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

Case No: A431/15
Magistrates' Court Case No: 14/985/2013

In the matter between:

PHUMEZA MLUNGWANA	First Appellant
XOLISWA MBADISA	Second Appellant
LUVO MANKQA	Third Appellant
NOMHLE MACI	Fourth Appellant
ZINGISA MRWEBI	Fifth Appellant
MLONDOLOZI SINUKU	Sixth Appellant
VUYOLWETHU SINUKU	Seventh Appellant
EZETHU SEBEZO	Eighth Appellant
NOLULAMA JARA	Ninth Appellant
ABDURRAZACK ACHMAT	Tenth Appellant

and

THE STATE	First Respondent
THE MINISTER OF POLICE	Second Respondent

APPELLANTS' HEADS OF ARGUMENT

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I INTRODUCTION

1. This appeal raises one simple issue: Is it constitutional to make it a crime to convene a gathering of more than 15 people, merely because the conveners did not notify the local authority that the gathering would occur?

2. Convening a gathering without notice is currently a crime in terms of s 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 (**RGA**), if more than 15 people attend. The Appellants were all convicted in the Magistrates' Court of contravening that provision.

3. They are all members of the Social Justice Coalition (**SJC**), an NGO that works for social justice, particularly in Khayelitsha. On 11 September 2013, they together with other members of the SJC chained themselves together on the steps of the Civic Centre to call for action by the Mayor to address chronic problems with sanitation in Khayelitsha. For years they had tried to engage with the City of Cape Town (**City**) but the City repeatedly failed to deliver on its promises. Frustrated, they arranged a gathering without notice because they believed that was the only way to express their frustration with the City's conduct and finally elicit a response from the City. They had intended to remain within the law by having only 15 protestors, but other members of the SJC joined the protest because of their passion for the cause.

4. Their conviction was unconstitutional. They have been punished for exercising their constitutional right "*peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.*" Their protest was peaceful and caused no significant disruption to members of the public. It was arranged to advance other constitutional rights like the right to dignity, to health, and to freedom and security of the person.

5. The Minister of Police (**Minister**) argues that their conviction is justified because it is necessary to incentivise conveners to give notice under the RGA. The notice is necessary, he argues, to allow the police to plan to use their resources at different gatherings.

6. The Appellants do not dispute the importance of notice. But criminalisation is neither necessary nor proportional to achieve the Minister's purpose. Conveners are already adequately incentivised to give notice by other provisions of the RGA, and the common law. If further incentives are needed, less restrictive means that do not involve criminalising the exercise of a constitutional right are available. Moreover, the criminalisation is arbitrary, overbroad and contrary to international law and best practice.

7. The correct result is to declare s 12(1)(a) of the RGA unconstitutional and invalid, and set aside the Appellants' convictions.

8. These heads of argument are structured as follows:

   8.1. **Part II** sets out the relevant facts that led to the Appellants' conviction;

   8.2. **Part III** describes the legal framework, and particularly the operation of the RGA;

   8.3. **Part IV** explains why s 12(1)(a) is unconstitutional; and

   8.4. **Part V** deals briefly with issues of remedy.

II FACTUAL BACKGROUND

9. In this Part, I summarise the evidence that served before the Magistrate and her conclusions of fact and law. I do so in the following sections:

   9.1. The nature of the City of Cape Town's notice procedure under the RGA;

   9.2. The motivation for the gathering on 11 September 2013;

   9.3. The conduct of that gathering;

   9.4. The effect of protest; and

   9.5. The Magistrate's reasons.

THE CITY'S NOTICE PROCEDURE

10. The RGA does not require people who wish to organise a gathering to apply for permission to do so. Nor is there any requirement for a permit to be issued. Convenors are merely required to give notice of their intention to convene a gathering.[1] If the local authority wishes to object to the gathering it is entitled to do so, but if it does not, the gathering can proceed.

11. Mr Da Silva testified that, despite there being no requirement for an application in the RGA, the City requires those who want to give notice of a gathering to complete an application and obtain a permit.[2] Under cross examination, he admitted that this procedure was not only incompatible with the RGA, but that it would appear very different to those who wished to hold a gathering.[3] He stated that it was "*a clear misnomer, which should be addressed*".[4] This concession is important because it demonstrates the true operation of the notice requirement; in practice it acts as a permission requirement.

THE MOTIVATION FOR THE GATHERING

12. The appellants are all members and leaders of the Social Justice Coalition (**SJC**). The SJC is a membership-based organization based in Khayelitsha. It was formed in 2008, with the objective to "*advance the Constitution, promote accountability in governance and also ensure and promote active citizenship*".[5] One of the SJC's primary campaigns is the "*clean and safe sanitation for all*" campaign.[6] The purpose

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[1] Transcript p 22 line 24 – p 23 line 4.

[2] Transcript p 22, lines 20-23.

[3] Transcript p 24, lines 12-16.

[4] Transcript p 24, line 19.

[5] Transcript p 62, lines 20-22.

[6] Transcript p 64, lines 8-9.

of the campaign is to ensure that everybody in Khayelitsha has access to adequate sanitation and that those sanitation facilities are properly maintained.[7]

13. The lack of sanitation poses serious threats to the health, safety and dignity of Khayelitsha's residents.[8] As the First Appellant testified, "*people have been the victims of rape, some people have been stabbed, some people have been murdered in that process [of accessing toilets] and some people have been injured in trying to access a toilet or on their way to access a toilet or being vulnerable to all sorts of crime.*"[9] As she explained, functioning sanitation is related "*to safety, to health, to education, to environmental health and people['s] dignity and freedom and their constitutional rights*".[10]

14. To try and address these serious constitutional violations, the SJC began work on its sanitation campaign in 2010 by trying to raise awareness about the issue.[11] When mayor Patricia De Lille was elected in 2011, the City of Cape Town ("**the City**") began to cooperate with the SJC to work on the problem of sanitation.[12] The City agreed to establish a janitorial service to ensure that sanitation facilities were cleaned and maintained.[13] The service began to be implemented in 2012.[14]

15. However, there were immediately problems with the service. It was designed and implemented without proper consultation with the community and without a policy or operational plan. The janitors lacked the necessary training and equipment and were unable to do their jobs.[15] The SJC engaged with the City about the flaws in the

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[7] Transcript p 64 line 22 – p 65 line 2.

[8] Transcript pp 65-68.

[9] Transcript p 67, lines 1-5.

[10] Transcript p 67, lines 22-24.

[11] Transcript p 70, line 1.

[12] Transcript p 74, lines 20-23.

[13] Transcript pp 75-76.

[14] Transcript p 77, line 4.

[15] Transcript pp 77-78.

implementation of the janitorial service and the need for a policy.[16] In late 2012, they made a commitment to develop the policy and plan.

16. However, despite the commitment, no policy or plan was developed. The SJC continued to follow up with the City in the first half of 2013 – through letters and emails – to attempt to get a plan developed.[17] On 25 June 2013,[18] the SJC held a march to the City and delivered a memorandum to the Mayor.[19] Between 300 and 400 people participated in the march, which was organised with the requisite notice to the City.[20]

17. In response to the march, Councillor Sonnenberg claimed that the City had developed an operational plan, however that plan was not publicly available.[21] The SJC instructed its attorneys to write to the City to demand a copy of the plan.[22] The City provided a policy that was clearly inadequate.[23] The SJC then instructed its attorneys, on 13 August 2013,[24] to write another letter to the City requesting an urgent meeting.[25] The City responded that it was only able to meet in October.[26]

18. The SJC took the view that this was "*unacceptable*".[27] The SJC regarded the matter as urgent because it had been working with the City since 2011 and there was still no

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[16] Transcript p 79, lines 2-8.

[17] Transcript p 80 line 12 - p 80 line1.

[18] Exhibit B, p 4.

[19] Exhibit C.

[20] Transcript p 84, lines 18-21.

[21] Transcript p 85, lines 19-24.

[22] Transcript p 87, lines 2-6.

[23] Transcript p 87, lines 10-23.

[24] Exhibit B, p 4.

[25] Transcript p 88, lines 14-20.

[26] Transcript p 89, lines 2-3.

[27] Transcript p 89, line 9.

implementation plan and problems with the janitorial service were getting worse.[28] The SJC convened a mass meeting where its members discussed how to respond to the City's offer of a meeting in October.[29] The members "*spoke strongly about their frustration with the City*" both for the poor communication, and the fact that "*people's experiences of sanitation [were] still the same.*"[30] The members stated that "*we need to have a protest, go big and show the city that we're very serious, we mean business.*"[31]

19. Following the mass meeting, the SJC held a special executive council meeting to decide what action to take.[32] That meeting was attended by the Convenor Accused.[33] It was decided that it was necessary to take public action because merely writing again would not help.[34] The meeting decided to picket at the Civic Centre to force the City to publicly acknowledge their responsibilities and act on them.[35]

20. The Appellants decided that they would not give notice, and that only 15 people would attend the picket so that they would comply with the RGA.[36]

21. The decision not to give notice was based on two concerns: the need to act urgently, and in order to show the City how frustrated they were. In the First Appellant's words:

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[28] Transcript p 89, lines 11-21.

[29] Transcript p 91, lines 4-12. The meeting happened in the week prior to the protest, probably on Thursday 5 September 2013. Record p 122, lines 4-5.

[30] Transcript p 92, lines 7-12.

[31] Transcript p 93, lines 6-8.

[32] Transcript p 93, lines 14-15.

[33] Transcript p 94 line 23 – p 95 line 12.

[34] Transcript p 95 line 19 – p 96 line 4.

[35] Record p 96, lines 5-16.

[36] Record p 97, lines 1-7.

> "*[W]e realized that people were really frustrated and we were frustrated and we must always realize that even though we started the sanitation campaign in 2010 and we know that people have been raped, people have been murdered, people have got sick, people have been mugged … during that period. …[W]e need to acknowledge that people do not, the conditions in which people are living are not conducive and we should put a stop to that. … It was important for the city to see how frustrated people are because you must remember the people who were taking these decisions are people that most of them are directly affected and people that feel they should do something.*"[37]

22. Although the Appellants intended to comply with the RGA by limiting the number to 15, they were aware that there was a risk they would be arrested. The decided that they "*were not going to leave there, the plan was we are not going to leave there until they come and acknowledge our demands.*"[38] The First Appellant explained the attitude at the meeting as follows: "*people were saying they are willing to be arrested for a cause they believe in because it's not , it's not that people wanted to be arrested, but they were saying they are willing to sit there or stay there at the Civic Centre until the mayor comes to acknowledge our demands. And if it means being arrested then…*"[39]

23. A caucus meeting was held on the Monday or Tuesday before the protest by all those who would be involved to plan for the protest.[40]

THE PROTEST

24. The protest took place on 11 September 2013. Fifteen people went by taxi from Khayelitsha to the Civic Centre and arrived at about 9:00.[41] The fifteen people then

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[37] Transcript p 97 line 9 – p 98 line 2.

[38] Record p 98, lines 4-6.

[39] Transcript p 98, lines 14-19.

[40] Record p 128 lines 18-23.

[41] Record p 99, lines 5-20.

chained themselves together in groups of five and walked to the staircase leading to one of the entrances to the Civic Centre, where they chained themselves to the railing.[42]

25. The following important facts about the protest appear from the Record:

25.1. The protest did not prevent people accessing the Civic Centre. The staircase to which they chained themselves was only one of several ways to access that entrance to the Civic Centre.[43] There were also other entrances for people to access the Civic Centre.[44] It was not the protestors' intention to prevent access,[45] and people were able to go underneath the protestors' arms.[46] People in fact used the entrance during the protest, although it was eventually closed.[47] The Magistrate accepted this was the correct position.[48]

25.2. The protest was peaceful and respectful. The protestors held placards and sang songs, but the protest was always peaceful.[49] The first Accused negotiated calmly and respectfully with Captain Prins when he asked them to leave.[50] The Magistrate confirmed that the protest was peaceful.[51]

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[42] Record p 99 line 24 – p 100 line 13.

[43] Record p 101, lines 7-11.

[44] Record p 101, lines 12-17.

[45] Record p 101, lines 18-19.

[46] Record p 107 lines 3-7. Officer Peterson's evidence to the contrary should be rejected. Record p 38, lines 11-14. He offered contradictory versions (at first stating it would be impossible, then conceding it would only be difficult) and his version is inconsistent with the photographic evidence.

[47] Record p 107, lines 8-11.

[48] Transcript p 193 line 15-p 194 line 7.

[49] Transcript p 43, lines 8-14.

[50] Transcript p 111, lines 16-21.

[51] Transcript p 194, lines 7-10.

25.3. There were approximately 16 people chained together. The accused admit that although initially 15 people were chained together,[52] later 16 of them were chained to the railing.[53] The photographs of the protest also show that approximately 16 people were chained together.[54] Some people joined the chain, and others left the chain during the protest. When Captain Prins asked them to leave, they realized that there were more than 15 people in the chain and offered to get the extra people to leave the chain.[55] The 15 people were nominated from the various branches and the executive structure of the SJC.[56] When the arrest actually took place, there were 13 people on the chain.[57]

25.4. The remaining accused were not chained, but participated in the protest.[58] There were less than 10 other SJC members[59] present who were singing and chanting and holding placards.[60] They were there to support those chained to the railings by sending media statements, bringing files and getting food.[61] They moved closer and further away from the railings, but were sometimes as close as a metre and a half away.[62] When those outside the chains joined in

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[52] Transcript p 104, lines 15-16.

[53] Plea Explanation at para 7.1: Record p 243.

[54] Exhibits F and G.

[55] Transcript p 110, lines 11-16.

[56] Transcript p 131-132.

[57] Transcript p 193, line 7.

[58] Plea Explanation at para 7.2: Record p 243.

[59] Transcript p 136, lines 15-17.

[60] Transcript p 104 line 23 – p 105 line 7.

[61] Transcript p 137, lines 15-17.

[62] Record p 139 line 13 – p 140 line 10.

by singing and dancing, the Appellants did not stop them.[63] The accused all formally admitted that the 21 accused attended the gathering.[64]

25.5. The accused did not resist arrest and nobody attempted to run away. All those who were part of the chain were arrested.[65] They were still chained together when they were arrested.[66] Some, but not all, of the unchained protestors were also arrested.[67] Nobody tried to run away.[68]

THE EFFECT OF PROTEST

26. Protest has been an effective method for the SJC to achieve its goals. For example, it aided in the establishment of the Khayelitsha Commission of Inquiry.[69]

27. The arrest of the accused for protesting has had a chilling effect on future protests by the SJC. As Ms Mlungwana put it:

> "*[P]eople are arrested even though they are arrested for raising issues that are dear to their hearts and issues that are very important, but obviously going forward it does affect when people need to protest again they're going to think twice: are we going to be arrested. Because if you think back we weren't violent, we weren't disrupting anything, but still we were arrested and so people are going to think twice even though they feel they've tried every possible avenue to be heard and they're not heard, but they are going to think twice for them to participate in a public or an action of this sort.*"[70]

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[63] Transcript p 195 lines 19-25.

[64] Plea Explanation at para 7: Record p 243.

[65] Record p 113, line 7.

[66] Record p 113, line 16.

[67] Record p 113, lines 8-11.

[68] Record p 113, lines 3-5; lines 12-22.

[69] Record p 117, lines 9-21.

[70] Record p 118, lines 2-11.

28. The protest also had an important impact – it led to a meeting with the City, the adoption of clear resolutions and the development of a policy.[71] That would probably not have been achieved if the SJC had followed the ordinary process of giving notice.[72]

THE TRIAL

29. The state charged all 21 accused with convening a gathering without notice (contrary to s 12(1)(a) of the RGA) and, in the alternative, attending a gathering without notice (contrary to s 12(1)(e) of the RGA).

30. The accused entered a plea explanation in terms of s 115 of the Criminal Procedure Act. In it they admitted that the Appellants had convened the gathering and that they had not given notice. They also admitted that all 21 accused had attended the gathering. There were therefore two categories of accused at the trial:

    30.1. Those that had convened and attended the protest (the Appellants); and

    30.2. Those that had only attended the protest (**the Attending Accused**)

31. The plea explanation foregrounded the accuseds' two defences:

    31.1. RGA s 12(1)(e) does not make it a crime to attend a gathering merely because no notice was given; and

    31.2. RGA s 12(1)(a) is unconstitutional and invalid to the extent that it criminalises convening a gathering without notice.

32. The Magistrate acquitted the Attending Accused of violating s 12(1)(a) because there was no evidence that they convened the gathering.[73] The Magistrate acquitted the Attending Accused of the alternative charge of attending the gathering contrary to s

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[71] Transcript p 118, lines 12-22.

[72] Transcript p 119, lines 1-11.

[73] Transcript p 195, lines 1-12.

12(1)(e). She upheld the defence that attending a gathering without notice was not a crime.[74]

33. However, the Appellants – who had admitted to convening the gathering – were convicted of contravening s 12(1)(a).

34. When it came to sentence, the Appellants asked that they be fined R100, suspended provided that they perform one week of community service.[75] The accused specifically asked to be sentenced to community service given their role as community activists.[76] However, the Magistrate imposed the lowest possible sentence: caution and discharge. In reaching that conclusion, the Magistrate noted that "*they cause[d] no harm to anyone. There were no threats. There was no damage to any property.*"[77] In addition, she noted that the reason more than 15 people participated in the protests was because "*emotions were running high*".[78] Moreover, the interests of the community favoured a light sentence:

> "*They were at all times … respectful and peaceful. … When the court looks at the interest of the community, the court certainly takes into account that it is the very community that they wish to help, hence the reason for their protest action, the various letters and engagements with the city and the mayor."*[79]

35. The Appellants sought leave to appeal solely for the purpose of raising the constitutional challenge to s 12(1)(a) of the RGA. The Magistrate granted leave, holding that "*a Court of Appeal could very well come to the conclusion that [s 12(1)(a)] is unconstitutional*".[80]

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[74] Transcript p 196, lines 17-24.

[75] Transcript p 203, lines 11-16.

[76] Transcript p 203, lines 16-22.

[77] Transcript p 207, lines 21-22.

[78] Transcript p 207, line 24.

[79] Transcript p 208, lines 12-18.

[80] Transcript p 236, lines 22-24.

III THE SCHEME OF THE RGA

36. The RGA was enacted to "*regulate the holding of public gatherings and demonstrations*".[81] Although passed prior to the Constitution,[82] its preamble recognises the right of every person "*to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so*". The preamble – like s 17 of the Constitution – also recognises that the exercise of the right to assemble must "*take place peacefully*".

37. In this Part I describe the scheme of the RGA in some detail. This is necessary because to evaluate the need to criminalise gathering without notice, it is necessary to understand where that crime fits into the broader regulatory structure. This Part is divided as follows:

    37.1. The distinction between a demonstration and a gathering;

    37.2. The notice requirement;

    37.3. The conduct of gatherings;

    37.4. The regulation of gatherings without notice; and

    37.5. Civil liability.

DEMONSTRATION V GATHERING

38. The basic scheme of the RGA involves a distinction between "*demonstrations*" and "*gatherings*":

    38.1. A demonstration is defined as "*includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action*";

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[81] RGA Long Title.

[82] It was signed on 14 January 1994, after the Interim Constitution had been signed, but before it came into force.

38.2. A gathering is defined as:

> "*any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air-*
>
> *(a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or*
>
> *(b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution*"

39. It is important to note the following about these definitions:

39.1. They are both extremely wide and cover virtually almost all conceivable forms of protest. In particular, they both cover protests against public and private parties or conduct, and protests that support or attack those parties or conduct;

39.2. The primary difference is the number of people involved: a demonstration consists of 1-15 people; a gathering consists of more than 15 people;

39.3. There are other less relevant substantive differences in the two definitions:

39.3.1. A gathering can only occur in an open-air public place or road, whereas a demonstration can occur anywhere, presumably also indoors;

39.3.2. Although the purposes for which a gathering is convened are more specifically stated, they appear to largely substantially coincide with those for which a demonstration must be convened;[83] and

39.3.3. It is not clear what the difference is, if any, between a "*demonstration*" and an "*assembly, concourse or procession*", nor why the Legislature chose to distinguish between the two.

THE NOTICE REQUIREMENT

40. The key mechanism of the RGA revolves around the notice requirement. This is where the distinction between a demonstration and a gathering plays out. Ordinarily[84] there is no requirement to give notice for a demonstration. However, the convener of a gathering is required by s 3(1) to "*give notice in writing signed by him of the intended gathering in accordance with the provisions of this section*".

41. The RGA defines a convener as: *"(a) any person who, of his own accord, convenes a gathering; and (b) in relation to any organization or branch of any organization, any person appointed by such organization or branch in terms of section 2(1)*". In addition, s 13(3) of the RGA provides that, if a convener has not been appointed in terms of s 2(1) – presumably because no notice was given – then:

> *"a person shall be deemed to have convened a gathering-*
>
> *(a) if he has taken any part in planning or organizing or making preparations for that gathering; or*

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[83] The wide wording in the definition of demonstration – "*for or against any person, cause, action or failure to take action*" – certainly covers all the purposes identified in the definition of gathering. It may be that the causes for which a gathering may be convened are narrower than those of a demonstration. This would mean that there is a class of "*assembly, concourse or procession*" that is neither a gathering nor a demonstration because: (a) it consists of more than 15 people; and (b) it is not for one of the purposes listed in the definition of gathering. This potential anomaly can only add to the unjustifiability of s 12(1)(a).

[84] There is a requirement to seek permission for a demonstration near certain government buildings. RGA s 7(1).

> *(b) if he has himself or through any other person, either verbally or in writing, invited the public or any section of the public to attend that gathering."*

42. The notice is given to the "*responsible officer*"[85] who is an official of the relevant municipality.[86] The notice must ordinarily be given at least 7 days prior to the planned gathering,[87] although it may be given up to 48 hours before the gathering.[88] The notice needs to include the relevant details about the gathering including the time, place, expected attendance, the route to be followed and the purpose of the gathering.[89]

43. It is important to repeat – as Mr Da Silva was forced to acknowledge – that the RGA does not contemplate an application procedure, but a notice procedure. People are entitled to convene gatherings as of right. The notice requirement is designed to create a process to facilitate the management of those gatherings. It is not to decide whether or not they may occur. The Constitution makes it clear that they may.

44. Once notice has been given, the responsible officer must decide in consultation with the authorized member whether it is necessary to hold negotiations with the convener on the conduct of the gathering.[90] If the responsible officer concludes that negotiations are not necessary, she informs the convener.[91] If she concludes negotiations are necessary, she must call a meeting of the relevant parties (**a s 4 meeting**).[92]

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[85] RGA s 3(2).

[86] RGA s 1 definition of "*responsible officer*" read with s 2(4).

[87] RGA s 3(2).

[88] RGA s 3(2) read with s 3(3). If the notice is given less than 7 days before the gathering, it must be given "*at the earliest opportunity*" and the notice must explain "*the reason why it was not given timeously*".

[89] RGA s 3(3).

[90] RGA s 4(1).

[91] RGA s 4(2)(a).

[92] RGA s 4(2)(b).

45. The purpose of the s 4 meeting is to discuss in good faith and seek to reach agreement on "*the conditions, if any, to be imposed in respect of the holding of the gathering so as to meet the objects of this Act.*"[93] If agreement is reached, the gathering takes place according to the agreed conditions.[94] If no agreement is reached, the responsible officer can still impose conditions relating to traffic, proximity to rival gatherings, access to property and workplaces and prevention of injury to persons and property.[95]

46. Importantly, the s 4 meeting does not ordinarily entitle the responsible officer to prohibit a gathering. She may only do so if:

> *"credible information on oath is brought to [her] responsible officer that there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat*".[96]

47. The responsible officer must then consult, if possible, with the convener and other relevant people.[97] Only if the responsible officer is "*on reasonable grounds convinced*" that it is not possible to amend the conditions to prevent the threat to traffic, persons or property, may she prohibit the gathering.[98]

48. If a gathering is prohibited, or if conditions are imposed at a s 4 meeting that the convener disagrees with, he may apply urgently to a magistrate to set aside the condition or prohibition.[99]

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[93] RGA s 4(2)(c), read with s 4(2)(d).

[94] RGA s 4(4)(a).

[95] RGA s 4(4)(b).

[96] RGA s 5(1).

[97] Ibid.

[98] RGA s 5(2).

[99] RGA s 6.

CONDUCT OF GATHERINGS

49. Section 8 deals in detail with the conduct of gatherings. Importantly, it applies to all gatherings, whether or not notice was given.[100] The conditions it imposes include:

49.1. A responsibility on the convener to appoint marshals to "*control the participants in the gathering, and to take the necessary steps to ensure that the gathering at all times proceeds peacefully*";[101]

49.2. No participant may have a firearm or a dangerous weapon;[102]

49.3. No person may demonstrate in a manner that incites hatred,[103] or may cause or encourage violence;[104]

49.4. No person may wear a disguise or mask,[105] or a uniform that resembles a uniform of the security services;[106]

49.5. The marshals must take reasonable steps to ensure that "*no entrance to any building or premises is so barred by participants that reasonable access to the said building or premises is denied to any person*";[107] and

49.6. No person may compel anybody else to join the gathering or demonstration.[108]

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[100] This appears from the wide introductory words – *"[t]he following provisions shall apply to the conduct of gatherings*" – and the definition of "convener" in s 13(3) which, as discussed above, includes a convenor of gathering without notice.

[101] RGA s 8(1).

[102] RGA s 8(4).

[103] RGA s 8(5).

[104] RGA s 8(6).

[105] RGA s 8(7).

[106] RGA s 8(8).

[107] RGA s 8(9).

[108] RGA s 8(10).

50. Non-compliance with any of these obligations is an offence in terms of s 12(1)(c).[109]

51. In addition, s 9 affords the police wide powers to manage any gathering or demonstration "*whether or not [it is] in compliance with the provisions of*" the RGA.[110] These powers, which are granted to any member of the Police, include:

51.1. In the case of a gathering for which no notice was given at least 48 hours beforehand, the power to:

> "*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*";[111]

51.2. Whenever "*an incident, whether or not it results from the gathering or demonstration, causes or may cause persons to gather at any public place*" specify an area necessary for the movement of traffic, the passage of a gathering, the exclusion of the public or the protection of property;[112]

51.3. An obligation to "*take such steps … as are in the circumstances reasonable and appropriate to protect persons and property*";[113]

51.4. If a member more senior than a warrant officer "*has reasonable grounds to believe that danger to persons and property, as a result of the gathering or*

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[109] RGA s 12(1)(c) reads: "*Any person who – (c) contravenes or fails to comply with any provision of section 8 in regard to the conduct of a gathering or demonstration*

[110] RGA s 9(1).

[111] RGA s 9(1)(c).

[112] RGA s 9(1)(e).

[113] RGA s 9(1)(f).

demonstration, cannot be averted" by the other powers referred to above, then that member "*may and only then*":

51.4.1. Call on the participants to disperse;

51.4.2. Order them to disperse; and

51.4.3. If they have not dispersed, instruct the member of the police to disperse them using force that is proportionate in the circumstances.[114]

52. It is a criminal offence not to "*comply with an order issued, or interfere with any steps taken*" in terms of the powers outlined above.[115] It is also an offence to "*hinder, interfere with, obstruct or resist a member of the Police, responsible officer, convener, marshal or other person in the exercise of his powers or the performance of his duties under this Act*".[116] As I argue below, this will always be a more appropriate charge for gatherings without notice that are not peaceful, or cause unjustifiable disruption.

53. What is plain from s 9 is that the RGA does not envisage that the police will simply arrest all people who convene or participate in a gathering without notice. It empowers and requires the police to manage the gathering reasonably to avoid damage to persons or property, or unjustifiable disruption to traffic or access to buildings. Those powers and obligations exist whether or not notice was given.

REGULATION OF GATHERINGS WITHOUT NOTICE

54. This is consistent with the manner in which the RGA regulates gatherings without notice in other provisions. Although the RGA generally requires notice to be given, it also includes specific provisions for dealing with situations where gatherings occur

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[114] RGA 9(2).

[115] RGA s 12(1)(g).

[116] RGA s 12(1)(j).

without notice. Importantly, the RGA does not absolutely prohibit those gatherings. Instead, it creates a flexible mechanism for the responsible officer and police to manage the gatherings in order to fulfil the purpose of the Act: protecting the right to peaceful protest.

55. First, the RGA makes specific provision for what occurs when either the local authority or the police receive information about a gathering other than through formal notice in terms of s 3(1). In those instances, the police must inform the responsible officer, or vice versa.[117] Once in possession of that knowledge, the RGA does not permit a responsible officer to prohibit the gathering. Nor does it automatically demand compliance with the formal notice requirement. Instead, s 3(5)(c) provides:

> "*Without derogating from the duty imposed on a convener by subsection (1), the responsible officer shall, on receipt of such information, take such steps as he may deem necessary, including the obtaining of assistance from the Police, to establish the identity of the convener of such gathering, and may request the convener to comply with the provisions of this Chapter.*"

56. Second, s 4(1) provides that the responsible officer must consult with the authorized member when notice of a gathering has been given, "*or other information regarding a proposed gathering comes to his attention*".[118] The s 4 negotiation process can, therefore, be triggered even where no notice has been given.

57. Third, the power to prohibit a gathering under s 5 applies to any "*proposed gathering*". That must include both gatherings for which notice has been given, and gatherings where the responsible officer has become aware of the gathering through other channels.

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[117] RGA ss 3(5)(a) and (b).

[118] RGA s 4(1) reads: "*If a responsible officer receives notice in terms of section 3(2), or other information regarding a proposed gathering comes to his attention, he shall forthwith consult with the authorized member regarding the necessity for negotiations on any aspect of the conduct of, or any condition with regard to, the proposed gathering.*"

58. The RGA therefore grants the responsible officer – and the police – the flexibility to determine how to handle a gathering for which no notice has been given. Section 12(1)(a)'s absolute criminalisation of convening a gathering without notice is inconsistent with this sensible discretion afforded to those tasked with providing protection to those exercising their constitutional rights.

59. Fourth, it is not a crime to attend a gathering merely because no notice has been given. That was the finding of the Magistrate in this matter and the reason that the Attending Accused were acquitted. That position has recently been confirmed by a full bench of the Free State High Court in *Tsoaeli v S*.[119] Section 12(1)(e) criminalises attending a gathering that has been "*prohibited in terms of this Act*". Prohibited gatherings are only those that have been expressly prohibited in terms of s 5, or that are contrary to s 7. A gathering without notice is not a "*prohibited gathering*" and attending one is entirely lawful. This case asks how it can be constitutional to criminalise the convening of a gathering in those circumstances.

CIVIL LIABILITY

60. Section 11(1) of the RGA imposes civil liability on "*every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener*" for any "*riot damage*"[120] that "*occurs as a result of*" a gathering, including a gathering without notice. Section 11(2) grants a limited defence for organizers and conveners if they can show that:

60.1. They were not responsible for the act or omission that caused the damage and it was not part of the objectives of the gathering;

60.2. The act or omission was not reasonably foreseeable

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[119] Unreported judgment, case no A222/2015 (17 November 2016).

[120] The RGA defines "*riot damage*" as "*any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering.*"

60.3. They took all reasonable steps to prevent the act or omission.[121]

61. In *South African Transport and Allied Workers Union and Another v Garvas and Others* the Constitutional Court held that the limited defence offered by s 11(2) was a justifiable limitation of the right to free assembly.[122] It held that the imposition of liability combined with the limited defence in s 11(2) served an important purpose:

> "*It is to protect members of society, including those who do not have the resources or capability to identify and pursue the perpetrators of the riot damage for which they seek compensation. When a gathering imperils the physical integrity, the lives and the sources of livelihood of the vulnerable, liability for damages arising therefrom must be borne by the organizations that are responsible for setting in motion the events which gave rise to the suffered loss.*"[123]

62. The availability of this civil remedy is important because it provides a strong incentive for conveners to take all reasonable steps to ensure that their gatherings do not cause damage. Often, the failure to give notice will mean that a convener is liable under s 11.

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[121] RGA s 11(2) reads in full:

"*(2) It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves-*

(a) that he or it did not permit or connive at the act or omission which caused the damage in question; and

(b) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and

(c) that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question."

[122] [2012] ZACC 13; 2012 (8) BCLR 840 (CC); 2013 (1) SA 83 (CC).

[123] Ibid at para 67.

OTHER OFFENCES

63. The provisions of the RGA are buttressed by other provisions of the common law and legislation that regulate gatherings.

64. Section 13(1) expressly states that the RGA does not detract from the Control of Access to Public Premises and Vehicles Act 53 of 1985; the Dangerous Weapons Act, 2013; the Arms and Ammunition Act 75 of 1969 the Trespass Act 6 of 1959; or the Criminal Procedure Act of 1977. These acts all provide for offences related to gatherings in public places.

65. So too do the common-law offences of public violence and malicious damage to property, amongst others.

66. There are also a raft of by-laws that regulate the use of public roads and public places. In Cape Town, for example, the By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances, 2007 contains multiple offences that can be used to prosecute those that cause a nuisance or disruption.

67. The point is this: the law without s 12(1)(a) is already more than sufficient to ensure that protests occur peacefully and without unjustified disruption. As I explain below, the Minister is therefore forced to adopt an alternative, and far less compelling, purpose for criminalising the Appellants' conduct.

IV RGA s 12(1)(a) IS UNCONSTITUTIONAL

68. In this Part, I explain why the criminalisation of convening a gathering without notice is unconstitutional. That exercise consists of two parts: (a) whether s 12(1)(a) limits the right to freedom of assembly; and (b) If so, whether that limitation can be justified in terms of s 36(1) of the Constitution.

LIMITATION OF S 17

69. Section 17 of the Constitution reads: "*Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.*" In *Garvas*, the Constitutional Court accepted that the civil liability imposed by s 11 of the RGA limited the right to freedom of assembly. While Mogoeng CJ held that "*mere legislative regulation of gatherings to facilitate the enjoyment of the right to assemble peacefully and unarmed, demonstrate, picket and petition may not in itself be a limitation*", s 11 went further:

> "*Compliance with the requirements of section 11(2) significantly increases the costs of organising protest action. And it may well be that poorly resourced organizations that wish to organise protest action about controversial causes that are nonetheless vital to society could be inhibited from doing so. Both these factors amount to a limitation of the right to gather and protest.*"[124]

70. Section 12(1)(a) makes it a crime to convene any gathering without notice. That includes gatherings that are peaceful and unarmed (like the one engaged in by the Appellants) and are therefore protected by s 17.

71. Criminalisation goes beyond mere regulation. The Appellants do not object to the requirement in s 3 that notice be given. As I expand on below, they accept that the notice requirement serves a legitimate purpose. They object to the criminalisation of gathering without giving notice in s 12(1)(a). That criminalisation will deter people from gathering, or will mean they face fines and/or imprisonment for exercising a

[124] Ibid at para 57.

constitutional right. It is difficult to think of a clearer case of a limitation. The submission of the Minister that "*the requirement of notice in terms of section 3 of the [RGA] does not result in an infringement of [s 17]*"[125] is therefore misguided.

72. In short, by criminalising conduct that is protected by the Constitution, s 12(1)(a) limits the right to peaceful and unarmed assembly.

THE LIMITATION IS NOT JUSTIFIABLE

73. Not all limitations of rights are impermissible. Section 36(1) allows the state to justify limiting constitutional rights in certain circumstances. It reads:

> "*(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -*
>
> *(a) the nature of the right;*
> *(b) the importance of the purpose of the limitation;*
> *(c) the nature and extent of the limitation;*
> *(d) the relation between the limitation and its purpose; and*
> *(e) less restrictive means to achieve the purpose.*"

74. Before I consider the relevant factors (and the impact of international law), it is necessary to make three preliminary points.

75. One, the Appellants accept that the RGA is a "*law of general application*" that can properly be relied on to limit the right to assembly.

76. Two, the onus is on the Appellants to establish that a right has been limited. But, "*once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the*

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[125] AA at para 42: Record Part B p 33.

provisions of the section."[126] In this case, that onus rests on the Minister. As Somyalo AJ has explained, that means that "*to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the court.*"[127]

77. Third, as Woolman and Botha note, s 36(1) not only tells us that rights are not absolute; it "*tells us that rights may only be limited where and when the stated objective behind the restriction is designed to reinforce the values that animate this constitutional project.*"[128] When analysing the factors set out in s 36(1)(a) to (e), a court must always do so through the animating matrix of the five basic constitutional values: freedom, dignity, equality, openness and democracy.

The Nature and Importance of the Right

78. The Constitutional Court had reason to consider the importance of the right to assembly in *Garvas*. Mogoeng CJ held that the right "*is central to our constitutional democracy. It exists*", he noted, "*primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons.*"[129] This is a vital observation. Other means of influencing the state available to those with economic power – the media, lobbying, formal submissions, litigation – are often out of reach of the poor and marginalised; protest is available to everybody. All it requires is that people get out on the streets. In Mogoeng CJ's words:

> "*It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can*

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[126] *Moise v Greater Germiston Transitional Local Council* [2001] ZACC 21; 2001 (4) SA 491 (CC) at para 18.

[127] Ibid.

[128] S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2 ed, 2006) at 34-2.

[129] *Garvas* (n 122) at para 61.

> *meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights.*"[130]

79. The right also has to be understood against the lessons of our history where the Apartheid state sought to strictly regulate and ban protest. Yet protest played a central role in the achievement of our democratic system and was "*part and parcel of the fabric of the participatory democracy to which they aspired and for which they fought.*"[131] *Garvas* reminds us that there are two lessons to draw from our history of protest:

> "*First, they remind us that ours is a "never again" Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away. Second, they tell us something about the inherent power and value of freedom of assembly and demonstration, as a tool of democracy often used by people who do not necessarily have other means of making their democratic rights count. Both these historical considerations emphasise the importance of the right.*"[132]

80. The insight here is that the right to assembly is an enabling right – it enables people to access their other constitutional rights. That is why the UN Human Rights Council has recognised "*the importance of the rights to freedom of peaceful assembly and of association <u>to the full enjoyment of civil and political rights, and economic, social and cultural rights</u>.*"[133]

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[130] Ibid.

[131] Ibid at para 62.

[132] Ibid at para 63. The Supreme Court of Appeal expressed similar sentiments when it considered the *Garvas* matter. See *South African Transport & Allied Workers Union v Garvis & others* [2011] ZASCA 152; 2011 (6) SA 382 (SCA); 2011 (12) BCLR 1249 (SCA) at pras 46-47.

[133] UNHRC Resolution 15/21 *The Rights to Freedom of Peaceful Assembly and of Association* (2010) available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/RES/15/21&Lang=E (my emphasis).

81. The right to assembly is part of a cluster of rights – including the rights to freedom of expression,[134] and freedom of assembly – that "*operating together, protect the rights of people not only individually to form and express opinions, but to establish associations and groups of like-minded people to foster and propagate their views.*"[135] It is particularly important for the Constitution to protect "*controversial or unpopular views, or those that inconvenience the powerful.*"[136] As Cameron J has explained: "*We have to put up with views we don't like. That does not require approval. It means the public airing of disagreements. And it means refusing to silence unpopular views.*"[137] And it means tolerating the expression of views in a robust and sometimes uncomfortable manner:

> "*Political life in democratic South Africa has seldom been polite, orderly and restrained. It has always been loud, rowdy and fractious. That is no bad thing. Within the boundaries the Constitution sets, it is good for democracy, good for social life and good for individuals to permit as much open and vigorous discussion of public affairs as possible.*"[138]

82. Therefore, while the right to freedom of assembly is limited to peaceful and unarmed protest, it is not limited to polite or completely non-disruptive action. In *Hotz*, the Supreme Court of Appeal recognised that the right to free speech – exercised in the context of the right to free assembly – "*must be robust and the ability to express hurt, pain and anger is vital, if the voices of those who see themselves as oppressed or disempowered are to be heard.*"[139] Accordingly, the Constitution does not permit the state to criminalise assemblies merely because they create some minimal disruption or inconvenience to others, or to the SAPS.

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[134] Constitution s 16.

[135] *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at para 125.

[136] Ibid.

[137] Ibid at para 126.

[138] Ibid at para 133.

[139] *Hotz and Others v University of Cape Town* [2016] ZASCA 159 at para 67.

83. That does not mean that protestors may act without regard for the rights of others. The text of s 17, and the judgments in *Garvas* and *Hotz* make it clear that protests "*must be exercised with due regard to the rights of others*"[140] and "*in a manner that respects the law.*"[141] The problem with s 12(1)(a) is that it makes it a crime to exercise the right to assembly in a way that is at the heart of the right: peaceful, unarmed, protest that is respectful of the right of others, otherwise lawful, and aimed at the fulfilment of other constitutional rights.

84. That is precisely the type of protest in which the Appellants engaged. They sought to highlight the plight of those who live in Khayelitsha without access to sanitation and pressure the Mayor to meet her commitments. They did so in a way that was evocative, but was not unjustifiably disruptive. It was on all accounts entirely peaceful, and did not seek or in fact obstruct access to the Civic Centre.

The purpose of the limitation

85. The Minister explains that the purpose of the notification requirement is "*to ensure that proper planning can take place and in particular … for a sufficient number of police officers to be deployed and to be made available on stand-by should they be so required*".[142] The Minister explains the purpose served by criminalising the failure to give notice as follows:

> *"The reason as to why convening a gathering in respect of which no notice has been given is an offence in terms of section 12(1)(a) is the deterrent effect that the criminalisation of such conduct has. Simply put, in the absence of a criminal sanction, persons would be able to convene gatherings in respect of which no notice has been given without any adverse consequences at all. The criminalisation of such conduct undoubtedly has a serious deterrent effect.*"[143]

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[140] *Garvas* (n 122) at para 68.

[141] *Hotz* (n 139) at para 62.

[142] AA at para 46.1: Record Part B p 34.

[143] AA at para 46.3: Record Part B pp 34-5.

86. As I point out below, the claim that there are no other adverse consequences is simply not true. The RGA already provides a wide range of measures that incentivise conveners to give notice of a gathering. And there are further measures that would serve the same purpose that are less restrictive of the right to assembly.

87. Nonetheless, the purpose of criminalising gatherings without notice can be stated as: **To incentivise conveners to give notice in order to make police planning easier.**

88. The Appellants accept this is a legitimate purpose. Indeed, in some circumstances notification to allow for adequate preparations will be vital to enabling the right to protest. However, the scope and importance of that purpose is limited in two ways:

88.1. It is <u>not related</u> to actual harm; and

88.2. It is <u>not necessary</u> for the police to do their work.

89. <u>First</u>, the purpose is <u>not</u> to prevent actual harm, or even actual disruption to daily life. The purpose of notification advanced by the state is to enable police to be deployed because there is a possibility, however small, that those police will be needed. The Minister correctly does not claim that notification (or the criminalisation of non-notification) is necessary to prevent actual harm. That goal is already amply served by the myriad other provisions in the RGA and other laws that prohibit damage to property, or unjustifiable disruptions of public order.

90. <u>Second</u>, it is not the Minister's case that without notice the police will be unable to regulate gatherings. Clearly they will and they must. In this instance, despite the fact that no notice was given, the police were able to do their job and manage and eventually disperse the protest. The purpose is to make the work of the police in regulating gatherings easier. That is a legitimate state purpose. But it is not a particularly important purpose. It is a third order purpose: the first order goals are to enable protest and prevent harm; the second order aim is to require police to assist in enabling protest and preventing harm; the third order purpose is to make planning easier for the police. Such a limited purpose can never justify criminalising the exercise of the constitutional right to peaceful assembly.

Nature and Extent of the Limitation

91. The limitation is severe. The severity arises from several factors:

91.1. The breadth of the limitation;

91.2. The arbitrariness of the limitation;

91.3. The serious consequences of criminalisation; and

91.4. The chilling effect.

92. After addressing those factors, I deal with the inadequacy of two possible restrictions on the extent of the limitation:

92.1. The spontaneity defence; and

92.2. The possibility of notice.

Breadth

93. The limitation is exceptionally broad. The breadth relates to place, purpose and number:

93.1. It applies to assemblies on a public road, but also in any "*public place or premises wholly or partly open to the air*". The term is not defined, but would plainly include public parks, beaches, squares, train and bus stations, taxi ranks, and pedestrian malls or promenades.

93.2. It concerns gatherings for an astonishingly broad range of purposes, including the discussion of the actions, principles or policies of any government, political party or political organisation.

94. It applies to any place and It makes it a crime to organise any "*assembly*" of 16 or more people in a public place to, for example:

94.1. Discuss the actions or policies of government, or a political party. If a group of friends meets in the public park to discuss recent political events they must give notice or risk criminal sanction.

94.2. Demonstrate support for the principles of any person or institution. As Woolman points out, this means that "*every convenor of a church convocation in a public park — during which issues of moment may be debated and the considered opinion of the community canvassed – [must] apprise local authorities of the meeting in advance or risk the imposition of a banning order or the dispersal of the persons assembled*".[144]

95. But it is not necessary to think up extreme examples in order to demonstrate the breadth of the prohibition. It clearly applies to all traditional forms of protest – meetings, marches, pickets – for almost any purpose. The only way to avoid the notice requirement and the threat of criminal punishment is to keep the numbers below 15. As I explain below, that number does not fit with the purpose advanced by the state.

Arbitrariness

96. Criminalising gathering of only 16 or more people is plainly arbitrary. There is no magic about the number 16 that suddenly requires police intervention. As Woolman has argued:

> "*The RGA offers no insight into this distinction between demonstrations and gatherings. The RGA does not engage the different types of assembly nor does it attempt to craft regulatory regimes that actually fit the varying aims of such assemblies. Given the absence of any explanation in the RGA for the distinction made between demonstrations and gatherings, the 15-person threshold for demonstrations must be viewed as arbitrary. The consequences of the distinction between demonstrations and gatherings under the RGA, however, are quite real. …*

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[144] Woolman 'Assembly' in S Woolman & M Bishop *Constitutional Law of South Africa* (eds) (2 ed, 2003) at ch43-p23, fn 3.

> *Given the history of this country, and, in particular, the prominence of demonstrations as a mode of mass political action, the drafters of the Final Constitution would have been unlikely to invest 'demonstration' with a narrow numerical extension. Even if we accept the proposition that the state may legitimately restrict demonstrations as of right, the definitions of 'demonstration' and 'gathering' under the RGA not only inhibit the exercise of assembly but criminalize gatherings that pose no absolute threat at all to order, property or other public goods. So while the definition of demonstration is constitutionally suspect because it is radically under-inclusive, the definition of gatherings may well be found void for vagueness and overbreadth."*[145]

97. I return to the issue of the arbitrariness of the definition when I deal with the relationship between the limitation and its purpose, and less restrictive means. For now, it is important to note that the arbitrariness of the definition exacerbates its impact. That is evident from the facts of this case. The Appellants sought to stay within the arbitrary 15-person limit. In the heat of the moment, they failed to do so. Yet the impact of the protest would have been identical if they had remained within the 15-person limit. This situation is not unusual – it will often be difficult to ensure that a demonstration does not expand to a gathering and trigger criminal liability.

98. I note that the Appellants do not challenge the constitutionality of the definition. That is because they accept that, without criminalization, the distinction would be arbitrary, but relatively harmless. It is the combination of arbitrary definition with criminalisation and the risk of imprisonment that is constitutionally offensive.

Effect of Conviction

99. Criminalisation is not the only possible way to regulate conduct or incentivise or disincentivise. It is the most severe possible approach. Not only does criminalisation come with loss of liberty or property – in this case an unspecified fine and imprisonment for one year – but it creates moral stigma about the offender's conduct and imposes a permanent stain on a person's record, making it far harder for them to

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[145] Woolman (n 144) at ch43-p23.

find work, to travel or to study. The Constitutional Court has repeatedly recognised the serious consequences of criminalisation:

99.1. In *DA v ANC*, the Constitutional Court noted that provisions imposing civil and criminal penalties for certain speech during elections "*are tough provisions. Very tough. They show the statute's proscriptions have meaning. And they could operate with calamitous effect on a person or party who falls foul of them.*"[146]

99.2. In *Teddy Bear Clinic* the Court was confronted with a challenge to the criminalisation of consensual sexual conduct between teenagers. Part of the case against the law was that the criminalisation stigmatised those who participated in harmless, consensual conduct. The government argued that it was not the criminalisation of conduct that created the stigma, but the act itself. Skweyiya J rightly rejected this approach: "*An individual's human dignity comprises not only how he or she values himself or herself, but also includes how others value him or her. When that individual is publicly exposed to criminal investigation and prosecution, it is almost invariable that doubt will be thrown upon the good opinion his or her peers may have of him or her.*"[147] This is as true of criminal prosecution for consensual sex as it is for criminal prosecution for peaceful, unarmed protest.

100. More recently, in *Tsoaeli*, the Free State High Court recognised the severity of criminal sanction in a directly analogous context. The Court was dealing with the correct interpretation of s 12(1)(e). In holding that it did not criminalise attending a gathering for which no notice had been given, the court wrote:

> "*[T]he right to freedom of assembly is central to our constitutional democracy and exists primarily to give a voice to the powerless. Given the*

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[146] *DA v ANC* (n 135 above) at para 129.

[147] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC) at para 56.

> *constitutionally protected right to peaceful assembly, a provision which allows for unarmed and peaceful attendees of protest gatherings to run the risk of losing their liberty for up to a period of one year and to be slapped with criminal records that will, in the case of the appellants, further reduce their chances of gaining new employment for merely participating in peaceful protest action, undermines the spirit of the Constitution.*"[148]

Chilling Effect

101. The effects of criminal sanction are not only severe for those who are convicted, the possibility will undoubtedly chill the exercise of the right to assembly by others who will never be prosecuted. The First Appellant testified expressly that the threat of prosecution has deterred members of the SJC from exercising their rights to free assembly and free speech.

102. That is consistent with a long line of cases.[149] In *Garvas*, for example, the Court accepted that the imposition of civil liability had a chilling effect on the exercise of the right to assembly.[150] Most recently, in *Democratic Alliance v Speaker of the National Assembly*, the Constitutional Court re-affirmed that the threat of criminal sanction has a chilling effect on free speech:

> "*the spectre of not only an arrest, but everything that may follow it, is real. I am here talking of being detained in police or prison cells and charged with and possibly convicted of a criminal offence. That may have a chilling effect on robust debate. If so, that does limit free speech.*"[151]

103. While the context was slightly different – the arrest of Members of Parliament for disrupting what occurs in the chamber – the principle is the same: criminal sanction

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[148] *Tsoaeli* (n 119 above) at para 41.

[149] See, for example, *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* [2004] ZASCA 67; [2004] 3 All SA 511 (SCA); *National Media Ltd. and Others v Bogoshi* [1998] ZASCA 94; 1998 (4) SA 1196 (SCA).

[150] *Garvas* (n 122 above) at para 69.

[151] *Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 8; 2016 (5) BCLR 577 (CC); 2016 (3) SA 487 (CC) at para 40.

chills free speech. The effect of the limitation is not only to punish people for gathering, it is to deter people from ever trying to exercise their right to free assembly.

Spontaneity

104. In terms of s 12(2) of the RGA, it is "*a defence to a charge of convening a gathering in contravention of subsection (1)(a) that the gathering concerned took place spontaneously.*" The Minister argues that this significantly reduces the impact of the limitation and, therefore, makes it easier to justify. That submission is misplaced.

105. First, it is difficult to understand how s 12(2) actually limits the reach of s 12(1)(a) given the definition of convening in s 13(3). As noted above, where notice is not given, a convener is defined as a person who: (a) "*has taken any part in planning or organizing or making preparations for that gathering*"; or (b) "*has himself or through any other person, either verbally or in writing, invited the public or any section of the public to attend that gathering.*" If a person complies with either (a) or (b), then it is difficult to understand how the gathering could also be said to be spontaneous. If she does not, then she will escape liability because she was not a convener, not because the gathering was spontaneous.

106. Second, even if the defence in s 12(2) has some effect, it does not apply to situations like the present. Here, the gathering was planned and the Appellants intentionally did not give notice despite being aware of the requirement. They did not give notice because they wanted to send a message to the City that they could not send through ordinary means. While they attempted to remain within the law by keeping the protest to 15 people, it expanded slightly beyond that. It could not be argued that the expansion was spontaneous because those joining the protest were members of the SJC and subject to the Appellants' control.

107. Nor would it cover the situation in *Tsoaeli*. There, 94 members of the Free State Health Department "*decided to hold a night vigil*" outside Bophelo House – the

headquarters of the Department. They were protesting against their dismissal and generally unsatisfactory conditions. While it is not clear who in fact convened the gathering – because nobody was charged with convening – it plainly was planned, not spontaneous.

108. To the extent that the spontaneity defence reduces the extent of the limitation – and it is difficult to see how it would do so – any reduction is extremely minor and would not prevent prosecution in cases that call out for constitutional protection.

The Possibility of Notice

109. The second ameliorating factor to which the Minister points is that protestors like the Appellants could simply have given notice. This misses the point.

110. First, as explained above, the notice procedure is complicated and lengthy. It requires at least 48 hours notice and permits summary prohibition if less notice is given. This necessarily interferes with the right to protest because it forces people to protest later than they wish if they do not want to commit a crime. There is plainly a gap between a protest that is spontaneous and a protest that is organised less than 48-hours beforehand.

111. Second, the RGA ultimately leaves the authority to prohibit the gathering in the hands of the local authority through the responsible officer. As was noted at the trial, the City of Cape Town expressly treated the notice requirement as an "application" for permission to hold a gathering. As Jane Duncan notes, that demonstrates the mentality of not only the City of Cape Town, many other municipalities across the country.[152] Notice requirements are routinely treated like application processes and are abused to prevent protests against the local authority. It is highly questionable that the City of Cape Town would have given the Appellants permission to stage their protest on the steps of the Civic Centre.

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[152] See J Duncan *Protest Nation* (2016).

112. Third, as the First Appellant explained, protesting without notice is often more effective at achieving the protestors' aims. They will also be able to engage in activities that would probably not have been permitted had they given notice – like chaining themselves to the railings at the Civic Centre – that are still valid exercises of the right to free assembly. The question is whether the limited purpose advanced by the Minister justifies the criminalisation of exercising the right to peaceful assembly, not whether the right could have been exercised in some other fashion.

Relation between limitation and purpose

113. Does the criminalisation of gathering without notice achieve the purpose of incentivising notice? Plainly it does. But in doing so it suffers from two flaws:

113.1. It is both over-inclusive and under-inclusive; and

113.2. It is inconsistent with the broader scheme and purposes of the RGA.

Over- and Under-Inclusive

114. The limitation is over-inclusive because it deters people from protesting even when there is no possibility that police resources will be needed to regulate the gathering or ensure public safety. If 20 people gather in a public park to chant peacefully in opposition to a government policy, police presence is hardly required to ensure that no people or property are harmed or traffic disrupted. Yet the conveners of the gathering will have committed a crime. Put simply, the limitation not only incentivises people to give notice, it deters them from exercising their constitutional right to assembly peacefully, unarmed, lawfully, without unjustified disruption to others, and where police resources are not necessary.

115. The limitation is also under-inclusive because it does not require notice for protests that do require a police presence. If 10 people decide that they are going to protest by lying down in the middle of a busy road, the police will be required to address the

situation. Yet those conveners were not required to give notice under the RGA and so the limitation has failed to serve its purpose – making it easier for the police to plan.

Inconsistent with the Scheme of the RGA

116. As demonstrated in Part III, the RGA envisions that the police will regulate gatherings to promote the right to free assembly even where no notice was given. It encourages the regularisation of protests by bringing gatherings without notice into the system wherever possible. It affords the police the necessary power to manage a gathering and makes it clear that they may only disperse where no other option exists. The purpose animating these measures is, as described in the preamble, to ensure that all people "*have the protection of the state*" to exercise their right to protest – a right that is not limited by a notice requirement.

117. The criminalisation of convening a gathering of more than 15 people without notice does not sit easily with that purpose or the scheme of flexible regulation. It does not grant the necessary degree of flexibility to promote and facilitate the right to free assembly. It is difficult to understand how the police are meant to manage a gathering-without-notice to facilitate free assembly if they are also going to arrest the gathering's conveners for violating s 12(1)(a).

118. Perhaps more important than the limitation's over- and under-inclusiveness, or its disconnect with the rest of the RGA, is that the limitation is not necessary to incentivise notice. That is already adequately achieved by existing measures in the RGA, and by alternative measures that are far less restrictive than s 12(1)(a).

Less Restrictive Means

119. The purpose of the limitation, to recall, is to deter people from arranging protests without notice, because that may inconvenience the police. The question is whether there are less restrictive means to achieve that goal. There plainly are. There are

both existing measures that achieve that goal and render s 12(1)(a) unnecessary, and alternative measures that could be introduced that are less severe than criminalisation.

Existing measures

120. As explained above, the RGA already establishes a range of mechanisms to achieve the goals the Minister claims are advanced by criminalisation. Most importantly, the Appellants do not wish to do away with the notice requirement and all the mechanisms that flow from it. They seek only to end criminalisation of convening without notice.

121. First, the imposition of civil liability in s 11. If a person convenes a gathering without giving notice and reasonably foreseeable damage results, the person will certainly be liable under s 11. The failure to give notice – and therefore the failure to secure police assistance if necessary – would undoubtedly render the convener's conduct unreasonable and make her liable for any civil damage. I address below how the Legislature could make it even clearer that notice is a requirement to avoid liability.

122. Second, the existing offences in both the RGA, the common law and other statutes adequately achieve the underlying purpose of deterring harm to people or property, and preventing disruption to traffic and access. It is already a crime to damage or steal property, assault others, engage in public violence, carry weapons, issue threats, obstruct roads or access to public buildings, and to disobey police orders.

123. But so too is the proximate purpose – making the job of the police easier.

123.1. The police have greater powers to regulate and control a gathering without notice than they do a gathering with notice. If notice is given, then the gathering is entitled to proceed at its assigned place or along its assigned route and according to the agreed conditions.[153] If no notice is given, the

[153] RGA ss 8(3) read with s 9(1)(b).

police are entitled to restrict the gathering as they deem appropriate.[154] Any convener that wishes to arrange a gathering has a strong incentive to give notice because then she will have a say in the conditions under which the gathering occurs and will know them in advance.

123.2. It is not only the individual participants that risk prosecution under the existing common-law, RGA and other statutory offences. A convener that arranges a gathering which leads to crimes being committed may well be liable as an accomplice. For example, in *R v Carson* the organizer of a meeting where violent threats were made was convicted as an accomplice to those who had actually made the threats contrary to a statutory prohibition.[155] Similarly, a person who convenes a gathering without notice – and therefore creates the opportunity for an offence – may well be liable as an accomplice if the gathering results in another crime such as public violence, malicious damage to property or the blocking of public roads.

Alternative measures

124. There are also alternative measures that the Legislature could introduce that would still serve the purpose of the provision, but be less restrictive of the right to peaceful assembly.

125. First, the state could impose **enhanced civil liability** for those convenors who do not give notice. For example, it could remove the defence currently available in s 11(2) if a convenor failed to give notice. That would create strict liability for damage if no notice is given and provide an even greater incentive to give notice where there is a real risk of harm. As OSJI points out, several countries rely solely on civil liability to incentivise compliance with the notice requirement, apparently without difficulty.

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[154] RGA s 9(1)(c).

[155] 1922 TPD 307.

126. Second, the state could impose **administrative fines** rather than criminal penalties. This would be a less restrictive means because administrative fines are civil, not criminal.[156] A person cannot be arrested prior to the imposition of the fine, nor can she be imprisoned for non-payment. In addition, it is not recorded on a person's criminal record and therefore will not affect future travel, employment and study.[157] In rejecting an attack on administrative penalties in *Pather*, the High Court expressly held that any rights violation could be justified because administrative penalties had lesser consequences than criminal offences:

> "*the respondents in these proceedings are not at risk of imprisonment or any deprivation of their liberties. The consequences of error are much less than in criminal matters where the accused faces imprisonment if convicted. The consequences in my further view and finding are similar or akin to or*

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[156] See *Pather and Another v Financial Services Board and Others* [2014] ZAGPPHC 303; [2014] 3 All SA 208 (GP); 2014 (9) BCLR 1082 (GP) and *Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission & another* 2005 (6) BCLR 613 (CAC). See also Phumudzo Munyai 'Making Administrative Penalties Work' (2008) 16 *Juta's Business Law* 23 at 25-26; Louise Jordaan & Phumudzo S Munyai 'The Constitutional Implications of the New Section 73A of the Competition Act 89 of 1998' (2011) 23 *SA Merc LJ* 197 at 204-5.

[157] *Federal-Mogul* (n 156 above) at 632 ("*The administrative penalty which is imposed in terms of section 59 is not a fine or a sanction of a criminal nature because it does not form part of the criminal record of a respondent who has been ordered to pay such as it will happen with a fine in a criminal court which ends up being recorded against personal records of the accused, in the SAP 69 form, as a previous conviction.*")

appropriate civil proceedings. The worst case scenario for instance, is the loss of money or property."[158]

Administrative penalties also do not come with the same stigma as criminal penalties.

127. Not only are administrative fines less restrictive, they are far better suited to the limited purpose the Minister seeks to advance. That is so for multiple reasons:

127.1. The purpose of criminalisation is not to punish morally reprehensible behaviour, nor to prevent harm to others. It is to incentivise action that will lead to a better use of police resources. That purpose is far better served by an administrative penalty. As the Competition Tribunal noted in *Federal Mogul* the purpose of administrative penalties in the Competition Act is to "*reduce the incentive on the part of potential transgressors to engage in them.*"[159] The use of administrative penalties is therefore "*premised on an incentive-based model not a criminal one.*"[160] If the purpose of criminalising gatherings without notice is purely an incentive to give notice in order to make the work of the police easier, an administrative fine is plainly more appropriate.

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[158] *Pather* (n 156 above) at para 221. See also *Federal-Mogul* (n 156) at 631 ("*In criminal matters where fines are usually imposed, as opposed to civil matters where an administrative penalty may be imposed, the fine which is imposed has an alternative sentence usually, a term of imprisonment. The term of imprisonment comes into force in the event of the accused person failing to pay the fine, which has been imposed. In civil matters, similar to the matter before the Tribunal, in the event of a party failing to pay the administrative penalty, there is no alternative term of imprisonment which can be imposed by the Tribunal. Consequently, in the event of the party failing to pay the administrative penalty, the remedy for the Tribunal or the affected party may be to proceed with an application for civil contempt of court or seek a conviction or judgment in terms of sections 73 and 74 read together with section 75 of the Act. This procedure is totally different to the one referred to above, as applicable in criminal matters. Thus, there is a clear distinction in the nature of the sanction, which is imposed. At this stage of the proceedings, the appellants do not "carry the keys of their own imprisonment in their own pockets". In the present case, he is not even in close proximity of the prison cell.*")

[159] *The Competition Commission of South Africa and Federal Mogul Aftermarket Southern Africa (Pty) Ltd* [2003] ZACT 43 at para 86.

[160] Ibid. See also *Federal-Mogul* (n 156 above) at 635-6.

127.2. Because administrative fines are civil, a person facing an administrative penalty does not have the rights in s 35(3) of the Constitution. This makes the fines easier to enforce. If they are less costly to impose, they are less susceptible to the danger of selective prosecution. For the same reason, administrative penalties are likely to better promote compliance with the notification requirement because while the sanction is less severe, the likelihood of sanction is higher.

128. Third, the Legislature could introduce **a better definition of "*gathering*"**. As noted earlier, the distinction between a demonstration and a gathering based solely on the number of participants is arbitrary, and irrational. The problem is not cured by the Minister's argument that any number would be arbitrary for at least two reasons:

128.1. There are other ways to draw the distinction. For example, in Ireland there is no notice requirement for static gatherings. And in England and Wales there is no requirement to give notice for open-air public meetings.[161] The need for notice could also be limited to situations where the convenor reasonably believes notification is required based on multiple factors such as location, time, purpose, impact on traffic and number.

128.2. The number could be more reasonably related to the actual purpose. A gathering of 16 people is an extremely small protest that can ordinarily be conducted without any need for a police presence. The Minister has failed to meet his onus to establish why 16 is an appropriate number to criminalise gatherings. The Special Rapporteur has recommended that *"[prior notification should ideally be required only for large meetings or meetings which may disrupt road traffic.*"[162] A higher numerical threshold would be less restrictive because small gatherings – like the one organised by the Appellants – would not require notice.

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[161] OSCE & Venice Commission *Guidelines on Freedom of Peaceful Assembly* (2 ed, 2010) at fn 175.

[162] *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Maina Kiai* (2012) A/HRC/20/27 at para 28.

129. The *Guidelines on Free Assembly* explain the position as follows:

> *"It is good practice to require notification only when a substantial number of participants are expected or only for certain types of assembly. In some jurisdictions there is no notice requirement for small assemblies … or where no significant disruption of others is reasonably anticipated by the organizers (such as might require the redirection of traffic)."*[163]

130. Sixteen people can hardly be regarded as a "*large meeting*" or "*a substantial number of participants*". In Moldova, for example, the notification requirement is limited to meetings of 50 people or more.[164] While any number requires a cut-off that may appear arbitrary, a limit of 50 people is far more closely related to the actual purpose of the limitation than a limit of 15 people.

131. Indeed, the 15-person-limit creates an additional administrative burden not only for protestors, but for municipalities and police who are required to comply with all the requirements of the RGA even for very small gatherings that are unlikely to require any police presence.

132. To be clear, the Appellants do not endorse any of these options as necessarily constitutional. Depending on the exact amendments, an administrative fine regime or an alteration to the definition of gathering may still result in unconstitutionality. Moreover, the Special Rapporteur has advised that even administrative sanctions are impermissible.[165] But even if these measures too are constitutionally problematic, they are undoubtedly far less restrictive of the right to peaceful assembly than the existing criminalisation.

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[163] *Guidelines* (n 161 above) at para 115.

[164] Article 3, Moldova's Law on Public Assemblies (2008): Definitions "*Assemblies with a small number of participants" are public assemblies that gather less than 50 persons.*"

[165] Special Rapporteur (n 162 above) at para 29.

International Law

133. It is helpful, in determining whether a limitation is justified under s 36(1), to consider international and comparative law. This is so for two reasons:

133.1. Section 39(1)(a) requires courts to consider international law when interpreting the Bill of Rights, while s 39(1)(b) permits courts to consider foreign law. This includes so-called "*soft law*" such as General Comments of UN Committees, and the reports of international organisations; and

133.2. Section 36(1) itself refers to what is "*reasonable and justifiable in an open and democratic society*". The courses taken by other open and democratic societies both in their own jurisdictions, and through the international mechanisms they have created, are therefore relevant.

134. Both OSJI and the Special Rapporteur have indicated that they intend to make submissions on relevant international and foreign law. OSJI filed its written submissions shortly before the filing of these submissions.

135. The Appellants support and endorse the submissions of OSJI. They demonstrate a clear consensus in international law, and a strong trend in foreign jurisdictions that:

135.1. While notice requirements are permissible, notice should only be required where the gathering will in fact create a risk of harm or disruption;

135.2. Convening a gathering should not attract a criminal sanction solely because no notice was given; and

135.3. The organisational advantages of providing notice do not justify criminalising the convening of otherwise peaceful, unarmed and non-harmful protests.

Conclusion

136. In summary:

136.1. The right at stake is vital for our constitutional democracy;

136.2. The limitation is severe – it is exceptionally broad and can result in imprisonment flowing from an arbitrary definition that will chill the exercise of the right to free assembly;

136.3. The purpose advanced is extremely limited – to incentivise notice and thereby make it easier for the police to manage their resources. The Minister rightly does not claim that criminalisation is necessary to avoid disruption or deter harm to people or property;

136.4. The limitation only partly achieves its purpose; it does not incentivise notice in all situations where police resources are required. At the same time, it requires notice even when no police resources will be needed;

136.5. There are less restrictive means to achieve the purpose. The existing measures in the RGA create an adequate incentive for conveners to give notice. Alternative measures, that are less restrictive of the right to free assembly, are also available including enhanced civil liability, administrative fines and a more rational definition of "gathering";

136.6. Criminalisation of convening a gathering without notice is inconsistent with international law.

137. In light of the above, it is plain that the limitation is not "*reasonable and justifiable in an open and democratic society*". The intrusion on constitutional rights must be proportional to the importance of the purpose served. In *S v Manamela & Another (Director-General of Justice Intervening)*, the Court held that courts "*not adhere mechanically to a sequential check-list*" of the factors in s 36(1), but were required, instead, to "*engage in a balancing exercise and arrive at a global judgment on proportionality*".[166] Or as O'Regan J put it in *S v Bhulwana*: "*[T]he Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other.*

[166] [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (CC) at para 32.

The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."[167]

138. Here, the inroads are substantial, and the purpose is uncompelling. Given the extent of the limitation, the third-order nature of the purpose, and the availability of less restrictive means to achieve the purpose (and the primary underlying purposes), the limitation is not justifiable. Section 12(1)(a) must be declared unconstitutional.

[167] *S v Bhulwana, S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC) at para 18.

V REMEDY

139. The appropriate remedy is simple, s 12(1)(a) must be declared unconstitutional and invalid, and the Appellants' convictions must be set aside. That flows naturally from s 172(1)(a) of the Constitution.

140. No further limitations on the prohibition are justified. I will address two possible limitations and explain why they are not "*just and equitable*" as required by s 172(1)(b) of the Constitution: suspension and retrospectivity.

141. First, there is no basis to suspend the declaration of invalidity. The default remedy is that an order of constitutional invalidity has immediate effect. A suspension order is only justified where an immediate order of invalidity will cause prejudice to another party or disrupt the administration of justice.[168] That is not the case here. As I have argued above, the existing measures in the RGA provide more than adequate protection to achieve the Minister's purpose. Even if they are not entirely adequate, the purpose is small and secondary to the primary purpose of protecting people and property. There can be no doubt that that purpose is adequately achieved without criminalising convening gatherings without notice.

142. Second, the Minister has provided no evidence to justify limiting the retrospective effect of the order. The default position is that an order of invalidity has full retrospective effect to the date it was enacted, or the date the Constitution came into force, whichever was later.[169] It is only if retrospectivity would cause harm that is disproportional to the harm of non-retrospectivity that the retrospective effect should be limited.

143. In this case, the following respective harms are relevant:

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[168] See, for example, *J & Another v Director General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 21.

[169] See *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12; 2015 (5) SA 370 (CC) at para 20; *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) at para 13.

143.1. The Appellants are entitled to relief. Any order must at least ensure that their conviction is set aside.

143.2. There is no evidence of the number of people who have been convicted under s 12(1)(a), or of the administrative burden that would arise if their convictions are set aside. Given that the maximum penalty is one year imprisonment, it is highly unlikely that many people will have to be released from prison. The primary result will merely be to expunge the criminal records of those who were convicted under an unconstitutional law.

143.3. This is not a situation where the constitutional flaw relates to a technical or procedural issue. In those situations, there is reason to hold that people convicted under good substantive law should not have their convictions set aside.[170] Here the substance of the offence is unconstitutional.

143.4. Nor is there any fear that those convicted will harm the community if their convictions are set aside. As the Minister acknowledges, s 12(1)(a) only exists to assist the police, not protect the public.

144. Accordingly, there is no reason to depart from the ordinary rule that the order of invalidity should have immediate and fully retrospective effect.

145. However, if the court is minded to limit the retrospective effect of the order, it should still apply to cases that have not yet been finalised. The order would then read:

> "*The declaration of invalidity is not retrospective and shall not affect finalised criminal trials, but will apply to any criminal trial in which, as at the date of this judgment, either an appeal or review is pending or the time for the noting of an appeal has not yet expired.*"

[170] See, for example, *Bhulwana* (n 167 above).

VI CONCLUSION

146. The Appellants' only crime was to exercise their constitutional rights to advance the rights of their community. There is no justifiable basis to criminalise that conduct merely because they did not give the responsible officer notice. The appeal must be upheld, their convictions must be set aside, and s 12(1)(a) declared unconstitutional.

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14 December 2016