22. The question of apportioning blame to certain individuals or identifying individual liability does not form part of the terms of reference for the investigation/review. In most instances the investigation/review has not been able to substantiate alleged individual wrongdoing, and this is largely reflected in the discussion and analysis. Where there is a *prima facie* case of individual wrongdoing, the UFS management is encouraged to institute appropriate measures, including referral to external bodies such as the police, IPID, PSIRA, and Chapter 9 institutions.
23. It was agreed in advance that the panel would submit its final report to the vice chancellor and rector for consideration of remedial action including legal steps, policy formulation, disciplinary proceedings and administrative action, where appropriate.
24. One of the panel's main concerns at the outset was the inclusion of a process of reflection following the tabling of the final report. There was consensus that the panel would be afforded an opportunity to present its findings and recommendations to a workshop with all the stakeholders and interested parties.
25. To address another serious concern relating to the implementation of the panel recommendations, it was agreed that there would be peace and trust building exercises, mediation, relationship by objective (RBO) exercises, and related alternative dispute resolution processes, where appropriate.

EVIDENCE

26. This was not a judicial commission of enquiry but an independent administrative proceeding conducted under the auspices of the UFS in terms of its internal rules and policies.
27. No evidence was led, and participants were not sworn in prior to narrating their stories.
28. During the process, the panel sought to establish the facts and to establish a coherent narrative based on the interviews and anecdotal reports. Those who came forward were encouraged to be as specific as possible and to provide basic details on incidents that they experienced first-hand and witnessed. However, there were some limitations in that the facts and circumstances could not be fully validated in all instances.
29. The panel endeavoured to address these limitations by reviewing the allegations and conducting an assessment as to whether there were sufficient indications to substantiate the findings and recommendations with reference to the facts and evidence, where this could be verified.
30. In the main, the findings and recommendations are therefore mostly reflective of the coherent narrative that the panel compiled.

CONFIDENTIALITY

31. Confidentiality was another of the panel's concerns, and to the extent that it was possible for the information to be anonymous within the needs of the

investigation/review, the panel accepted the anonymous allegation and gave an undertaking to honour the confidentiality of this information.

32. Most of the interviewees did not insist on complete anonymity. However, in some interviews, issues were raised 'in confidence', and the interviewees requested the investigation/review to honour the confidentiality thereof.
33. In other words, in some cases, there appeared to be a visible reluctance on the part of people interviewed to be completely frank and forthright for fear of retaliation.
34. They were given the assurance that if they suspected retaliatory action or any threat of retaliation was made against them after sharing their experiences in the investigation/review, they could approach the panel and their complaints would be taken seriously and addressed through the relevant structures.
35. UFS retained the recordings of the interviews conducted, and the panel strongly suggests that they be password protected on the UFS server, thereby minimising the risks of a breach of confidentiality.

CONSTITUTIONAL AND STATUTORY FRAMEWORK

36. The following provisions of the Bill of Rights were considered in the investigation/review process:

- 36.1. Section 10 provides:

Everyone has inherent dignity and the right to have their dignity respected and protected.

36.2. Section 12 provides:

- 1 *Everyone has the right to freedom and security of the person, which includes the right -*
 - (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- 2 *Everyone has the right to bodily and psychological integrity, which includes the right -*
 - (a) *to make decisions concerning reproduction;*
 - (b) to security in and control over their body; and
 - (c) *not to be subjected to medical or scientific experiments without their informed consent.*

36.3. Section 14 provides:

Everyone has the right to privacy, which includes the right not to have-

- (a) *their person or home searched;*
- (b) *their property searched;*
- (c) *their possessions seized; or*
- (d) *the privacy of their communications infringed.*

36.4. The rights of freedom of opinion, association and expression, contained in sections 15-18, include 'the right to freedom of conscience, religion, thought, belief and opinion', 'the right to freedom of expression', 'the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions', and 'the right to freedom of association'.

37. Other provisions of the Constitution which were considered are as follows:

37.1. Section 198 of the Constitution, which governs security services generally, provides:

Governing principles

The following principles govern national security in the Republic:

- (a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.*
- (b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.*
- (c) National security must be pursued in compliance with the law, including international law.*
- (d) National security is subject to the authority of Parliament and the national executive.*

37.2. The indirect regulation of private security contained in 199(3) of the Constitution provides:

Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.

37.3. Sections 199(4) to (7) of the Constitution govern the general duties of security forces:

The security services must be structured and regulated by national legislation.

- (4) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law,*

including customary international law and international agreements binding on the Republic.

- (5) *No member of any security service may obey a manifestly illegal order.*
- (6) *Neither the security services, nor any of their members, may, in the performance of their functions -*
 - (a) *prejudice a political party interest that is legitimate in terms of the Constitution; or*
 - (b) *further, in a partisan manner, any interest of a political party.*
- (8) *To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.*

37.4. Section 205(3) of the Constitution, which sets out the objectives of the South African Police Service, provides:

The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

38. Several statutory sources are also relevant here:

38.1. The Criminal Procedure Act 56 of 1977

38.2. The South African Police Service Act 68 of 1995 (the SAPS Act)

38.3. The Standing Orders (SO) issued under the SAPS Act

38.4. The Regulation of Gatherings Act 205 of 1993 (the RGA)

38.5. The Private Security Industry Regulation Act 56 of 2001 (the PSIRA)

38.6. The regulations and notices promulgated under the PSIRA

The Regulation of Private Security Providers

39. The Code of Conduct for Security Service Providers, 2003 (the Code), as promulgated under the PSIRA, is instructive for purposes of the investigation/review, and the relevant sections are reflected below.

40. Section 5 of the Code provides:

5 General obligation to act in terms of applicable law

(1) A security service provider must comply with the provisions of the Act and with all other legal provisions and obligations, whether they are based on or form part of common law or statutory law, including but not limited to any directives, determinations, findings, orders or rulings issued by any competent authority including a court, tribunal, commission, regulator, forum or organ of state, that are applicable or relevant to -

- (a) practising the occupation of security service provider;*
- (b) rendering a security service;*
- (c) carrying on business in the rendering of a security service;*
- (cA) employing security officers; and*
- (d) performing any other act or function, which is subject to the Act.*

(2) The general obligation contained in sub-regulation (1) does not derogate from any specific obligation imposed by this Code and no specific obligation in this Code derogates from the generality of sub-regulation (1).

41. With regard to the duty of cooperation between private security providers and the police, the Code provides:

7 General obligations towards the Security Services and organs of State

- (1) *A security service provider must, within his or her ability, render all reasonable assistance and co-operation to the members and employees of the Security Services to enable them to perform any function, which they may lawfully perform.*
- (2) *A security service provider may not interfere with, resist, obstruct, hinder or delay a member or an employee of a Security Service or an organ of State in the performance of a function, which such person may lawfully perform.*
- (3) *A security service provider must, without undue delay, furnish all the information and documentation to a member or employee of a Security Service or an organ of State which such member or employee may lawfully require.*
- (4) *A security service provider may not unjustly cast reflection upon the honesty, professional reputation, skill, knowledge, service or qualifications of any member of the Security Services.*
- (5) *A security service provider must be honest in all his or her dealings with a Security Service and with any organ of State.*
- (6) *A security service provider may not, whether directly or indirectly, request or use a member or former member of a Security Service or any employee or former employee of a Security Service or an organ of State, to obtain any information, document, object or assistance for the purposes of rendering a security service, where such member, former member, employee or former employee, will contravene a law or the conditions of his or her service, as the case may be, in providing such information, document, object or assistance.*
- (7) *A security service provider must, where the importance, nature or circumstances of a security service, or the nature or extent of the risks guarded against, or any other relevant fact, reasonably requires such a step, officially provide a responsible member of the Service with all relevant information regarding the rendering or proposed rendering of the security service, and maintain contact with such a member if this is reasonable and prudent in the circumstances or if so requested by such member.*

42. Section 8 of the Code sets out in extensive detail the duties of private security providers to the public at large:

8 General obligations towards the public and the private security industry

- (1) A security service provider must at all times act in a manner which -*
- (a) does not threaten or harm the public or national interest;*
 - (b) promotes the stability of the private security industry;*
 - (c) promotes good discipline in the private security industry;*
 - (d) maintains and promotes the status of the occupation of security service provider; and*
 - (e) promotes efficiency in and responsibility with regard to the rendering of security services.*
- (2) A security service provider may not infringe any right of a person as provided for in the Bill of Rights and, without derogating from the generality of the foregoing -*
- (a) may not unfairly discriminate directly or indirectly against any person or unfairly deny any person equal service, employment or employment benefits on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; and*
 - (b) may not break open or enter premises, conduct a search, seize property, arrest, detain, restrain, interrogate, delay, threaten, injure or cause the death of any person, demand information or documentation from any person, or infringe the privacy of the communications of any person, unless such conduct is reasonably necessary in the circumstances and is permitted in terms of law.*
- (3) Every security service provider must endeavour to prevent crime, effectively protect persons and property and refrain from conducting himself or herself in a manner which will or may in any manner whatsoever further or encourage the commission of an offence or which may unlawfully endanger the safety or security of any person or property.*

- (4) *A security service provider may only use force when the use of force as well as the nature and extent thereof is reasonably necessary in the circumstances and is permitted in terms of law.*
- (5) *A security service provider may not hold himself or herself or any other security service provider out to any person as having any authority, power, status, capacity, level of training, accreditation, registration, qualification or experience which he or she or the other security service provider does not have.*
- (6) *A security service provider may only possess or carry a firearm, ammunition or a weapon, or possess or use any equipment, if such conduct is lawful.*
- (7) *A security service provider may only use a firearm in circumstances and in a manner permitted by law.*
- (8) *A security service provider may not act in any manner that threatens or poses an unreasonable risk to the public order or safety.*
- (9) *A security service provider must, when performing functions in a public place, do so with due regard to the safety, security and other rights of the members of the public who are present in such a place.*
- (10) *A security service provider may not through the medium of any other person or body, or by using such person or body as a front or nominee, do or attempt to do or achieve anything, which would not be permissible for him or her to do or to achieve, and no security service provider may allow himself or herself to be used as a front or nominee for such a purpose.*
- (11) *A security service provider must in practising this occupation, rendering a security service or carrying on business in the rendering of a security service, or when he or she is undergoing security training or assessment of security training, knowledge or skill, always act in an honest and trustworthy manner.*
- (12) *A security service provider rendering a security service -*

- (a) *must treat members of the public with whom he or she comes into contact with the respect and courtesy that is reasonable in the circumstances;*
 - (b) *may not incite, encourage or help any person to use force unlawfully or commit any unlawful act; and*
 - (c) *may not use abusive language or language which may be reasonably construed as the advocacy of hatred or contempt that is based on race, colour, ethnicity, sex, religion, language or belief.*
- (13) *A security service provider may not use or be under the influence of alcohol or a narcotic drug while rendering a security service.*
- (14) *Without derogating from any provision in this regulation, a security service provider may not intentionally commit a delict against any person while rendering a security service.*
- (15) *A security service provider may not unjustly cast reflection upon the honesty, professional reputation, skill, knowledge, quality of service, background or qualifications of any other security service provider, and, without derogating from the generality of the foregoing, may not intentionally or negligently disseminate false information concerning another security service provider or lay a false charge or make a false complaint against or concerning another security service provider.*
- (16) *A security service provider may not -*
 - (a) *in any unlawful manner infringe the goodwill of another security service provider, and, without derogating from the generality of the foregoing, may not make false statements regarding a security service provider, instigate a boycott against a security service provider, or unlawfully exercise physical or psychological pressure on clients, employees or suppliers of a security service provider;*
 - (b) *engage in an act of unlawful competition in competing with another security service provider, and, without derogating from the generality of the foregoing, may not mislead the public, copy the distinguishing signs or misappropriate the performance of another security service provider, exploit the*

reputation of another security service provider, unduly influence the public with regard to his or her own services, bribe an employee or agent of a client or potential client of another security service provider, obtain or use the trade secrets or confidential business information of another security service provider or compete with another security service provider in breach of a statutory or contractual obligation;

- (c) interfere with, hinder or obstruct another security service provider or his or her personnel in the rendering of a security service or the administration of his or her business affairs; or*
- (d) interfere with or tamper with the equipment, firearms, ammunition, or weapons used by another security service provider in the rendering of a security service, or intercept or interfere with the communications of another security service provider.*

43. Section 9 of the Code sets out the general duties of private security providers towards a client of such private security provider.

43.1. Section 9(3) of the Code limits the terms and conditions which can be contained in the contractual arrangement and specifically provides that such contract may not contain any term, condition or provision that -

- 43.1.1. *“Excludes, limits or purports to exclude or limit the legal liability of the security service provider towards the client in respect of any malicious, intentional, fraudulent, reckless or grossly negligent act of the security service provider, his or her security officers or other personnel, or any other person used by the security service provider or recommended by him or her to the client; or*
- 43.1.2. *Places a duty or purports to place a duty on the client to indemnify or compensate the security service provider or any other person in respect of any act referred to above by a person for whose conduct the client is not independently responsible in law;*
- 43.1.3. *Excludes or limits or purports to exclude or limit any duty on the security service provider in terms of the PSIRA or the Code or any right which a client has in terms of the PSIRA or the Code,*

or which constitutes or purports to constitute a waiver of any such right by the client; or

43.1.4. *Is prohibited in terms of any legislation dealing with unfair or unconscionable contractual provisions.”*

43.2. Section 9(5) of the Code requires that a security service provider must provide the security service that it is contracted to perform in accordance with the terms and conditions of the contract, the PSIRA and the Code; and must also provide the security service and perform any related function or work, with such a degree of skill, diligence and care which is expected of a reasonable, competent and qualified security service provider in the circumstances.

43.3. Section 9(8) of the Code provides that:

A security service provider must protect the rights and legally recognised interests of a client in a reasonable manner, in accordance with all applicable law and with due regard to the rights and legally recognised interests of all other parties concerned.

43.4. Section 9(9) of the Code provides that:

A security service provider may not in rendering a security service make any person available or use or permit the use of any firearm, ammunition, weapon or equipment if this exposes the client or any other person to any unlawful harm, or the unreasonable risk of unlawful harm, of which the security service provider is aware or should reasonably be aware.

The Regulation of the Police

44. The relevant parts of Section 13 of the SAPS Act make the following provisions:

Members

- (1) *Subject to the Constitution and with due regard to the fundamental rights of every person, a member [of the SAPS] may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.*
- (2).....
- (3) (a) *A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions perform such duties in a manner that is reasonable in the circumstances.*
 (b) *Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances.*

45. Section 9 of the RGA provides the following:

Powers of Police

- (1) *If a gathering or demonstration is to take place, whether or not in compliance with the provisions of this Act, a member of the Police -*
 - (a) *may, if he has reasonable grounds to believe that the Police will not be able to provide adequate protection for the people participating in such a gathering or demonstration, notify the convener and such people accordingly;*
 - (b) *may prevent people participating in a gathering from proceeding to a different place or deviating from the route specified in the relevant notice or any amendment thereof or from disobeying any condition to which the holding of the gathering is subject in terms of this Act;*
 - (c) *may, in the case of a responsible officer not receiving a notice in terms of section 3 (2) more than 48 hours before the gathering, restrict the gathering to a place, or guide the participants along a route, to ensure -*
 - (i) *that vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded; or*

- (ii) *an appropriate distance between participants in the gathering and rival gatherings; or*
 - (iii) *access to property and workplaces; or*
 - (iv) *the prevention of injury to persons or damage to property;*
 - (d) *may order any person or group of persons interfering or attempting to interfere with a gathering or demonstration to cease such conduct and to remain at a distance from such gathering or demonstration specified by him;*
 - (e) *may, when an incident, whether or not it results from the gathering or demonstration, causes or may cause persons to gather at any public place, by notice in a manner contemplated in section 4 (5) (a) specify an area considered by him to be necessary for -*
 - (i) *the movement and operation of emergency personnel and vehicles; or*
 - (ii) *the passage of a gathering or demonstration; or*
 - (iii) *the movement of traffic; or*
 - (iv) *the exclusion of the public from the vicinity; or*
 - (v) *the protection of property;*
 - (f) *shall take such steps, including negotiations with the relevant persons, as are in the circumstances reasonable and appropriate to protect persons and property, whether or not they are participating in the gathering or demonstration.*
- (2) (a) *In the circumstances contemplated in section 6 (6) or if a member of the Police of or above the rank of warrant officer has reasonable grounds to believe that danger to persons and property, as a result of the gathering or demonstration, cannot be averted by the steps referred to in subsection (1) if the gathering or demonstration proceeds, the Police or such member, as the case may be, may and only then, take the following steps:*
- (i) *Call upon the persons participating in the gathering or demonstration to disperse, and for that purpose he shall endeavour to obtain the attention of those persons by such lawful means as he deems most suitable, and then,*
 - (ii) *In a loud voice order them in at least two of the official languages and, if possible, in a language understood by*

the majority of the persons present, to disperse and to depart from the place of the gathering or demonstration within a time specified by him, which shall be reasonable.

- (b) If within the time so specified the persons gathered have not so dispersed or have made no preparations to disperse, such a member of the Police may order the members of the Police under his command to disperse the persons concerned and may for that purpose order the use of force, excluding the use of weapons likely to cause serious bodily injury or death.*
- (c) The degree of force, which may be so used, shall not be greater than is necessary for dispersing the persons gathered and shall be proportionate to the circumstances of the case and the object to be attained.*
- (d) If any person who participates in a gathering or demonstration or any person who hinders, obstructs or interferes with persons who participate in a gathering or demonstration -
 - (i) kills or seriously injures, or attempts to kill or seriously injure, or shows a manifest intention of killing or seriously injuring, any person; or*
 - (ii) destroys or does serious damage to, or attempts to destroy or to do serious damage to, or shows a manifest intention of destroying or doing serious damage to, any immovable property or movable property considered to be valuable, such a member of the Police of or above the rank of warrant officer may order the members of the Police under his command to take the necessary steps to prevent the action contemplated in subparagraphs (i) and (ii) and may for that purpose, if he finds other methods to be ineffective or inappropriate, order the use of force, including the use of firearms and other weapons.**
- (e) The degree of force which may be so used shall not be greater than is necessary for the prevention of the actions contemplated in subparagraphs (d) (i) and (ii), and the force shall be moderated and be proportionate to the circumstances of the case and the object to be attained.*

(3) No common law principles regarding self-defence, necessity and protection of property shall be affected by the provisions of this Act.

46. In addition, Standing Order (General) 262 on Crowd Management issued on 16 September 2004 by SAPS (the SO) provides that its purpose is to regulate crowd management during gatherings and demonstrations in accordance with the principles contemplated in the Constitution and with due regard for acceptable international standards.
47. Paragraph 1(3) of the SO provides that one of the duties of the police is to promote public safety and to adopt a proactive role in an attempt to defuse conflict before it escalates to the level of violence. In terms of paragraph 11(1) of the SO, the use of force must be avoided at all costs, and police members deployed for purposes of the operation in question must display the highest degree of tolerance. Paragraph 11(1) of the SO further stipulates that the use of force and the dispersal of crowds must be in compliance with the provisions of sections 9(1) and (2) of the RGA.
48. Paragraph 11(3) of the SO prescribes a list of requirements, which are to be followed by the police if the use of force becomes unavoidable. These include the following:
- 48.1. The degree of force must be proportional to the seriousness of the situation and the threat posed in terms of situational appropriateness;
- 48.2. The force is to be reasonable in the circumstances;
- 48.3. Minimum force must be used to accomplish the envisaged goal; and

48.4. The use of force is to be discontinued once the objective has been achieved.

UFS AS AN ORGAN OF STATE AND ITS LIABILITY

49. It is clear from previous court cases involving universities that as a higher education institute, UFS is an organ of state. To illustrate the point, in one of the cases the court stated:

49.1. *The respondent herein is a learning institution which has been established in terms of the Higher Education Act which provides for the establishment of all higher education institutions in the country. It follows that the respondent is an organ of state and therefore its actions and decisions are subject to review in terms of the Constitution.^{iv}*

49.2. *I am persuaded that all universities in South Africa are organs of state by virtue of the functions they perform. Tertiary education in South Africa is traditionally a government function. Schedule 4 Part A of the Constitution classifies tertiary education as a functional area of exclusive national legislative competence. To date there are no private universities in South Africa and all universities come into existence by virtue of legislation, which broadly defines their powers and functions. As such, universities exercise powers and perform functions normally associated with government.^v*

50. The common law established principles, holding that an occupier or person in charge of a premises can be vicariously liable to visitors and the like for the negligence of a security provider which it has hired:

[Para 8.2] As to the argument premised on the fact that the security personnel at the VIP entrance were employed by and worked for an independent contractor (APS) and that as a result, defendant could not be held vicariously liable, Mr. Haskins countered this argument by reference to the written security service agreement which was signed by defendant and the independent contractor.

The undisputed evidence of Hudson is that although there was no formal security service agreement with APS as at 21 June 2001, their contractual relationship and obligations were exactly the same as that entered into with Khulani Fidelity Services Group (Pty) Ltd (Khulani Security) which appears at page 18 of Exhibit A. Mr. Haskins submitted that in terms of this agreement, it is clear that the independent contractor operated under the direct supervision and approval of the defendant, to an extent that the security personnel can never be described as having been independent. For this submission Mr. Haskins relied primarily on Langley Fox Building Partnership (Pty) Ltd v De Valence 1991 (1) SA 1 (AD) and Midway Two Engineering & Constructions Services BK v Transnet BPK 1998 (3) SA 17 (SCA). I have found the following passage in Langley Fox (supra) at page 13 A -B to be apposite and illuminating:

It follows from the foregoing that the existence of a duty upon an employer of an independent contractor to take steps to prevent harm to members of the public will depend in each case upon the facts. It would be relevant to consider the nature of the danger; the context in which the danger may arise; the degree of expertise available to the employer and the independent contractor respectively; and the means available to the employer to avert the danger. This list is in no way intended to be comprehensive.

[8.3] *In response to the further submissions by Mr. Stais for the defendant that defendant did not owe plaintiff a duty of care in the circumstances, alternatively that the risk of the harm occurring to plaintiff was so remote that defendant, as a reasonable man (the so-called bonus paterfamilias) could not have and did not in fact foresee the harm which occurred, Mr. Haskins countered with reference to the recent case of Carmichele v Minister of Safety and Security & Another 2001 (1) SA 489 (SCA) page 494 C where the learned Vivier JA stated:*

The existence of the legal duty to avoid or prevent loss is a conclusion of law depending upon a consideration of all the circumstances of each particular case and on the interplay of many factors which have to be

considered. The issue, in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the court.

Based on the above dicta, I am of the view that, given the peculiar circumstances of this case, the defendant owed all the patrons, guests, invitees, casual visitors including employees and management at or inside the casino a duty of care. On the proven evidence, it is clear, in my view that the defendant failed to observe that duty of care. As to whether the risk of harm was reasonably foreseeable, it is clear on the evidence that such risk was clearly foreseeable to defendant. Evidently this is the reason why there were elaborate security measures put in place complimented by surveillance cameras which were placed at all strategic places to carefully monitor and control all activities within the casino.^{vi}

51. The above is arguably heightened in the case of an organ of state.

The State cannot abdicate its constitutional and other statutory obligations when it outsources certain functions to private parties and use that third party to shield itself from accountability.^{vii}

THE GENERAL DUTIES OF A PRIVATE SECURITY COMPANY

52. In reality, a PSC stands in much the same position as the security services when it renders security services to a client which, in this instance, is an organ of state.

The Supreme Court of Appeal in the matter of Private Security Industry Regulatory Authority & another v Association of Independent Contractors and another (127/2004) 2005 ZASCA 32; 2007 1 All SA 221 (SCA) (31 March 2005) stated:

[Para 1] *The private security industry has work for more people than the police and defence forces combined. The security officers who operate in the industry provide personal and property protection. They secure enjoyment of others' fundamental rights. In carrying out their functions they often wear uniforms, bear arms and are granted access to homes and other landed*

property. The legislature considered that in these circumstances it was necessary to regulate the industry to monitor security service providers. To ensure the integrity and reliability of their service it enacted the Private Security Industry Regulation Act 56 of 2001 (the Act) which requires security service providers to be registered.

53. In the matter of Bertie Van Zyl (Pty) Ltd & another v Minister for Safety and Security & others (CCT 77/08) 2009 ZACC 11; 2010 (2) SA 181 (CC) ;2009 (10) BCLR 978 (CC) (7 May 2009), the Constitutional Court stated:

[Para 35] *The sheer size of the private security industry, as well as the coercive power it wields during the regular conduct of its business, underscore the need for regulation and adherence to appropriate standards. Close control and management of this massive industry is imperative. This ensures a sound balance between complying with the rule of law on the one hand and exercising their coercive power in protecting the safety and security rights of the public, as well as those of members of the private security industry itself on the other. As Maya JA observed in Private Security Industry Regulatory Authority and Another v Anglo Platinum Management Services Ltd and Others:*

It is so that there is a legitimate and compelling public interest in the control of the large and enormously powerful private security industry. This is to ensure, for example, that security officers have no links to criminal activities, are properly trained and are subject to proper disciplinary and regulatory standards and avoid any abuses, which might be perpetrated by security officers against the vulnerable public. There is therefore a compelling need for vigilance on the [Private Security Industry Regulatory] Authority's part to ensure that the objects of the Act are not undermined.

[Para 64] *An important purpose of the Act is that private security services, including in-house security, act in terms of the relevant law and norms and standards in the Code.⁶¹ Whether they carry arms or not, private security service providers exercise coercive power, authority and control. To ensure that the public is safeguarded against undue exercise of authority and abuse of power, it is important that the private security industry be regulated and subjected to the discipline and standards of the Code. As security service providers, in-house security personnel are no different. They too exercise authority, control and coercive power. The need for scrutiny invariably arises to ensure that in-house security personnel observe the law and act in a manner consistent with related rights. Against the backdrop sketched above, it is necessary and therefore reasonable that in-house security personnel be subject to the Code. In that regard, the ambit of the Code is not too wide and the inclusion of in-house security for regulation has a rational connection with the legitimate purpose of the Act.*

54. In the matter of Union of Refugee Women and others v Director, Private Security Industry Regulatory Authority & others (CCT 39/06) 2006 ZACC 23; 2007 (4) BCLR 339 (CC) ; 2007 28 ILJ 537 (CC) (12 December 2006), the Constitutional Court further stated:

[Para 37] *The private security industry is a very particular environment. At stake is the safety and security of the public at large. Section 12 of the Constitution guarantees everyone the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. In a society marred by violent crime, the importance of protecting this right cannot be overstated.*

55. In another decision, Loureiro & others v Imvula Quality Protection (Pty) Ltd (CCT 40/13) 2014 ZACC 4; 2014 (5) BCLR 511 (CC); 2014 (3) SA 394 (CC) (20 March 2014), the Constitutional Court stated:

[Para 3] *The South African Police Service is not always perceived to be capable of meeting its constitutional mandate. Hence, the private security industry is a large and powerful feature of South Africa's crime-control terrain. While it should and could not be a substitute for state services, it fulfils functions that once fell within the exclusive domain of the police. This is in part because of our history. From the late 1970s and throughout the 1980s the apartheid regime concentrated policing activities on state security and maintaining political control, and so the private security industry increasingly played a role in protecting private individuals' safety and security.*

[Para 4] *The industry continues to do so. It is suggested to have been the fastest-growing South African industry since the early 1990s. Indeed, security officers employed in the private industry greatly outnumber the members of the South African Police Service. Many of those with the resources to do so turn to the private security industry for the protection of their rights. The Loureiro family, the applicants, did just that.*

56. In the same matter of Loureiro & others v Imvula Quality Protection (Pty) Ltd (CCT 40/13) 2014 ZACC 4; 2014 (5) BCLR 511 (CC); 2014 (3) SA 394 (CC) (20 March 2014), the Constitutional Court also highlighted various public policy considerations for the imposition of direct liability on a security provider who acts negligently:

[Para 56] *There are ample public-policy reasons in favour of imposing liability. The constitutional rights to personal safety and protection from theft of or damage to one's property are compelling normative considerations. There is a great public interest in making sure that private security companies and their guards, in assuming the role of crime prevention for remuneration, succeed in thwarting avoidable harm. If they are too easily insulated from claims for these harms because of mistakes on their side, they would have little incentive to conduct themselves in a way that avoids causing harm. And policy objectives (such as the deterrent effect of liability) underpin one of the purposes of imposing*

delictual liability.[52] The convictions of the community as to policy and law clearly motivate for liability to be imposed.

57. Moreover, the recent decision in Malesela Taihan Electric Cable (Pty) Ltd v Fidelity Security Services (Pty) Ltd (17193/2014) [2017] ZAGPJHC 341 (18 April 2017) also holds that the PSIRA and the Code create directly enforceable rights against a PSC by a client of the security provider. The court specifically stated:

[Para 46] The private security industry is extensively involved in crime prevention in this country; in protecting people's safety and security and their property from theft or damage. The private security industry, as it was held in Loureia, 'fulfils functions that once fell within the exclusive domain of the police'. The adequate protection of the constitutionally entrenched rights to life and security of the person as well as the right not to be deprived of property, is fundamental to the well-being and to the social and economic development of every person.

[Para 53] An interpretation that the legislative intent is not invalidity, would detract from the adequate protection and safeguarding of the fundamental rights to life and security of persons and the right not to be deprived of their property. On the contrary, it would permit the security service providers, who are employed for reward, to infringe those fundamental rights, through their own intentional and grossly negligent acts or those of their security guards, without civil liability. That would undermine the purpose of the legislation, several of the objects of the regulatory authority, and it would undermine both the trustworthiness and legitimacy of the private security industry. Security service providers would be disincentivized from undertaking proper screening and exercising proper control of their security guards. The users of security services would be exposed to a situation where those who protect them for reward, might, without civil liability, cause them harm. The purpose of sub-regulation 9(3)(d), on a proper construction of the Act, is not sufficiently served by the penalties prescribed for improper conduct.

THE USE OF FORCE

58. A careful review of case law demonstrates a strong emphasis on 'proportionality', between the 'need' to control a situation and the 'means' used, and its 'necessity' to protect life and/or property.

59. The recent decision in Mandhlaami v Minister of Police (7279/2013) 2017 ZAWCHC 33 (29 March 2017) deals extensively with the use of force by police in the context of a protest.

59.1. The court dealt with self-defence as a reason and stated:

[Para 69] It could not be suggested in the circumstances that prevailed that armed police officers clad in protective riot gear (including helmets) were confronted with such immediate danger that the only option open to them was to discharge rubber bullets at the attackers. It was, for instance, open to the police to turn on their heels and leave the area, thereby reducing the level of personal risk immediately. In fact, as I have said, the video footage shows them retreating behind the police vehicles and under the footbridge.

59.2. The court, however, found that the use of force was necessary and thus upheld the defence of 'necessity'.^{viii}

60. However, as the above case was quite fact-specific, a brief review of these concepts would be instructive.

61. In the matter of S v Makwanyane & another, 1995 (3) SA 391 (CC), at footnote 166, the Constitutional Court stated that:

Self-defence is treated in our law as a species of private defence. It is not necessary for the purposes of this judgment to examine the limits of private defence. Until now, our law has allowed killing in defence of life, but also has allowed killing in defence of property, or other legitimate interest, in circumstances where it is reasonable and necessary to do so. Cf Ex parte Minister of Justice: In re S v Van Wyk 1967 (1) SA 488 (A). Whether this is consistent with the values of our new legal order is not a matter, which arises for consideration in the present case. What is material is that the law applies a proportionality test, weighing the interest protected against the interest of the wrongdoer. These interests must now be weighed in the light of the Constitution.

62. The decision in Ntamo & others v Minister of Safety and Security 2001 (1) SA 830 ((Tk HC) (paras 21 to 24) confirms that in deciding whether the use of force was the only or least dangerous means of avoiding the danger, one must have regard not only to the events immediately preceding the use of force by the defender but also to the question as to whether some other form of intervention was available to the defender at an earlier stage.
63. In general, where the use of force is proven, the onus shifts to the one using force to demonstrate its lawfulness. In the context of a protest, regard must be given to the possibility, for instance, that innocent bystanders may be harmed by the use of force.^{ix}
64. It should also be borne in mind that an unauthorised protest or the like is not automatically deemed to be 'violent' and, thus, does not always justify dispersal, let alone the use of force.^x
65. Moreover, it has always been trite law that even if force is justified, it must be limited to what is strictly necessary in the circumstances.^{xi}

66. It is accordingly against the above backdrop that the conduct of the parties involved must be analysed and considered.

ANALYSIS

67. There is widespread recognition across various sectors of the university community that it is undesirable to have PSCs and police on campus when legitimate protests take place.
68. The events that unfolded during the period under review, and particularly the way in which they were managed, caused a lot of distrust. It also raised questions of fairness and justice.
69. The altercations between the students and the PSCs and police contained elements of disproportionate violence that pose grave concerns for the culture of protest, debate and levels of tolerance on campus. Indeed, the democratic space, which is so vital for a thriving and transformative university, was severely impacted by the escalation of security services.
70. The escalation of security services in itself was not the issue in question but the manner in which certain actions were executed and the disdainful conduct of the security personnel towards the students.
71. The narrative paints a picture of students under extreme attack and in pain and shock after the PSCs and the police were 'let loose' on them. There is evidence of severe trauma amongst the students and the staff who were interviewed. They were courageous to come forward and speak to the panel, and no doubt it was not

easy for them to do so. The psychologist on the Qwaqwa campus confirmed what the panel suspected, that everyone, including those students and staff who were not part of the protests and especially the first year students, suffered trauma and struggled to cope after the events that took place.

72. This trauma was compounded by the curfews imposed by the PSCs and police on students living in the residences during the period under review. They were reportedly not allowed to leave their rooms to use the toilet.
73. The counselling sessions that UFS subsequently arranged, (which in some instances were offered in 20-minute intervals), were viewed by most as a 'witch hunt', 'information gathering' and 'cover up' exercises. This was complicated by the fact that the students complained they were given very little opportunity to speak.
74. Further the panel heard evidence that the counsellors on the Qwaqwa campus created confusion about their role by performing administrative functions to determine whether the students could or could not sit for exams, rather than providing focused trauma counseling to the students who were desperately in need of it at the time.
75. While this may not be problematic under normal circumstances, within the context of the protests and the immediate aftermath this resulted in a sense of bewilderment and alienation at best, and caused further secondary trauma at worst amongst many of the students who sought assistance.

76. The counselling sessions were reportedly recorded, and students who attended reported that they did not feel as if it was a safe space to speak about their trauma.
77. Therefore, the evidence regarding the quality of psychological services that were rendered on both campuses indicated there were serious shortcomings, which need to be addressed especially for those who were traumatised and desperately in need of assistance following the protest action and the interventions of the PSC personnel and the police.
78. It is fair to conclude from the interviews that the counselling sessions did nothing to allay the fears of the students who were traumatised and needed space to be debriefed after witnessing horrific scenes of PSC actions and police brutality.
79. For many, the UFS interventions that were arranged did not help the affected students much particularly because there was also a racial dynamic that played out during the counselling sessions that made many of them visibly uncomfortable.
80. For instance, one student related that in her opinion the language issues and the manner in which black non-Afrikaans speaking students were treated constituted the crux of the underlying tensions at the UFS. She explained that she was experiencing ongoing trauma associated with being at UFS, and this was compounded whenever she encountered the security personnel and police.
81. The post-traumatic stress experienced by the students and staff seems to be ongoing. One student who was arrested spoke of her challenges with falling

asleep, her dependence on medication, her inability to study and the expectation held by her family that she should go for a customary 'cleansing ceremony' in order to heal properly.

82. Many students that were beaten, arrested and abused by the security personnel, and did not get proper psychological treatment, were reportedly also subjected to swift punishment by the UFS. While they complained of being subjected to disciplinary proceedings and being suspended, they also stated that none of their complaints were addressed.
83. The panel is left without any doubt that remedial action is necessary to promote a more tolerant democratic space at UFS where the rights of everyone are respected, protected and fulfilled.

Chronology of Events^{xii}

Bloemfontein Campus

84. According to the factual matrix that emerged during the investigation, on Tuesday, 17 October 2017, the student leadership met with the university management to discuss their demands on *inter alia* the fees increase in 2018 and the concern that the impending exams were too congested.
85. Although no written agreement was concluded, the student leadership understood that an agreement was reached that fees would not be increased and that certain conditions would be implemented.

86. When the SRC convened a mass meeting on Wednesday, 18 October 2017 to give the student cohort feedback on the meeting, the protests commenced in earnest. The students proceeded to shut down the library. The students were dispersed with stun grenades, although there is no evidence of any provocation or threat to warrant such action.
87. On Thursday, 19 October 2017, the student leadership compiled a memorandum of demands and handed it to the university management at 12 pm. These demands related to issues of access to the university, financial constraints, safety concerns for the students, the postponement of exams by a week and no fee increment for 2018. The student leaders expected to receive the university management's response by 12 pm on Friday, 20 October 2017.
88. Protesting students proceeded to the main building to disrupt a CTA examination there. However, officers from CPS arrived at the venue, and the exam was written successfully.
89. In an isolated incident, there was an altercation with the Dean of Economics, Professor Kroucamp. He confronted the protesting students who were moving on an exam venue, and one protesting student released a fire extinguisher in his face, causing him to be injured.
90. Sometime on Thursday, 19 October 2017 - we were not told precisely when this occurred - the Flippie Groenewald lecture room was set alight.

91. Notably, in the communiqué from the SRC president, Asive Dlanjwa, and SRC secretary, Siphokazi Tyida, issued on Thursday, 19 October 2017 informing the student cohort of their recent actions and the memorandum of demands, they pledged a commitment to supporting the student struggles and denounced incidents of violence as criminal behaviour.
92. At approximately 8 am on Friday, 20 October 2017, four students were arrested, and this prompted the resumption of the protests from about 9 am. The reason for the arrests is unclear, but in the narrative that the panel was given, there is no evidence of any provocation or threat to warrant such drastic action.
93. The protests continued for most of the day and culminated in the late afternoon when the CPS escalated the security services and deployed Mafoko Security Patrols (Pty) Ltd and the SAPS. The protesting students had moved towards the main building after hearing that no concrete agreement had been reached with the UFS management. As they marched towards the Callie Human Building, they were confronted by the PSC and SAPS and given five minutes to disperse, ostensibly because the gathering was in breach of an interdict. They were effectively dispersed through the use of stun grenades and rubber bullets.
94. Many protesting students as well as innocent bystanders were arrested – 37 students in total. They were kept in custody in a holding cell on campus before being taken to the police station where they were charged.
95. The PSC and the SAPS then appeared to go on the offensive and began hunting down fleeing students, in the gym locker room and bathrooms and the residences,

all the while shooting rubber bullets and using pepper spray on the students. In the pandemonium that ensued, many students were injured, and there are reports that security officers from the PSC shot rubber bullets at students inside the residences, damaging a trophy cabinet and glass doors in the process.

96. At approximately 4 pm, a further group of four students were arrested.
97. At approximately 7 pm, all the arrested students were taken to Bainsvlei and Parkweg police stations.
98. Once again, in the narrative that emerges during the investigation, there is no evidence of any provocation or threat to warrant such actions.
99. On the morning of Saturday, 21 October 2017, the SRC president, Asive Dlanjwa, met with the vice chancellor and rector, Professor Petersen, to discuss the letter from the dean of students to the investigating officers requesting the release of the students.
100. The students were held over the weekend and eventually released on bail on Monday, 23 October 2017.

Qwaqwa Campus

101. The narrative that emerged from the Qwaqwa campus indicates that the protests commenced on Thursday, 19 October 2017 and that the PSC Zero Tolerance (Pty) Ltd had already been deployed on campus the day before at approximately 5 pm.

102. The students gathered from approximately 10 am in the parking areas and started throwing stones at the PSC. The protests ended on the day when the SAPS were deployed and effectively dispersed the crowds using stun grenades and tear gas and shooting rubber bullets. After the SAPS withdrew for the day, the PSC returned to the campus that evening with two guard dogs. They were told by the students and the UFS management to remove the dogs from campus.
103. That evening, from approximately 7:30 pm, the students gathered to protest, and the situation escalated rapidly, becoming violent when the students attacked security officers from the PSC using jojos and burned a mobile tuck shop located near the residences. There are also reports of an attempt to burn the main building and that the attempt was thwarted by the CPS.
104. One student was reportedly injured as a result of the use of teargas. She complained of collapsing when teargas was shot into the police van in which she was held. She was unable to breathe and became hysterical. A nursing sister, Sister Mathabelo Moloi from the campus Health and Wellness Centre, helped to revive and stabilise the student.
105. On Friday, 20 October 2017, at approximately 3 am, seven students were arrested, and later that morning, the protests resumed on campus. Another female student was injured on the upper lip and received treatment at the campus Health and Wellness Centre from Sister Moloi. She referred the student to hospital and later reported how the student's parents confronted her angrily wanting to sue the UFS.

106. The panel also discovered perchance, while speaking to Sister Moloi, that another student had been shot in the eye on 20 October 2017 and was admitted to the Bloemfontein Netcare Hospital.
107. On the evening of Saturday, 21 October 2017, at approximately 11.15 pm, students resumed the protest, and the situation escalated rapidly once again with students attacking the PSC, burning jojos, mattresses and dustbins on campus.
108. On Sunday, 22 October 2017, in the early hours of the morning, between mid night and 1.30 am – the exact time is unknown – two male students, Xolani Dlamini and Mpho Radebe, were shot with live ammunition and severely injured. There is no evidence in the narrative that there was any provocation or threat to warrant such action. It is of grave concern that live ammunition was used in a situation that did not appear violent at the time.
109. After hearing this, Sister Moloi went to the hospital to check on the students and discovered that one of the students who had been shot with live ammunition through the chest, Mpho Radebe, had been transferred to the Bosamed Private Hospital at the UFS's expense. He stayed in hospital for one day before leaving with his parents.
110. Sister Moloi reported that she only saw Xolani Dlamini, also shot with live ammunition in his arm, when he came to have the stitches in his arm removed on 13 November 2017.

111. When the shooting incident occurred, the SAPS had reportedly withdrawn from the campus at that stage, and only the PSC was there with a few security officers from the CPS.
112. There are unconfirmed reports that the shooter had dreadlocks. Mr Molefe confirmed that there were two security officers with the PSC who had dreadlocks. This aspect needs to be investigated further, and the criminal justice process must be pursued in earnest.
113. The SAPS arrived on campus at approximately 2.30 am to investigate the shootings. They instructed the PSC to guard the buildings, including the chemistry lab, Mandela Hall, library, and other buildings.
114. Three students were reportedly arrested during this period.
115. It is necessary to analyse and discuss some key thematic questions arising from these events:

Decision to Call Private Security

Bloemfontein Campus

116. On Wednesday, 18 October 2017, the student leadership on the Bloemfontein campus mobilised students in protest, demanding that the exams be postponed and a zero increase in fees for the following academic year.
117. Interviewees and participants from the SRC on the Bloemfontein campus painted a picture of a peaceful, organised and managed protest action. However, there are clear indications from the various anecdotal reports received that soon after it

started, the protest lacked proper management and coordination. By approximately 10 o' clock that morning, the student leadership had effectively lost any semblance of control.

118. A particular concern, which emanated from a number of anecdotal reports, is that various individuals who were not part of the university community and had no legitimate reason to be there had infiltrated the protest on the Bloemfontein campus and were causing havoc.
119. UFS management and CPS personnel reported that during the protests certain buildings were set alight, a lecturer was sprayed with a fire extinguisher, tests were disrupted, and innocent bystanders and those unwilling to join the protest action were intimidated and harassed.
120. It would appear that the UFS management and CPS personnel were caught unaware as there seemed to be no indication that the situation would deteriorate so rapidly; hence, they decided to deploy the PSC Mafoko Security.
121. The panel finds on the basis of the facts accumulated that the protest was no longer peaceful and there were legitimate concerns for the safety and security of students, staff and property on the Bloemfontein campus.
122. Since the CPS had no capacity internally, the situation warranted some form of external intervention, failing which more damage to university property and further injuries to students and staff would potentially have been caused, with catastrophic consequences for the UFS community.

Qwaqwa Campus

123. On the Qwaqwa campus, the protest commenced on the evening of Thursday, 19 October 2017 for similar reasons as that on the Bloemfontein campus (ie the demand to move the exams and no fees increase for 2018).
124. There were well-grounded fears amongst the UFS management that protesters would loot the dining hall and attempt to destroy buildings, particularly the library, as they had done so during previous protests. The PSC Zero Tolerance had already been deployed the day before (ie Wednesday, 18 October 2017 at approximately 5 pm.).
125. On the morning of Friday, 20 October 2017, the protesters had barricaded the main entrance to the campus and were refusing to let staff and other students who were not part of the protest to enter the campus. There are reports and CCTV footage which indicate that the protesting students were militant and used stones to attack the CPS and private security personnel.
126. The panel finds that on the basis of the anecdotal reports and CCTV footage, the decision to escalate the security services on the Qwaqwa campus was warranted after the UFS management and CPS personnel were unable to restore peace and stability to the campus and there were genuine concerns about threats of violence, violence (ie stone throwing), abuse, intimidation and harassment of students and staff and damage to property.

Deployment of Security Personnel

127. The panel was informed that the security protocols at UFS provided a clear delegation of authority between the three arms of security, namely CPS, PSC and police, and that they are meant to be progressively deployed as the situation escalated.
128. However, this seemed not to be the case during the period under review, and decision making on the escalation of security services was wholly subjective and almost arbitrary.
129. The investigation/review revealed that the relationship and cooperation between the CPS, PSCs and the police appeared to be haphazard and uncoordinated. There was insufficient clarity as to when and how the CPS escalated the security services to the PSCs and, in turn, how the PSCs escalated the security services to the SAPS.
130. The lines of accountability became even more blurred by the presence of the police, as part of the Joint Operations Centre (JOC), located in the same building as the CPS on the Bloemfontein campus.
131. The private security personnel reported that they arrested students on instructions from the CPS and police.
132. Whilst the security personnel that were interviewed claimed they were briefed before moving out to confront the protesters, the briefings did not seem to be adequate.

133. The narrative that emerges from the investigation paints a picture of private security personnel and police who were ill-informed about what to expect on the ground and who were operating on the basis of fear.
134. The reports of private security personnel using rubber bullets, stun grenades and teargas as well as wearing balaclavas and bringing dogs and live ammunition (on Qwaqwa campus) without informing CPS or, for that matter, UFS management, gave the panel the distinct impression that they were more worried about their own safety than about restoring peace or securing the safety of the institution.
135. The result is that the security personnel and police that were deployed during the period under review lacked any cohesion and efficiency in restoring peace and stability.
136. The panel also heard that the moment the police became involved, they refused to negotiate or speak with the students. In addition, there appeared to be some concerns that UFS kept changing PSCs, making it difficult for the student leaders to establish a relationship and open lines of communication with them.
137. It was notable that in these circumstances, the students reacted violently in response to the apparent failure to engage the heavy-handedness of the security personnel and the police. This aggravation and the students' response were reportedly made worse by the pattern of mocking of the students and the use of profane and vulgar language by the security personnel and police. For instance, in addition to a pattern of collective punishment and arbitrary arrests, security

personnel were reportedly seen taunting students and saying things like, 'I will hand you your mother's vagina to wear as a hat'.

138. Upon review, there appears to be an appreciation by all the security personnel that an integrated protocol is required so that the CPS, PSC and the police can work together to manage protests at UFS. Although no protocol had yet been finalised, it was reported that meetings were being held under the banner of the Campus Protection Society of Southern Africa (Camprosa) forum.

PSCs' Compliance with UFS Protocols

139. Although it was reported that the PSCs were given instructions on what they could and could not do, the panel was not able to establish in clear terms precisely what protocols were issued to the PSCs on the two campuses and whether it was done verbally or in writing after the decision was made to escalate the security services.
140. The anecdotal reports indicate that the PSCs' protocols were also wholly ineffective during the period under review. In the heat of the moment, various security measures were deployed that did not seem consistent even with the PSCs' own protocols. The PSC managers conceded during the investigation that individual security personnel had acted outside the scope of what they were permitted to do.
141. With the police and the PSC leading the security services on the Bloemfontein campus and the PSC almost completely in control on the Qwaqwa campus, there is sufficient anecdotal evidence to indicate that they exercised too wide a

discretion, imposed an excessive amount of force when the situation did not warrant it and violated the rights of students.

142. When the panel asked the commander in charge of the PSC unit that was deployed on the day, as well as other security personnel who had been named by students as having perpetrated violence against them, to provide a list of the security equipment they used, the list changed depending on who we were speaking to.
143. Balaclavas, dogs and live ammunition were never mentioned as part of the list of security equipment.
144. Dogs were clearly a feature on the Qwaqwa campus, and the reasons they were brought on campus by Zero Tolerance also seemed to change from one security officer to another.
145. When viewing the CCTV footage of their colleagues shooting at students with live ammunition on the Qwaqwa campus, the management of Zero Tolerance acknowledged that the shooter came from them but said that they did not instruct any of their personnel to bring guns on campus as it was not their policy to do so.
146. At the Bloemfontein campus, some students and staff were adamant that they had seen security personnel from Mafoko wearing balaclavas. Notably, the management of Mafoko appeared reluctant to share the names of the culprits although the panel was informed that disciplinary action was taken against the culprits. However, the sanctions imposed on them did not seem to correlate with the severity of the offences. There did not seem to be an appreciation that by not

observing their own protocols, the security personnel put both their lives and the lives of students and faculty members in danger and violated various human rights.

147. In the end, the UFS management stated that the apparent cause for the 'termination' of the PSCs was that the security personnel went beyond what they were permitted to do.

Was the Conduct of the PSCs Reasonable?

148. The security personnel on both campuses appeared to be performing law enforcement functions and were involved in crowd control activities (which are normally performed by a specially trained division with the SAPS).

149. Whilst the situation must have appeared very frightening for the security personnel, particularly when students went into an offensive mode and started targeting them personally, the actions of the security personnel came across as heavy-handed and far beyond what one would expect from people who claimed they had received training in crowd control.

150. There are reports that the security personnel imposed an informal curfew on the campuses and that they stopped and pointed their weapons at students conducting everyday errands like purchasing groceries.

151. It appears from the outset that the officers were operating on the basis of fear and that they had little understanding of the context in which they were operating.

152. The CCTV footage of the Qwaqwa campus revealed that the confrontation between the PSC and students on the night of 20 October 2017 quickly deteriorated into mini warfare. The panel was informed by the CPS at Qwaqwa campus that the students there are known for putting up a good fight during protests.
153. It is not, however, clear whether the Zero Tolerance security personnel were briefed sufficiently and adequately prepared; hence, they felt they had to raise the ante with an excessive use of force in order to show that they were in control.
154. What is worrisome is that one of the security personnel interviewed stated that they were instructed on arrival in Bloemfontein to arrest students. This statement did not seem to have a particular context; however, there is evidence from numerous sources about collective punishment of black students on campus regardless of whether they were protesting or not, let alone behaving in a violent manner towards the security personnel for whatever reason. The same could not be said of the white students on campus.
155. One student explained to the panel that she was simply observing the protests and was sitting down with her hands raised in surrender when two private security personnel came to her and picked her up; in the process, she was abused and 'manhandled' and then put in a police van. She stated that the security personnel took the student cards of those students that were put in the police van and wrote down their personal information. She was subsequently arrested.

156. Given that the arrested students were to be handed over to the police, one wonders about the power dynamics that were at play as the security tried (probably unconsciously) to prove that they too were tough and could quell the aggression from the students. Unfortunately, in such a situation, respect for human rights and reason is abandoned as everybody tries desperately to fight for survival.
157. In the circumstances, the panel finds that the conduct of the PSCs on both campuses was unreasonable and irrational at times when cool heads were needed and clear protocols ought to have been followed.

Use of Force and Whether This Was Warranted

158. There is no doubt from the submissions given that security personnel and police used extreme levels of force on both campuses, and in many cases, there is evidence of the arbitrary use of force against protesters, innocent bystanders and non-protesting students.
159. The fact that women were dragged out of gyms and some students were arrested in their dorms indicates that the security personnel and police that were deployed on both campuses operated beyond what one would expect of people who are trained and disciplined.
160. One UFS employee reported that he was walking peacefully with a group of students across an open patch of ground when a military style vehicle driven by security personnel stopped near them and they were surrounded, beaten up

violently and then arrested. A student who tried to take a video clip of the incident had his phone removed.

161. In the narrative that emerges, it is noteworthy that security personnel and police used stun grenades and shot rubber bullets at students who were dispersing, and at times when students were singing and walking peacefully and no damage to property was being caused at all.
162. There is anecdotal evidence that students who were merely moving from one residence to another were arbitrarily arrested without evidence of any wrongdoing.
163. The panel heard reports of security personnel and police firing rubber bullets, teargas, pepper spray and stun grenades at the residences even though there were no protests at the time.
164. Even if one could remotely appreciate why the security personnel and police felt compelled to shoot stun grenades and rubber bullets to disperse or disrupt the students marching and singing peacefully, it is wholly unreasonable and unacceptable that they hunted out the students who had retreated into the safety of various buildings and that stun grenades and rubber bullets were shot into the closed and confined buildings.
165. In these circumstances, the panel concludes that the use of force was unwarranted and resulted in the violation of various human rights.

Racial Barriers

166. One of the female students who were arrested observed that the security personnel and police used Afrikaans as a means of creating racial barriers.

167. Other students who were similarly arrested while using the gym observed that when the police charged into the gym and started shooting rubber bullets, a noticeable effort was made to separate the white students from the black female students.
168. It was also noticeable that indiscriminate arrests were made and force was used against the black female students, and when questioned about this, the police simply responded that they were acting on orders and thus were not exercising individual discretion whether to arrest a specific student on the basis of wrongdoing.
169. The panel heard how the PSCs and police on the Qwaqwa campus tended to be more heavy-handed towards the students there because they came from poor black families and communities.
170. Another student stated that from his perspective it was apparent that the curfew imposed by the security personnel on the Bloemfontein campus was primarily enforced against the black students. Many black students spoke about being forced into the residence and then compelled to remain inside and denied freedom of movement.
171. The PSC managers on the Bloemfontein campus denied that they were given instructions to arrest only black students. However, this does not detract from the perceptions that were created as a result of the manner in which security personnel conducted themselves and de facto isolated the black students.

172. It is noteworthy that not a single white female student was arrested during the period under review despite the reports that there were white female students in proximity to the protests and the places where the black students were indiscriminately arrested.

173. The panel finds that the conduct of the security personnel and the police created, at a minimum, the perception of racial bias and, at worst, the systematic targeting of black students for arrest.

Use of PSCs for Guarding Property and Monitoring Protests, Demonstrations and Pickets

174. The distinction between the use of PSCs for purposes of (a) guarding property and (b) monitoring protests, demonstrations and pickets emerged unambiguously during the investigation/review.

175. Nothing contentious was said about the use of PSCs for guarding property. However, the panel uncovered a spectrum of views on whether or not the UFS should use PSCs when protests, demonstrations and pickets take place on campus.

176. In the panel's view, there is a fine line between using PSCs for the guarding of property and for monitoring protests, demonstrations and pickets, particularly in the context where there is always the potential for escalation of a dispute into a full blown conflict situation and where proactive security services may be warranted.

177. The panel recognises that protests, demonstrations and pickets by their very nature are fluid, volatile and dynamic and is therefore inclined to support the view

of those in favour of using PSCs, strictly as a last resort, with specific measures to determine if any escalation in security services is warranted.

178. Since there is currently no policy to regulate the conduct of PSCs at UFS, there must be a focus on developing and implementing an effective policy, which considers various activities such as protests, demonstrations and pickets and the specific functions that PSCs perform for the UFS across the entire university system.
179. The UFS must of necessity also develop clear and unambiguous guidelines to support the policy. These guidelines would need to provide a clear methodology for all the practical measures that warrant an escalation in security services, as well as monitoring and supervision thereof.
180. The policy and guidelines would need to be developed and adopted through a university-wide public participatory process, since it would provide:
 - 180.1. A set of uniform rules across the university system; with
 - 180.2. Procedures and mechanisms of accountability; as well as
 - 180.3. The exchange of information between and across various departments that would use the PSCs.
181. The guidelines should clarify the chain of accountability and ensure that the deputy vice-chancellor and vice-rector responsible for safety and security at UFS approve the use of PSCs in general.

182. Ultimately, responsibility for authorising the use of PSCs for purposes other than guarding property, and particularly in respect of protests, demonstrations and pickets, lies with the vice-chancellor and rector of the UFS.
183. Importantly, the guidelines would increase transparency and provide clarity in the use of PSCs across the entire university system, including the various departments and programmes that must be notified when any part of the university seeks to hire PSCs.
184. Apart from receiving the anecdotal reports from interviewees and participants in the investigation/review that the decision-making processes lacked any objective and clear application of appropriate criteria for the escalation of security services from CPS to the PSC and then to the SAPS on the two campuses and that the PSCs that were deployed were not adequately skilled or equipped to deal with protests, demonstrations and pickets at the UFS, the panel was unable with the limited time available to do a complete evaluation of negative impacts of the use of PSCs on the two campuses during the period under review.
185. In the panel's view, the guidelines require an evaluation of the potential negative effects of the use of PSCs for protests, demonstrations and pickets across the university system.
186. Nevertheless, sufficient factual information emerged during the investigation/review to indicate the following:

- 186.1. There were shortcomings in applying the principle of 'last resort' and in the application of appropriate criteria coupled with acceptable reasons before deploying PSCs and for purposes of monitoring protests, demonstrations and pickets during the period under review.
 - 186.2. The UFS officials and CPS relied too heavily on self-reporting from the PSCs that were deployed during the period under review.
 - 186.3. There were a number of excesses in the conduct of the PSCs on both campuses during the period under review, and in some cases, an excessive use of force, which resulted in rights violations and severe injuries to protesting students, bystanders and innocent students and staff.
187. The panel is of the view that the guidelines, and particularly the principle of using PSCs as a last resort to carry out security functions related to protests, demonstrations and pickets, are not just technical or administrative issues but are profoundly political in nature and require the following measures to ensure that personnel and PSCs with dubious records, skills, experience and capacity are effectively screened out:
- 187.1. An oversight mechanism to ensure compliance;
 - 187.2. A proper selection process; and
 - 187.3. Adequate screening and vetting processes;
 - 187.4. Appropriate remedial action when breaches and excesses occur; and

- 187.5. Personnel training and capacity building
188. The UFS has to ensure prior to contracting with the PSCs that they have established specialist units with the requisite experience, expertise and skills capable of providing functional security services in the context of protests, demonstrations and pickets.

General Remarks on the Use of Security Services During Protests

189. There are also certain additional points to consider in the South African context, and specifically, in the context of the involvement of SAPS and PSC at universities:

189.1. Firstly, as has already been stated, criminal and disciplinary sanctions should be used as a last resort. Thus, if the UFS recognises a fundamental right to protest in a peaceful manner, they will likewise recognise that not every demonstration requires a law enforcement response. This is so that even if some disruption is caused because, as noted earlier, some disruption will no doubt occur at any protest on a heated issue and it is only where such disruption is 'unreasonable' in all the circumstances, that restrictions should be considered.

189.2. However, even an 'unreasonable' disruption does not automatically make an entire group of students collectively liable. Thus, as noted earlier, attempts to liaise and coordinate with student leaders should be attempted first before resorting to any physical means of shutting down a protest.

189.3. There is also a fundamental problem with mass arrest and detention processes, for instance, where students are collectively detained, simply for being involved in a protest that may have some violent or disruptive elements. Indeed, it is well-recognised in South African law that reasonable grounds to believe a person has committed an offence is a necessary element to carry out an arrest.^{xiii}

189.4. Consideration has also been given in other jurisdictions to mass arrests without independent evidence of wrongdoing by any specific person involved in a protest.^{xiv}

189.5. The above has also been noted in the university context, where significant opposition has arisen to the notion of collective punishment of students for misbehaviour by one member of a group.^{xv}

189.6. However, it should also be noted that where a demonstration becomes unlawful, because of, for instance, a violation of a statute or breach of an interdict, the police may have the power to demand the dispersal of students. This power in itself is strictly regulated by the Constitution, legislation and policy.^{xvi}

189.6.1. There may be situations, however, where there is no effective means to prevent an unlawful demonstration, but to arrest all of those engaging in such protest.^{xvii}

189.6.2. However, there are some important limitations on the above:

189.6.2.1. The first is the implicit indication that the demonstration was unlawful in that it was validly prohibited due to compelling safety and security concerns as a last resort.

189.6.2.2. The second is that it is also implicit that a distinction needed to be made between innocent bystanders and actual wrongdoers so that those arrested were only those who were likely to continue to cause significant harm, without arrest.

189.6.2.3. The third is that in South African law, it is clear that an arrest cannot be made to punish or harass, and in fact, the discretion to arrest, even where there is unlawful conduct, may only be exercised where a prosecution is likely to follow.^{xviii}

189.6.3. There is also a fundamental problem with private security personnel, hired by the university, carrying out detentions and searches and arrests of students. In this regard, it should be noted that:

189.6.3.1. The powers of private security personnel to arrest and detain are much more circumscribed

than a police officer's. They, for instance, do not have the power of search, unlike the police.

189.6.3.2. In addition, private security personnel do not have the same level of training on statutes and the Constitution, in so far as they govern arrest and detention. This is not their primary function.

189.6.3.3. Security personnel owe their loyalty primarily to their employer who, in turn, is hired for profit by the university. They are therefore primarily concerned with protecting private interests. This is unlike SAPS officials, who owe their duty to the state and the Constitution and the law, above all else. Therefore, the risk of abuse of the powers of arrest and detention is much higher in the case of private security personnel.

189.6.3.4. Private security personnel are direct agents of the university. Therefore, the possibility of liability on the part of the university is much greater, on grounds of vicarious liability, where their own agents carry out an unlawful arrest. The university would be less likely to be held

liable for the conduct of an independent organ of state.

189.6.3.5. In addition, private security personnel are known by students to be employed by the university (and not, for instance, by an independent arm of government). Thus, the perception of victimisation by the university will be much greater where private security personnel become involved in law enforcement functions. In this regard, the conduct of private security personnel will be seen as simply carrying out the direct orders of the university.

189.6.3.6. Moreover, there is a perception of a right to resist, and therefore, the likelihood for chaotic scenes of unrest is much greater where a private security officer makes an arrest, as opposed to the police.

189.6.4. Therefore, in the circumstances:

189.6.4.1. Private security officers should see their primary duty as being to observe, report and deter. They should not be seen as a private, hired law enforcement arm attached to the

university, with powers of arrest, detention or search and seizure.

189.6.4.2. The role of private security personnel should be clear to students, and thus, the limitations on their authority should be demarcated clearly, with a clear complaints mechanism/process for any offending behaviour. In this regard, they should be seen as assisting in facilitating coordination and cooperation, and therefore, should in fact be meeting with student leadership in the lead up to, and even during, student protest activity.

190. The police may have the power to arrest in situations that warrant it – but the reality is that for the most part, a university has a broad discretion as to who it will permit to remain on its premises and who it will label a trespasser or person who is acting disorderly. Thus, as essentially the ‘complainant’ in these sorts of matters, discretion is called for, especially given that the university should not use law enforcement in a manner which undermines the legitimate interests of students. The same would arguably also apply to the exercise of disciplinary powers.

Establishing a New Culture of Protest

191. The panel encourages the UFS to engage in university-wide transparent debate on the issue of the use of PSCs and more broadly with the view to developing a culture of human rights throughout the university community.
192. The Institute for Reconciliation and Social Justice (IRSJ) by virtue of its institutional mandate is uniquely placed to be able to facilitate that debate, before any violations occur and prior to developing and implementing measures to prevent and remedy violations of human rights in the context of protests, demonstrations and pickets.
193. The panel suggests that instead of relying on PSCs to do the risk assessments and planning, which they ordinarily do for clients as short-term countermeasures for specific threats with the view to selling future security services, the UFS increases the capacity of internal institutions and programmes such as the IRSJ to understand the influence of PSCs on university-wide thinking, policymaking and decision making.
194. The UFS would also be able to draw on its own experiences in a systematic way through the following:
- 194.1. Approach conflict situations with a culture of human rights in mind.
 - 194.2. Recognise transparency as a legal principle and participation as a basic principle of a peaceful, stable and transformative university environment.

- 194.3. Create an understanding of when and how to use PSCs effectively and efficiently in conflict situations involving protests, demonstrations and pickets.
- 194.4. Develop long-term countermeasures for defusing long-term threats and disputes, thereby avoiding conflict that may potentially lead to arbitrary protests, demonstrations and pickets.
195. In doing so, the institutions and programmes such as the IRSJ and other similar institutions would be capacitated to engage in peace building and relationship building exercises during ‘moments of quiet’ for the collective interests of the university community, and, in turn, they may exert some influence on how and when the UFS responds to protests, demonstrations and pickets through the use of PSCs when conflict occurs.
196. Drawing on the lesson that outsourcing security functions to PSCs in the context of the protests that unfolded during the period under review is a question that profoundly affects legitimacy, the UFS would effectively be in-sourcing peace and stability programmes, and only as a last resort would it have to outsource security functions to PSCs in order to restore rather than impose peace and stability, where this is necessary.
197. In other words, the UFS would be engaging in peacemaking in the sense that it would perform the primary activities supplemental to the core functions of peace and human rights internally, while the PSCs would only be called upon to play a secondary role by performing specific security functions required in a situation

involving protest, demonstrations and pickets, instead of being called upon to impose peace and stability.

198. The panel suggests that the UFS impose a limit on the outsourcing of certain security functions to PSCs. It should also prevent the phenomenon of PSCs, once they are appointed, taking on other security functions unrelated to peace and stability; PSCs need to perform in terms of a specific contract.

199. Furthermore, in order to avoid the scenario that emerged from various anecdotal reports that the PSCs 'took orders' from the SAPS officers during the protests, the PSCs must only be accountable in terms of the specific contract to the UFS and no other body or person.

200. In this way, the UFS would retain its legitimacy and be responsive to the collective interests of the university community. Indeed, it would signal the dawn of a new culture of protest.

RECOMMENDATIONS

201. The panel recommends that UFS implement the following measures in the short term:

Provide Assistance to Students and Staff who suffered Harm

201.1. The two students who were shot with live ammunition by the PSC personnel, the student who was shot in the eye and those students and staff who came forward or were identified as having experienced direct physical and emotional harm as a result of the force that was employed by

the PSC's and the police during the period under review, receive the necessary assistance from the UFS for the pain and suffering they endured. The form of assistance may include, but is not limited to, monetary assistance to cover all medical bills and counseling sessions associated with their treatment.

Arrange Dedicated Counselling Sessions

201.2. The UFS management should arrange for dedicated counseling sessions with independent and reputable counselors who are not necessarily linked to the UFS for students and staff who suffered psychological trauma during October 2017 as a result of the interventions by private security personnel and the police.

201.3. The dedicated counselling sessions should take into consideration race and gender dynamics at UFS.

Adopt a Policy and Protocols on Counselling Services

201.4. The UFS management should adopt a policy and appropriate protocols regarding the provision of counseling services in the context of student protests, which will endeavour to ensure that the health and wellness center is not (ab)used in a manner that may create the perception that it is an information or evidence gathering service. Importantly, counseling services should not be perceived as a tool that is used arbitrarily against the students in any way.

201.5. The policy and protocols must ensure that the counseling services and administrative assessments for purposes of determining whether students

could or could not sit for exams be treated as separate and distinct functions in order to avoid any confusion regarding the centre's purpose.

- 201.6. The policy and protocols must ensure that the health and wellness center's core business, which is the duty of care, is not compromised and that its integrity as a safe space for debriefing and healing is preserved. This would no doubt also address issues of trust between the UFS management and students caught up in the protests.

Engage a Dedicated Specialist PSC Unit

202. The very nature of constitutional democracy indicates that protests are intrinsically part of the landscape in South Africa and that it permeates almost every facet of society.
203. In order to avoid the type of problems that transpire whenever the PSC's are called to deal with protesting students, the UFS management should engage a dedicated specialist PSC unit with appropriately trained personnel having the necessary skills, expertise and experience to deal with protesting students at universities.
204. This PSC unit should be properly introduced to the UFS community in times of peace and before any protest action takes place.
205. The UFS management should therefore ensure the PSC unit knows the lay of the land, is familiar with the internal CSP and general campus protocols and can operate in an integrated manner alongside the CPS seamlessly, if the need arises.

206. The value of this approach is that the PSC unit will be familiar with the university environment and is less likely to cause more harm than good under pressure. This will also make it easier for the university to hold the PSC unit accountable.
207. The UFS should endeavor to ensure that the PSC that is appointed is not only familiar with the historical and racial dynamics within the university community, but also ensures that it does not operate in a way that further exacerbates such dynamics. For instance, the PSC should be sensitive and alive to the impact that arresting only black students, in a context of a university where there are both black and white students, may have on the university community and how this may be perceived as racial profiling. Such conduct does not auger well for a university that purports to work towards transforming its institutional culture.

Address Disparities between the Bloemfontein and Qwaqwa Campuses

208. The prevailing perceptions that the Qwaqwa campus student protests are treated differently and more harshly as compared with the Bloemfontein student protests because they are black and come from poor and vulnerable communities does not reflect well on the image of the UFS.
209. This “class distinction” between the two campuses should be fully investigated and remedial steps taken to ensure that the poor are not further marginalized.
210. The investigation should include an assessment of the prevailing perceptions that black students’ lives matter less than white students.

Approach External Bodies for Support and Assistance

211. The issues and challenges at the UFS are in many ways a reflection of the broader national agenda. The local is profoundly national, and the national tends

to become local, particularly in regard to issues of structural transformation and adapting the fundamental values and precepts of the Constitution in current context.

212. Issues of racial injustice, cultural alienation, inequality and poverty experienced by the students who come from diverse communities in various parts of the country, find expression in the contested spaces at universities across South Africa.
213. In that sense UFS is no exception, however it presents its own unique historical and racialised responses to the current challenges because of its apartheid baggage and for this reason it has to make a decisive and resounding break with its insular and polarising past.
214. In many ways the UFS cannot do this on its own entirely, and will need the support and assistance from other institutions of state that have specialist mandates such as the Chapter 9 Institutions and statutory bodies set up to advance constitutional democracy. The panel therefore recommends that this report be shared with the Chapter 9 institutions (in particular, the SAHRC, CGE and CRL Commission), IPID, PSIRA and the office of the Provincial Commissioner of Police in the Free State.
215. These institutions should address the human rights violations, wrongful arrests and statutory violations under the Criminal Procedure Act 56 of 1977, the SAPS Act, the Standing Orders (SO) and National Instructions issued under the SAPS Act, the Regulation of Gatherings Act 205 of 1993, the Private Security Industry Regulation Act 56 of 2001, the regulations and notices promulgated under the PSIRA and the Code of Conduct for security service providers.

216. The Chapter 9 institutions enjoy functionally distinct constitutional mandates, to intervene on the specific issues that are related to the individual, systemic and structural inequalities and injustices that were highlighted in the events that unfolded; to address the barriers of mistrust and racial barriers; to monitor and observe remedial measures; and generally to ensure appropriate preventative steps are taken so that the human rights violations that occurred during October 2017 at the UFS do not happen again.

Establish a Mechanism for Meaningful Engagement

217. The constitution introduced participatory democracy into the South African legal landscape, and the constitutional court has recognised the principles relating to meaningful engagement as justiciable.

218. The panel recommends that the UFS management formally recognise the principle that before any decision is made to deploy security services to intervene in protests on campus, there must be meaningful engagement with all the parties and stakeholders in the university community. In other words, the requirement of meaningful engagement must be one of the fundamental principles regulating the use of security services at UFS.

219. The rationale for this approach is to be found in the constitution, which requires that everyone must be treated with care and concern, and that the measures adopted respond to the specific needs in every situation. Meaningful engagement shows respect and care for the dignity of all the individuals concerned, and enables the UFS management to understand the needs and concerns of aggrieved parties and stakeholders.

220. The use of security services will differ from situation to situation and be affected by the nature and size of the protest in each case.
221. In this context it is important that the actual situation involving protest action be taken account of, and to recognise that it is not appropriate to have a one-size-fits-all approach or a plan that works in theory.
222. The challenge will always be to find an appropriate means of intervention in the protests, where necessary, without prejudicing the rights of parties and stakeholders, while ensuring safety and security of people and property.
223. Meaningful engagement in this context therefore means that parties and stakeholders must, through their respective representatives, have proper consultations with the view to reaching agreement on a plan that not only ensures that a proposed intervention takes account of issues of rights, safety and security, but also determines whether and under what conditions security services may be deployed in the context of protest action at UFS.
224. A top-down approach to meaningful engagement must be avoided at all costs, and where necessary mediation should be used to reduce tensions, narrow the areas of dispute between the parties and stakeholders, facilitate mutual give-and-take, and avoid the escalation of conflict.
225. The agreement that results from the engagement or even the failure to reach agreement is itself a matter that must be supervised by an internal mechanism or institution within the university.
226. Again, the panel recommends that the Institute for Reconciliation and Social Justice at UFS is suitably positioned and mandated to play this crucial supervisory

role, and that the SAHRC and the PSIRA be notified and requested to monitor the proposed intervention.

Towards a Progressive Protest Policy

227. UFS should adopt a policy that operationalises the right to freedom of assembly, demonstration and picket (ie a protest policy), and which balances the right to legitimate peaceful and unarmed protest with the broader interests of the university community.
228. There are a number of educational institutions, in South Africa^{xix} and abroad^{xx}, which have adopted protest policies that recognise the right to freedom of expression while at the same time noting the need to prevent violence and addressing other safety and security concerns.
229. These policies often seek to strike a practical balance of rights and interests. They are tried and tested in many instances and therefore provide useful guidance for the purposes of this exercise.
230. There are key elements in such a policy that should be publicly debated and discussed prior to adoption. These include *inter alia* the following:
- 230.1. The meaning of a university environment that is conducive for all.
 - 230.2. The spirit in which protests should take place on campus.
 - 230.3. A definition of what is a legitimate cause or position within the context of the UFS.
 - 230.4. Channels for internal communication at UFS.
 - 230.5. UFS commitment to fulfilling the rights of all parties.
 - 230.6. Ensuring a balance is struck between different rights and interests.

- 230.7. Leadership and what it means in the context of protests.
- 230.8. Whether protestors should obtain prior approval when they embark on protest action.
- 230.9. The meaning of peace and order when protesting.
- 230.10. Measures to ensure safety and security of people and property during protests.
- 230.11. A definition of when a protest becomes disruptive and unsafe so as to warrant the escalation of security services.
- 230.12. The presence of UFS management during protests.
- 230.13. The duration of a protest.
- 230.14. The aftermath of protests, namely, restoring peace and stability, including the 'clean up'.
231. The above elements have been adapted from one protest policy, which is worth reviewing in more detail.^{xxi}
232. The suggested approach to developing and adopting a protest policy is noteworthy in that it recognises certain fundamental notions, propositions and limitations on the right to protest, which when read together with other policy considerations, provide a useful framework.
233. The following are some critical aspects of the protest policies that have been reviewed and which should be considered and elaborated on during the public participation process:

- 233.1. A university has a responsibility to provide effective channels for internal communication, free discussion and rational persuasion as the normal and preferred means of airing and reconciling differences and divergence of views.
- 233.2. There is a fundamental right to protest in a non-violent and non-disruptive manner, and to this end, to communicate thoughts and ideas to other students, including by way of protests and demonstration, and a university must facilitate the exercise of such right.
- 233.3. Any restriction on such right to protest must strike a 'fair and reasonable balance', with a view to at the same time, protecting the 'academic and vocational objectives [of the university] without unreasonable obstruction or hindrance'.
- 233.4. It is notable in this regard, that it is only 'unreasonable' obstruction and hindrance that the policy restricts (not obstructions or hindrances of any kind). In fact, it would be hard to exercise a right to protest freely and impart ideas without at least some obstruction or hindrance.
- 233.5. A university is a place where it is customary to impart and disseminate ideas and thoughts. The notion of 'fighting ideas with ideas' finds resonance in the university space.
- 233.6. Thus, it can hardly be said that protest is an 'obstruction' or 'hindrance' *per se*, let alone, an 'unreasonable' one. Consequently, simply since there

may be additional noise, disruption or foot traffic, this does not automatically mean that a protest should be prohibited or terminated by force.

233.7. In some situations, the policies recognise a requirement of prior approval or notification for a protest. An example of a potential type of application for approval can be found in the North West University Policy^{xxii}.

233.8. However, there should also be the recognition that in some situations, it is not practicable, nor appropriate or necessary, to demand or even expect prior approval. Thus, certain areas could be set aside, after having regard to low-disruption areas of the campus (such as those areas which are least likely to cause noise or other forms of disruption to lectures) for ongoing rights to protest, without a need for prior permission.^{xxiii}

233.9. The following may be an example of a type of protest policy within a designated area, for which no prior permission or approval should be needed: 'Picket lines which permit free passage of those who wish to pass, and signs, banners and peaceful assemblies are all acceptable'.^{xxiv} Of course, the greater the interference and disruption, the greater the need for coordination and cooperation, and thus, the more likely that prior approval or something similar would be appropriate or required.

233.10. There may also be certain restrictions imposed on an intended protest or even an ongoing one, where unreasonable disruption may exist. Arguably, any restriction should be the least intrusive possible. The above policy

does contain a definition of what would amount to unreasonable conduct in the course of a protest. There is also guidance in other policies as well.^{xxv}

233.11. The panel recommends that measures are taken to ensure that any requirement of advance approval not be intended or inadvertently used as a 'gate keeping' function to keep out certain ideas. Indeed, the primary purpose of such prior approval requirement should be to coordinate and help facilitate a balancing of rights, rather than to restrict speech.^{xxvi}

233.12. UFS should also recognise a duty of care owed to the students for the conduct of security staff on campus. It should encourage a relationship of mutual cooperation by actively facilitating easy contact between protest organisers and student leaders.

233.13. In addition, a transparent mechanism is needed to process complaints against security personnel and to assist in escalating complaints of police misconduct to the Independent Police Investigative Directorate (IPID).^{xxvii}

233.14. The presence of university staff and agents at a protest should not be with the intention of intimidating or preventing protest. Instead, it should be simply to monitor and assess.^{xxviii}

233.15. A process of cooperation and coordination also means that in most situations, resort to disciplinary sanctions should be a last resort. This arguably also includes any security measures that are designed to break

up a protest, which in itself can only occur where irreparable harm would otherwise result.^{xxix}

233.16. In all situations, 'due process' must be followed, and the values and precepts of the Constitution must be guaranteed for all persons.

ANNEXURES

Annexure A – Biographies of Panellists

Ashraf Mahomed	<p>Ashraf Mahomed, BA LLB (UCT), is an attorney and director at Ashraf Mahomed Attorneys in Cape Town, with rights of appearance in the High Court. He was admitted as an attorney on 13 January 1999 and over the years acquired experience in most areas of the law, but specialist expertise in high court litigation, constitutional law, administrative law, public law, alternative dispute resolution (including mediation, arbitration, negotiation and facilitation), land reform law and project management. He has represented high profile clients as well as poor individuals and communities. Ashraf was appointed as an acting judge of the High Court (Western Cape Division) for two terms and dealt with various civil and criminal matters. He has experience as a mediator, facilitator and arbitrator. Ashraf has been appointed as Adjunct Associate Professor in Public Law at the University of Cape Town and is a lecturer in the PLT Course run by LEAD and UCT. He is the principal author and editor of two books on land tenure law published by Juta Law Publishers and has attended various law conferences both locally and internationally. Previously, he was a director of CTH Inc., and prior to that he served as the provincial head of the South African Human Rights Commission (SAHRC). He also practiced as an attorney at the Legal Resources Centre (LRC) in Cape Town focusing on land, housing and development cases. He has represented government and served as the founding Project Director of the Legal Services Project and later the Land Rights Management Facility, which he managed on behalf of the Department of Rural Development and Land Reform. Ashraf</p>
----------------	--

	<p>serves as a board member of the Dullah Omar Institute (DOI) for Constitutional Law, Governance and Human Rights at the University of the Western Cape, Ndifuna Ukwazi (NU). He is a longstanding member of the National Association of Democratic Lawyers (NADEL), formerly the branch chairperson in the Western Cape, and he presently serves on its national executive structure. Ashraf served on the Council of the Law Society of South Africa (LSSA) and recently completed his second term as President of the Cape Law Society (CLS). He also serves on various committees of the Law Society including the Disciplinary Committee.</p> <p>Contact: Email: ashraf@amattorneys.co.za or Cell: 0845801245</p>
Nomfundo Walaza	<p>Nomfundo Walaza is a clinical psychologist. She obtained her Masters degree in Clinical Psychology from the University of Cape Town in 1991. She has worked in the human rights field for the past two decades. She served as the CEO of the Desmond Tutu Peace Centre (DTPC) for 7 years.http://www.tutu.org/home/She also served for 11 years as the Executive Director of the Trauma Centre for Survivors of Violence and Torture in Cape Town, focusing primarily on empowering and healing victims of torture, trauma and violence, many of whom suffered severely at the hands of the Apartheid government.</p> <p>She worked closely with the Truth and Reconciliation Commission of South Africa and appeared as a witness in one of its hearings. Currently she works part time as a mediator and conflict transformation specialist for an NGO called Peace</p>

	<p>Systems, which is based in Cape Town.</p> <p>Since leaving the DTPC, Nomfundo has focused on mediation, conflict transformation, dialogue facilitation, peace building and assisting academic institutions with engaging in difficult conversation around issues of transformation and decolonization. Of note, is that in November of 2016 she helped mediate a process that led to the signing of an agreement, which facilitated the writing of exams for that academic year. She currently works with a group of concerned young leaders in South Sudan and Liberia and co-facilitates Unyoke reflective processes for international peace practitioners. She is concerned about finding innovative ways to accompany and nurture young and upcoming leaders within the Africa continent.</p> <p>She is passionate about advocating for women's issues and is concerned about the escalating violence and abuse of women and children in her country. She has published and presented widely on issues of trauma management, healing victims of trauma and torture and the TRC process.</p> <p>In 2010 she received the AAUW/NASPA Women of Distinction Award from the National Conference for College Women Student Leaders at the University of Maryland Washington DC.</p> <p>Nomfundo currently serves on a number of boards, and is a patron of two organisations.</p>
--	--

Annexure B – List of Interviewees and Participants (in no particular order)

1.	Prof Hendry Kroukamp	Dean: Economic and Management Science
2.	Mr Noko Masalesa	Director: UFS Protection Service
3.	Mr Ricardo O'Connell	Technical Operation Officer: UFS Protection Service
4.	Mr Daniel Alexander	Assistant Director: UFS Protection Service
5.	Mr Angelo Mockie	Residence Head: Beyers Naude
6.	Mr Teboho Manchu	Campus Vice-Principal: Support Services and Acting Campus Principal (Qwa-Qwa Campus)
7.	Mrs Mathapelo Moloi	Chief officer: Senior Official Nurse Kovsie Health
8.	Mr Titus and Mr Makutsi	Mafoko Security
9.	Mr David Mulaudzi	Mafoko Security – Commander (nightshift)
10.	Mr Justice Temane	Mafoko Security – Commander (day shift)
11.	Mr Bongani Mazula	Student (Bloemfontein campus) and Chairperson of Young Communist League (YCL)
12.	Mr Siyabulela Lufefe	Student (Bloemfontein campus) and Free Education Movement
13.	Mr. Gcinumuzi Gadebe	Student (Bloemfontein campus) and member of SASCO and Provincial Leader YCL
14.	Mr Liza Mfana	Student and EFF Student Command (Bloemfontein campus)
15.	Mr Mondli Mthembu	Student (Bloemfontein campus) interviewed via Skype
16.	Mr Willy Nel	Lecturer: School of Education Studies and Residence Head of Armentum
17.	Ms Annelie De Man	Coordinator: Advocacy Division Free State Centre for Human Rights (Written submission, 10 November 2017)
18.	Ms Nombuso Ndlanzi	(Written submission, 11 November 2017)
19.	Ms Tebello Ntene	Concerned student (Written submission)

20.	Mr WP Wahl	Director: Student Life
21.	Mr Zukhanye Nyanda	Armentum RC Prime: Strategies & Values and Alumni
22.	Prof Nicky Morgan	UFS management
23.	Colonel Munsamy	SAPS Commander
24.	Ms Mosele Lepheane	Student
25.	Ms Ziphezihle Xulu	Student
26.	Mr Steve Rakoma	Regional Manager of Mafoko Security (Free State)
27.	Mr Christopher Rawson	Legal Aid Clinic and postgraduate student (Bloemfontein campus)
28.	Mr Lebohang Moibatle	Student (Bloemfontein campus)
29.	Ms Tammy Fray	Student (Bloemfontein campus)
30.	Mr Teboho Masena	Student (Bloemfontein campus)
31.	Mr Vhugala Nthakheni	Head: Student Governance and professional assistant to the Dean of Students
32.	Mr Nthebo	Student (Bloemfontein campus)
33.	Mr Asive Dlanjwa	President of the SRC (Bloemfontein campus)
34.	Mr Tshokelo Molefe	Campus Security Officer: Qwa-Qwa campus, UFS
35.	Mr Masopha Hlalele	President of the SRC (Qwaqwa Campus)
36.	Mr Xolani Dlamini	Student (Qwaqwa campus)
37.	Ms Noluthando Samukelisiwe	Student (Qwaqwa campus)
38.	Ms Mosa Prudence Mosia	Student (Qwaqwa campus)
39.	Mr Frederick Motaung	Administrative Head: Zero Tolerance Security
40.	Mr Mishack Nhlapo	Commander of Zero Tolerance Security Team
41.	Mr Themba Hlaso	Director: Student Affairs (Qwaqwa campus)
42.	Mr Zakhele Mdluli	Chief Officer: Student Housing and Residence Head of HJ Petersen and Steve Biko (Qwa-Qwa campus)

43.	Mr Tobias van den Bergh	Counselling Psychologist and Head of Department: Student Counselling and Development
-----	-------------------------	---

Annexure C – Chronology of Events

	Bloemfontein Campus	Qwaqwa Campus
Wednesday, 18 October	At approximately 13:00, the SRC holds a mass gathering (a student <i>legotla</i>). The main purpose is to report back to students about the new SRC portfolio and to notify students that the SRC has held a meeting with Prof Peterson regarding tuition fees increases for 2018. The SRC states that they could not commit to the fee increment because the fees commission report has not yet been released by the president. After the <i>legotla</i> , they call for a protest, and a group of students proceeds to shut down the library, the study log, outside the library, the one inside and the one adjacent to the entrance of the library on the side. No less than four stun grenades are used to disperse students. The SRC council meeting takes place, and after that meeting, SRC meets with #FeesMustFall students. These students ask for more time to discuss matters amongst themselves.	Zero Tolerance security is deployed to Qwaqwa campus from 18 – 25 October. They arrive at 17:00 on 18 October. On their arrival, the SAPS leave and nothing happens for the rest of the night. No arrests are made.
Thursday, 19 October	Four students are arrested in the morning for taking independent action. These students are subsequently suspended from UFS. Around 12:00, the SRC submits a memorandum to the UFS management. Students go	When students wake up in the morning, there is private security on campus and they begin to mobilise in the residences. From 10:00 – 11:00, approximately 500 students gather around the residence parking lot, and they start throwing stones at private

	<p>to the main building to disrupt a CTA exam. In an isolated incident, one student releases a fire extinguisher into a lecturer's face causing him to be injured. At this time, there is no private security on campus. At approximately 13:45, two campus security guards arrive at the exam venue, and eventually the test is written successfully. A memorandum of demands is issued by the SRC with two main demands: (a) exams be moved by a week and (b) no fee increment for 2018. In the evening, the SRC president is notified that private security will be bought to campus with little police presence. The Flippie Groenewald lecture room is also set alight, but it is unclear when this occurs.</p>	<p>security. Female and male residences are locked to prevent people from attending classes. Rubber bullet shots are used to disperse the students without any warning or a warning stun grenade. Zero Tolerance security officers throw tear gas in residences, they use pepper spray to disperse students and force students into residences. All of this is happening with the police present. Zero Tolerance is withdrawn, but they return to the campus in the evening after the withdrawal of the SAPS. Zero Tolerance security bring two German Shepherd dogs onto campus, and the Dean of Students tells them that dogs are not allowed on campus. At approximately 19:30, the students gather and use jojos to attack the PSC. At 20:00, the mobile tuck shop is burnt, and there is an attempt to burn the main building.</p>
Friday, 20 October	<p>Around 08:00, four students are arrested for allegedly disrupting classes. Amongst those arrested is Mr Nthebo who is caught walking on his way off campus - the assumption is that he is a protestor involved in the action. In the early afternoon, after the memorandum of student demands gets no firm response from UFS management, the SRC move towards to the main building. The protest action takes place between 14:00 and 16:00. Some say the protest starts on the bridge with</p>	<p>Seven students are arrested at about 03:00. At approximately 09:00, the protest resumes, and students are visibly angry about the arrests. One student is shot in the eye and admitted to the Bloemfontein Netcare Hospital.</p>

	<p>students marching and singing peacefully. With the SRC leading the protest, students march to the Callie Human Building, where SAPS and PSC meet them. They are told to disperse because their gathering constitutes a violation of the court interdict. Within 5 minutes, the SAPS used three stun grenades and the PSC security officers also started shooting at students with rubber bullets. The PSC begins to arrest students. The students are put into a police van or taken to the protection service cell. The PSC arrests 37 students (20 female and 17 male). The SAPS enter the gym, and they use rubber bullets injuring female students. The SAPS walk into bathrooms and locker rooms arresting students - mostly black female students. The PSC officers are seen shooting inside the residence with rubber bullets, and students are pepper sprayed. The trophy cabinet and glass doors are damaged at one of the residences. At approximately 16:00, four students are arrested. Around 19:00, all the arrested students are taken to Bainsvlei and Parkweg police stations. At approximately 20:30, the rectorate meet with the SAPS, the PSC and CPS. The students hold a night vigil after the</p>	
--	---	--

	shooting and arrests, and they move peacefully from residence to residence singing.	
Saturday, 21 October	At approximately 06:00, a meeting is held between the SRC and UFS management. The purpose of this meeting is to establish what took place on the 20 October. A decision is taken to terminate the contract with the Mafoko security company. The SRC together with UFS management try to facilitate the students' release, but this is unsuccessful.	
Sunday, 22 October	The SRC spends most of the day collecting bail money for the arrested students. They collect a total of approximately R20 000. A CPS security officer, the dean and senior management meet with the parents of students who have been arrested. In the afternoon, bail is finalised, and some students are released.	According to Mr Molefe, the protest starts at 20:00 with an address from the SRC president. At approximately 23:15, the students gather near the Steve Biko residence and begin to attack the PSC with stones. They also burn jojos and dustbins. Other students collect mattresses from the residence storage rooms, which they use as shields or burn. At this stage, no one is arrested. Later, two students are shot with live ammunition while carrying a mattress from another residence. The exact time of the shootings is not clear. Students, however, estimate that the shooting takes place shortly after midnight. The PSC has been operating alone on campus from 18:00 to 01:30 when the shooting incident occurs. When the protest escalates and a mobile tuck shop is burnt, the SAPS are called to the Qwaqwa campus. When the SAPS arrive, they instruct the PSC to guard

		<p>the key points, including the cafeteria, chemistry lab, Mandela Hall, the library, etc. Throughout the rest of the night, pepper spray is used on students who resist arrest. One of the students who is shot in the arm is taken to the hospital at approximately 01:30; however, the bullet is only removed at approximately 11:00, and he is discharged at 12:00 the same day. The police arrive at the hospital at approximately 09:00, and they inform him that he is being arrested for public violence and contravening the interdict. Three other students are also arrested.</p>
--	--	--

REPORT ON DAMAGE TO UFS INFRASTRUCTURE (CAPITAL
WORKS)
DUE TO STUDENT UNREST DURING OCTOBER 2017

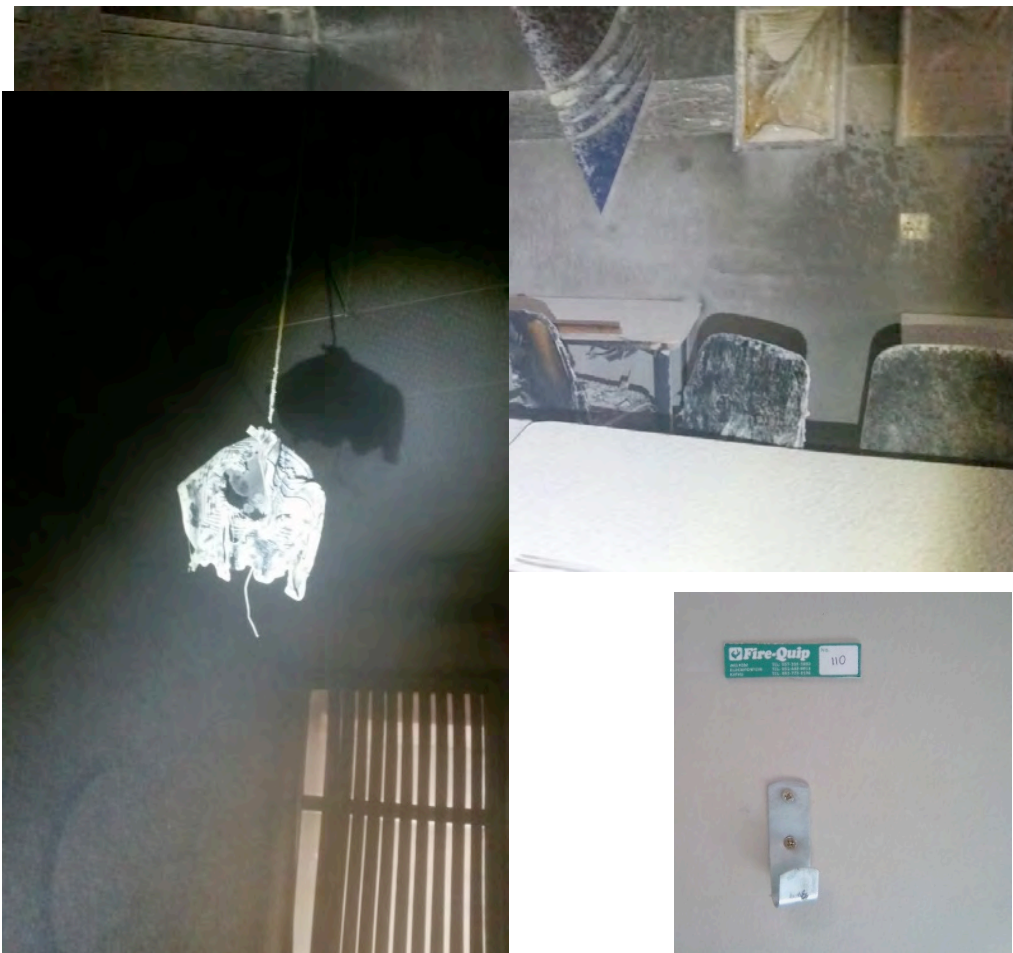


1. BLOEMFONTEIN CAMPUS

1.1. Flippie Groenewoud Lecture Room

Chairs were set alight. This caused major damage to the lecture room including the audiovisual equipment. Damage was limited to this room, but various fire extinguishers needed to be replaced and all passages needed to be cleaned.

Photos 1 - 4: FGG Lecture Room



1.2. Rag Farm

This is where the most damage was done. The complete is constructed from corrugated sheets which was mostly damaged. Loose furniture, etc. was also damaged.

Photos 3 - 5: Rag Farm



1.3. Steff Coetzee Building

Bags with a strong petrol smell were placed at doors.

Photos 6: Stef Coetzee



1.4. AD-HOC Offices

These offices have outside facing doors. Five of these doors was set alight causing the carpets to be damaged, air conditioners melted from the heat and a lot of smoke damage was incurred.

Photos 7 & 8: Ad-hoc Offices



1.5. Thakaneng Bridge – floors

Dustbins were set alight causing damage to the floor coverings.

Photos 9: Thakaneng Flooring



1.6. Graffiti

Graffiti was painted to buildings and items such as dust bins.

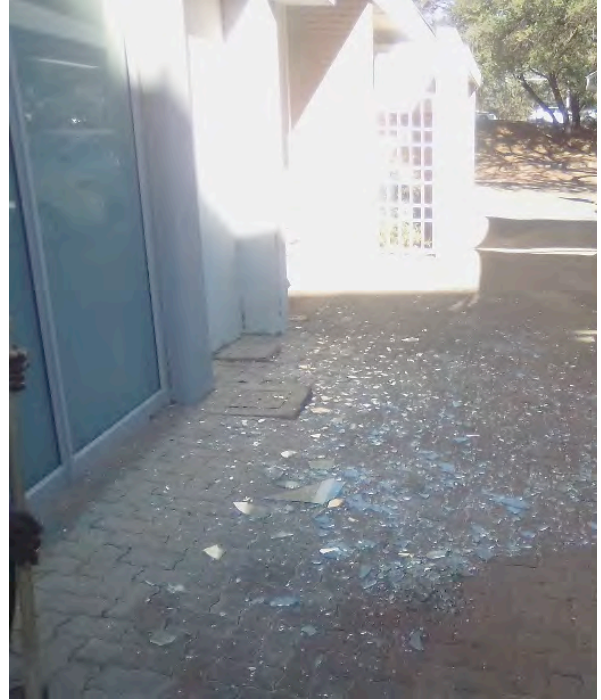
Photos 10 - 11: Graffiti



1.7. Various minor items

This was mostly breaking of glass and cleaning due to littering.

Photos 12-13: Various



2. QWAQWA CAMPUS

2.1. Construction Site-office

The construction site-office of the contractor on the new computer laboratory building, was set alight

Photos 14: QwaQwa Site office



2.2. Generator Room

The doors was forced open and it was attempted to be set alight. The complete unit does not need to be replaced, but can be repaired.

Photos 15: Generator Room



3. SUMMARY OF COST ESTIMATES

Table 1: Summary of Cost Estimates

SUMMARY		
BLOEMFONTEIN CAMPUS	R	2 256 678,22
QWAQWA CAMPUS	R	540 548,66
SOUTH CAMPUS		none
TOTAL ESTIMATED COST	R	2 797 226,88

4. WAY FORWARD

- Insurance Claims have been registered.
- UFS to provide overdraft facility as bridging capital to do repair work.

- Quotations/Tenders in process to repair work.
- Timeframes for completion dates.

Bfn	Building	Oct '17		Nov '17		Dec '17		Jan '18		Feb '18		Mar '18	
1	Rag farm												
2	FGG Lecture Hall												
3	(Including ICT installations and furniture)												
4	Ad-hoc offices												
5	Graffiti												
6	Thakaneng												
7	Various broken windows												
8	Fire Extinguishers												
9	<i>Cleaning Cost</i>												
10	Repairwork to Fence												
QQ													
1	Various minor works												
2	Repairwork to generator												

Table 2: Proposed Timeframes

FOOTNOTES

ⁱ See Annexure D – Report on Damage to UFS Infrastructure (Capital Works) Due to Student

ⁱⁱ See Annexure A – Biographies of Panellists.

ⁱⁱⁱ See Annexure B – List of Interviewees and Participants.

^{iv} *Masakhane Security Services (Pty) Ltd v University of Fort Hare* (530/2011) 2012 ZAECBHC 1 (19 January 2012) para 16.

^v *Retired University of Natal Staff Association v Associated. Institutions Pension Fund & another* 2000 (3) BPLR 302 (PFA); *Nutesa v Central University of Technology, Free State* 2009 (4) BLLR 369 (LC); *Baloro & others v University of Bophuthatswana* 1995 (4) SA 197 (B).

^{vi} *Qing-He-Shan v Tsogo Sun Holdings & another* (31089/2004) 2004 ZAGPHC 3 (16 August 2004).

^{vii} *Cf Emeribe v VFS Global Visa Facilitation Centre, Port Elizabeth & others; Javed v VFS Global Visa Facilitaion Centre, Port Elizabeth & others* (2190/2015, 2458/2015) 2015 ZAECPEHC 71 (15 December 2015) para 23.

^{viii} In the matter of *Mandhlaami v Minister of Police* (7279/2013) [2017] ZAWCHC 33 (29 March 2017), the court stated (paras 76-81):

[76] *In light of the situation which existed on that day in the Valley generally, in and around De Doorns in particular and at the footbridge specifically, I am of the view that the police were lawfully discharging their statutory duties under s 207(3) of the Constitution and the SAPS Act to maintain public order and secure the safety of the inhabitants of the area and their property, when they took control of the volatile and dangerous situation in the vicinity of the footbridge and the electric substation. The question that then follows is whether they adhered to the recognized common law principles in general, and to the requirements of SO 262 in particular. The test in both instances is similar – objectively viewed, was the force employed proportional to the threat which presented?*

[77] *It is significant to note that, as one sees on the video footage, the arrival of the police on the scene was immediately met by a violent response from the crowd across the railway tracks. The numbers were stacked against the police - about a dozen or so of them against several hundred protesters - and the latter showed no inclination to retreat. On the contrary, the protesters advanced aggressively and tauntingly towards the law enforcement officials: Some even came over the bridge to confront the police as they were ascending it from the northern side notwithstanding the earlier use of stun grenades and rubber bullets in an attempt to repel them. Having effectively prevented the crowd from crossing the railway line and reaching the*

business centre of the village, a further danger presented. The attempt by a part of the crowd to attack the substation is apparent from the video footage and that activity presented a real and imminent threat to public safety and public property in the area.

[78] *There was, in the circumstances, no other option for the police in their attempts to restore calm and protect property. West, as the senior officer on the ground, was justified in giving the order to fire rubber bullets and he himself was entitled to take aim at those persons intent upon damaging the substation and to fire rubber bullets at them so as to stop them in their tracks. To quote from the words of Brand JA in Petersen:*

[12] *In the circumstances counsel for the appellant was unable to propose any realistic alternative means by which the police could avert the danger. And I can think of none. Before firing sharp point ammunition they had essentially tried everything else. The question, which sometimes arises in matters of this kind, namely, whether the defendant should rather have fled, does not even occur. At the stage when the police started to fire live ammunition, their attackers simply did not allow them to flee.*

With the necessary paraphrasing for the facts at hand, I am of the considered view that when the police resorted to firing rubber bullets they had tried everything else and were unable to bring the crowd under control and restore order. And, when they did open fire they did so sporadically and with the requisite degree of constraint.

[79] *Mr. Coughlan submitted that the crowd posed no direct danger to the police and when they opened fire they did not do so in order to defend themselves “from a real threat of stones and petrol bombs”. Counsel went on to suggest that the police should rather have taken up a defensive line at the railway tracks and that it was likely that the crowd would have dispersed of their own accord when they ran out of stones, or as darkness descended. This was described as a realistic alternative by which the police could have averted the danger resulting from the stone throwing.*

[80] *I do not agree with counsel’s submissions. Not only are they based on a rose-tinted viewing of the video footage, they are speculative and unhelpful in the circumstances, emanating as they do from “the secluded security of the courtroom”. The court was fortunate to view, first hand, the mayhem which prevailed that evening. The circumstances included an imminent attack on the substation, the potential damage which could be caused to the*

railway line (a crucial logistical artery to the interior of the country) and the prospect of further damage to businesses in the town. That state of affairs did not permit the police to flee the scene. To do so would have been a complete abandonment of their constitutional and statutory duties. Indeed, those very duties compelled them to take up a position which necessitated the dispersion of the crowd.

[81] *The fact that the plaintiff may have been shot shortly after he emerged into the open at the corner of the crèche while not taking part (as he claimed) in the unlawful activities of the crowd, does not mean that the police (and West in particular) acted unlawfully. On the basis of the authority already referred to, the defendant does not incur liability since West was lawfully about the duty of protecting public property and maintaining law and order when he discharged his shot-gun in the direction of the crèche.*

^{ix} In the matter of Lediga v Minister of Police 2015 JDR 1895 (GJ), the court held (paras 20-28):

[20] *The plaintiff therefore sustained physical injuries as a consequence of the conduct of members of the SAPS. This gives rise to an inference of wrongfulness. As will be pointed out herein below, I am persuaded that the common cause facts in fact sustain an inference of negligence on the part of members of the SAPS and that a reasonable person in the position of Mokhari would have foreseen the possibility of harm being caused to innocent bystanders (who were in the vicinity of the protesters) if shots were fired in the direction of the protesters and that a reasonable person would have guarded against such harm being caused by not shooting in the manner in which they did especially in circumstances where no stones or "missiles" were thrown at the police and in circumstances where no warnings were issued to innocent bystanders to get out of the way.*

[21] *It was not in dispute that Mokhari and the other members of the SAPS were acting in the course and scope of their employment at the time of the incident.*

[22] *It was also not disputed that there was in fact a protest on 9 May 2014 near the Alexandra Magistrates Court. The plaintiff also did not dispute that the police could take action against the protesters. What the plaintiff is contending is that there was no justification for the infliction of any harm on him. As was pointed out by the court *The Government of the Republic of South Africa v Basdeo & Another*, it is an accepted principle that "conduct which is lawful towards one person may be unlawful towards others".*

[23] *The question which arises in this matter is whether the conduct of the SAPS in shooting at protesters with rubber bullets was reasonable in respect of its consequences to the plaintiff. The court in The Government of the Republic of South Africa pointed out that this question "falls to be decided by applying the general criterion of reasonableness... In doing so we must bear in mind that the value judgment, which the application of the general criterion of reasonableness requires, is based on considerations of morality and policy and the court's perception of the legal convictions of the community and entails a consideration of all the circumstances of the case."*

[24] *Was it reasonably foreseeable that the plaintiff and Ndlovu were present as innocent bystanders and that they were directly in the line of fire? In the present case it was common cause that the plaintiff and Ndlovu were walking in front of the police towards the protesters. The evidence of both of them also was that there were many pedestrians in the street as they were all returning home from work. In evaluating this question, I am mindful of what the Appellate Division stated in The Government of the Republic of South Africa in respect of the difficult task faced by every police officer:*

There can be no doubt that, had Apostolides actually been aware of the deceased's presence, he would have had a legal duty towards him to act reasonably in the exercise of his powers of arrest. In saying this I am not unmindful of the need for criminals to be detained and brought to justice, and of the duty of every police officer, and all others to whom police powers have been entrusted, to do so; nor am I insensitive to the inherent difficulties of such a hazardous task. We cannot pretend to be unaware, moreover, of the public outcry in recent times for better protection against crime, and for offenders to be brought to book speedily and effectively in order to receive their just deserts. On the other hand, however, we must bear in mind that section 49(2) invests arresting officers with the power of taking human lives even on a mere (albeit reasonably held) suspicion. Such an awesome power plainly needs to be exercised with great circumspection and strictly within the prescribed bounds. Section 49(2) should not and cannot be regarded as a licence for the wanton killing of innocent people; nor can any attempt to extend its operation to cases not falling of innocent people; nor can any attempt to extend its operation to cases not falling within its ambit be countenanced.

Cf Hughes en andere v Minister van Wet en Orde en andere supra at 345g-346d.

[25] *It is trite law that the foreseeability of harm is a relevant consideration in determining whether actions taken by the police officers were lawful: That the foreseeability of harm is a relevant consideration in the determination of lawfulness is clear. The reason for its relevance is perhaps best illustrated in the following passage in Millner's Negligence in Modern Law (1967) 25:*

The law lays down two tests for ascertaining the existence of a duty of care; firstly, that the injury was such as a reasonable man would have foreseen and guarded against; secondly, that the nature of the interest infringed was one which the law protects against negligent conduct. These two elements must occur to give rise to a duty of care.

Now it is plain that the first test is in no way different from the test applied in order to decide the 'negligence issue', that is, in order to answer the question: was the defendant's conduct negligent? It reiterates the identical abstract standard of reasonableness. If a reasonable man, placed in the circumstances of the defendant, would have foreseen that his conduct might endanger or prejudice others in regard to their legally protected interests, then the defendant is deemed to have been under a legal duty towards such others to exercise appropriate care.

[26] *Both Mokhari and Witbooi testified that the only people that were in front of them were the protesters. According to Witbooi if the plaintiff was there he (the plaintiff) must have been part of the protesters despite the fact that it was common cause that the plaintiff was not part of the protesters. Mokhari also testified that he did not see the plaintiff.*

[27] *I am of the view that, in the circumstances of this case - especially in light of the uncontested evidence that the plaintiff and Ndlovu were not part of protesters and in light of the fact that they were some distance away from the protesters, and in light of the fact that there were other pedestrians, Mokhari should reasonably have foreseen that there were innocent bystanders in the street. Furthermore, in the circumstances of this case, Mokhari ought to have taken steps to ensure the safety of the innocent bystanders before he issued the order to deploy the stun grenade and before he issued the order to start shooting. I have already referred to the fact that no warning was issued prior to the deployment of the stun grenade and the shooting. Furthermore, there is simply no evidence before the court apart from the say so of Mokhari that his offices were pelted by missiles. If this was so it would have been recorded on the video recording. In fact, as already pointed out, it was common cause that for a period of two hours and 15 minutes immediately prior to the shooting incident there was no stone throwing.*

[28] *Innocent bystanders must be protected against the consequences of the unlawful use of firearms. I am not persuaded on the evidence that there was a need to use rubber bullets especially in light of the fact that the evidence before the court was that, at the time when the plaintiff and Ndlovu passed the Magistrates Court, the protesters were merely singing and dancing. The protesters were also some distance away from the police. In these circumstances members of the SAPS did not in my view exercise the powers they have with the required circumspection. The possibility of harm to innocent bystanders was real and entirely foreseeable in the circumstances of this case. It is therefore the finding of this court that the actions of the SAPS unlawfully caused the injury to the right eye off the plaintiff and that the conduct of members of the SAPS deviated from the norm of the reasonable man. In the event it is concluded that the defendant is liable for such damages that the plaintiff can prove.*

^x This was recognized prior to the advent of constitutional democracy in the matter of Dempsey v Minister of Law and Order 1986 (4) SA 530 (C):

Before assessing the impact of what these deponents have said there are some other relevant points which must be made. Right up until the time when the decision to disperse those who had attended the funeral was made the people concerned had not actually shown any unmistakable inclination to behave violently. The aggressive dancing and slogan-shouting and the singing of freedom songs and the giving of Black power salutes are not necessarily indications of impending violence, although, of course, they could be. Nor was any marshalling of the procession which was observed any such indication. No flags, banners, placards, pamphlets or posters of banned or unbanned organisations were being displayed or distributed. It is not alleged that the particular songs which were being sung on this particular occasion were in fact of a particularly obnoxious variety. The police behaved for much of the time in a way which might have suggested acquiescence in what was taking place and their successful deviation of the procession from NY 78 into Terminus Road without having to resort to any violence suggests a relatively compliant crowd, at that stage of the events at any rate. The later calls upon them to disperse once they were in Terminus Street down which they had been directed by the police may well have come as somewhat of a surprise to some of them. Captain Oosthuizen thought they were acting unlawfully in moving down the road on foot. He thought that they were acting in contravention of reg 3 and order 5. In fact they were not. Regulation 3 is not per se capable of being contravened as a mere perusal of it will show and order 5 does not prohibit persons moving by foot from a place of burial after a funeral service to the home of the deceased. Mr. Viljoen suggested that order 5 (4) should be interpreted to encompass such a journey, but there is no justification for

that. The language is quite plain, and it certainly does not cover such a journey. Captain Oosthuizen was accordingly wrong in thinking that what was happening was in conflict with either of these provisions. What was happening may, of course, have been unlawful for other reasons, but, if so, he was not aware of them. His order to disperse was therefore based upon a false premise. Not that that necessarily vitiates the lawfulness of the subsequent arrest and detention of Sister Harkin, but it is symptomatic of a somewhat less than clear mind.

Then there is the fact that there is no suggestion that there was any particular person or property in Terminus Street or any other street which they might traverse which might represent a tempting target for those with violent inclinations. In saying this I do not overlook the fact that violence sometimes erupts irrationally and mindlessly, but the point that I make is that an outbreak of violence was at that stage no more than a hypothetical possibility with very little concrete to suggest that it would become a reality. After all, there was a strong police presence virtually escorting the procession and that, too, represented a powerful deterrent to any outbreak of violence.

Of particular importance is the fact that there is no suggestion that Sister Harkin was known to Captain Oosthuizen, or anyone else for that matter, as a political activist or as someone likely to foster public unrest and disorder. Given her vocation of life, her presence in Guguletu, and at this funeral in particular, was nothing unusual and not on the face of it sinister. When the police did decide to disperse the procession by the use of quirts, there is no suggestion that there were attempts to re-group thereafter. On the contrary, as Captain Oosthuizen says, the crowd ran away and within three minutes it was gone.

A further example of how even during the apartheid era, strict limitations on the use of force were recognized can be found in the following passage in S v Turrell and Others 1973 (1) SA 248 (C):

The fact that the Legislature was aware of the undesirability of using force to disperse a crowd is indicated by the provision that only police officers of or above the rank of a head constable are authorised to call upon a gathering that had assembled in contravention of a prohibition to disperse. Moreover this more senior police officer has been given the right to use his discretion as to whether he will call upon the prohibited gathering to disperse. It must also be noted that the attendance at a prohibited gathering is not made an offence; it is the failure to disperse after being directed to do so and after certain information has been communicated by such officer which is an offence. This direction is to be effected by the police officer thrice calling upon those present to disperse and by thrice warning them that upon a failure to disperse force will be used to enforce dispersal. Moreover, after each order and warning time has to be given to consider the order and warning and to enable those who wish to comply to depart in time to avoid the application of the force the police are about to use to disperse the militant. It is only upon the truly militant that the Legislature intends to visit

criminal responsibility and to authorise the police to enforce obedience by using force to disperse them. The thrice repeated order, warning and period for consideration and compliance are intended not only to separate from the gathering all those who are prepared to comply because they are not really concerned, and those who, although militant are not prepared to suffer the hurt and indignity of being dispersed by force, but also by the timeous dispersal of these elements to induce some of the more militant to do likewise.

^{xi} In the matter of *Chetty v Minister of Police* 1976 (2) SA 450 (N), the court held as follows:

Since we are concerned only with one particular situation - that of the Police endeavouring to control an unruly crowd - it is unnecessary to do more than enumerate what we consider to be the principles which regulate the conduct of the Police in that context. For this purpose we have considered what has been said with regard to the actions of the Police in relation to other situations (e.g. in Wolpe's case, supra; Mentor v. Union Government, 1927 CPD 11; Gosschalk v. Rossouw, 1966 (2) SA 476 (C); Jooste, N.O. v. Minister of Police and Another, 1975 (1) SA 349 (E)), and also to cases dealing with certain aspects of the defence of necessity. It has also been useful to refer to the provisions of sec. 7 of Act 17 of 1956, which deals with the dispersal of prohibited or riotous gatherings. Sub-sec. (3) authorises the Police to use force for that purpose -

But the degree of force which may be so used shall not be greater than is necessary for dispersing the persons assembled and shall be moderated and proportionate to the circumstances of the case and the object to be attained.

In the present context I consider that the Police can only escape liability for harm caused by them if the following requirements are satisfied:

1. *There must have been reasonable grounds for thinking that, because of the crowd's behaviour, there was such a danger (commenced or imminent) of injury to persons or damage to or destruction of property as to require Police G action. Whether or not such a situation existed must be considered objectively, the question being whether a reasonable man in the position of the Police would have believed that there was such a danger. It has been said that this is the approach in relation to the requirements of the defence of necessity (Burchell and Hunt, S.A. Criminal Law and Procedure, vol. 1, pp. 286 H, 287), but it has also been said that it is the wrong approach (Van der Merwe and Olivier, Die Onregmatige Daad in die Suid-Afrikaanse Reg, 2nd ed., p. 70; 1975 Tydskrif vir Hedendaagse Romeins-Hollandse Reg, p. 301). The test has however been applied in the manner set out above in a number of cases (R. v. Mahomed and Another, 1938 AD 30 at p. 36; S. v. Mnguni, 1966 (3) SA 776 (T) at p. 778; Ex parte Minister van Justisie: In re S. v. van Wyk,*

1967 (1) SA 488 (AD) at p. 509), and it is the manner in which it ought in my view to be applied in the present context.

2. *The means used in an endeavour to restore order and avert such danger, and resulting in one or more main being injured, were not excessive having regard to all the circumstances, such as the nature and the extent of the danger, the likelihood of serious injury to persons, the value of the property threatened, etc. It is apposite to note in this regard that whilst the Courts will be astute to protect the public from high-handed action on the part of the Police, -*

The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted. The Court must be careful to avoid the role of the armchair critic, wise after the event, weighing the matter in the secluded security of the Court room.

(per VAN WINSEN, A.J. (as he then was), in Ntanjana V. Vorster and Minister of Justice, 1950 (4) SA 398 (C) at p. 406).

At p. 410 of the same report, the learned Judge said:

Having regard to these considerations I am far from satisfied that, objectively considered, there was any real (or even apparent, for that matter) danger of the shop windows breaking, and thereby causing injury to persons.

Still on the topic of the last passage from the magistrate's judgment quoted above, it seems to me that the magistrate over-emphasised the 'grave danger' to persons the windows broke without giving sufficient attention to the likelihood otherwise of the windows in fact breaking.

The magistrate deals at length with the obstruction of the pavement which was being caused by the crowd and he concludes that the plaintiff and the other people who were not standing in queues were in this respect guilty of contravening a Durban City bye-law. It is not clear to me what the significance is of this finding in relation to the issues between the parties, and Mr. Booysen did not seek to place any reliance upon it, rightly in my view. This also applies to the magistrate's conclusion, in a different part of his judgment, that the plaintiff was also guilty of a contravention of sec. 27 (a) of Act 7 of 1958. This finding prompted the magistrate to say:

As it is accepted that the Police took sufficient steps before the dogs were brought in, the plaintiff not heeding these requests and warnings, acted

illegally and certainly most negligently after the dogs were brought in. Why was he still there and not in a queue or at least away from the entrance?

He must have meant that it was accepted by him (that the Police took sufficient steps before the dogs were used) because that certainly was not accepted by the appellant.

The magistrate also deals with the argument advanced on behalf of the appellant to the effect that there were less drastic measures than the use of dogs which the Police could have adopted in order to control the crowd. Before us Mr. Allaway also submitted that there were several other methods which could have been employed before the use of dogs was resorted to. He suggested that dogs should only have been used as a last resort. In the first place I do not think that it is profitable to consider the merits and demerits of alternative methods that could have been employed. The crucial question is whether the method which was employed was reasonable in the circumstances, and for this purpose it is in my view irrelevant to consider the efficacy of other methods (cf. Ntanjana v. Vorster and Minister of Justice, supra at p. 408). Then again, I do not think that it is incumbent upon the Police, in the performance of their duties under circumstances such as the present, to start off with the least innocuous method and then, if it fails, to employ progressively more drastic methods until, somewhere along the line, dogs, or even more drastic methods, are used as a last resort. They may well be faced with a situation which requires the use of extreme measures at the commencement of their intervention. This brings me back to the question whether the circumstances I have outlined justified the use of unmuzzled dogs at the stage at which they were used in the present case.

There can be no doubt but that the situation created by the people who congregated in front of the entrance to Morkel's and who did not join the queues which had been formed, called for some Police action. Those people obstructed the pavement and disrupted traffic in the street, and it was necessary that order be restored before customers could be let into the shop. It cannot, however, in my view be said that there were reasonable grounds for thinking that the crowd's behaviour was so unruly that there was an imminent danger of injury to persons or of destruction or loss of property. The person who appears to have been in the greatest danger of being injured was the woman with the baby who was pressed against the shop windows, and the damage to property which was foreseen was the breaking of the shop windows. I have already expressed my views on both these matters. There was probably some danger of such injury or damage occurring, but was there such a likelihood of it occurring as to justify the use of dogs? In my view the answer to this question is clearly in the negative. The magistrate does not suggest, nor did Mr. Booysen suggest before us, that the use of unmuzzled Police dogs for the purpose of crowd control is not an extreme measure. Marais, whose dog bit the plaintiff, conceded that when moving into a crowd with a dog it is not possible to ensure that no-one will be bitten, and that he expected on this occasion that somebody would be bitten. One need only look at the photographs of the dog to realise what damage it is

likely to do if it does bite a person. To say that it is a 'large and intimidating dog' (see Jooste, N.O. v. Minister of Police and Another, 1975 (1) SA 349 (E) at p. 353) is probably a euphemistic description of it.

In my view the magistrate ought to have held that the means used by the Police to restore order were excessive having regard to all the circumstances, and that the defendant was liable to the plaintiff for such damages as he was proved to have suffered.

^{xii} See Annexure C - Chronology of Events.

^{xiii} See, for instance, *Minister of Law and Order & others v Hurley & Another (59/86) [1986] ZASCA 53; [1986] 2 All SA 428 (A) (26 May 1986)*

^{xiv} One American case notes:

An individual's participation in a law breaking group may, in appropriate circumstances, be strong circumstantial evidence of that individual's own illegal conduct, but, no matter the circumstances, an arresting officer must believe that every individual arrested personally violated the law. Nothing short of such a finding can justify arrest. The Fourth Amendment does not recognize guilt by association.

The court noted that an important issue to consider was whether the police 'made sufficient efforts to clear innocent bystanders from the street before placing those that remained on East 16th Street under arrest'.

Cf <https://pospislaw.com/2012/10/03/court-issues-major-victory-to-protesters-in-rnc-litigation/>

^{xv} <https://www.insidehighered.com/news/2018/02/09/potential-university-minnesota-rule-could-punish-entire-group-when-one-member-acts>

^{xvi} See, for instance, http://www.policesecretariat.gov.za/downloads/policies/policing_public_protests_2013.pdf for current police policy

^{xvii} Thus, the abovementioned American decision noted:

The City was not required to engage in an ineffectual game of tag, in which protestors could stop traffic, get a ticket, and proceed to their next rendezvous for further disorder. The No-Summons Policy was tailored to this well-founded fear of recidivism, which could have rendered normally minor infractions highly disruptive and potentially dangerous. Accordingly, the Court finds that the No-Summons Policy was narrowly tailored to

address the unique challenges associated with hosting a four-day national political convention.

Cf <https://pospislaw.com/2012/10/03/court-issues-major-victory-to-protesters-in-rnc-litigation/>

^{xviii} Thus, in the SWEAT judgment the court noted the following (paras 23-28):

It was argued on behalf of applicant that the arrests of sex workers with the knowledge that prosecutions would not follow, are unlawful as the arrests are not also accompanied by the requisite purpose of having the arrestees prosecuted. Applicant contends that, in the circumstances, the purpose of the arrests is an ulterior one, namely to harass, punish or intimidate the sex workers.

It was argued on behalf of respondents that the police are, in terms of sec 205 (3) of the Constitution, obliged to carry out the arrests of sex workers as part of their crime prevention duties. They contend that it would be unprecedented to order an organ of State not to carry out the duties which it is constitutionally obliged to do. This, it was argued, would intimidate police officers into not making arrests, thereby causing them to fail in their duty to prevent crime.

It was emphasised on behalf of respondents that by arresting the sex workers, the police officers intended to have them prosecuted, but that the prosecuting authorities have failed to do so. It was argued that the blame for the failure to prosecute the sex workers can accordingly not be laid at their door. The City Police added that, in any event, their members have no control over whether prosecutions are brought, or even for how long arrested persons are detained by the SAPS. This is so, by virtue of the provisions of sec 64H of the South African Police Service Act, No. 68 of 1995, which requires a person arrested by a member of a municipal police service, to be brought as soon as possible to a police station under the control of the SAPS. Finally, respondents submitted that applicant's failure to have joined the National Prosecuting Authority ("the NPA") in this application is fatal.

Whilst accepting that police officers are constitutionally obliged to carry out arrests as part of their crime prevention duties, and that the discretion whether or not to prosecute any particular case vests in the NPA in terms of sec 179(2) of the Constitution, it should be borne in mind that the peace officer making an arrest must do so with the object of bringing the arrestee under the physical control of the State to enable the prosecuting authority to institute criminal proceedings in appropriate cases. I agree with the submission on behalf of applicant, that in the circumstances prevailing in the instant matter, the peace officers who effected the arrests of the sex workers during the relevant period, did not do so with the required object or purpose of having the sex workers

prosecuted. This is so because they knew with a high degree of probability that no prosecutions would follow.

In their answering affidavits respondents stressed that the arresting officers wished to have the sex workers prosecuted, but that it is for the prosecuting authorities to decide whether or not to do so. I agree with the submission on behalf of applicant, that respondents are in this regard confusing desire and purpose. Even if the arresting officers wished to have the sex workers prosecuted, they knew with a high degree of probability that it would not happen. The history of arrests without prosecution recounted by the sex workers, as well as respondents' own records, confirm that, to the knowledge of the arrestors, sex workers are virtually as a matter of course not prosecuted after having been arrested. A peace officer who arrests a person, knowing with a high degree of probability that there will not be a prosecution, acts unlawfully even if he or she would have preferred a prosecution to have followed the arrest.

I accordingly conclude that arrests of sex workers in circumstances where, as I have already found, the peace officers know with a high degree of probability that no prosecutions will follow, are unlawful.

Cf The Sex Worker Education and Advocacy Taskforce v Minister of Safety and Security & others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009).

^{xix} North West University Policy, accessible at http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/i-governance-management/policy/1P-1.1.13_gatherings_e.pdf

^{xx} The following are some links to policies from international educational institutes:

- <https://www.usm.edu/institutional-policies/policy-stua-una-012>
- <https://www.fandm.edu/college-policies/campus-events/public-demonstrations-and-protests-policy>
- <https://studentmanual.uchicago.edu/protest>
- <https://www.umass.edu/studentlife/guidelines-student-demonstrations>
- <http://www.uvm.edu/policies/student/demonstrations.pdf>
- <https://www.brown.edu/about/administration/student-life/student-conduct/policies-regulations/protest-demonstration-guidelines>
- <http://policies.northwestern.edu/docs/university-disruption-and-demonstration-policy-final-012717.pdf>

-
- <http://www.marquette.edu/osd/policies/demonstrations.shtml>

^{xxi} <http://www.marquette.edu/osd/policies/demonstrations.shtml>

^{xxii} http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/i-governancemanagement/policy/1P-1.1.13_gatherings_e.pdf

^{xxiii} Indeed, one university protest policy has the following guideline:

2.0 Areas defined in Section 1.0 may be used without permission from the University by students, faculty or staff so long as they have not been previously reserved or scheduled for a particular function, no sound amplification is used, no structure is erected, and the participants do not violate other University policies. Any speaker may be denied or asked to leave if the speech constitutes an immediate and serious danger to the institution's orderly operation by the speaker's incitement of such actions by:

2.1 The wilful damage or destruction or seizure and subversion of the institution's buildings or other property;

2.2 The forcible disruption or impairment or interference with the institution's regularly scheduled classes or other educational functions;

2.3 The physical harm, coercion, intimidation or other invasion of lawful rights of the institution's officials, faculty members or students; or other campus disorder of a violent nature.

3.0 Any University affiliated speaker may be asked by a University official or University Police Department officer to relocate to one of the alternate locations listed if the designated "free speech zone" has been previously reserved by one or more student organizations or University departments.

4.0 Individual students, faculty or staff have the right of free expression anywhere on campus so long as the expressive activities or related conduct does not violate any other applicable University policies.

5.0 If a student organization desires to demonstrate in an area of campus outside of the Free Speech Zones or if the student organization intends to advertise for an event or anticipates an event that may draw a large crowd or impede pedestrian or vehicular traffic or will involve a parade, march or other similar activity, the University requires the student organization to complete an event form through the Office of Leadership and Student

Involvement (LSI) at least one week in advance of the activity. LSI will work with the organization to meet the request or find a suitable time and location that balances the rights of the student organization with the rights of others and the University's educational mission. The purpose of this policy is not to designate University streets and common areas as a public forum or to accommodate demonstrations or protests by those who are not part of the University community (non-students and other campus guests). Rather, the purpose of this policy is to promote and facilitate student expression while allowing the University to make any necessary arrangements (such as arranging parade route, providing security) to assure such activities do not interfere with the University's mission and operations or with the rights of others. If an individual student wishes to conduct an organized demonstration or to demonstrate in areas other than the Free Speech Zones, the student must seek the sponsorship of a registered student organization and follow the procedures outlined in this section.

Cf <https://www.usm.edu/institutional-policies/policy-stua-una-012>

^{xxiv} <https://www.brown.edu/about/administration/student-life/student-conduct/policies-regulations/protest-demonstration-guidelines>

^{xxv} For instance, one policy notes:

In addition to the guidelines set forth in this policy, other factors considered by the College in determining whether a request for peaceful protest or orderly demonstrations should be granted include, but are not limited to, whether such protest or demonstration would

- *Interfere unreasonably with the activities of other persons. The time of day, size, anticipated noise level and general tenor of a meeting, event or demonstration are factors that may be considered;*
- *Cause injury to persons or property or threaten to cause such injury;*
- *Endanger health or safety; or*
- *Knowingly interfere with unimpeded movement in a College location*

Cf <https://www.fandm.edu/college-policies/campus-events/public-demonstrations-and-protests-policy>

^{xxvi} A policy at the University of Chicago notes:

Advance Arrangements

To further the effectiveness of their event, organizations and other groups of students organizing a protest or demonstration are encouraged to make advance arrangements with the staff of the Center for Leadership and Involvement (CLI) and/or their appropriate Recognized Student Organization (RSO) Advisor. Advance notification enables the University to help ensure that the event takes place in a constructive and peaceable manner.

When possible, a request to hold a protest or demonstration should be submitted at least 48 hours before the start of the event to ensure its successful execution. With the appropriate advance notice, RSO Advisors together with the Dean-on-Call will engage with student protestors and demonstrators during the event to help assure that the event is effective, to ensure participants' safety, and to assist organizers in seeing that the demonstration does not disrupt the normal functioning of the University. For events occurring on city sidewalks and streets adjacent to the University, students should make appropriate arrangements to acquire city permits and should adhere to city ordinances and applicable state and federal law.

Cf <https://studentmanual.uchicago.edu/protest>

^{xxvii} Thus, a policy at the University of Massachusetts states:

One of the primary roles of the University of Massachusetts Police Department (UMPD) is to ensure the safety of the campus community. UMPD supports community members to exercise guaranteed rights and is committed to working with students, student groups, and student organizations to provide education and consultation on University policies, applicable laws, and safety and security procedures. The UMPD Community Outreach Officer is available to meet with students to discuss issues and concerns that may arise before or after a demonstration. If there is a complaint regarding an alleged impropriety by UMPD, a citizen complaint form can be filed. UMPD officers who are especially helpful and supportive can be commended by filing a commendation form.

Cf <https://www.umass.edu/studentlife/guidelines-student-demonstrations>

^{xxviii} Another policy from Marquette University notes:

When demonstrations are scheduled, organizers should expect University personnel (typically, Student Affairs staff and/or Marquette University Police officers) to be present for all or part of the event. This presence is often necessary to ensure organizers' own rights are protected and the University's regular operations and activities are not interrupted. Accordingly, University

representatives may film, photograph or record elements of the event. The presence of University personnel should not be viewed as an effort to deter or otherwise interfere with properly approved demonstrations.

Cf <http://www.marquette.edu/osd/policies/demonstrations.shtml>

^{xxix} Thus, one policy states:

When disruption occurs, responsible administrators shall, whenever possible and appropriate, first attempt to resolve the situation through dialogue. If reasonable efforts to resolve the situation through dialogue fail, or where disruption presents an imminent and significant threat of violence or risk of harm to persons or property, persons engaged in disruptive conduct will first be advised that failure to desist may result in University disciplinary action, issuance of a trespass citation, and/or criminal prosecution; however, in cases where, in the considered judgment of the responsible administrator(s), action must be taken immediately to avert personal injury or property damage, notice of the violation shall be given at the same time as preventive or responsive action is instituted.

Cf <http://www.uvm.edu/policies/student/demonstrations.pdf>