IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION

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

In the matter between:

PHUMEZA MHLUNGWANA	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

HEADS OF ARGUMENT ON BEHALF OF THE SECOND RESPONDENT

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INTRODUCTION

1. This matter raises a single and very narrow issue, *viz*, the constitutionality of section 12(1)(a) of the Regulation of Gatherings Act No 205 of 1993 ("**the Gatherings Act**"), in terms of which it is a crime to convene a gathering without notice being given as contemplated by section 3 of the Gatherings Act.

2. While the Appellants do not object to the requirement that notice be given in terms of section 3 of the Gatherings Act (which they accept serves a legitimate purpose), their complaint lies in the criminalisation of the actions of a person who convenes such a gathering without giving notice.[1] According to the Appellants, such criminalisation will deter people from gathering or will mean that they face fines and/or imprisonment for exercising a constitutional right.[2]

3. The Second Respondent ("**the Minister**") on the other hand contends that the giving of notice is vital to the proper management of gatherings and ultimately facilitates the convening of peaceful and unarmed gatherings, thereby protecting (not infringing) the constitutional rights enshrined in section 17 of the Constitution. According to the Minister, the criminalisation of the actions of a person convening such gathering by reason of their failure to give notice deters gatherings in respect of which no notice has been given in instances where such "non-notified" gatherings bear a higher risk of not being peaceful. Gatherings which are not peaceful result in an infringement of rights of others. The Minister further contends that if contrary to this primary submission, this Court was to find that the impugned provision infringes section 17 of the Constitution, then the

[1] Appellants' Heads of Argument; page 28; par 71.
[2] Appellants' Heads of Argument; page 28; par 71.

impugned provision constitutes is a reasonable and justifiable limitation of the right.

4. At the heart of the Minister's response to this challenge is an underlying contention that the rights and interests of one group of persons cannot, as a matter of course take precedence over another group of person; a balancing of competing rights must occur as the Gatherings Act has sought to do. Indeed in **Re Ramlila Maidan Incident [2012] INSC 138 at par 32** the Indian Supreme Court held:

> "The restriction placed on a fundamental right would have to be examined with reference to the concept of fundamental duties and non-interference with liberty of others. Therefore a restriction on the right to assemble and raise protest has also to be examined on similar parameters and values. In other words when you assert your right, you must respect the freedom of others. Besides imposition of a restriction by the State, the non-interference with the liberties of others is an essential condition for the assertion of the right to freedom of speech and expression …."

5. The key facts giving rise to this challenge are that the Appellants in this matter were charged and convicted for having unlawfully convened a gathering in protest against access to sanitation services without giving the Municipality ("**the City**") any notice that such gathering would take place; they did so on or about 11 September 2013.

6. It is common cause that in having failed to give notice of the gathering, the Appellants did not comply with the requirements of the Gatherings Act[3].

[3] Rule 16A Notice; page 3; par 4.

7. In the judgment on sentence, the Magistrate found that the offence occurred because "emotions were running high".[4] According to the Magistrate, the Appellants' understanding was that there were only going to be 15 people participating in a demonstration. The Magistrate however found that their conduct could not be excused by the law because they had contravened the law. This notwithstanding, the Magistrate found that the rights of the Appellants to protest was never taken away and is still not taken away; it has however been limited in that if they wanted to protest without giving notice they could do so provided they kept their numbers to a maximum of 15 and if they knew that their numbers were going to increase, they needed to give the requisite notice, which, according to the Court a quo, "should not have been too difficult".[5]

8. In the Court a quo, the defence motivated for a sentence of a suspended fine, subject to the condition that the Appellants do one week of community service.[6] In light of the facts giving rise to the conviction, the Court a quo ultimately imposed an even more lenient sentence by simply cautioning and discharging the Appellants.

9. Against this background, the relief sought in this application was instituted by way of a Rule 16A Notice. Though the institution of proceedings by way of a Rule 16A notice is somewhat unconventional and does not appear to be contemplated by the Rules of Court, the Minister does not raise any objection in this regard. The relief sought in these proceedings is clear from the Rule 16A Notice, viz, the Appellants seek an order: (a) upholding their appeal and setting

[4] Transcript; page 207; line 22.
[5] Transcript; page 208; line 10.
[6] Transcript; page 208; line 18.

aside their conviction; and (b) declaring that section 12(1)(a) read with section 1 of the Gatherings Act is unconstitutional.[7]

10. The basis on which the Appellants seek to declare section 12(1)(a) of the Gatherings Act to be unconstitutional is also clear from the Rule 16A Notice. It is that the criminalisation of a gathering of more than 15 people because no notice was given violates section 17 of the Constitution in that[8]:

    10.1. It makes it a crime to convene a peaceful unarmed, gathering merely because the gathering is attended by 15 or more people and prior notice was not given.

    10.2. It deters people from exercising their fundamental constitutional right to assemble peacefully and unarmed.

11. The Appellants further contend in the Rule 16A Notice that the limitation of the right to freedom of assembly cannot be justified in terms of section 36(1) of the Constitution because:

    11.1. The limitation of the right to assembly is severe.

    11.2. The application to gatherings of only 15 people or more is arbitrary and unrelated to the purpose of the provision.

    11.3. Although the goal of regulating protest is legitimate, there are less restrictive means to achieve that goal, including: (a) non-criminal

[7] Rule 16A Notice; page 3; par 4.
[8] Rule 16A Notice; page 2; par 2.

sanction; (b) expanding the number of people that may be convened without notice; and (3) relying on other existing criminal sanctions that permit police to deal with protest that pose some risk to public order or safety.

12. In addressing the challenge, these Heads of Argument are structured as follows:

    12.1. First, we provide an overview of the scheme and framework of the Gatherings Act.

    12.2. Second, we provide an analysis of the common cause facts underpinning the present challenge.

    12.3. Third, we address the threshold enquiry for a constitutional challenge of this nature and advance submissions as to why the challenge must fail.

    12.4. Fourth, we refer to comparative and international law on the subject.

    12.5. Finally, we address the question of remedy.

THE SCHEME AND FRAMEWORK OF THE GATHERINGS ACT

13. At the core of this challenge lies the constitutional guarantee of freedom to demonstrate as initially protected by section 16 of the Interim Constitution[9] and currently protected by section 17 of the Constitution.[10]

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[9] Section 16 of the Interim Constitution provided: "Every person shall have the right to assemble and demonstrate with others peacefully and unarmed and to present petitions."

[10] Section 17 of the Final Constitution provides: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

14. Consistent with this constitutional guarantee, the Preamble of the Gatherings Act recognises that every person has the right to assemble with other persons and to express his/her views on any matter freely in public and to enjoy the protection of the State while doing so. The Preamble, however also recognises that it is of equal importance that these rights be exercised peacefully and with due regard to the rights of others.

15. Central to this challenge is the fact that the Gatherings Act regulates "gatherings" which applies only to groups of more than fifteen persons as well as the holding of "demonstrations" which is limited to less than fifteen persons.

    15.1. A "gathering" is defined in section 1 as follows:

> "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."

    15.2. A "demonstration" is defined in section 1 as including:

> "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."

16. In his answering affidavit, the Minister has highlighted the following key pillars of the Gatherings Act:

17. First, the Gatherings Act recognises the need for an organisation or branch of an organisation that intends holding a gathering (i.e. more than 15 persons) to appoint a designated person to act on its behalf and for the details of such person to be made available to the responsible officer in terms of section 2 of the Gatherings Act. Section 2 of the Gatherings Act provides as follows:

> "2 Appointment of conveners, authorized members and responsible officers
>
> (1) (a) An organization or any branch of an organization intending to hold a gathering shall appoint-
>
> (i) a person to be responsible for the arrangements for that gathering and to be present thereat, to give notice in terms of section 3 and to act on its behalf at any consultations or negotiations contemplated in section 4, or in connection with any other procedure contemplated in this Act at which his presence is required; and
>
> (ii) a deputy to a person appointed in terms of subparagraph (i).
>
> (b) Such organization or branch, as the case may be, shall forthwith notify the responsible officer concerned of the names and addresses of the persons so appointed and the responsible officer shall notify the authorized member concerned accordingly.
>
> (c) If a person appointed in terms of paragraph (a) is or becomes unable to perform or to continue to perform his functions in terms of this Act, the organization or branch, as the case may be, shall forthwith appoint another person in his stead, and a person so appointed shall be deemed to have been appointed in terms of paragraph (a): Provided that after the appointment of a person in terms of this paragraph, no further such appointment shall be made, except with the approval of the responsible officer concerned.

(2) (a) The Commissioner or a person authorized thereto by him shall authorize a suitably qualified and experienced member of the Police, either in general or in a particular case, to represent the Police at consultations or negotiations contemplated in section 4 and to perform such other functions as are conferred or imposed upon an authorized member by this Act, and shall notify all local authorities or any local authority concerned of every such authorization, and of the name, rank and address of any authorized member concerned.

(b) If an authorized member is or becomes unable to perform or to continue to perform his functions in terms of this Act, the Commissioner or a person authorized thereto by him shall forthwith designate another member of the Police to act in his stead, either in general or in a particular case, and the member so designated shall be deemed to have been authorized in terms of paragraph (a) for the purposes contemplated in the said paragraph: Provided that after the designation of a member of the Police in terms of this paragraph, no further such designation shall be made, except with the approval of the responsible officer concerned.

(3) If any consultations, negotiations or proceedings in terms of this Act at which the presence of a convener or an authorized member is required, are to take place and such convener or member is not available, such consultations or negotiations or other proceedings may be conducted in the absence of such convener or member, and the organization or Police, as the case may be, shall be bound by the result of such consultations, negotiations or proceedings as if it or they had agreed thereto.

(4) (a) A local authority within whose area of jurisdiction a gathering is to take place or the management or executive committee of such local authority shall appoint a suitable person, and a deputy to such person, to perform the functions, exercise the powers and discharge the duties of a responsible officer in terms of this Act.

(b) If, for any reason, a local authority has not made an appointment in terms of paragraph (a) when a convener is required to give notice in terms of section 3 (2) or when a member of the Police is required to submit information in terms of section 3 (5) (a), such notice shall be given or such information shall be submitted to the chief executive officer or, in his absence, his immediate junior, who shall thereupon be deemed to be the responsible officer in regard to the gathering in question for all the purposes of this Act."

18. The Minister has explained that the key purpose to be served by the appointment of a person responsible for the arrangements for a gathering is to: (a) give notice of the intended gathering in terms of section 3 of the Gatherings Act; and (b) to engage in negotiations and consultations in respect of the terms under which the gathering shall take place.[11]

19. Second, the Gatherings Act requires that the convenor of a gathering give formal notification in writing signed by him or her of the intended gathering to the responsible officer in terms of section 3. Section 3 provides as follows:

> "3 Notice of gatherings
>
> (1) The convener of a gathering shall give notice in writing signed by him of the intended gathering in accordance with the provisions of this section: Provided that if the convener is not able to reduce a proposed notice to writing the responsible officer shall at his request do it for him.
>
> (2) The convener shall not later than seven days before the date on which the gathering is to be held, give notice of the gathering to the responsible officer concerned: Provided that if it is not reasonably possible for the convener to give such notice earlier than seven days before such date, he shall give such notice at the earliest opportunity: Provided further that if such notice is given less than 48 hours before the commencement of the gathering, the responsible officer may by notice to the convener prohibit the gathering.
>
> (3) The notice referred to in subsection (1) shall contain at least the following information:
>
> (a) The name, address and telephone and facsimile numbers, if any, of the convener and his deputy;
>
> (b) the name of the organization or branch on whose behalf the gathering is convened or, if it is not so convened, a statement that it is convened by the convener;

[11] AA; page 20; par 24.

(c) the purpose of the gathering;

(d) the time, duration and date of the gathering;

(e) the place where the gathering is to be held;

(f) the anticipated number of participants;

(g) the proposed number and, where possible, the names of the marshals who will be appointed by the convener, and how the marshals will be distinguished from the other participants in the gathering;

(h) in the case of a gathering in the form of a procession-

(i) the exact and complete route of the procession;

(ii) the time when and the place at which participants in the procession are to assemble, and the time when and the place from which the procession is to commence;

(iii) the time when and the place where the procession is to end and the participants are to disperse;

(iv) the manner in which the participants will be transported to the place of assembly and from the point of dispersal;

(v) the number and types of vehicles, if any, which are to form part of the procession;

(i) if notice is given later than seven days before the date on which the gathering is to be held, the reason why it was not given timeously;

(j) if a petition or any other document is to be handed over to any person, the place where and the person to whom it is to be handed over.

(4) If a local authority does not exist or is not functioning in the area where a gathering is to be held, the convener shall give notice as contemplated in this section to the magistrate of the district within which that gathering is to be held or to commence, and such magistrate shall thereafter fulfil the functions, exercise the powers and discharge the duties conferred or imposed by this Act on a responsible officer in respect of such gathering.

(5) (a) When a member of the Police receives information regarding a proposed gathering and if he has reason to believe that notice in terms of subsection (1) has not yet been given to the responsible officer concerned, he shall forthwith furnish such officer with such information.

(b) When a responsible officer receives information other than that contemplated in paragraph (a) regarding a proposed gathering of which no notice has been given to him, he shall forthwith furnish the authorized member concerned with such information.

(c) 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."

20. The Minister has explained that the purpose of giving notice in terms of section 3 of the Gatherings Act is primarily to ensure that proper planning may occur so as to ultimately ensure that the rights to freedom of expression and freedom of assembly may be exercised; it seeks to ensure that such gatherings are managed so as to ensure that they occur in an orderly manner, with minimal disruption and that any risk of violence and/or unruly behaviour is mitigated to the greatest extent possible. Section 3 of the Gatherings Act also seeks to ensure due and proper regard for the rights of others. [12] The Minister has emphasised in this regard that the rights protected by section 17 of the Constitution vest in all persons, as do a range of other constitutional rights that are implicated by gatherings, such as those protected by section 12, section 14 and section 21 of the Constitution. [13] It is precisely for this reason that the notice requires disclosure of the items stipulated in section 3(3) of the Gatherings Act. It warrants

[12] AA; page 22; par 26.
[13] AA; page 23; par 26.

reiterating that section 3(3)(f) of the Gatherings Act does not require disclosure of an exact number of participants but rather the anticipated number.[14]

21. According to the Minister compliance with the notice requirements allows for the proper deployment of police resources in respect of such a gathering; noting that the demand for scarce police resources significantly outstrips what is available. The Minister has therefore explained that the details of a gathering provided under section 3 allows for the deployment of adequate police resources in order to manage a gathering. In the event that no notice is given, there is the risk that sufficient police resources cannot be deployed at the stage when the gathering is already in progress, thereby jeopardising the right to freedom of assembly and the safety and security of persons and property.[15]

22. <u>Third</u>, the process to be followed after notice has been given in terms of section 3 of the Gatherings Act is regulated in section 4 thereof. Section 4 provides as follows:

> "4 Consultations, negotiations, amendment of notices, and conditions
>
> (1) 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.
>
> (2) (a) If, after such consultation, the responsible officer is of the opinion that negotiations are not necessary and that the gathering may take place as specified in the notice or with such amendment of the contents of the notice as may have been

[14] AA; page 23; par 26.
[15] AA; page 23; par 27.

agreed upon by him and the convener, he shall notify the convener accordingly.

(b) If, after such consultation, the responsible officer is of the opinion that negotiations are necessary, he shall forthwith call a meeting between himself and-

(i) the convener;

(ii) the authorized member;

(iii) any other responsible officers concerned, if any; and

(iv) representatives of such other public bodies, including local authorities and police community consultative forums, as in the opinion of such responsible officer or officers ought to be present at such meeting,

in order to discuss any amendment of the contents of the notice and such conditions regarding the conduct of the gathering as he may deem necessary.

(c) At the meeting contemplated in paragraph (b) discussions shall be held on the contents of the notice, amendments thereof or additions thereto and the conditions, if any, to be imposed in respect of the holding of the gathering so as to meet the objects of this Act.

(d) The responsible officer shall endeavour to ensure that such discussions take place in good faith.

(3) If a convener has been notified in terms of subsection (2) (a) or has not, within 24 hours after giving notice in terms of section 3 (2), been called to a meeting in terms of subsection (2) (b) of this section, the gathering may take place in accordance with the contents of the notice and in accordance with the provisions of section 8, but subject to the provisions of sections 5 and 6.

(4) (a) If agreement is reached at the meeting contemplated in subsection (2) (b) the gathering may take place in accordance with the contents of the notice, including amendments, if any, to such contents, on which agreement was reached at the meeting, but subject to the provisions of sections 5 and 6.

(b) If at a meeting contemplated in subsection (2) (b) agreement is not reached on the contents of the notice or the conditions regarding the conduct of the gathering, the responsible officer may, if there are reasonable grounds therefore, of his own

accord or at the request of an authorized member impose conditions with regard to the holding of the gathering 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.

(c) A responsible officer who imposes any condition or refuses a request in terms of paragraph (b) shall give written reasons therefor.

(5) (a) The responsible officer shall ensure as soon as possible that a written copy of the notice, including any amendment thereof and any condition imposed and the reasons therefor, is handed to the convener and the authorized member who, and to every party which, attended the meeting referred to in subsection (2) (b): Provided that if the identity or whereabouts of the convener is unknown, or if in view of the urgency of the case it is not practicable to deliver or tender the said written notice and reasons to him, the notice shall forthwith, notwithstanding any provision to the contrary in any other law contained, be published in one or more of the following manners:

(i) In a newspaper circulating where the gathering is to be held; or

(ii) by means of the radio or television; or

(iii) by the distribution thereof among the public and the affixing thereof in public or prominent places where the gathering is to be held; or

(iv) by the announcement thereof orally where the gathering is to be held; or

(v) by affixing it in a prominent place at the address of the convener specified in the notice.

(b) The convener and the authorized member shall, respectively, ensure that every marshal and every member of the Police at the

gathering know the contents of the notice, including any amendment or condition, if any.

(6) (a) If a gathering is postponed or delayed, the convener shall forthwith notify the responsible officer thereof and the responsible officer may call a meeting as contemplated in subsection (2) (b), and thereupon the provisions of subsections (2) (c) and (d), (3), (4) and (5) shall apply, mutatis mutandis, to the gathering in question.

(b) If a gathering is cancelled or called off, the convener shall forthwith notify the responsible officer thereof and the notice given in terms of section 3 shall lapse.

(7) If a responsible officer is notified as contemplated in subsection (6) (a) or (b), he shall forthwith notify the authorized member accordingly."

23. The Minister has explained that once notice is given consultations and negotiations ensue, aimed at ultimately determining the parameters within which the gathering may take place. [16] According to the Minister, if no notice is given, the opportunity for this process to take place is lost, with the attendant consequence that there is a higher risk of a gathering not being peaceful. [17]

24. Fourth, in terms of section 5 of the Gatherings Act, a gathering may be prevented and prohibited in certain circumstances. This may occur when "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". The Minister has explained that

[16] AA; page 26; par 29.
[17] AA; page 26; par 29.

if no notice is given, the opportunity for this assessment to be made in advance is also lost.[18]

25. Fifth, there is ready access to a magistrate in instances where inter alia, a condition is imposed or a gathering is prohibited. In such instances, the magistrate may set aside a prohibition of a gathering or a condition imposed in respect thereof. Accordingly, as the Minister has explained, any aggrieved person has automatic recourse to this further procedural step.[19]

26. Sixth, the Gatherings Act expressly regulates the conduct at gatherings and demonstrations; section 8 provides as follows:

> 8 Conduct of gatherings and demonstrations
>
> The following provisions shall apply to the conduct of gatherings and, where so indicated, to the conduct of demonstrations:
>
> (1) The convener shall appoint the number of marshals mentioned in the notice or, if it was amended in terms of section 4, in the amended notice, to control the participants in the gathering, and to take the necessary steps to ensure that the gathering at all times proceeds peacefully and that the provisions of this section and the applicable notice and conditions, if any, are complied with, and such marshals shall be clearly distinguishable.
>
> (2) The convener shall take all reasonable steps to ensure that all marshals of the gathering and participants in the gathering or demonstration, as the case may be, are informed timeously and properly of the conditions to which the holding of the gathering or demonstration is subject.
>
> (3) The gathering shall proceed and take place at the locality or on the route and in the manner and during the times specified in the notice or, if it was amended, in the amended notice, and in accordance with the contents of such notice and the conditions, if any, imposed under section 4 (4) (b), 6 (1) or 6 (5).

[18] AA; page 27; par 30.
[19] AA; page 27; par 31.

(4) No participant at a gathering or demonstration may have in his or her possession-

(a) any airgun, firearm, imitation firearm or any muzzle loading firearm, as defined in section 1 of the Firearms Control Act, 2000 (Act 60 of 2000), or any object which resembles a firearm and that is likely to be mistaken for a firearm; or

(b) any dangerous weapon, as defined in the Dangerous Weapons Act, 2013 and the convener and marshals, if any, shall take all reasonable steps to ensure that this section is complied with.

(5) No person present at or participating in a gathering or demonstration shall by way of a banner, placard, speech or singing or in any other manner incite hatred of other persons or any group of other persons on account of differences in culture, race, sex, language or religion.

(6) No person present at or participating in a gathering or demonstration shall perform any act or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons.

(7) No person shall at any gathering or demonstration wear a disguise or mask or any other apparel or item which obscures his facial features and prevents his identification.

(8) No person shall at any gathering or demonstration wear any form of apparel that resembles any of the uniforms worn by members of the security forces, including the Police and the South African Defence Force.

(9) The marshals at a gathering shall take all reasonable steps to ensure that-

(i) 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;

(ii) no entrance to a building or premises in or on which is situated any hospital, fire or ambulance station or any other emergency services, is barred by the participants.

(10) No person shall, in any manner whatsoever, either before or during a gathering or demonstration, compel or attempt to compel any person to attend, join or participate in the gathering or demonstration, and the convener and marshals, if any, shall

take all reasonable steps to prevent any person from being so compelled."

27. In this regard, the Minister has explained that the role of the convenor and the marshals appointed by such person is key to the regulation of a gathering. Accordingly, if no notice is given, police resources are not supplemented by marshals. This is of particular relevance because experience, according to the Minister, has shown that members of a gathering are more inclined to adhere to instructions from persons within the gathering, such as marshals as opposed to police. [20]

28. Seventh, the Police are given wide-ranging powers in terms of section 9 of the Gatherings Act aimed at regulating gatherings.

29. Eighth, section 11 provides for liability arising from riot damage at a gathering or demonstration. In terms thereof, the convenor may be held liable in certain circumstances.

30. Ninth, the Gatherings Act makes certain conduct an offence and imposes penalties in respect thereof. Section 12 provides as follows:

"12 Offences and penalties

(1) Any person who-

(a) convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3; or

[20] AA; page 29; par 33.

(b) after giving notice in accordance with the provisions of section 3, fails to attend a relevant meeting called in terms of section 4 (2) (b); or

(c) contravenes or fails to comply with any provision of section 8 in regard to the conduct of a gathering or demonstration; or

(d) knowingly contravenes or fails to comply with the contents of a notice or a condition to which the holding of a gathering or demonstration is in terms of this Act subject; or

(e) in contravention of the provisions of this Act convenes a gathering, or convenes or attends a gathering or demonstration prohibited in terms of this Act; or

(f) knowingly contravenes or fails to comply with a condition imposed in terms of section 4 (4) (b), 6 (1) or 6 (5); or

(g) fails to comply with an order issued, or interferes with any steps taken, in terms of section 9 (1) (b), (c), (d) or (e) or (2) (a); or

(h) contravenes or fails to comply with the provisions of section 4 (6); or

(i) supplies or furnishes false information for the purposes of this Act; or

(j) hinders, interferes with, obstructs or resists 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 or a regulation made under section 10; or

(k) who is in possession of or carrying any object referred to in section 8 (4) in contravention of that section,

shall be guilty of an offence and on conviction liable-

(i) in the case of a contravention referred to in paragraphs (a) to (j), to a fine or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment; and

(ii) in the case of a contravention referred to in paragraph (k), to a fine or to imprisonment for a period not exceeding three years.

> (2) It shall be a defence to a charge of convening a gathering in contravention of subsection (1) (a) that the gathering concerned took place spontaneously."

31. It warrants emphasis, a failure to give notice in terms of section 3 constitutes an offence on the part of the person convening the gathering; the gathering itself is not criminalised.

32. In addition, it warrants noting that it is a defence to a charge of convening a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3, if the gathering took place spontaneously as is apparent from section 12(2).

33. Accordingly, unless the gathering took place spontaneously, the failure of the person convening the gathering to give notice, or adequate notice is an offence.

34. Finally, one of the interpretative principles provided for in section 13 of the Gatherings Act is as follows:

> "(3) For the purpose of this Act, where a convener has not been appointed in terms of section 2 (1), 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
>
> (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."

THE COMMON CAUSE FACTS UNDERPINNING THIS CHALLENGE

35. The undisputed factual background giving rise to this application is best encapsulated in the following statement made on behalf of the Applicants[21]:

> "We purposefully convened a demonstration and intentionally refused to give notice. While the demonstration was meant to be limited to 15 people, it expanded to include slightly more than 15 people. It was not spontaneous."

36. What is clear from this statement is the following:

    36.1. That the Appellants purposefully convened a demonstration (i.e. less than fifteen people).

    36.2. Because they convened a demonstration, no notice was required under the Gatherings Act.

    36.3. Despite a demonstration having been convened, it became a gathering when it expanded to more than 15 people. It appears that this expansion was unanticipated / unexpected; yet, the Appellants contend that it was not spontaneous. It is difficult to understand the factual basis for this contention given that the expansion into a gathering was, on their version, seemingly, impulsive, unprompted, occurred on the spur of the moment, unplanned as well as instinctive; these terms, are clearly synonyms for the word "spontaneous". This is significant because in terms of section 12(2) of the Gatherings Act, it is a defence to a charge of convening a gathering in contravention of

[21] RA; page 113; par 29.

subsection (1) (a) that the gathering concerned took place spontaneously.

37. In the determination of this matter it is significant that the following constitute the common cause facts against which this application falls to be determined:

37.1. That section 3 of the Gatherings Act prescribes a notice process and not an application. While the Appellants contend that in practice the notice is "often treated as an application procedure"[22], we submit that it is clear that the Gatherings Act contemplates a notice procedure. If there is a complaint that that process as applied in practice is too onerous or that it amounts to more than what the legislation prescribes, we submit that the Appellants' complaint lies elsewhere.

37.2. That "the notification procedure is necessary to allow the South African Police Services (SAPS) and others to make arrangements for the gathering".[23]

37.3. That SAPS may disburse a gathering where necessary and that the powers afforded to SAPS under the Gatherings Act allows for this. [24]

37.4. That there is a need for notice to be given. [25]

37.5. That there is utility in appointing a convenor to a gathering. [26]

[22] RA; page 108; par 13.1.
[23] RA; page 108; par 13.2.
[24] RA; page 108; par 13.3.
[25] RA; page 108; par 14. Their complaint lies in the criminalisation of the failure to give notice.
[26] RA; page 109; par 16.

37.6. That a notice serves to allow the orderly management of a gathering (though the Appellants contend that it is not always necessary to ensure that a gathering is orderly and occurs with minimal disruption).[27]

37.7. That in some cases, notice may be necessary to deploy police resources (though according to the Appellants, it is equally possible for a gathering to occur where no police resources are required).[28]

37.8. That consultations and negotiations can serve an important purpose.[29]

37.9. That it is possible that if no notice is given, it may interfere with SAPS' ability to plan to regulate the gathering.[30]

37.10. That giving notice facilitates the work of the police.[31]

38. It is also of significance that these proceedings do not seek to challenge: (a) the definition of a "gathering" or "demonstration" and in particular the number of persons which are required for a gathering and/or a demonstration; or (b) the requirement of giving notice.

39. It must accordingly be emphasised that the value and significance of a notice provision is accepted by the Appellants. According to the Minister, such notice deters unlawful gatherings and thereby facilitates the exercise of the freedom to demonstrate.

[27] RA; page 109; par 17.
[28] RA; page 109; par 18.
[29] RA; page 110; par 19.
[30] RA; page 114; par 35.
[31] RA; page 116; par 42.

40. In the circumstances, the sole dispute before this court relates to the constitutionality of making it a crime to convene a gathering (which is defined to consist of more than 15 people), "merely because the convenors did not notify the local authority that the gathering would occur".[32]

THE RIGHT PROTECTED BY SECTION 17 OF THE CONSTITUTION

41. In one of its first pronouncements concerning section 17 of the Constitution, in **SATAWU and Another v Garvas and Others 2013 (1) SA 83 (CC)**, the Constitutional Court pronounced as follows:

    41.1. That the wording of section 17 is generous and that it would need some particularly compelling context to interpret this provision as actually meaning less than its wording promises. There is nothing, in our own history or internationally, that justifies taking away that promise.[33]

    41.2. That it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection. [34]

    41.3. That the 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.[35]

[32] Appellants' Heads of Argument; page 4; par 1.
[33] At par 52.
[34] At par 53.
[35] At par 55.

THE CONSTITUTIONAL ANALYSIS

42. It is trite law that there is a two-fold test for a finding of constitutional invalidity. In **Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) SA 984 (CC)**, the Constitutional Court held as follows:

> "[44] The task of determining whether the provisions of s 417(2)(b) of the Act are invalid because they are inconsistent with the guaranteed rights here under discussion involves two stages: first, an enquiry as to whether there has been an infringement of the s 11(1) or 13 guaranteed right; if so, a further enquiry as to whether such infringement is justified under s 33(1), the limitation clause. The task of interpreting the chap 3 fundamental rights rests, of course, with the Courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of the particular right in question. Concerning the second stage, '(it) is for the Legislature, or the party relying on the legislation, to establish this justification (in terms of s 33(1) of the Constitution), and not for the party challenging it to show that it was not justified'."

(Own Emphasis)

Is there an infringement of section 17 of the Gatherings Act?

43. Turning then to the first of the two-fold enquiry, viz, whether the impugned provision of the Gatherings Act constitutes an infringement of section 17 of the Constitution.

44. This first stage of the analysis has been described as principally a matter of interpretation of the provisions of the law and the Bill of Rights in that the Court is required to determine the scope of the rights by a process of interpretation and in so doing is required to ascertain whether the right has been infringed by the challenged law or conduct.[36]

[36] Currie and De Waal, "The Bill of Rights Handbook", (6th Edition), page 153.

45. As the plain wording of the text of section 17 of the Constitution makes clear, section 17 of the Constitution protects only peaceful and unarmed demonstrations. This is confirmed by the judgment of the High Court in **Fourways Mall (Pty) Ltd v SACCAWU** 1999 (3) SA 752 (W) and more recently by the judgment of the Constitutional Court **SATAWU v Garvas** 2013 (1) SA 83 (CC) at par 52.

46. The category of demonstrations protected by section 17 have been described by Davis as follows[37]:

> "The section [i.e. section 17] contains two internal qualifications. The first, the word "peaceful" appears to have been taken from the First Amendment to the Constitution of the United States ('the right of people to assemble peacefully'). This qualification is presumably intended to ensure that no constitutional difficulty can be raised regarding laws restricting breaches of peace, or riots, pursuant to an assembly.
>
> Armed assemblies are not to be constitutionally protected because, once petitioners are armed, there is a potential for such forms of assembly to become violent."

47. The point has been reiterated by Rautenbach as follows[38]:

> "Section 17 protects only peaceful and unarmed assemblies, demonstrations and pickets. Although the use of arms and non-peaceful actions could readily have been dealt with in terms of the general limitations clause for the protection of the public interest or of the rights of others, restricting the protection of this right to peaceful and unarmed activities is a formula used in most other human rights instruments. <u>Gatherings that are not peaceful and unarmed are not protected by the Bill of Rights and their limitation need not comply with section 36</u>.
>
> In practice a gathering will be considered non-peaceful if the public and private interests (the public order, persons and property) are violated or threatened by violent or riotous action to such an extent that

[37] Davis, "Assembly" in "South African Constitutional Law: The Bill of Rights" by Cheadle, Davis and Haysom at 12-2.
[38] Rautenbach, "Introduction to the Bill of Rights" in Bill of Rights Compendium at page 1A-154.

the limitation of the right, by prohibiting that particular action would in any case have been justified in terms of section 36.

The same applies to the concept of unarmed. The presence of arms could be an indication of the violent nature of the happening which, in turn, could serve as a purpose for a limitation of a right."

(Emphasis added)

48. Gatherings and demonstrations, by their very nature involve more than one person. Accordingly, in the ordinary course, a gathering or demonstration by an individual occurs together with at least one other person; their conduct together forms a gathering or demonstration that is protected by section 17; this is distinguishable from the position in respect of other constitutional rights.

49. In terms of section 7(2) of the Constitution, the State must respect, protect, promote and fulfil the rights in the Bill of Rights.

50. Indeed, according to the judgements of the Constitutional Court:

50.1. It is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation.[39]

50.2. There are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights; the courts will not be prescriptive as to what measures the State

[39] Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) at par 67.

takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. [40]

50.3. A range of possible measures is therefore open to the State, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable. [41]

50.4. The rights contained in the Bill of Rights ordinarily impose, in the first instance, an obligation that requires those bound not to act in a manner which would infringe or restrict the right; the obligation is in a sense a negative one, as it requires that nothing be done to infringe the rights.[42]

50.5. However, in some circumstances, the correlative obligations imposed by the rights in the Bill of Rights will require positive steps to be taken to fulfil the rights.[43]

51. Furthermore, the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 21 May 2012, A/HRC/20/27 has stressed that States have a positive obligation to actively protect peaceful assemblies. Such obligation includes the protection of participants of peaceful assemblies from individuals or groups of individuals, who aim at disrupting or dispersing such

[40] Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) at par 191.
[41] Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) at par 191.
[42] Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC) at par 69.
[43] Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC) at par 69. See too: Head of Dept, Dept of Education, FS Prov v Welkom High School 2014 (2) SA 228 (CC) at par 84 and following.

gatherings[44]; States also have a negative obligation not to unduly interfere with the right to peaceful assembly.[45]

52. In a more recent Joint report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extra judicial, summary or arbitrary executions on the proper management of assemblies dated 4 February 2016 A/HRC/31/66, the State's role in facilitating the exercise of the right to peaceful assembly is emphasised.[46] In this regard, it expressly states as follows:

> "37. The positive obligation of the State to ensure rights requires that authorities facilitate assemblies. States should plan properly for assemblies, which requires the collection and analysis of information, anticipation of different scenarios and proper risk assessments. Transparent decision-making is central to the process of planning and facilitating assemblies and in ensuring that any action taken by law enforcement is proportionate and necessary. Contingency plans and precautionary measures must also be put in place. Proper planning and preparation requires continuous monitoring of activities and should be adaptable to changing circumstances.
>
> 38. The proper facilitation of assemblies also benefits from effective communication and collaboration among all relevant parties (see A/HRC/17/28, para. 119). Open dialogue between authorities (including the authority responsible for receiving notices and law enforcement officials) and, where identifiable, assembly organizers before, during and after an assembly enables a protective and facilitative approach to be taken, helping to defuse tension and prevent escalation. Law enforcement agencies and officials should take all reasonable steps to communicate with assembly organizers and/or participants regarding the policing operation and any safety or security measures. Communication is not limited to verbal communication and law enforcement officials must be trained on the possible impact of any indirect communication that may be perceived by organizers and participants as intimidation, for

[44] At par 33.
[45] At par 39.
[46] Section D.

example, the presence or use of certain equipment and the body language of officials."

53. It is submitted that the Regulation of Gatherings Act (and in particular section 12(1)(a)) falls within the purview of the State's obligations in terms of section 7(2) of the Constitution in that it constitutes a legislative measure aimed at facilitating and enabling the realisation of the right protected in section 17 of the Constitution, as opposed to limiting, infringing or impeding its realisation.

An analysis of section 36 of the Constitution and the limitation enquiry

54. If notwithstanding our primary submission that there is no infringement of section 17 of the Constitution, this Court was to find otherwise on the basis that the criminalisation of a failure to comply with the procedural barrier[47] imposed by the Gatherings Act, constitutes an infringement of section 17, then we submit that it constitutes a reasonable and justifiable limitation of the right.

55. Section 36 of the Constitution provides as follows:

"36 Limitation of rights

(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-

[47] By way of example, in Beinash and Another v Ernst & Young and Others 1999 (2) SA 116 (CC) at par 16 and in the context of a challenge to vexatious legal proceedings, the Constitutional Court held that the effect of the impugned provision was "to impose a procedural barrier to litigation on persons who are found to be vexatious litigants." This, according to the Constitutional Court served to restrict the access of such persons to courts and in so doing it was inconsistent with the right of access to Court. Having made that finding, the Court proceeded to a limitations analysis.

(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.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

56. The applicable legal principles pertaining to a limitation enquiry are now well-established. Key amongst them are:

56.1. That the balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.[48]

56.2. The law that limits a fundamental right must do so for reasons that are acceptable in an open and democratic society based on human dignity, equality and freedom. In addition, the law must be reasonable

[48] National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) at par 35.

in the sense that it should not invade rights further than it needs to in order to achieve its purpose.[49] According to De Waal and Currie[50]:

> "[I]t must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purposes of the law)."

56.3. Where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law — usually the organ of state responsible for its administration — must put material regarding such considerations before the court.[51]

56.4. A limitation will not be proportional if other, less restrictive means could have been used to achieve <u>the same ends</u>. And if it is disproportionate, it is unlikely that the limitation will meet the standard set by the Constitution, for section 36 "does not permit a sledgehammer to be used to crack a nut".[52]

56.5. A provision which limits fundamental rights must, if it is to withstand constitutional scrutiny, be appropriately tailored and narrowly focused.[53]

[49] Currie and De Waal, "The Bill of Rights Handbook", (6th Edition), page 163.
[50] Currie and De Waal, "The Bill of Rights Handbook", (6th Edition), page 163.
[51] Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC) at par 19. See too: Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Dev 2014 (2) SA 168 (CC).
[52] S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC) at par 34.
[53] Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) at par 49.

56.6. However, the State ought to be given a margin of appreciation in relation to whether there are less restrictive means available to achieve the stated purpose.[54]

57. We now apply the limitation enquiry with reference to each of its constituent elements.

The nature of the right

58. In **Garvas**, the Constitutional Court recognised the importance of the right to assemble. The Court had this to say in its analysis in terms of the limitation clause:

> "[61] The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. 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 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.
>
> [62] Under apartheid, the state took numerous legislative steps to regulate strictly and ban public assembly and protest. Despite these measures, total repression of freedom of expression through protest and demonstration was not achieved. Spontaneous and organised protest and demonstration were important ways in which the excluded and marginalised majority of this country expressed themselves against the apartheid system, and were part and parcel of the fabric of the participatory democracy to which they aspired and for which they fought.
>
> [63] So the lessons of our history, which inform the right to peaceful assembly and demonstration in the Constitution, are at least twofold. First, they remind us that ours is a 'never again'

[54] S v Makwanyane and Another 1995 (3) SA 391 (CC) at par 104.

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."

59. The above dictum confirms that the right to free assembly is undoubtedly an important constitutional right. Indeed, the Constitutional Court in **Garvas** accordingly concluded its analysis on this point as follows:

> "[66] …. Freedom of assembly is no doubt a very important right in any democratic society. Its exercise may not, therefore, be limited without good reason. The purpose sought to be achieved through the limitation must be sufficiently important to warrant the limitation."

60. This departure point confirms two propositions (particularly when considered in light of the full judgment and Order in **Garvas**):

    60.1. First, while the right to assemble is important and indeed vital to South Africa's democracy, it is not absolute.

    60.2. Second, measures aimed at giving effect to the right to peaceful and unarmed assembly bear particular significance in recognising the importance of the right.

The importance of the purpose of the limitation

61. Key to this leg of the enquiry is whether there is a legitimate government purpose to be served by the impugned provision.[55]

[55] Richter v Minister of Home Affairs 2009 (3) SA 615 (CC) at par 78.

62. The Constitutional Court has confirmed that rights may be limited in order to meet a constitutional imperative[56] and further that rights may be limited in order to protect the rights of others.[57]

63. In this regard, the following dictum of the Constitutional Court in **Garvas** is particularly instructive:

> "[38] The somewhat unusual defence created for an organisation facing a claim for statutory liability appears to have been made deliberately tight. Gatherings, by their very nature, do not always lend themselves to easy management. They call for extraordinary measures to curb potential harm. The approach adopted by parliament appears to be that, except in the limited circumstances defined, organisations must live with the consequences of their actions, with the result that harm triggered by their decision to organise a gathering would be placed at their doorsteps. This appears to be the broad objective sought to be achieved by parliament through s 11. The common-law position was well known when s 11 was enacted. The limitations of a delictual claim for gatherings related damage in meeting the policy objective gave rise to the need to enact s 11 to make adequate provision for dealing with the gatherings related challenges of our times.
>
> [55] The mere legislative regulation of gatherings to facilitate the enjoyment of the right to assemble peacefully and unarmed,

[56] SANDU v Minister of Defence 1999 (4) SA 469 (CC) at par 35.

[57] Beinash and Another v Ernst & Young and Others 1999 (2) SA 116 (CC) where the Constitutional Court held:

> "[17] The right of access to courts protected under s 34 is of cardinal importance for the adjudication of justiciable disputes. When regard is had to the nature of the right in terms of s 36(1)(a), there can surely be no dispute that the right of access to court is by nature a right that requires active protection. However, a restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right of access for those with meritorious disputes. Indeed, as the respondents argued, the Court is under a constitutional duty 14 to protect bona fide litigants, the processes of the Courts and the administration of justice against vexatious proceedings. Section 165(3) of the Constitution requires that '(n)o person or organ of State may interfere with the functioning of the courts'. The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed. This limitation serves an important purpose relevant to s 36(1)(b). It would surely be difficult to anticipate the litigious strategies upon which a determined and inventive litigator might embark. Thus there is a requirement for special authorisation for any proposed litigation."

demonstrate, picket and petition may not in itself be a limitation.…"

64. Applied to the present instance, we submit that the purpose and importance of the limitation is to protect the rights of everyone to demonstrate peacefully by criminalising the conduct of persons who convene non-notified gatherings. Such criminalisation, it is contended by the Minister, deters the occurrence of non-notified gatherings. This deterrence, we submit, serves an important and legitimate government purpose in that there is a greater risk to non-notified gatherings not being peaceful and unarmed and thereby infringing the section 17 right that vests in all persons.

65. The Minister has explained in this regard[58]:

    65.1. That the reason for notification, is in order to ensure that proper planning can take place and in particular, depending on the nature of the information regarding the gathering, for a sufficient number of police officers to be deployed and to be made available on stand-by should they be so required.

    65.2. The failure to provide any notification means that the requisite police resources may not be available and crucial issues, such as planning, in respect of marshals etc. cannot occur. The result of this, according to the Minister, is that it increases the risk of the gathering descending into chaos and not being peaceful. This, in turn, according to the Minister,

[58] AA; page 33; par 46.

may lead to an infringement of other persons' rights including posing a risk to their person and property.

65.3. 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 consequence at all. The criminalisation of such conduct undoubtedly has a serious deterrent effect.

65.4. The fact that a gathering may subsequently prove to be peaceful does not serve to excuse the failure to have complied with the notice requirements. This, the Minister explains, would not be known at the time when compliance with the notice requirements must take place and further if a gathering subsequently proves to be disruptive, chaotic and non-peaceful, there would be little recourse available to persons who have been adversely affected.

65.5. Section 205(3) of the Constitution, the constitutionally imposed objects of the police service are "to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law." The giving of notice as provided for in section 3 of the Gatherings Act, the Minister has explained, materially facilitates the role of the South Africa Police Service in vindicating this constitutional imperative.

66. It is submitted that the legislative choice to criminalise the impugned conduct is consistent with the general principles applicable to criminalised conduct; the relevant aspects of which we address hereunder.

67. At the outset, it must be emphasised that the criminalising of certain conduct[59]:

    67.1. serves as a tool of social control;

    67.2. acts as a guide to the citizen indicating the limits of legitimate activity on his or her part and predicting the consequences of contravention of the law.

68. To state the obvious, a crime is conduct which the law declares to be criminal. The legislature that is responsible for the creation of statutory offences plays a decisive role in defining the conduct that may qualify for criminal punishment. A legislature provides descriptions of prohibited conducted or required conduct, buttressed by a threat of punishment for those who should contravene the provision in question. A crime comes into existence when the provision in question is contravened. The offender, so to speak, brings it on him-or herself.[60]

69. Criminal sanction as opposed to other forms of social control is based on the following three principles namely: (a) autonomy; (b) social welfare; and (c) harm prevention.[61]

[59] Ndawula, B. Criminalisation of HIV/AIDS in South Africa: A critical look at the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[60] Joubert, W.A.;Faris, J.A., *The Law of South Africa*, Volume 6, para 8
[61] Decisions to Criminalise; para 2.1; page 32. Accessed on: catalogue.pearsoned.co.uk/assets/hip/gb/uploads/M02_WILS2642_04_SE_C02.pdf

70. As regards autonomy:

70.1. According to the notion of autonomy informing the bulk of criminal prohibition issues from J.S.Mill in his essay 'On Liberty'[62]:

> "The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear . . . because in the opinion of others to do so would be wise or even right."

70.2. The "harm principle" gives political priority to **individual freedom** from coercion rather than individual or collective goods such as morality or welfare. The State therefore has limited authority to coerce and punish. This is viewed as the negative thrust of the harm principle.[63]

70.3. The positive thrust is to identify what justifies State coercion, namely harm prevention. Where freedom of action must be restricted in order to maintain the autonomy and security of citizens, it is proper to curtail it[64].

70.4. In a restatement of Mill's harm principle Joel Feinberg describes it as follows:

> "(S)tate interference with a citizen's behaviour tends to be morally justified when it is reasonably necessary . . . to prevent harm or the unreasonable risk of harm to parties other than the person interfered with. More concisely, the need to prevent harm (private or public) to parties other than the actor is always an appropriate reason for legal coercion."[65]

[62] J.S. Mill, 'On Liberty' in J. Gray (ed.) *On Liberty and Other Essays*, Oxford: OUP (1991)
[63] Decisions to Criminalise, para 2.2, page 33. Accessed on: catalogue.pearsoned.co.uk/assets/hip/gb/uploads/M02_WILS2642_04_SE_C02.pdf
[64] Ibid.
[65] Harm to Others: The Moral Limits of the Criminal Law, New York: OUP (1984), 11.

71. As regards harm prevention and other welfare values:

71.1. The harm principle is the cornerstone of the liberal state's approach to criminalization and its influence is seen not only with respect to core crimes involving moral wrongs committed against individuals but more obviously in the context of statutory public welfare offences such as traffic, building, food, environmental protection regulation and state security.[66]

71.2. It is designed to allow the state to perform a key function in the constitution of a civilized autonomy-respecting society which is to secure its own as well as its peoples' welfare interests.[67]

71.3. Public welfare is deemed so crucial to society's general purposes that such offences are often constituted in violation of the principle of responsibility. Such offences represent the subjugation of individual autonomy to collective welfare interests. It is therefore not coincidental that they issue from politically accountable legislators rather than unaccountable judges[68].

71.4. Parliament, rather than judges, is best able to make the "complex judgment about the acceptable level of risk of physical and mental harm, taking into account costs of enforcement, utility of traffic

[66] Decisions to Criminalise, para 2.2, page 37. Accessed on: catalogue.pearsoned.co.uk/assets/hip/gb/uploads/M02_WILS2642_04_SE_C02.pdf
[67] Id.
[68] Id.

circulation . . . , the autonomy of citizens who choose to take certain risks, and so on."[69]

71.5. State coercion is reserved for activities that pose a serious threat to the integrity of society, such that it demands a public rather than private response.[70]

72. The practical criteria underpinning decisions to criminalise and the thresholds of seriousness have been explained as follows:

72.1. A central concern for an autonomy-respecting society is to maintain proper thresholds of "seriousness". Appropriate thresholds are constituted by the requirement that criminal liability should only attend culpable wrongdoing. The harm / culpability equation allows thresholds of seriousness to vary according to both gravity of harm and fault.

72.2. <u>Intention</u> and <u>subjective recklessness</u> is a more culpable state of mind than negligence which therefore affects the seriousness of the actor's wrongdoing.[71]

72.3. Assessing appropriate thresholds of harm whether for purposes of basic criminalisation or for purposes of grading offences is not straightforward, although at a basic level it is deceptively easy to produce thresholds of

[69] Lacey (1988), 105.
[70] f. *Coney* (1882) 8 QBD 534, at 549, 'A man may by consent . . . compromise his own civil rights, but he can- not compromise the public interests', at 553 per Hawkins J.
[71] See A.P. Simester, 'Can Negligence be Culpable?' in J. Horder (ed.) *Oxford Essays in Jurisprudence*, Oxford: OUP (2000).

seriousness capable of differentiating both criminal and non-criminal wrongs and offences of different grades of seriousness.[72]

72.4. Joel Feinberg's method for assessing seriousness of harm centres upon the victim's loss of choice or opportunity. Some other measure is required for appropriateness for regulatory offences and offences involving remote harms.

72.5. The mechanism for determining the appropriate threshold for state intervention in the absence of any direct harm-causing activity, as suggested by Feinberg, takes the form of a practical equation weighing the gravity of the harm and the likelihood of its occurrence on the one hand, against the social value of the relevant conduct and the degree of interference with personal liberty on the other. "The greater the risk of harm and the greater the magnitude of the harm which would occur if the risk materialised, the greater must be the value of the conduct and the implications for personal liberty to justify criminalization."[73]

73. It is accordingly submitted that key to this leg of the enquiry are the following considerations:

73.1. Section 12(1)(a) serves is a legitimate government purpose, viz, facilitating the realisation of the right protected in section 17 of the Constitution. To this end, it meets the prescripts of public welfare and

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[72] Decisions to Criminalise, para 2.2, page 43. Accessed on: catalogue.pearsoned.co.uk/assets/hip/gb/uploads/M02_WILS2642_04_SE_C02.pdf
[73] Decisions to Criminalise,para 2.2, page 44. Access on: catalogue.pearsoned.co.uk/assets/hip/gb/uploads/M02_WILS2642_04_SE_C02.pdf

social value. It prevents society degenerating into an uncontrollable abyss of social chaos; it does so by placing the most elementary notice requirements in place only for gatherings of over 15 persons. It also provides a defence in relation to spontaneous gatherings.

73.2. The criminal offence arises from a deliberate and intentional decision not to comply with the notice requirements. Importantly, the criminal offence does not arise as a result of not being able to comply because there was an element of spontaneity.

The nature and extent of the limitation

74. In **Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development** 2014 (2) SA 168 (CC) at par 87, when applying the justification test the Constitutional Court held that the State needed to to demonstrate is that the existence and enforcement of the impugned provisions can reasonably be expected to control the identified risks.

75. The Court further held:

> "[88] In the ordinary case it may well be that the state may, without more, rely on the nominal deterrent effect that the criminalisation of particular conduct may have. But where there is expert evidence indicating that the statute under challenge will not have the desired deterrent effect, more is required from the state if the relevant criminal prohibitions are to survive."

(Emphasis added)

76. In **Garvas**, the Court held:

> "[69] Whilst the Act does have a chilling effect on the exercise of the right, this should not be overstated. The Act does not negate the right to freedom of assembly, but merely subjects the exercise of that right to strict conditions, in a way designed to moderate or prevent damage to property or injury to people. Potentially, the exercise of the right also occasions deterrent consequences. One of them is the presumption of liability for riot damage, which can be traced back to the organisation's decision to exercise the right to assemble."

77. We submit that the following considerations are relevant to this leg of the enquiry:

    77.1. First, the notification as required by section 3 of the Gatherings Act is a relatively simple process. Accordingly there is no impediment to it being complied with.

    77.2. Second, the notice requirement and the consequent criminalisation of conduct under section 12(a)(a) does not negate the right to freedom of assembly; it merely regulates its exercise.

    77.3. Third, the Constitutional Court has accepted that criminalisation may have a deterrent effect. Significantly, the Appellants have not adduced any expert evidence to demonstrate the contrary. Accordingly, we submit that Minister's evidence in relation to deterrence must form the lens against which this challenge is adjudicated.

    77.4. Fourth, the relief sought by the Appellants effectively renders section 12(1) of the Gatherings Act irrational. What it will result in is a situation of there being no criminal sanction for a failure to give notice for

convening a gathering; yet, there will be a sanction for giving notice but failing to adhere to the content of a notice or a condition. Such a consequence, we submit, will serve as an incentive for persons not to give notice in the first place. This will result in the right protected by section 17 running the risk of infringement.

Less restrictive means

78. In **Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development** 2014 (2) SA 168 (CC) the Constitutional Court held:

> "[95] A limitation will not be proportional if other, less restrictive means could have been used to achieve the same ends. And if it is disproportionate, it is unlikely that the limitation will meet the standard set by the Constitution, for s 36 'does not permit a sledgehammer to be used to crack a nut'. A provision which limits fundamental rights must, if it is to withstand constitutional scrutiny, be appropriately tailored and narrowly focused. However, this court has held that the state ought to be given a margin of appreciation in relation to whether there are less restrictive means available to achieve the stated purpose."

79. In assessing whether less restrictive means exist to achieve the purpose of the Act, the Constitutional Court stated as follows in **S v Mamabolo (E TV Intervening)** 2001 (3) SA 409 (CC) at par 49:

> "[49] Where s 36(1)(e) speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. And, in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant."

80. We submit that in assessing the question of less restrictive means, the following dictum of of the Constitutional Court in **Garvas** (though raised in a somewhat different context) is of particular relevance:

> "[80] The purpose of the section is to ensure that a gathering that becomes destructive and results in loss to others does not leave its victims without recourse. It is thus to protect the rights of individuals who may be affected detrimentally by riot damage that takes place in the course of the exercise of the right to assemble.
>
> [81] There is a tight fit between the limitation and its purpose. The purpose is to achieve an appropriate balance between the right to assemble on the one hand and the safety of people and property on the other. That balance has been struck."

81. Turning to the relevant considerations in respect of the impugned provision of the Gatherings Act:

81.1. First, the notification requirement applies only to gatherings (i.e. more than 15 persons). Demonstrations (i.e. less than fifteen persons) do not have to comply with the notification requirements and may occur as a matter of right. It is important in this regard to emphasise once more that the Appellant do not challenge the respective definitions of gatherings or demonstrations as being unconstitutional. As regards the threshold of more than 15 for a gathering, the Minister has explained[74]:

81.1.1. The notice provisions in section 3 applies only in respect of a gathering (i.e. more than 15 persons). There is good reason for this; there is a far greater risk of protests descending into

[74] AA; page 34; par 47.

chaos when its participants exceed 15 persons. There is accordingly an element of risk by virtue of this factor alone.

81.1.2. The specific number of 15 is by no means arbitrary. The point to be emphasised is that there has to be a cut-off number. The determination of fifteen is considered reasonable and appropriate in light of the fact that demonstrations of less than fifteen are easier to manage and generally do not pose a threat to public order.

81.1.3. The determination of the number fifteen is significant because, according to the Minister, in light of the limited police resources and attendant demands thereon, it is not possible for gatherings to be properly and adequately policed in all instances, in the absence of notice having been given.

81.2. Second, the notification requirement is very easy to comply with; there is nothing onerous about it at all. Indeed, none of the provisions of the Gatherings Act have been challenged as imposing notification requirements that are too onerous.

81.3. Third, in terms of section 12(2) it is a defence to a charge of convening a gathering in contravention of subsection (1) (a) that the gathering concerned took place spontaneously. We submit that this defence of spontaneity:

81.3.1. On its plain wording, responds to a situation whether the entire gathering was unanticipated, unprompted and occurred on the spur of the moment; it also responds to a situation whether, at inception, it was anticipated that the gathering would not exceed the threshold of 15 persons but that more than 15 persons did ultimately form part of the gathering. In other words, it spontaneously developed from a demonstration to a gathering.

81.3.2. To the extent that the Appellants seriously suggest otherwise in respect of the latter issue, we submit that our interpretation is supported by the applicable principles of statutory interpretation.[75]

[75] Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC)at par 21 to 26. The principle was subsequently explained by the SCA as follows in Minister of Safety & Security v Sekhoto 2011 (5) SA 367 (SCA):

> "[15] It is also necessary to be reminded of the manner in which statutes must be interpreted in the light of the Bill of Rights. I do not apologise for setting this out at length; because it would appear that the different High Courts have failed to have regard to these principles. Langa CJ, in Hyundai, 11 after quoting s 39(2) of the Constitution — which states, inter alia, that when interpreting legislation a court must promote the spirit, purport and objects of the Bill of Rights — said that it means that all statutes must be interpreted through the prism of the Bill of Rights. He F made the following salient points, relevant for present purposes:
>
> (a) The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistent with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.
>
> (b) Judicial officers must prefer an interpretation of legislation that falls within constitutional bounds over one that does not, provided it can be reasonably ascribed to the section.
>
> (c) Legislation, which is open to a meaning which would be unconstitutional, but is reasonably capable of being read in conformity

81.4. Fourth, it is the conduct of the person convening the gathering that is criminalised by the impugned section. Importantly, it is not the entire gathering that is criminalised by the Gatherings Act. Indeed, there is no criminal sanction for simply attending a gathering in respect of which no notice has been given. Likewise, a gathering in respect of which no notice has been given is not prohibited in terms of the Gatherings Act.

81.5. Fifth, the Appellants incorrectly complain that the impugned provision will have a chilling effect on the right protect by section 17 of the Constitution. The Appellants are wrong in this contention because the impugned provision: (a) does not criminalise the gathering; (b) does not criminalise the conduct of those attending the gathering; the criminal element is limited to the person convening the gathering. Accordingly, we submit that if there is to be any chilling effect (which the Minister does not accept), this is limited to a chilling effect on persons who would otherwise convene a gathering without notice; it will not and cannot have a bearing on the general right of freedom to demonstrate – which

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with the Constitution, should be so read — but the interpretation may not be unduly strained.

(d) There is a distinction between interpreting legislation in a way which promotes the spirit, purport and objects of the Bill of Rights, and the process of reading words into or severing them from a statutory provision — under s 172(1)(b) — following upon a declaration of constitutional invalidity under s 172(1)(a).

(e) The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The second can only take place after the statutory provision, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.

(f) It follows that, where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance."

general right remains unaffected by the criminal sanction of section 12(1)(a).

81.6. Sixth, while it is correct that section 9 of the Gatherings Act provides for the adoption of a range of measures by the police in order to regulate a gathering and section 12(1)(g) makes it offence for a failure to comply with an order issued, or if a person interferes with any steps taken in terms of section 9(1)(b), (c), (d)or (e) or 2(a), it must be emphasised that none of those provisions deal with the position of a person who has convened a gathering without giving notice

81.7. Seventh, and in response to the Appellants' argument that there are both existing measures and alternative measures that could be introduced that are less severe than criminalisation[76], we submit as follows:

81.7.1. As regards the Appellants' reliance on section 11, that provision applies to consequences of "riot damage". At the core of the definition of "riot damage" however, is the question loss suffered.[77] That purpose is a very different one to criminalising conduct. If there is no riot damage caused, there is no adverse consequence to the Convenor; this notwithstanding wide-ranging disruption, chaos and inaccessibility to certain public areas, that may be caused by

[76] Appellants' Heads of Argument; page 44; par 119.

[77] "Riot damage" is defined in the Gatherings Act as follows: "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."

a non-notified gathering. In any event and notwithstanding section 11, proof of damage in circumstances resulting from a gathering is by its very nature difficult to prove. Simply put, the purpose served by section 11 of the Gatherings Act is a very different one from that served by section 12 thereof.

81.7.2. The Appellants further rely on the fact that the existing offences under the Gatherings Act, the common law and other statutes serve the purpose of deterring harm to person or property and preventing disruption to traffic and access.[78] None of these measure however would lay liability at the door of a person convening a gathering in the absence giving notice.

81.8. Eighth, the Appellants propose alternative measures in the form of enhanced civil liability or administrative fines.[79] What the Appellants have however fail to demonstrate is: (a) that the deterrent effect that the Minister relies on in support of criminalisation is unjustified or incorrect – indeed, according to the Constitutional Court, the Appellants ought to have produced expert evidence to show otherwise; (b) that the alternative measures that they propose will, in the words of the Constitutional Court "achieve the same ends" as the criminal sanction that the Minister has opted for.

[78] Appellants' Heads of Argument; page 45; par 122.
[79] Appellants' Heads of Argument; page 46; par 124 and following.

81.9. Ninth, the well-established presumption of restrictively interpreting penal provisions would apply.[80] Of particular relevance to the subject challenge in this regard is the very tight wording of section 12(3) of the Gatherings Act in respect of who is deemed to have convened a gathering. Such a person must have participated in the "planning", "organising", making preparation for or inviting persons to attend the gathering.

[80] In Tsoaeli and Others v S (A222/2015) [2016] ZAFSHC 217 (17 November 2016) the Full Bench of the Free State High Court held:

> "[17] It is trite law that the purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law. In the case of *Natal Joint Municipality Pension Fund v Endumeni Municipality* the court stated that in interpreting legislation or other statutory instrument, regard must be had to its context, taking into account "the circumstances attendant upon its coming into existence". In order to give full context to the RGA, it is necessary to first consider a brief history behind its promulgation.
> …
> [26] It is evident from the preamble of the RGA that, unlike its pre-constitution counterparts, the RGA recognises fundamental rights that are embodied in section 16 and 17 of the Constitution. Unlike its forerunners, the RGA does not provide for a summary prohibition of a gathering. Instead provides for a consultative process through the creation of a so-called "safety triangle" – the convener of a gathering, a responsible officer of the local authority and the authorized member of the South African Police Service. Unlike its predecessor, the RGA creates appeal and review procedures. It is quite evident from these provisions that the iron-fist approach towards protest action manifested in the holding of gatherings and demonstrations in the past has, by virtue of the RGA, been replaced by a more amicable and transparent consultative process. The highest court in the country, in the case of SATAWU and Another v Garvas had occasion to make some pronouncements on the RGA. The pronouncements, although made in the context of assessing the constitutionality of section 11 of the RGA, are foundational in the approach that courts should follow when interpreting the RGA.
> ….
> [29] The principle of legality is regarded as a grounding value for the legality of legislative and administrative measures taken by public authorities. The principle of legality in criminal law is also known as the *nullum crimen sine lege* principle. This principle is now firmly established as part of our law. Snyman posits that its most important facets may be formulated as follows:- An accused may not be found guilty of a crime and sentenced unless the type of conduct with which he is charged (a) has been recognized by the law as a crime; (b) in clear terms; (c) before the conduct took place; (d) without the court having to stretch the meaning of the words and concepts in the definition to bring the particular conduct of the accused within the compass of the definition and (e) after conviction the imposition of punishment also complies with the four principles set out immediately above."

81.10. <u>Tenth</u>, the sanction imposed for an offence under section 12(1)(a) is very modest. Depending on the facts, it ranges from a fine to imprisonment of up to one year or a combination thereof. Accordingly, notwithstanding the fact that we accept that there is an element of particular seriousness attached to the question of a person convening a gathering without complying with the notice requirements, the harshness of that consequence is mitigated by the sentence that may be imposed for a contravention. Viewed together (i.e. the offence coupled by the sanction), we submit meet the objective of deterrence on the one hand and protection of the right guaranteed by section 17 on the other.

81.11. <u>Finally</u>, the Appellants place much store on the fact that a criminal prosecution may ensue even if the gathering was peaceful. This is indeed correct. Given the limited ambit under which the criminal consequence follows, the Minister's reasons as to why notification is required (the ultimate protection of the rights in section 17) and that criminal sanction facilitates compliance with the notice requirement, thereby ultimately facilitating the realisation of the right protected in section 17 of the Constitution, we submit that a criminal sanction is warranted in terms of section 12(1)(a), even if a gathering may be peaceful.

82. We accordingly submit that on the evidence the Appellants have failed to demonstrate that there are less restrictive means than the criminal sanction imposed that will serve to achieve the Minister's objective of deterrence.

Conclusion on the limitation enquiry

83. In light of the aforesaid, we submit that to the extent that this Court finds that the impugned provision results in an infringement of section 17 of the Constitution, such limitation is reasonable and justifiable as contemplated by section 36 of the Constitution.

84. In summary, we submit that the following factors are of particular relevance to this enquiry:

    84.1. First, the breadth of the provision in that it only applies to the person who convenes a gathering, with such a person being defined very narrowly in terms of section 13(3) of the Gatherings Act.

    84.2. Second, the objective sought to be achieved by the provision, viz, deterrence and the ultimate facilitation of the rights protection afforded by section 17 of the Constitution. Of particular relevance in this regard is that there is no expert evidence to debunk the deterrent effect that the Minister relies on.

    84.3. Third, the limited sanction that may result from such criminalisation.

    84.4. Finally, the criminal sanction arises only as a result of deliberate non-compliance with the very low threshold requirements of notice.

INTERNATIONAL LAW

The relevance of international law

85. In **Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) at par 97**, the Constitutional Court explained the relevance of international law to the South African constitutional framework as follows:

> "[95] To summarise, in our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic law fall within the province of Parliament. The approval of an international agreement by the resolution of Parliament does not amount to its incorporation into our domestic law. Under our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic.
>
> [96] This is not to suggest that the ratification of an international agreement by a resolution of Parliament is to be dismissed 'as a merely platitudinous or ineffectual act'. The ratification of an international agreement by Parliament is a positive statement by Parliament to the signatories of that agreement that Parliament, subject to the provisions of the Constitution, will act in accordance with the ratified agreement. International agreements, both those that are binding and those that are not, have an important place in our law. While they do not create rights and obligations in the domestic legal space, international agreements, particularly those dealing with human rights, may be used as interpretive tools to evaluate and understand our Bill of Rights.
>
> [97] Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. Firstly, s 233 requires legislation to be interpreted in compliance with international law; secondly, s 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, s 37(4)(b)(i) requires legislation that derogates from the Bill of Rights to be 'consistent with the Republic's obligations under international law applicable to states of emergency'. These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.

> [98] But treating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights and obligations is tantamount to 'incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door'."

(Own Emphasis)

The protection given to freedom of demonstration and assembly under international law

86. As a point of departure it must be accepted that there are differences in the form of protection given to the right of freedom to demonstrate under international law as compared to section 17 of the Constitution; these textual differences clearly bear on the recommendations and jurisprudence that has emerged in relation to the protection afforded to freedom of assembly / demonstration under international law.

87. Accordingly, we caution that international law not be used as the ultimate benchmark against which to assess the subject challenge.

Determinations pursuant to the International Covenant on Civil and Political Rights

88. Article 21 of the International Covenant on Civil and Political Rights ("**the ICCPR**") (which has been ratified by South Africa) provides as follows:

> "The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national society or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."

89. The Open Society Justice Initiative (one of the Amicii in this matter) rely on the ruling of the Human Rights Committee in **Kivenmaa v Finland**, UNHCR, Views of 9

June 1994, **UN Doc. CCPR/C/50/D/412/1990**.[81] That matter concerned certain action by the complainant and about 25 members of her organisation, where they distributed leaflets and raised a banner critical of a visiting head of state. The police immediately took down the banner and asked who was responsible. The complainant identified herself and she was subsequently charged with violating the Act on Public Meetings by holding a public meeting without prior notification.[82] The Act made it an offence to call a public meeting without notification to the police at least six hours before the meeting.[83]

90. While the Human Rights Committee ultimately found that there had been a violation of Articles 19 and 21 of the ICCPR, it recognised the following:

    90.1. The requirement to notify the police of an intended demonstration in a public place six hours before its commencement "may be compatible with the permitted limitations laid down in Article 21 of the Covenant."[84]

    90.2. A requirement to pre notify a demonstration would normally be for reasons of national security or public safety, public order, the protection of public health or morals or the protection of the rights or freedoms of others. "Consequently the application of Finnish legislation on demonstrations to such a gathering cannot be considered as an application of a restriction permitted by article 21 of the Covenant." [85]

[81] Heads of Argument; page 18.
[82] At par 2.1. of Ruling.
[83] At par 2.2. of the Ruling.
[84] At par 9.2. of the Ruling.
[85] At par 9.2. of the Ruling.

90.3. The complainant had exercised the right protected by article 19 by raising a banner. While article 19 authorises a restriction on freedom of expression in certain circumstances, on the facts of this matter, the State party had not referred to a law allowing this freedom to be restricted or established how the restriction which applied to the complainant was necessary to safeguard the rights and natural imperatives of article 19 of the Covenant.[86]

91. We submit that the present matter is distinguishable at least on the basis that the State has identified why the restriction is necessary and further that the law relied upon is that of the Gatherings Act.

Determinations pursuant to the African Charter on Human and Peoples' Rights

92. The African Charter on Human and Peoples' Rights (which South Africa has also ratified) provides the following protection in Article 11:

> "Every individual shall have the right to assembly freely with others. The exercise of this right shall be subject only to the necessary restrictions provided for by law in particular those enacted in the interests of national security, the safety, health, ethics, rights and freedom of others."

93. In **Malawi African Association and Others v Mauritana, ACHPR, Comm. Nos 54/91, 61/91,98/93,164/97, à 196/97 and 210/98 (2000)**[87] "the Commission held that the imprisonment of presumed political activists on charges of holding unauthorized meetings constituted a violation of the right to assemble, as – " the

[86] At par 9.3. of the Ruling.
[87] Referred to Appellants' Heads of Argument; par 30; fn 25.

government did not come up with any element to show that these accusations had any foundation "in the interests of national security, the safety health, ethics, and rights and freedoms of others, as specified in article 11."

94. The facts giving rise to that matter were that over 30 people were arrested for distributing a document providing evidence of racial discrimination to which black Mauritanians were subjected and demanded the opening of a dialogue with the government.[88] The victims were mainly black Mauritanian government employees, suspected of belonging to the opposition.[89] The Mauritanian government did not contest the allegations that massive human rights violations had been committed.[90]

95. The following background underpinned the Commission's ultimate findings:

    95.1. The government did not contest the facts adduced by the complainants, the Commission therefore based its arguments on the elements provided by the complainants.[91]

    95.2. The government did not come up with any element to show that these accusations had any foundation "in the interests of national security, the safety, health, ethics, and rights and freedoms of others, as specified in article 11, consequently, the Commission considers there was violation of article 11 in the cases in question."[92]

[88] At par 3.
[89] At par 14, 15 and 20.
[90] At par 9.
[91] At par 103.
[92] At par 111.

96. It appears from the facts of this case that the government was not concerned with pursuing any legitimate aim by restricting the applicants' rights to peaceful assembly. The imposition of the restrictions had nothing to do with protecting the right to peaceful assembly and the rights of other citizens. To that end we submit that that matter is vastly distinguishable from the present.

Determinations pursuant to the European Convention on Human Rights

97. Article 11 of the European Convention on Human Rights (which does not bind South Africa at all) provides as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise on these rights by members of the armed force, of the police or of the administration of the State."

98. Article 12 of the European Convention on Human Rights is also of relevance to the case-law that some of the Amicii rely on; it provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licencing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of

disorder or crime, for the protection of health or morals or for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

99. In **Frumkin v. Russia, application No. 74568/12, 5 January 2016** the applicant alleged a violation of his right to peaceful assembly. He complained, in particular, of disruptive security measures implemented at the site of the meeting, the early termination of the assembly, and his own arrest followed by his conviction for an administrative offence constituted an infringement of article 11 of the Convention. In reaching its conclusion that there been a violation of article 11 of the Convention on account of the applicant's arrest, pre-trial detention and administrative penalty, the Court summarised the general principles of the right to freedom of assembly to include the following:

99.1. The right to freedom of assembly, one of the foundations of a democratic society, is subject to a number of exceptions which must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[93]

99.2. When examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Contracting States enjoy a certain but not unlimited margin of appreciation. [94]

99.3. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review

[93] At par 93.
[94] At par 93.

under Article 11 the decisions they took. This does not mean that it has to confine itself to ascertaining whether the State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine, after having established that it pursued a "legitimate aim", whether it answered a "pressing social need" and, in particular, whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient".[95]

99.4. The Contracting States must refrain from applying unreasonable indirect restrictions upon the right to assemble peacefully. In addition, there may be positive obligations to secure the effective enjoyment of this right.[96]

99.5. The States have a duty to take reasonable and appropriate measures with regard to lawful demonstrations to ensure their peaceful conduct and the safety of all citizens, although they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used.[97]

99.6. It is incumbent on the State, in particular, to take the appropriate preventive security measures to guarantee the smooth conduct of a public event, such as ensuring the presence of first-aid services at the

[95] At par 94.
[96] At par 96.
[97] At par 96.

site of demonstrations and regulating traffic so as to minimise its disruption. [98]

99.7. It is important for the public authorities, moreover, to show a certain degree of tolerance towards peaceful gatherings, even unlawful ones, if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of all substance; the limits of tolerance expected towards an unlawful assembly depend on the specific circumstances, including the duration and the extent of public disturbance caused by it, and whether its participants had been given sufficient opportunity to manifest their views.[99]

99.8. Where demonstrators engage in acts of violence, interferences with the right to freedom of assembly are in principle justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others.[100]

100. The Amicii rely on the findings of the European Court of Human Rights in **Novikova and Others v Russia, ECtHR, Judgment of 26 April 2016**.[101] That case concerned five separate applications against the Russian Government. Importantly, each of the complainants had started as solo demonstrations; the total number of participants in each of the five matters ranged from two people to six people in total.[102] Furthermore, it is common cause that on having been informed of the police's position on the unlawful nature of the event and having

[98] At par 96.
[99] At par 97.
[100] At par 98.
[101] Heads of Argument of the Open Society Justice Initiative, par 19.
[102] At par 171.

been ordered to disburse, the applicants complied with or were read to comply with the police order.[103]

101. The Court ultimately concluded as follows in respect of three of the complainants:

> "213. The Court considers that, in the absence of aggravating factors, the swift termination of the events followed by the taking of the applicants to police stations and the prosecution for an administrative offence consisting solely in organising or participating in a non-notified public event, constituted a disproportionate interference with the applicants freedom of expression."

102. The following aspects of the Court's judgment however warrant highlighting:

102.1. The Court found that in the absence of any specific arguments and submissions on the aspect of proportionality, it would proceed on the assumption that the authorities had a legal basis for putting an end to what they perceived as a non-notified public event; the staging of a non-notified event, per se, constituted a "wilful violation" of the regulations or participation in such an event, per se, constituted "unlawful actions" on the part of the participants.[104]

102.2. That it is conceivable that in certain circumstances the authorities may have legitimate reasons to stop a demonstration and take those responsible to a police station such as in instances where it is to put an end to prima facie unlawful conduct where he or she has refused to

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[103] At par 172.
[104] At par 120.

comply with a lawful order to cease such conduct or on other grounds which may be found.[105]

102.3. What matters in the context of an article 10 complaint concerning freedom of expression is whether there was a "pressing social need" requiring such a measure in the specific circumstances of the case, taken as a whole.[106]

102.4. That the applicable legislation at the time was not sufficiently foreseeable as to what conduct or omission could be classified as an offence on account of a breach of the notification requirements.[107] Such a state of affairs was conducive to creating a chilling effect on the legitimate recourse to expression in the form of a solo demonstration.[108]

102.5. The Court could not find a legitimate aim in terms of article 10 of the Convention; the State had failed to discern sufficient reasons constituting a pressing social need for convicting for non-observance of the notification requirement, where the participants were merely standing in a peaceful and non-disruptive manner, at a distance of some 50 meters from each; the only relevant consideration was punitive.[109]

103. It is submitted that the impugned provision is vastly distinguishable. In particular:

[105] At par 177.
[106] At par 177.
[107] At par 131.
[108] At par 189.
[109] At par 199.

103.1. The notice provisions apply only to gatherings of more than 15 persons.

103.2. The Minister has explained fully and comprehensively what the justification for the impugned provision is; significantly, it is not limited to being a punitive measure; it is most importantly for reasons of deterrence.

103.3. A gathering may still proceed even if no notice is given.

104. The Amicii further rely on the matter of **Ziliberberg v Maldova, ECtHR, Judgment of 4 May 2004**[110]. The applicant in that matter alleged that his rights to freedom of assembly and right to a fair hearing had been breached. The facts giving rise to the complaint were that the applicant had attended a demonstration that had not been authorised in accordance with the law; the organiser had not even applied for authorisation. The demonstration was initially peaceful but the demonstrators later started to throw eggs and stones at the Municipality building and the police intervened.[111]

105. The Court did not deal with the matter on the basis of article 11; instead it was dealt with in terms of article 6 and 1, neither of which protect the right to freedom of assembly / demonstration. Article 6 protects the right to a fair and public hearing and guarantees an accused person the right to participate effectively in his criminal trial.

[110] Footnote 34.
[111] At par 8.

106. Though the matter was not determined on the basis of article 11, the Court observed as follows:

> "As regards the nature of the offence committed by the Applicant the court notes that he was convicted under Article 174/1 & 4 of the Code of Administrative Offences act ("CAO") of participating in an unauthorised demonstration. The provision regulates offences against public order and is designed to regulate the manner in which demonstrations are to be held. Accordingly, the legal rule infringed by the applicant is directed towards all citizens and not towards a given group possessing a special status. The general character of the legal rule in question is further confirmed in Article 1 and 12 of the CAO which refer to the fact that the administrative responsibility comes into operation at the age of sixteen and all citizens must show respect for legal rules and the rights of other citizens and legal persons."

107. We accordingly submit that this judgment has limited relevance to the present challenge.

108. In **Oya Ataman v Turkey, ECtHR, Judgment of 5 December 2006** before the European Court of Human Rights[112], police dispersed a gathering (50 people) on the ground that no prior notice has been given as required by Turkish law. There was no evidence to suggest that the group in question represented a danger to public order apart from possibly disrupting traffic.[113] The demonstrators refused to obey the police orders to disperse and attempted to continue, moving towards the police.[114]

109. Section 24 of the Turkish Demonstrations Act provides that demonstrations and processions which do not comply with the provisions of the Act will be *dispersed by force* on the order of the governor's office and after the demonstrators have

[112] Referred to in para 36, fn 36 of (Open Society) Heads of Argument.
[113] At par 38 to 42.
[114] At par 7.

been warned.[115] The police dispersed the crowd using pepper spray after a number of warnings. The applicant complained of an infringement of her right to freedom of expressions as per article 11 of the Convention.[116] The Government submitted that the meeting in question had been unlawful in that no prior notification had been given. Paragraph 2 of article 11 imposed limits on the right of peaceful assembly in order to prevent disorder.[117]

110. The Court noted that States must not only safeguard the right to assemble peacefully but also refrain from applying unreasonable indirect restrictions upon that right. The essential object of article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights.[118]

111. Significantly, the Court held as follows[119]:

> "the Court considers that in this instance the polices' forceful intervention was disproportionate and was not necessary for the prevention of disorder within the meaning of the second paragraph of Article 11 of the Convention."

112. In **Akgöl and Göl v Turkey , ECthHR, Judgment of 17 May 2011**[120] while the Court found that public authorities show a certain degree of tolerance, a peaceful

[115] At par 15.
[116] At par 28.
[117] At par 29.
[118] At par 36.
[119] At par 43.
[120] Referred to at par 37; fn 36 of the Amicus (Open Society) Heads of Argument.

gathering should not, in principle, be made subject to the threat of a penal sanction[121] it made the following pronouncements:

112.1. In considering whether the applicants engaged in an unlawful action the Court reiterated that any demonstration in a public place may cause a certain level of disruption to ordinary life and encounter hostility. Therefore according to the Court, in order to enable the domestic authorities to take the necessary preventative security measures, associations and others organizing demonstrations, as actors in the democratic process, should respect the rules governing that process by complying with the regulations in force."[122]

112.2. That Government gave no specificities of the location of the demonstration, to show that this group represented a danger to public order or public safety. The Court having particular regard to the fact that the gathering took place on the grounds of a university, and without taking a position on the application of Law.no.2911 to university premises, the Court finds no evidence of its own motion".[123]

113. In **Sergey Kuznetsov v Russia, ECtHR, Judgment of 23 October 2008, para 5**[124] Kuznetsov and two others held a picket at the entrance to the Sverdlovsk Regional Court to protest "violations of the human right of access to a court."

[121] At par 43.
[122] At par 41.
[123] At par 42.
[124] Referred to at par 38 ; fn 42 of the Amicus' (Open Society) Heads of Argument.

He gave prior notice to the authorities but outside the prescribe periods, he was arrested as a result and given an administrative fine.[125] The *applicant gave notice eight days before the event*, the domestic laws requires 10 days' notice. The Court found that it does not appear that the two-day difference in any way impaired the authorities' ability to make the necessary preparations for the picket.[126] The Court found that breach of the notification time-limit was not a sufficient reason for imposing administrative liability on the applicant.[127]

Conclusion on international law

114. While we accept that there are certain findings by the Court (in particular the European Court on Human Rights) that are inconsistent with the position that the Minister has adopted in relation to the impugned provision, we emphasise the following:

114.1. First, section 17 of the Constitution is not absolute. Indeed, in **Garvas** the Constitutional Court accepted that section 11 of the Gatherings Act constituted a reasonable limitation.

114.2. Second, the textual protection afforded to the right protected in terms of section 17 is different from that of other international provision. For instance, as is apparent from the jurisprudence of the European Court of Human Rights (and the threshold test that it adopted), its approach is informed and underpinned by the formulation of the right in article 11.

[125] At par 5.
[126] At par 43.
[127] At par 43.

114.3. Third, as is trite, each case is fact dependent. Accordingly, we caution against the wholesale adoption of a finding by a court in circumstances where a State has laid no basis or justification for the impugned provision; the present litigation is very different.

114.4. Fourth, the provisions of international law (in relation to specific issues) cannot be considered in isolation of the overall scheme of the Gatherings Act. As addressed: (a) notification only applies to gatherings of fifteen persons or more; (b) it is common cause that notification serves an important and legitimate government purpose; (c) the Minister's justification for the imposition of criminal sanction is ultimately aimed at facilitating the realisation of the right protected by section 17; (d) the resultant sanction is very modest; and (e) spontaneity constitutes a complete defence.

REMEDY

115. In light of the submissions advanced, we submit that the application falls to be dismissed with costs.

116. If, notwithstanding our primary submission, this Court is to find that section 12(1)(a) is unconstitutional, then it is bound in terms of section 172(1)(a) of the Constitution to declare it as such.

117. However, any order of unconstitutionality ought to be limited so as to have no effect on any completed and closed cases where convictions occurred pursuant to section 12(1)(a) of the Gatherings Act. Accordingly, if the impugned

provision is found to be unconstitutional, it ought to be limited to pending matters and future matters.

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22 May 2017

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