IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 32/18

Case No: A431/15

Magistrates' Court Case No: 14/985/2013

In the matter between:

PHUMEZA MHLUNGWANA	First Applicant
XOLISWA MBADISA	Second Applicant
LUVO MANKQA	Third Applicant
NOMHLE MACI	Fourth Applicant
ZINGISA MRWEBI	Fifth Applicant
MLONDOLOZI SINUKU	Sixth Applicant
VUYOLWETHU SINUKU	Seventh Applicant
EZETHU SEBEZO	Eighth Applicant
NOLULAMA JARA	Ninth Applicant
ABDURRAZACK ACHMAT	Tenth Applicant
and	
THE STATE	First Respondent
THE MINISTER OF POLICE	Second Respondent
and	
EQUAL EDUCATION	First Amicus Curiae
RIGHT2KNOW CAMPAIGN	Second Amicus Curiae
UN SPECIAL RAPPORTEUR ON THE RIGHTS OF FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATIONS	Third Amicus Curiae

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FIRST AND SECOND RESPONDENTS' WRITTEN SUBMISSIONS IN RESPONSE TO SUBMISSIONS MADE BY *AMICII*

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INTRODUCTION

1. As addressed in our main Heads of Argument ("**the Main Heads**"), this matter relates to the determination of a very narrow issue, *viz*, whether it is constitutional to criminalise the conduct of a person who intentionally opts not to give notice to the relevant authorities of an intended gathering of more than 15 persons, notwithstanding the peremptory requirement in section 12(1)(a) of the Regulation of Gatherings Act No 205 of 1993 ("**the Gatherings Act**"); the latter provision requires that such notice be given prior to an intended gathering of more than 15 persons.

2. The submissions made by the *Amicii* all support the confirmation of the order of the Western Cape High Court, handed down on 24 January 2018, which: (a) declared section 12(1)(a) of the Gatherings Act to be unconstitutional to the extent that it criminalises convening a gathering of more than 15 people; and (b) upheld the appeal against the Applicants' conviction and set aside their convictions.[1]

3. The submissions made by the *Amicii* mainly focus on international law and foreign authorities, including the findings of treaty bodies. The major treaties referred to by the *Amicii* and which South Africa has ratified is Article 21 of the International Covenant on Civil and Political Rights ("**the ICCPR**") and Article 11 of the African Charter on Human and Peoples' Rights ("**the African Charter**").

4. These Heads of Argument are structured as follows:

   4.1. <u>First</u>, we address the relevance of international law and foreign law.

[1] Record: Judgment; page 677; par 95.

4.2. Second, we address the protection given to freedom of demonstration and assembly under international law.

4.3. Third, we address the approach adopted in certain comparative jurisdictions.

4.4. Finally, we address the right to freedom of assembly in relation to children.

RELEVANCE OF INTERNATIONAL LAW AND FOREIGN LAW

5. The relevance of international law to the South African constitutional framework has been explained by this Court in **Glenister v President of the Republic of South Africa and Others** 2011 (3) SA 347 (CC) at paras 95 – 98, the following aspects of which warrant emphasis:

5.1. Under our Constitution, 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.[2]

5.2. 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. [3]

5.3. 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

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[2] At par 95.
[3] At par 96.

and understand our Bill of Rights.[4]

5.4. 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.[5] Sections 233, 39(1)(b) and 37(4)(b)(i) "*demonstrate that international law has a special place in our law which is carefully defined by the Constitution"*.[6]

5.5. Notwithstanding the special significance of international law as an interpretive aid, it does not entail elevating it to the status of domestic law in the Republic in that: "*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'."*[7]

6. This Court has also not always followed the approach adopted by Treaty Bodies and has, from time to time, distinguished either the South African constitutional framework (in respect of the formulation of a right) and/or the South African context in respect of the nature of protection required.[8] In similar vein, we submit at the outset that:

6.1. The right protected in section 17 of the Constitution which is subject to limitation in terms of section 36, differs from the formulation of the right under international treaties.

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[4] At par 96.
[5] At par 97.
[6] At par 97.
[7] At par 98.
[8] By way of example, see: Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) at par 31 and following.

6.2. So too, the South African context in respect of scarce policing resources coupled with the fact that the criminal element arises only in instances of a conscience and deliberate decision not to comply with the most basic notice requirement, places South Africa, we submit, in a position that is not directly comparable with that of other countries.

7. The relevance of foreign law is somewhat different. Foreign law may be used as a tool in assisting this court in coming to decisions on the issues before it. The Constitution provides that "*(w)hen interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law*".

8. The position in respect of foreign law was summarised by this Court in **H v Fetal Assessment Centre** 2015 (2) SA 193 (CC) at par 31 as follows:

8.1. Foreign law is a useful aid in approaching constitutional problems in South African jurisprudence. South African courts may, but are under no obligation to, have regard to it.

8.2. In having regard to foreign law, courts must be cognisant both of the historical context out of which our Constitution was born and our present social, political and economic context.

8.3. The similarities and differences between the constitutional dispensation in other jurisdictions and our Constitution must be evaluated. Jurisprudence from countries not under a system of constitutional supremacy and jurisdictions with very different constitutions will not be as valuable as the jurisprudence of countries founded on a system of constitutional supremacy and with a

constitution similar to ours.

8.4. Any doctrines, precedents and arguments in the foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values.

THE PROTECTION GIVEN TO FREEDOM OF DEMONSTRATION AND ASSEMBLY UNDER INTERNATIONAL LAW

9. The right to freedom of assembly is protected by a number of international and regional human rights treaties.

10. As is apparent, the provisions of these international instruments are notably very similar. The similarity extends to both the protection given to the right and the recognition that it is not an unqualified and absolute right in that, there are instances in which the right to freedom of assembly may be restricted by authorities in the interests of one or more of the following considerations: (a) national security; (b) public safety; (c) prevention of disorder or crime; (d) the protection of health or morals; (e) protection of the rights and freedoms of others.

11. While it is well recognised that the primary purpose of laws created to give effect to the right to freedom of assembly should be aimed at the facilitation of the exercise of such right, restrictions are similarly well recognised provided that such restrictions are aimed at the protection of the rights of others and to balance the various interests involved.

The African Charter

12. The African Charter on Human and People's Rights provides as follows in Article 11:

"Every individual shall have the right to assemble freely with others. The exercise of this righ

13. In **Inspector-General of Police v All Nigeria Peoples Party and Others (2007) AHRLR 179 (NgCA 2007)**[9] the provisions of section 1(2),(3),(4),(5) and (6) Public Order Act Cap 382 Laws of the Federation of Nigeria 1990, requiring a police permit for the holding of a rally or procession, were found unconstitutional and invalid and in violation of Article 11 of the African Charter on Human and Peoples' Rights. This finding was made by the Court of Appeal of Nigeria.

14. We submit that the notice requirement provided for in section 3 of the Gatherings Act, unlike the Public Order Act of Nigeria, serves to facilitate the exercise of the right of freedom of expression and assembly. No authorisation or permit is required. The giving of notice is a simple and straightforward procedure which triggers protection from the State in the exercise of the right of freedom of assembly.

15. 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)[10] the African 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 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.*" We have addressed the details of this matter at paragraph 87 to 90 of our Main Heads of Argument.

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[9] Found at: http://www.chr.up.ac.za/index.php/browse-by-subject/415-nigeria-inspector-general-of-police-v-all-nigeria-peoples-party-and-others-2007-ahrlr-179-ngca-2007.html

[10] Found at: https://www.escr-net.org/caselaw/2006/malawi-african-association-and-others-v-mauritania-african- commission-human-and-peoples

The ICCPR

16. The International Covenant on Civil and Political Rights ("**the ICCPR**") provides as follows in Article 21:

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

17. The Right2Know Campaign (Second Amicus in this matter) relies 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**.[11] We have addressed the details of that matter and sought to distinguish it from the present case at paragraphs 82 to 85 of our Main Heads of Argument.

The European Convention on Human Rights

18. The European Convention for the Protection of Human Rights provides as follows in Article 11:

> "*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.*
>
> *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 of these rights by members of the armed forces, of the police or of the administration of the State."*

[11] Heads of Argument; page 8.

19. 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."*

20. 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 has 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:

20.1. 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.[12]

20.2. 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. [13]

20.3. 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 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*".[14]

20.4. 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.[15]

20.5. The States have a duty to take reasonable and appropriate measures with regard to lawful demonstrations to ensure their peaceful conduct and the

[12] At par 93.
[13] At par 93.
[14] At par 94.
[15] At par 96.

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.[16]

20.6. 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 site of demonstrations and regulating traffic so as to minimise its disruption.[17]

20.7. 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.[18]

20.8. 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.[19]

[16] At par 96.
[17] At par 96.
[18] At par 97.
[19] At par 98.

21. The Amicii also rely on the findings of the European Court of Human Rights in **Novikova and Others v Russia, ECtHR, Judgment of 26 April 2016**.[20] 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.[21] Furthermore, it is common cause that on having been informed of the police's position on the unlawful nature of the event and having been ordered to disburse, the applicants complied with or were ready to comply with the police order.[22]

22. 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."*

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

    23.1. 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

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[20] Heads of Argument of the Second Amicus, par 19.
[21] At par 171.
[22] At par 172.

or participation in such an event, per se, constituted "unlawful actions" on the part of the participants.[23]

23.2. 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 comply with a lawful order to cease such conduct or on other grounds which may be found.[24]

23.3. 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.[25]

23.4. 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.[26] 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.[27]

23.5. 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

[23] At par 120.
[24] At par 177.
[25] At par 177.
[26] At par 131.
[27] At par 189.

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.[28]

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

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

24.2. 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 of un-notified gatherings.

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

25. The Second Amicus further relies on the matter of **Ziliberberg v Maldova, ECtHR, Judgment of 4 May 2004**[29]. 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.[30]

26. 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

[28] At par 199.
[29] Footnote 32.
[30] At par 8.

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.

27. 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."*

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

29. In **Oya Ataman v Turkey, ECtHR, Judgment of 5 December 2006** before the European Court of Human Rights[31], 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.[32] The demonstrators refused to obey the police orders to disperse and attempted to continue, moving towards the police.[33]

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[31] Referred to in para 34, fn 34 of (Second Amicus) Heads of Argument.
[32] At par 38 to 42.
[33] At par 7.

30. 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 been warned.[34] 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.[35] 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.[36]

31. 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.[37]

32. Significantly, the Court held as follows[38]:

> *"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."*

33. In **Akgöl and Göl v Turkey , ECthHR, Judgment of 17 May 2011**[39] while the Court found that public authorities show a certain degree of tolerance, a peaceful

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[34] At par 15.
[35] At par 28.
[36] At par 29.
[37] At par 36.
[38] At par 43.
[39] Referred to at par 35; fn 39 of the Amicus (Second Amicus) Heads of Argument.

gathering should not, in principle, be made subject to the threat of a penal sanction[40] it made the following pronouncements:

33.1. 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."[41]

33.2. 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 found no evidence of its own motion.[42]

34. In **Sergey Kuznetsov v Russia, ECtHR, Judgment of 23 October 2008, para 5**[43] 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*." He gave prior notice to the authorities but outside the prescribe periods, he was arrested as a result

[40] At par 43.
[41] At par 41.
[42] At par 42.
[43] Referred to at par 36 ; fn 40 of the Amicus' (Second Amicus) Heads of Argument.

and given an administrative fine.[44] There the *applicant gave notice eight days before the event*, whereas 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.[45] The Court found that breach of the notification time-limit was not a sufficient reason for imposing administrative liability on the applicant.[46]

FOREIGN LAW

The United States of America

35. The First Amendment of the United States protects the right to conduct peaceful public assembly. This right to assemble is however not absolute. Time, place, and manner restrictions are permissible so long as they are justified without reference to the content of the regulated speech…, are narrowly tailored to serve a governmental interests and leave open ample alternative channels for communication of the information[47].

36. In **Thomas ET AL. v Chicago Park District, 534 U.S. 147, 150-51 (1969)[48]**, such restrictions took the form of requirements to obtain a permit for an assembly. The facts of the matter, in summary, are these: an Ordinance was adopted by the Chicago Park District (Respondent) requiring individuals to obtain a permit before conducting large scale events in public parks. The Ordinance provides that the Park District: (a) may deny a permit on any of 13 specified grounds; (b) must process applications within 28 days; and (c) must explain reasons for a denial. Petitioners

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[44] At par 5.
[45] At par 43.
[46] At par 43.
[47] Right to Peaceful Assembly: United States found at: https://www.loc.gov/law/help/peaceful-assembly/us.php
[48] Found at: https://supreme.justia.com/cases/federal/us/534/316/

who were dissatisfied that the Park District had denied some of their applications for permits to hold rallies advocating the legalising of marijuana, filed a 42 U.S.C4 §1983 suit alleging that the Ordinance is unconstitutional on the face of it. The District Court granted the Park District summary judgment, which was confirmed by the Seventh Circuit.

India

37. In India, Article 19(1) of the Indian Constitution protects the right of every citizen to freedom of speech and expression, assembly, associations, movement, residence and practicing any trade, business, occupation or profession. This right is however not absolute. Restrictions are imposed under Article 19(1)(3) in the interests of sovereignty and integrity of India or public order. Chapter VIII of the Indian Penal Code lays down the conditions when an assembly becomes unlawful and provides that an assembly of five or more persons becomes an unlawful assembly if the common object of the persons comprising the assembly is:

(i) To repel and resist the execution of any law or legal process;

(ii) To commit any sort of mischief or criminal trespass;

(iii) To obtain the possession of any property using force;

(iv) To impel and coerce of a person to do what he is not legally bound to do or omit which he is legally entitled to do;

(v) To overawe, that is to appall and astonish the government by means of criminal force or show of criminal force any public servant in the exercise of

his lawful powers[49].

Germany

38. In Germany, the right of freedom of assembly is protected by the German constitution as a fundamental right. The right to assemble peacefully is protected under Article 8 of the Basic Law for the Federal Republic of Germany ("GG"). The Federal Act on Assemblies of 1953 ("Versammlungsgesetz or "VersG") regulates the protection afforded under Article 8 of the Basic Law for the Federal Republic of Germany[50].

39. Article 14 VersG provides that an organizer needs to notify the assembly to the competent authority at least 48 hours prior to the assembly in open air and that the notification needs to include the name of the person responsible for leading the assembly. Spontaneous assemblies were found to be protected by the Federal Constitutional Court although there is no explicit provision in the Federal Act on Assemblies which would allow spontaneous demonstrations[51].

Malaysia

40. In Malaysia, the right to freedom of assembly is a right that is protected by the Federal Constitution. An organizer of an assembly was previously under section 27 of the Police Act 1967 required to obtain a permit from the officer in charge of a Police District before holding an assembly. The assembly was deemed to be unlawful and anyone who attended or participated was committing an offence. The

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[49] Legal Article: Right to Peaceful Assembly -Law Times Journal found at: http://lawtimesjournal.in/right-peaceful-assembly/

[50] Freedom of Assembly in Germany found at: http://www.icnl.org/research/resources/assembly/FoA%20in%20Germany.pdf

[51] http://www.icnl.org/research/resources/assembly/FoA%20in%20Germany.pdf

Police Act was repealed an replaced with the Peaceful Assembly Act 2012. The Peaceful Assembly Act does not require a permit but does require that notice be given of 10 days before the assembly. Once notice is given, certain conditions and restrictions can be imposed and organisers would still have committed an offence under the Act and liable to be charged[52]. The role of the police was considered to be that of facilitation of the assembly[53].

41. In **Public Prosecutor v. Yuneswaran a/l Ramaraj (2015) 6 MLJ 47** (referred to in paragraph 52 of the Second Amici's heads of argument) the Court observed that, "*the most relevant considerations in determining the constitutionality or otherwise of a statute or any of its provision is the object and reasons as well as the legislative history of the statute*[54]."

42. The Court found that the purpose of the Peaceful Assembly Act is to facilitate the exercise of a right granted by Article 10(1) (b) of the Federal Constitution and not to restrict it. Section 2 of the Peaceful Assembly Act states the objects of the Act as follows:

> *"The objects of this Act are to ensure- (a) so far as it is appropriate to do so, that all citizens have the right to organize assemblies or to participate in assemblies, peaceably and without arms; and (b) that the exercise of the right to organize assemblies or to participate in assemblies, peaceably and without arms, is subject only to restrictions deemed necessary or expedient in a democratic society in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons."*[55].

43. The Court further considered various decided cases of European Courts in order to

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[52] Peaceful Assembly Act 2012; section 9.
[53] The right to peaceful assembly by https://www.thestar.com.my/opinion/online-exclusive/a-humble-submission/2016/11/11/the-right-to-peaceful-assembly-unlike-the-police-act-before-this-the-peaceful-assembly-act-allows-as/
[54] Public Prosecutor v. Yuneswaran a/l Ramaraj (2015) 6 MLJ 47, par 23.
[55] Public Prosecutor v. Yuneswaran a/l Ramaraj (2015) 6 MLJ 47, par 25.

determine whether the Peaceful Assembly Act was in accordance with European standards and noted that, while Article 11 of the European Convention does not require organizers to submit prior notification to state authorities, all of the countries surveyed with the exception of Sweden, require advance notification.

44. It referred to **Rassemblement Jurassien and Unite Jurassienne v Switzerland, ECHR Application No. 8191/78 at para 114** where the European Commission on Human Rights stated[56]:

> "*Such a procedure is in keeping with the requirements of Article 11(1), if only in order that th*

45. The Court concluded that the Peaceful Assembly Act was in accordance with international norms.

RIGHTS OF CHILDREN TO ASSEMBLY

46. The rights of children to freedom of assembly is protected in a number of treaties to which South Africa is a signatory. Article 15 of the UN Convention on the Rights of the Child ("the UNCRC"), which South Africa has ratified, provides as follows:

> "*States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.*
>
> *No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others."*[57]

47. Article 8 of the African Charter on the Rights and Welfare of the Child ("ACRWC") provides in Article 8 that:

[56] Public Prosecutor v. Yuneswaran a/l Ramaraj (2015) 6 MLJ 47, par 44.
[57] Found at: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx

> *"Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law."*[58]

48. The provisions of Article 15 of the UNCRC are very similar to that provided for in Article 21 of the ICCPR and Article 11 of the African Charter.

49. Article 15 of the UNCRC, like the ICCPR and the ACHPR, provides that the right to freedom of assembly may be restricted and that it is not absolute. Public safety; prevention of disorder; the protection of health or morals; and the protection of the rights and freedoms of others, are equally valid grounds for the restriction on the child's right to freedom of assembly.

50. Article 8 of the ACRWC, makes no reference to restrictions but notes that the right to freedom of assembly has to be in conformity with the law.

51. The Gatherings Act, and in particular the notice requirement as provided for in section 3, takes nothing away from the rights afforded to children under the treaties referred to above. The purpose of the notice requirement remains true to the treaty agreements referred to, which is to facilitate the exercise of the right to freedom of assembly.

52. In countries such as Finland, a restriction is placed on the capacity of children by the Assembly Act 1999 of Finland which provides following in section 5:

> ***Section 5*** *— Right to arrange public meetings*
>
> *Public meetings may be arranged by private persons with full legal capacity, by corporations and by foundations. A person who is without full legal capacity but 2 who has attained 15 years of age may arrange a public meeting, unless it is evident that he/she will not be capable of fulfilling the*

[58] Found at: http://www.un.org/en/africa/osaa/pdf/au/afr_charter_rights_welfare_child_africa_1990.pdf

> *requirements that the law imposes on the arranger of a meeting. Other persons without full legal capacity may arrange public meetings together with persons with full legal capacity*[59].

53. In Maldova, the Law on Assemblies Act (2008 as amended 2014), like the Assembly Act of Finland, also refers to full legal capacity and that minors may only organise assemblies together with a person vested with full capacity. The provisions of Article 6 reads as follows in that regard:

> ***Article 6. Assembly Organisers***
>
> *(1) Organizers of assemblies may be individuals with full legal capacity, groups of persons, as well as legal entities. (2) Minors who have reached the age of 14, as well as persons declared disabled, may organize assemblies only together with a person vested with full legal capacity*[60].

54. The Gatherings Act notably does not have similar provisions and places no limitation on children on the basis of age or legal capacity. While children previously had no protection and/or recognition of their right to freedom of assembly, the Gatherings Act now affords them such protection and facilitates the exercise of such rights.

55. The First Amicus, Equal Education, notes that the exercise of the right to protest and any limitations thereon must, in respect of children, be viewed through the prism of section 28(2) of the Constitution.[61]

56. This Court noted in **Centre for Child Law v Minister of Justice and Constitutional Development**[62] the following:

> *"[29] This is not to say that children do not commit heinous crimes. They do. The courts, which deal with child offenders every day, recognise this no*

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[59] Found at: https://www.finlex.fi/en/laki/kaannokset/1999/en19990530_20020824.pdf
[60] http://www.legislationline.org/topics/country/14/topic/15
[61] Third Amicus' Heads of Argument; page 32, par 83.
[62] 2009 2 SACR 477 (CC); par 29.

> *less than Parliament. The affidavit on behalf of the Minister rightly points to legislators' concern about violent crimes committed by under-18s. The Constitution does not prohibit Parliament from dealing effectively with these offenders. The children's rights provision itself envisages that child offenders may have to be detained. The constitutional injunction that "[a] child's best interests are of paramount importance in every matter concerning the child" does not preclude sending child offenders to jail. It means that the child's interests are "more important than anything else", but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment."*

57. This Court noted further in **S v M**[63] with reference to **Minister of Welfare and Population Development v Fitzpatrick and Others** 2000 (3) SA 422 (CC) at para 17 that:

> *"[i]t is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child." Furthermore "'(t)he list of factors competing for the core of best interests [of the child] is almost endless and will depend on each particular factual situation'."Viewed in this light, indeterminacy of outcome is not a weakness. A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved.*

58. A court faced with a minor in contravention of the provisions of the section 12(1)(a) of the Gatherings Act, would in line with the principles established by these authorities, be forced to take an entire spectrum of considerations into account in respect of the child offender as well the interests of society.

59. The principles of restorative justice, entrenched in the Child Justice Act 75 of 2008, affords further protection to juvenile offenders through the establishment of the Child Justice Courts.

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[63] 2008 (3) SA 232 (CC); par 24.

60. The purpose of the Gatherings Act remains, even in relation to children, the protection and facilitation of the right to freedom of assembly. That is apparent from the Preamble of the Act.

61. We emphasise that even if the Court finds that section 12(1)(a) of the Gatherings Act is unconstitutional, to the extent that it applies to children (notwithstanding our submissions to the contrary), the Order that a Court grants falls to be limited to addressing that constitutional defect; it does not entitle the Applicants to an Order that section 12(1)(a) is unconstitutional in its entirety.

CONCLUSION

62. While we accept that there are certain findings under international or foreign law (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:

62.1. First, section 17 of the Constitution is not absolute. Indeed, in **South African Transport and Allied Workers Union and Another v Garvas and Others**[64] this Court accepted that section 11 of the Gatherings Act constituted a reasonable limitation.

62.2. Second, the textual protection afforded to the right protected in terms of section 17 is different from that of other international provisions. 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.

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[64] 2013 (1) SA 83 (CC).

62.3. Third, each case is fact dependent. Accordingly, we caution against the wholesale adoption of a finding by a court in circumstances (such as the present) where the State has set out a full justification for the impugned provision.

62.4. 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.

KARRISHA PILLAY

MARIA MOKHOAETSI

Counsel for the Respondents

13 July, Chambers, Cape Town