IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A431/15

In the matter between:

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

And

THE STATE	First Respondent

THE MINISTER OF POLICE Second Respondent

CORAM: Ndita J et Magona AJ

DELIVERED: 24 JANUARY 2018

JUDGMENT

NDITA, J:

Introduction

[1] This an appeal against the conviction of all the appellants for contravening section 12 (1) (a) of the Regulation of Gatherings Act 205 of 1993 ("the RGA"). At the heart of this appeal is a constitutional challenge to the validity of the aforesaid provisions in terms of which it is a crime to convene a gathering without notice being given as contemplated by section 3 of the RGA.

[2] In order to fully comprehend the issues in this appeal I deem it prudent to outline from the outset the provisions of s 12 (1) (a) and 3 of the RGA.

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

. . .

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

Section 3 provides:

"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.

Factual Background

[3] The factual background that underpins the determination of the issues in this appeal can be summarised as follows: The appellants were arraigned before the magistrate court, Cape Town, on a charge of contravening section 12 (1) (a) of the Regulation of Gatherings Act 205 of 1993 ("the RGA") (the main count), in that on or about 11 September 2013, they unlawfully and intentionally convened a gathering in protest against poor sanitation services without giving the relevant municipal authority any notice that such gathering would take place. In the alternative, they were charged with attending a gathering for which no notice had not been given. They all pleaded not guilty to charges. After evidence was led, the appellants were convicted as charge on the main count. The sentence imposed is that of a caution and discharge. With the requisite leave of the trial court, they now appeal against the conviction.

[4] In the proceedings before the trial court, the appellants made the following admissions:

1. A *"gathering*" as defined in terms of RGA was held at the offices of Mayor Patricia de Lille on 11 September 2013.

2. No notice of the gathering was given in terms of section 3 of the RGA.

[5] The appellants filed an explanation of plea in terms of section 115 of the Criminal Procedure Act 51 of 1977 which reads thus:

5.1 Section 12 (1) of the RGA is not applicable to them as the provision criminalises attending or a gathering where such gathering is in contravention of the RGA. According to the Appellant's plea explanation, section 12(1) (e) does not prohibit attending a gathering for which no notice has not been given, and attending or convening such a gathering does not contravene the RGA in any respect other than the fact that it constitutes an offence in terms of section 12 (1) (a).

5.2 The criminalisation of convening a gathering without giving notice is unconstitutional and invalid.

The Evidence

[6] Mr Noel Desmond Da Silva ("Mr Da Silva"), an officer employed by the City of Cape Town in terms of the RGA, gave evidence to the effect that on 11 September 2015, a gathering without a permit took place in the vicinity of the Civic Centre, City of Cape Town. Mr Da Silva outlined the process that must be followed in order to obtain a permit for a gathering and explained that an application must be lodged at least seven days prior to the intended gathering. But, the applicants may, on good cause shown, be granted a permit within a truncated period. The officer who receives the application must then consult with an authorised member of the South African Police Services ("SAPS"). The person who must give the notice of the intended gathering is the convener. According to Mr Da Silva, and as earlier pointed out, no convener or conveners contacted him in the matter at hand. The Act defines a convener as:

(a) Any person who out of his own accord convenes a gathering and;

(b) in relation to an organisation or branch of any organisation any person appointed by such organisation or branch in terms of 2(1)

[7] Mr Jacob Petersen ("Mr Petersen"), a Warrant Officer in the Public Order Policing Services stationed at Faure, confirmed that he and Captain Prins were on crowd management duties at the Civic Centre where they found about forty protesters carrying placards, and singing and dancing. According to his evidence, next to the entrance of the Civic Centre, some of the protesters had chained themselves to each other using padlocks. Mr Petersen testified that Captain Prins warned the protestors that their actions were illegal. When the protestors refused to disperse, the officers arrested them and used bolt cutters to cut the padlocks.

[8] All the appellants are members of the Social Justice Coalition ("SJC"), a membership-based organisation operating at Khayelitsha, Western Cape. According to the evidence of the first appellant, Ms. Phumeza Mlungwana ("Ms. Mlungwana"), the general secretary of the SJC, the broad objective of the organisation is to advance the Constitution, promote accountability in governance and to ensure and promote active citizenship. One of SJC's primary campaigns is the *"clean and safe sanitation for all"*. Its purpose is to ensure that all residents of Khayelitsha have access to adequate sanitation facilities

which are properly maintained. According to Ms. Mlungwana's evidence, lack of sanitation poses a serious threat to the health, safety and dignity of Khayelitsha residents.

[9] The evidence reveals that the SJC began work on its sanitation campaign in 2010 through raising awareness to this critical issue. Ms Mlungwana said that when Mayor Patricia de Lille was elected in 2011, the City of Cape Town began to cooperate with the SJC and even established a janitorial service to ensure that sanitation facilities were cleaned and maintained. This service began to be implemented in 2012. The janitorial system was not without problems. To this end, the SJC felt that the system was implemented without proper consultation with the community and without a policy or operational plan. Ms Mlungwana alleges that the janitors lacked the necessary training and equipment to execute their mandate. Pursuant thereto, the SJC engaged with the City, and the latter late in 2012 committed itself to developing the policy and plan. However, by 2013, there were according to Ms Mlungwana, no clear implementation plans on the part of the City. On 25 June 2013, approximately 300 to 400 members of the SJC held a march to the City and delivered a

memorandum. According to Ms Mlungwana, responding to the march Councillor Sonnenberg, advised them that the City had developed an operational plan which was at the time not yet available to the public. The SJC sent queries to the City and when that bore no results, the organisation requested an urgent meeting on 13 August 2013. Much to the chagrin of the SJC, representatives of the City advised that the Mayor could only meet with them in October. After receiving this information, members of the SJC held a mass meeting and people expressed their frustration with the City's poor communication and lack of commitment to the issue of sanitation in Khayelitsha. It was resolved that a special executive action be held where a decision would be made as to which course of action to follow. At the meeting it was decided that members would picket at the Civic Centre and that no notice would be given as only 15 members would attend so that the gathering did not fall foul of the RGA as they were already aware of the fact that the law made provisions for at least 15 people to picket without a notice.

[10] Ms Mlungwana testified that it was necessary to embark on this action because the sanitation campaign began in 2010, and it was

important to them that the City should see their frustration with the lack of progress. Furthermore, they were also aware of the fact that because of the compromised sanitation system, people were murdered or mugged or raped as they went to the outside communal toilets. Ms Mlungwana further explained the role of protests in SJC activities in the following manner:

> "I think for us it is important to just understand that a protest has a powerful, has a long history in South Africa and its everyone's right to do it properly and that also it's a tool, an advocacy tool to get government accountability, to get people's voices to be heard, but the SJC's we've always felt that if people need to protest they can protest as long as we do it non-violently. As long we do it right within the framework of the law. But for us just to, for us also a protest it's not like an event it's a moment of expressing voices and to bring attention to certain issues."

According to Ms Mlungwana, protests have been a very effective tool in pursuing the goals of the SJC and that their arrest has a chilling effect on future protests by the SJC. To this end the witness stated thus:

> "People are arrested even though they are arrested for raising issues that are dear to their hearts and issues that are very important, but obviously going forward it does affect when people need to protest again they're going to think twice: are we going to be arrested. Because if you think

back we weren't violent, we weren't disrupting anything, but still we were arrested and so people are going to think twice even though they feel they've tried every possible avenue to be heard and they're not heard, but they are going to think twice for them to participate in a public or an action of this sort."

[11] As earlier alluded to, Ms Mlungwana confirmed that on 11 September 2015 at 9:00 am, fifteen people travelled by taxi from Khayelitsha to the City's Civic Centre. The fifteen people chained themselves together in groups of five and walked to the staircase leading to one of the entrances to the Civic Centre, where they chained themselves to the railings. Ms Mlungwana testified that although initially fifteen people were chained together, some people joined the chain and the number increased to sixteen. She said that the protesters demanded that someone from the office of the Mayor come and address them but were advised that the Mayor's office was refusing to see them. The protest was peaceful, some protesters sang songs, and some had placards. She further confirmed that Captain Prins of the South African Police Services negotiated with the appellants requesting that the protesters leave, and when they

refused all those who were part of the chain as well as supporters or members who were unchained were arrested.

The judgment of the trial court

[12] The trial court convicted the appellants of contravening section 12 (1) (a) of the RGA, having made the following findings:

12.1. By their own admissions, the appellants had convened the gathering of the day in question but had decided not to give notice as the number of people protesting would be no more than fifteen. Although initially there indeed were no more than fifteen protesters, when others joined in, the conveners failed to stop them whilst knowing full well that they had exceeded the permissible number of 15 protesters.

12.2. The appellants made a conscious decision not to give notice of the intended protest, and when the number of protesters exceeded fifteen, the protest constituted a gathering as defined in section 3 of the RGA.

A detailed affidavit setting out the SJC's grievances and frustrations with the City's perceived tardy approach to the sanitation plight of the Khayelitsha community was handed up to court as an exhibit.

The Leave to appeal and Rule 16 A Notice

[13] Pursuant to the conviction and sentence, the appellants filed a notice of appeal against the conviction. I have already indicated that the appellants in their plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 raised a constitutional issue to the effect that section 12 (1)(a) of the RGA in that the criminalisation of merely convening or attending a gathering without giving notice is unconstitutional. The relief sought in this application/appeal was instituted by way of a Rule 16A which provides that:

> "(1) (a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.
>
> (b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.
>
> (c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.
>
> (d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days."

In *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 (CC) at para 24 the court explained the purpose of the rule thus:

> "The purpose of the Rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the Constitutional challenge, in order that they may take steps to protect their interests. This is especially important in those cases where a party may wish to justify a limitation of a chapter 2 right and adduce evidence in support thereof."

[14] As correctly submitted by Ms Pillay, the institution of proceedings by way of Rule 16A notice is quite unconventional and does not appear to be contemplated by the rules of Court, however, both the State and the Minister of Police have not raised any objection in this regard. For this reason, I find no impediment to the determination of this appeal/application on the basis set out in Rule 16.

[15] The main issue raised by the Appellants in terms Rule 16 is that section 12 (1) (a) of the RGA violates the right to freedom of assembly in s 17 of the Constitution of the Republic of South Africa, 1996 (the Constitution), and is therefore unconstitutional and invalid, to the extent that it criminalises the convening of a gathering solely on the basis that:

15.1 The gathering consists of 15 or more people; and

15.2 No prior notice was given.

[16] The Appellants further contend that the criminalisation of a gathering of more than 15 people merely because no notice was given violates s 17 because:

16.1 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; and

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

[17] According to the Appellants, the limitation of the right to freedom of assembly further cannot be justified in terms of s 36 (1) of the Constitution because:

17.1 The limitation of the right of assembly is severe.

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

17.3 Although the goal of regulating protests is legitimate, there are less restrictive means to achieve that goal, including:

18.2.1 Non-criminal sanctions;

18.2.2 Expanding the number of people that may be convened without notice; and

18.2.3 Relying on other existing criminal sanctions that permit police to deal with protests that pose risk to public order or safety.

[19] Based on the aforegoing, the appellants seek the following remedy:

19.1 Upholding the appeal and setting aside their conviction;

19.2 Declaring that ss 12 (1) (a), read with s 1, of the RGA is unconstitutional and invalid to the extent that it criminalises convening a gathering of more than 15 people merely because no notice was given.

The Amici Curiae

[20] On 21 February 2017, by agreement between the parties, the following parties were admitted as *amici curiae* and were granted leave to make written and oral submissions:

1. The Open Society Justice Initiative;

2. The United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association; and

3. Equal Education.

Does the criminal sanction in s 12 (1) (a) limit the right of assembly?

[21] The appellants do not challenge the requirement that notice be given in terms of section 3 of the RGA. They, in fact, accept that it serves a legitimate purpose. Their concern is the criminalisation of the actions of a person who convenes a gathering without giving notice. The appellant's main contention is that the effect of the criminalisation is to deter people from gathering and if they do, they may face fines and imprisonment for exercising a constitutionally guaranteed right and freedom to demonstrate as envisaged in section 17 of the Constitution. Section 17 provides as follows:

> "Everyone has the right, peacefully and unarmed, to assemble to demonstrate, to picket and to present petitions."

The First Respondent has not opposed this appeal and has elected to abide by the decision of the court. The Second Respondent, the Minister of Police ("the Minister" or the Second Respondent),

opposes the relief sought by the appellants on the basis that the rights and interests of the appellants cannot take precedence over another group of persons. To this end, so goes the contention, the RGA has struck the right equilibrium between the two competing rights.

[22] Against this backdrop, I find it necessary at this point to outline the scheme of the RGA.

The Statutory Framework

[23] The purpose of the RGA is to regulate the holding of public gatherings and demonstrations at certain places. In line with the provisions of section 17 of the Constitution, its preamble reads thus:

> "Whereas every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so;
>
> And whereas the exercise of such right shall take place peacefully and with due regard to the rights of others."

[24] The RGA draws a distinction between “gatherings” and “demonstrations.” The primary difference between the two is the number of people involved. A demonstration consists of 1-15 people and a gathering consists of more than 15 people.

24.1More specifically, a “gathering” is defined in section 1 as:

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

24.2A “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."

[25] The RGA requires an organisation or branch of an organisation that intends holding a gathering 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 RGA. Section 2 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."

[26] The obvious 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.

[27] The RGA defines a convener as: *"(a) any person who, of his own accord, convenes a gathering; and (b) in relation to any organisation or branch of any organisation, any person appointed by such organisation or branch in terms of section 2(1)".* If a convener has not been appointed in terms of s 2(1) –presumably because no notice was given - then:

> "a person shall be deemed to have convened a gathering:
>
> (a) If he has taken any part in the planning or organising 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 the gathering."

[28] In terms of s 3, a convener of a gathering is required to give formal notification in writing signed by him or her of the intended gathering to the responsible officer. 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;

(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."

[29] It is clear from the wording of s 3 that its primary intent is to ensure that such gatherings are managed and occur in an orderly manner, with minimal disruption and that any risk of violence and/or unruly behaviour is mitigated to the greatest extent. The Second Respondent has explained that the purpose of giving notice in terms of section 3 of the RGA is to enable proper planning to ultimately ensure that the rights to freedom of expression and freedom of assembly may be exercised. Section 3 of the RGA also seeks to ensure due and proper regard for the rights of others. Furthermore, compliance with the notice requirements allows for the proper deployment of police resources in respect of such a gathering. If no notice is given, there is, according to the Second Respondent, 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.

[30] Once the notice has been given, the responsible officer must decide in consultation with the authorised member whether it is necessary to negotiate with the convener on the conduct of the gathering. The responsible officer may conclude that negotiations are unnecessary, if that be the case, he/she may inform the convener. If he/she forms an opinion that negotiations are necessary, he/she must then call a meeting of the relevant parties. The purpose of the s 4 meeting is to discuss in good faith and seek to reach an agreement on "the conditions, if any, to be imposed in respect of the holding of the gathering so as to meet the objectives of this Act."[1] If the parties reach an agreement, the gathering will take place in accordance with the agreed conditions.[2] If no agreement is reached, the responsible officer can still impose conditions relating to traffic, proximity of gathering to rival gatherings, access to property and workplaces and prevention of injury to persons and property.[3] It is noteworthy that the s 4 meeting does not entitle the responsible officer to prohibit a gathering, but he/she may only do so if:

[1] RGA s 4(2)(c), read with s 4 (2)(d)
[2] RGA S 4(4) (a)
[3] RGA s 4 (4)(b)

> "credible information on oath is brought to [ther] responsible officer that there is threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, or injury to participants in the gathering or other extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat."[4]

In such a scenario, the responsible officer must then meet and consult, if possible, with the convener and other relevant people.[5] Pursuant to the aforesaid meeting, the responsible officer may prohibit a gathering if he/she is "on reasonable grounds convinced" that it is not possible to amend the conditions to prevent the threat to traffic, persons or property.[6] If a gathering is prohibited, or if conditions are imposed at s 4 meeting that the convener disagrees with, he/she may apply urgently to the magistrate to set aside the condition or prohibition.[7]

[31] Section 8 of the RGA regulates conduct at gatherings and demonstrations. The section applies to all gatherings whether or not notice was given, It provides as follows:

[4] RGA s 5(1)
[5] Ibid
[6] RGA 5 (2)
[7] RGA s 6

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).

(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."

Non-compliance with any of the obligations outlined above is an offence in terms of s 12(1)(c)

[32] The Second Respondent has averred 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 relevance because experience, according to the averment, 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.

[33] Section 9 of the RGA affords the police wide powers to manage any gathering or demonstration. In the case of a gathering without for which no notice at least 48 hours before hand the police have the power to:

"restrict the gathering to a place, or guide the participants along a route, to ensure that:

(i) that vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded; or

(ii) an appropriate distance between the 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".[8]

In a nutshell, it is plain from the provisions of s 9 that the Act empowers the police to manage the gathering reasonably to avoid damage to persons or property, or unjustifiable disruption to traffic or access to buildings.

[34] Section 11 provides for liability arising from riot damage at a gathering or demonstration. The provisions of the sections do not strictly apply to the matter at hand as no damage resulted from the gathering. It must be mentioned though that s 11 (2) grants a limited defence to organisers and convenors if they can show that:

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

[8] RGA s9(!) (c)

2. the act or omission was not reasonably foreseeable;

3. they took all reasonable steps to prevent the act or omission.

[35] The RGA 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
>
> (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."

[36] It must be reiterated that 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. Furthermore, on a charge of failure to give notice of a gathering as envisaged in s 3 of the RGA, it is plain from the provisions of section12(2) that that the gathering took place spontaneously constitutes a complete defence. Stated differently, unless the gathering took place spontaneously, the

failure of the person convening the gathering to give notice, or adequate notice is an offence.

The Constitutional Challenge

[37] In the determination of this matter it must be restated that the appellants do not challenge the notice process envisaged in s 3 of the RGA. In fact, they readily concede that it serves a legitimate purpose. They also do not challenge the definition of a "gathering" or "demonstration".

[38] Where a constitutional invalidity of the statute is raised, the test to be applied is set out in *Ferreira v Levin NO And Others; Vryenhoek v Powell NO And Others* 1996 (1) SA 984 (CC), 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'."

The appellants contend that by the criminalisation of the conduct that is protected by s 17 of the Constitution, the provision effectively limits the right to peaceful and unarmed assembly. The appellants' sentiments are echoed by all the *amici,* albeit for different reasons. The Second Respondent, on the other hand, contends that there is no infringement of section 17 of the Constitution, but if this Court finds that the criminalisation of a failure to comply with the procedural barrier imposed by the RGA, constitutes an infringement of section 17, then limitation of the right is reasonable and justifiable. I deal with full contentions tendered on behalf of each party later in this judgment. I now turn to consider whether there is an infringement of section 17 of the Constitution.

Does s 12 (1) (a) of the RGA limit s 17 of the Constitution?

[39] Section 17 of the Constitution protects peaceful and unarmed demonstrations. It guarantees the right of free assembly, to hold

demonstrations, to picket and the right to present petitions. In terms of section 7(2) of the Constitution, the State must respect, protect, and promote and fulfil the rights in the Bill of Rights. The rights contained in the Bill of Rights, therefore, impose an obligation that requires those bound thereby not to act in any 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.[9] In *Satawu and Another v Garvas And Others*[10], the Court interpreted section 17 of the Constitution thus:

> "everyone who is unarmed has the right to go out and assemble with others to demonstrate, picket and present petitions to others for any lawful purpose. The wording is generous. It would need some particularly compelling context to interpret this provision as actually meaning less than its wording promise. There is, however, nothing, in our own history or internationally, that justifies taking away that promise."

The enquiry into whether the impugned provision limits the Constitutional rights is two-pronged. In the first leg, the first question

[9] See Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 CC at par 69.
[10] 2013 (1) SA 83 (CC) at para 52

that must be answered is whether is 12 (1) (a) is inconsistent with the Constitution in that it limits the s 17 rights.

[40] It was submitted on behalf of the appellants that s 12(1) (a) of the RGA, making it a crime to convene a gathering without a notice, infringes s 17 of the Constitution as it goes beyond mere regulation. According to the argument, this is so because criminalisation will deter people from gathering, or will mean that they face fines and/or imprisonment for exercising a constitutional right. Therefore, by criminalising conduct that is protected by the Constitution, the section limits the right to peaceful and unarmed protest. However, it must be stressed that s 12(1) (a) does not criminalise the convening of the gathering, but only the failure to give a timely notice.

[41] Mr Budlender, who presented argument on behalf of the first amicus, the Open Society Foundation contended that the criminal sanctions for not complying with the notice requirement have a chilling effect on the right of assembly and will inhibit groups and individuals from convening gatherings with more than 15 participants. This, according to the argument, is illustrated by the fact that the appellants initially planned the protest to fall within the purview of 15

participants so as to avoid giving notice, but more people joined the group and it resulted in the conveners being arrested, prosecuted and convicted. Similarly, the rest of the amici submitted that the criminal sanctions envisaged in s 12(1)(a) of the RGA flies in the face of the constitutionally guaranteed right of assembly and the conviction of the appellants for failure to give a timeous notice may well deter others from exercising their constitutional rights of assembly.

[42] It is plain when regard is had to the circumstances of the present matter that criminal sanctions envisaged in s 12 (1) (a) constitute a limitation to the exercise of s 17 rights. As can be discerned from the Rule 16 statement, and having regard to the circumstances of the present matter, those being that all the appellants acquired criminal convictions for failure to give notice of a gathering wherein they were seeking a response from the City for what appears on these papers to be an ongoing sanitation problem in Khayelitsha, the effect of the s 12(1) (a) sanctions appears to be quite chilling. This is so because of the well-known calamitous effects of a previous conviction recorded against an individual.

[43] A cursory look at the charge sheet reveals that the ages of the appellants vary from 18 to 51. Most them are young adults who found themselves at the wrong side of the law and society for the simple reason that they dared to convene a gathering to express their frustration with service delivery, albeit without the requisite notice. In *Garvas*, Jafta J, at paragraph 120 emphasised the importance of s 17 rights in the following manner:

> "In democracies like ours, which give space to civil society and other groupings to express collective views common to their members, these rights are extremely important. It is through the exercise of each of these rights that civil society and other similar groups in our country are able to influence the political process, labour or business decisions and even matters of governance and service delivery. Freedom of assembly, by its nature can only be exercised collectively and the strength to influence lies in the number of participants in the assembly. These rights lie at the heart of democracy."

In my view, the factors relied upon by the appellants in the Rule 16 statement as well as the evidence of Ms Mlungwana prove that s 12 (1) (a) does limit the rights of freedom of assembly. That in my view, constitutes a limitation to exercise the rights guaranteed in s 17 of the

Constitution. However, whether that limitation is constitutionally justifiable is another question.

Justification

[44] To determine whether the limitation I have already identified is constitutionally justifiable, regard must be had to the provisions of section 36 of the Constitution. This must be done by considering the five basic constitutional values, namely: freedom, dignity, equality, openness and democracy. To this end section 36 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-
>
> (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."

[45] I now turn to the limitation enquiry with reference to each of its constituent elements.

The nature and importance of the right

[46] The nature of the right to assemble and its importance is encapsulated by the Mogoeng CJ in *Garvas at paragraph 61 to 63* in the following manner:

"[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' 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."

As can be discerned from the aforegoing, the right to free assembly was not only pivotal to the freedom that gave rise to the Constitution, it remains a vital tool to the country's democracy. The Court in *Garvas at paragraph 66* accordingly concluded thus:

> "[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."

[47] Mr Bishop, who represented the appellants expatiated on the nature and importance of the right and stated that that the right of assembly is part of a cluster of rights – including the rights to freedom of expression and freedom of assembly – that *"operating together, protect the rights of people not only individually to form and express opinions, but to establish associations and groups of like-minded people to foster and propagate their views"*.[11] He further argued that whereas in exercising the right of assembly it is plain that protesters must act with due regard to the rights of others and in a manner that respects the law[12], the real issue with s 12 (1) (a) is that it makes a

[11] See Democratic Alliance v African National Congress [2015] ZACC 1, 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at para 25
[12] See Hotz and Others v University of Cape Town [2016] ZASCA 159 at para 62

crime to assembly in a way that is at the heart of the right: peaceful, unarmed, protest that is respectful of the right of others, otherwise lawful, and aimed at the fulfilment of other constitutional rights.

[48] All in all, it is clear from the aforegoing that the nature and importance of the right of assembly cannot be overemphasised.

The importance of the purpose of the limitation

[49] The importance and purpose of the limitation is determined by enquiring into whether there is a legitimate government purpose to be served by the impugned provision. In *Garvas at paragraph 38 and 55*, the Court explained that every right must be exercised with due regard to the rights of others and stated thus:

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

[50] The Second Respondent explained that the purpose of the notification requirement is *"to ensure that proper planning can take place . . . for a sufficient number of police officers to be deployed and to be made available on stand-by should they be required."* The Second Respondent further explains the purpose served by criminalising the failure to give notice as follows:

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

consequences at all. The criminalisation of such conduct undoubtedly has a serious deterrent effect."

[51] According to the Second Respondent the 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. The criminalisation, so goes the argument, deters the occurrence of non-notified gatherings. This deterrence, in turn 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 person.

[52] The Second Respondent further explained that the reason for notification is to ensure that proper planning can take place, and , 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. According to the Second Respondent, the failure to provide any notification therefore 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 not being peaceful. According to the Minister, this may lead to an infringement of other persons' rights including posing a risk to their person and property. Besides, the criminalisation of such conduct undoubtedly has a serious deterrent effect.

[53] The Second Respondent further stated that 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. According to this explanation it would not be known at the time when compliance with the notice requirements must take place and further if a gathering will subsequently prove to be disruptive, chaotic and non-peaceful, and there would be little recourse available to persons who have been adversely affected. Notably, so explains the Second Respondent, Section 205(3) of the Constitution, outlines the constitutionally imposed objects of the police service as *"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."* It is for this reason that the giving of notice as provided for in section 3 of the Gatherings Act, materially

facilitates the role of the South African Police Service in vindicating this constitutional imperative.

[54] Ms Pillay who represented the Second Respondent submitted the following considerations as being key to the determination of the purpose of the limitation:

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

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.

[55] Mr Bishop, who represented the appellants, readily conceded that the criminalising of gatherings without a notice to incentivise conveners to give notice so that the planning of the police is made easier serves a legitimate purpose. This is particularly so, according to the argument, because in some instances notification to allow for adequate preparations will be vital to enabling the right to protest. However, so goes the argument, the scope and purpose of that purpose is limited in two ways:

1. It is not related to actual harm. Its purpose is not to prevent actual harm, or even actual disruption to daily life. The purpose stated by the Second Respondent is that it enables the police to be deployed because there is a possibility that they will be needed.

2. Whilst the Appellants have acknowledged that the notice is designed to make it easy for the police to regulate gatherings, a legitimate state purpose, it is not a particularly important purpose. Stated differently, the notice is not necessary for the police to do their work as it merely facilitates their management of gatherings.

[56] It is apparent, and I so hold that the notice does serve a legitimate purpose as every right must be exercised with due regard to the rights of others.

The nature and extent of the limitation

[57] I have already stated that the effect of the criminalisation of the failure to give notice has a chilling effect on the exercise of the right to freedom of assembly. As observed by the court in *Garvas*:

> "[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.[13]

In Teddy Bear Clinic for Abused Children And Another v Minister of Justice & Constitutional Development And Another 2014 (2) SA 168 (CC) at par 87, the Constitutional Court held that when applying the

[13] Garvas para 69

justification test the State needed to demonstrate that the existence and enforcement of the impugned provisions can reasonably be expected to control the identified risks. The Court further held at para 88 that:

> "[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."

[58] Ms Pillay made several submissions as to why the limitation on the appellant's right of assembly is justified. These are: First, the notification as required by section 3 of the Gatherings Act is a relatively simple process and there is virtually no impediment to it being complied with. 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. Third, the Constitutional Court has accepted that criminalisation may have a deterrent effect and the Appellants have not adduced any expert evidence to demonstrate the contrary. Fourth, the relief sought by the Appellants effectively renders section

12(1) of the Gatherings Act irrational. Accordingly, it will result in 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. According to the Second Respondent such a consequence, 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.

[59] Regarding the nature and extent of the limitation, Mr Bishop raised the following several factors which in his opinion render the limitation to be too severe:

1. The limitation is exceptionally broad.

2. It is arbitrary.

3. The consequences of the criminalisation are calamitous.

4. The effect is chilling.

[60] The approach adopted by the Amicii in their submissions is largely based on international law. It therefore makes sense to now

turn to consider foreign and international law and its relevance to the present matter. I do so because South Africa belongs to a comity of nations and has signed and ratified most international human rights covenants relating to demonstrations and gatherings.

The relevance of international law and jurisprudence from other jurisdictions

[61] In line with the country's constitutional dispensation, s 39(1) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open democratic society based on human dignity, equality and freedom, (b) must consider international law and (c) may consider foreign law. Section 233 obliges the court when interpreting any legislation to prefer any reasonable interpretation that is consistent with international law, over any alternative interpretation that is inconsistent with international law.

[62] In *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 95 to 98, 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'."

[63] That said, the court in *Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and another* [2005] *CPLR*

50 (CAC) considered the application of foreign law and explained that:

> "There is no justification for the application of foreign dicta that may not only be at odds with an express purpose of the Act but the result of which would lead to an interpretation which is at war with the express words of the section."

[64] As I have earlier stated, South Africa is a State Party to several international covenants, of note, the International Covenant on Civil and Political Rights (ICCPR)[14] and the African Charter on Human and People's Rights[15].

Article 21 of the ICCPR 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."

[14] International Covenant on Civil and Political Rights, G.A res 2200 A (XX1), 21 UN GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1996), 999 UNT.S. 171, entered into force 23 Marc 1976.
[15] African Charter on Human and People's Rights, O.A.U. Doc CAB/LEG/673 rev. 5.21 ILM58 (1982), entered into force 21 October 1986.

Similarly, Article 11 of the ACHPR stipulates that:-

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

[65] The Open Society Justice Initiative, the first Amicus in this matter, duly represented by Mr Budlender SC, submitted that the right of peaceful assembly is one of the core civil and political rights protected by international law. To this end, international precedents support the view that the criminalisation of the failure to give notice constitutes a limitation on freedom and peaceful assembly. Relying on the ruling of the Human Rights Committee (HRC) in *Kivenmaa v Finland*,[16] wherein the HRC found Finland had violated *Kivenmaa*'s rights when it gave her an administrative fine under Finland's Act on Public Meetings for convening a small protest.

[66] It is necessary to provide a concise context for the decision of the HRC. In this matter, the complainant *Kivenmaa*, together with 25

[16] Kivenmaa v Finland, UNHRC, Views of 9 June 1994, UN Doc. CCPR/C/50/D/412/1990.

members of her organisation distributed pamphlets 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 took full responsibility for the action and was subsequently charged with violating the Act on Public Meetings by holding a public meeting without prior notification. The Act made it an offence to call a public meeting without notification to the police at least six hours before the meeting.

[67] Although the HRC found that Finland had violated Articles 19 and 20 of the ICCPR, it also noted, as correctly submitted by Ms Pillay, that:

> 67.1The 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."*
>
> 67.2 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."*

67.3The 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 Finland had not made reference to any 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.

[68] Regarding African regional mechanisms, South Africa has ratified ACHPR. Counsel referred the court to the case of *Malawi African Association and Others v Mauritania*[17]wherein approximately 30 people were arrested for distributing a document providing evidence of racial discrimination against black Mauritanians government employees suspected to be aligned with the opposition

[17] ACHPR, Comm. Nos 54/91, 61/91,98/93,164/97, à 196/97 and 210/98 (2000)

political party. The Mauritanian government did not contest the allegations that massive human rights violations had been committed.

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 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."

The following background underpinned the Commission's ultimate findings:

> 4.1 "The government did not contest the facts adduced by the complainants, the Commission, therefore based its arguments on the elements provided by the complainants.
>
> 4.2 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."

Although the Mauritania case does not stand on all fours with the matter at hand, it appears from the reasoning of the Commission, like the HRC, that a State Party must show that the enforcement of a notice requirement pursues a legitimate aim.

[69] The Open Society Amicus referred the court to a report compiled by a Study Group on Freedom of Association and Freedom of Assembly, commissioned by the ACHPR wherein the findings emphasised that the proper purpose of the notification regime is not to control the exercise of the right to freedom of assembly, but to enable the State to meet its obligations to facilitate the gathering.[18] The Study Group concluded thus:

> "in the case of small public gatherings or gatherings leading to no disruption to others, no notification should be necessary."[19]

The Study Group considered that the failure to notify may only be sanctioned if coupled with demonstrable harm-

> "[C]ore to the idea of a notification regime [is] that no sanctions be imposed merely for failure to notify, as to do so would be to punish people

[18] ACHPR, Report of the Sudy Group on Freedom of Association and Assembly in Africa, 2014ACHPR, Report of the Sudy Group on Freedom of Association and Assembly in Africa, 2014, p, 60, para 5, available at http://www.achpr.org/mechanisms/human-rights-defenders/FreedomofAssociation .
[19] Ibid., p 61 para 61

for exercising their right. Rather, sanctions may be imposed only when lack of notification is combined with demonstrable harms. Similarly, no assembly should be dispersed for failure to notify."[20]

[70] Most Amicus have referred to the European Regional mechanisms' approach to gatherings, notably, the European Convention on Human Rights. It must be said upfront that South Africa is not bound by jurisprudence emanating therefrom but courts may, in interpreting legislation have recourse to it though. 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

[20] Ibid., p. 62, para 10

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."

[71] The general principles relating to gatherings that emerge from the European jurisprudence are set out in *Frumkin v. Russia, application* No. 74568/12, 5 January 2016. These principles are in step with those already set out by our Constitutional Court in *Garvas* and can be summarised thus:

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

71.2 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.

71.3 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”.

71.4The 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.

71.5 It is incumbent on the State 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.

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

[72] Reference was also made to decisions in other jurisdictions, such as Malaysia, the United Kingdom, Australia, Brazil as well as the Inter-American Commission on Human Rights. The following conclusions emerge from the international and comparative jurisprudence.

72.1. It is generally accepted that State may impose a requirement of prior notification of assemblies in order to meet their obligation to facilitate the gathering and manage.

72.2 Failure to give notice does not justify sanctions against organisers of or participants in the protest, they must serve a legitimate purpose.

72.3 The sanctions must be necessary in a democratic society.

[73] The Second Amicus, the United Nations Special Rapporteur on the Right to Freedom of Peaceful Assembly and Association, duly represented by Mr. Thobakgale, argued that gatherings notifications serve the positive obligation of the State where a degree of disruption is anticipated. Support for this contention is based on the case of *Ashughyan v America*[21], the European Court of Human Rights held that:

> "any demonstration in a public place may cause a certain level of disruption to ordinary life, including disruption to traffic, and where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly is not to be deprived of all substance."

[74] The arguments presented by the Amicus on the scope and application of international law overlaps, and therefore, for the purpose of this judgment, I outline only the points of divergence.

[21] Ashughyan v Armenia, ECItHR, Application No. 33268/03 (2008*)("Ashughyan v Armenia")* at para 90.

[75] The upshot of Mr Thobakgale's submissions is that using criminal sanctions against individuals solely for having organised or participated in a peaceful assembly, is, in principle, not a legitimate response available to States when persons concerned have not themselves engaged in other criminal acts. Furthermore, so goes the argument, when no other punishable behaviour is involved, sanctioning the mere non-notification of a peaceful assembly means de facto that the exercise of the right of assembly is penalised.

[76] The Third Amici, the Equal Education, represented by Mr Sidaki made the following submissions:

76.1 The Equal Education's primary contention is that because its core membership base consists of high school learners who often engage in advocacy programmes to advance their right to education, inclusive of protest action, the criminalisation of convening a gathering without a notice inhibits their ability to picket, demonstrate or engage in a variety of activity in furthering their rights to basic education.

76.2 Some of the learners, who may engage in protest, picketing and demonstrating activities, are minors. According to Mr Sidaki, this assertion is borne out by the history of protests in South Africa, dating back to the student protests of the 1920s under the banner of *Amafelandawonye* (the Die-hards/ we will die fighting together) where learners and parents protested and boycotted mission schools in the former Transkei.[22] Similarly, the Soweto Uprising, and its catalytic students' protests that took place during June 1976, was a critical moment where learners, many of whom were minor children, brought the attention of the international community to an unjust system of education and unjust society at large.

76.3 The exposure of children to criminal prosecution and or subsequent conviction for failure to provide the requisite notice is incongruent with s 17 of the Constitution.

In a nutshell, the Equal Education foundation further argued that by creating, indiscriminately, a criminal for failure to give notice, s 12 (1) (a) of the RGA not only violated s 17, it also affronts the principle of

[22] Robert Edgar, "The American School Movement" in Apartheid Education: The Education of Black South Africans, Peter Kallaway (ed), 1984pp184-191

the “best interest” or “paramountcy” of the children due to the heavy-handedness of criminal sanctions.

[77] In summary, all the Amici submitted that s 12 (1) (a) is unconstitutional as it limits the s 17 rights, and that such limitation is not justifiable in an open society and neither does it serve a legitimate purpose.

[78] I now turn to consider each of the several factors. In so doing, it is well to recall the caution sounded by Jafta J, in the minority judgment in *Garvas* to the following effect:

> “[117] A court called upon to determine the validity of the legislation may not base its decision on the mere say-so of the parties regarding whether or not a particular limitation is justified. This is so because s 36, when read with s 172, obliges courts themselves to determine whether a 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 those listed in the section.”

[79] That said, the first appellant expressly testified that the threat of prosecution has deterred members of the SJC from exercising their rights to free assembly and speech.

[80] Insofar as the breadth of the limitation, it is so that s 12 (1) (a) applies to all forms of protest where the number exceeds 15-, meetings, marches, pickets, etc, and the breadth relates to place, purpose and number. According to the appellants, this limitation is exceptionally broad. In addition, notwithstanding the fact that the appellants have not raised any constitutional challenge to the definition of the gathering, they (the appellants) contend that the arbitrariness of the definition exacerbates its impact.

[81] It will be recalled that the sole constitutional challenge mounted by the appellants is the criminalisation of the failure to give notice of a gathering. Of importance is the contention by the appellants that the criminalisation of the failure to give notice and the resultant conviction impact negatively on the s 17 rights. Mr. Bishop argued that criminalisation is the most severe approach when regard is had to its effect on the appellants, yet it is not the only way to regulate conduct or incentivise or disincentivise. He referred to the *Teddy Bear Clinic*[23] case where Skweyiya J, rejected the argument that it was not the criminalisation of the conduct that created the stigma but the act itself and stated that:

[23] supra

> "An individual's human dignity comprises not only how he or she values herself, but also includes how others value him or her. When that individual is publicly exposed to criminal investigation and prosecution, it is almost invariable that doubt will be thrown upon the good opinion his or her peers may have of him or her."

Whilst the above statement was made in the context of a criminal prosecution, it, according to Mr. Bishop is true of criminal prosecution for peaceful, unarmed protest. Furthermore, so goes the argument, the effects of a criminal sanction are not only severe for those who are convicted, the possibility is strong that it will undoubtedly chill the exercise of the right of assembly by others who will not be prosecuted. Moreover, the Constitutional Court has most recently re-affirmed that the threat of criminal sanction has a chilling effect on free speech when it said the following:

> "…the spectre of not only an arrest, but everything that may follow it, is real, I am here talking of being detained in police or prison cells and charged with and possibly convicted of a criminal offence. That may have a chilling effect on robust debate. If so, that does limit free speech."[24]

[24] Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 487 (CC) at para 40

Similarly, the Court in *S v Tsoaeli* 2018 (1) SACR 42 (FB) in holding that the RGA did not criminalise the attendance of a gathering where no notice had been given in the context of s 12(1) (e) stated that:

> "41 I echo the sentiments expressed by the court in the *Garvas* case. Indeed the right to freedom of assembly is central to our constitutional democracy and exists primarily to give a voice to the powerless. Given the constitutionally protected right to peaceful assembly, a provision which allows for unarmed and peaceful attendees of protest gatherings to run the risk of losing their liberty for up to a period of one year and to be slapped with criminal records that will, in the case of the appellants, further reduce their chances of gaining new employment for merely participating in peaceful protest action, undermines the spirit of the Constitution."

Although the above remarks were made in the context of those who had attended a gathering in respect of which no notice was issued, I align myself with the court's recognition of the effects of a criminal record. This is so largely because criminalisation may at times come with the loss of liberty, and the effect of a previous conviction impacts very negatively on one's future employment, travel, or study prospects. The stigma of a criminal conviction has a long-lasting

calamitous effect. These consequences are in my view enough to deter people from exercising their rights of assembly and gathering.

[82] The Second Respondent in trying to justify the limitation averred that it is the conduct of the person convening the gathering that is criminalised by the impugned section and not the entire gathering that is criminalised by the RGA. The Second Respondent further denies that the criminalisation has any chilling effect, and if the court finds that it does, it 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 general right remains unaffected by the criminal sanction of section 12(1) (a).

[83] It is indeed so that there is no criminal sanction for simply attending a gathering in respect of which no notice has been given. But, it seems to me that the argument loses sight of the fact that, as a matter of logic and common sense, if criminal sanctions are imposed on the very members or leaders of the organisation or person/s who convened the gathering, the purpose of the gathering is likely to be disrupted. I have a difficulty with the contention that it is not the entire

gathering that is criminalised by the RGA. At the heart of any demonstration or gathering is a convener, who after having identified certain conduct which requires the members of the community to gather and express their frustration or displeasure. In other words, it is difficult to imagine a gathering and or demonstration which did not commence with someone convening it. If sanctions are aimed at the convener, and not the gatherers, it goes without saying that the impact of the arrest and or incarceration of a convener for failing to file a notice as well as a subsequent conviction will, without a doubt, filter through to those who had gathered, as well as to the community. It must be accepted that the conveners are, after all, those who would have identified the social misnomer requiring a gathering or protest. Stated more aptly in IsiXhosa *"ngabo abahlabe ikhwelo*[25] " (they are the ones who made the clarion call for action). In bygone times they would have been referred to as '*ringleaders*'.

[84] One of the arguments raised by the Respondent in justifying the limitation is that 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. Accordingly, on its

[25] Ukuhlaba ikhwelo is an appeal to people to do something

plain wording, it 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. I understand this submission to suggest that because spontaneity is a complete defence, the impact of the criminal sanction is limited and therefore justified. In other words, it spontaneously developed from a demonstration to a gathering. Again, it must be emphasised that even if spontaneity is a defence, it does not exempt an accused person from the necessity to prove it. A court may well find that on the facts, no spontaneity was established. Furthermore, as correctly pointed out by Mr Bishop, when regard is had to the fact that a convener is defined as a person who (a) *"has taken any part in planning or organising or making preparations for that gathering*"; (b) or *"has himself through any other person, either verbally or in writing, invited the public or any section of the public to attend the gathering"*, it is difficult to understand how the gathering could be said to be spontaneous.

[85] I therefore find that the criminal sanction does chill free speech. The effect of the limitation therefore is not only to punish the conveners for failing to serve a notice, it is also to deter people from exercising their right to free assembly. That much is clear from the fact that deterrence is one of the purposes of criminal punishment. It is well established that deterrence is the use of punishment to prevent the offender from repeating his offence and to demonstrate to other potential offenders what will happen to them if they follow the wrongdoer's example.

The balance between the limitation, the purpose and the less restrictive means.

[86] The express purpose of the RGA as can be discerned from the preamble is to ensure that all people *"have the protection of the state*" to exercise their right to protest – a right that is not limited by a notice requirement. The objective sought to be achieved by the provision of s 12 (1) (a) therefore is deterrence and the ultimate facilitation of the rights protection afforded by section 17 of the Constitution. The

question that must be answered is whether there are less restrictive means to achieve that objective.

[87] It was argued on behalf of the appellants that there are both existing and alternative measures that could be introduced that are less severe than criminalisation. More specifically, the Appellants rely on the fact that the existing offences under the RGA, the common law and other statutes serve the purpose of deterring harm to person or property and preventing disruption to traffic and access. According to the appellants, the limitation is over-inclusive because it deters people from protesting even when there is no possibility that police resources will be needed to regulate the gathering or ensuring public safety. It is under-inclusive because it does not require notice for protests that do require a police presence. Mr. Bishop gave an example of a situation where 10 people decide to protest by lying in the middle of a busy road; the police would be required to address the situation, acting in accordance with provisions of s 9 of the RGA, yet those conveners were not required to give notice under the RGA. In this scenario, the limitation, according to the appellants would then have failed to serve its purpose. The Appellants further proposed

alternative measures to the criminal sanction envisaged in s 12 (1) (a) in the form of enhanced civil liability or administrative fines.

[88] The appellants made much of the fact that the protest was peaceful and respectful and did not prevent people from accessing the Civic Centre. It must be stated from the outset that the way the protest was conducted is immaterial to the determination of this appeal.

[89] The Second Respondent retorted by stating that the notification requirement is quite easy to comply with and that there is nothing onerous about it at all. In addition, while it is correct that section 9 of the RGA 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 an offence of 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. Ms. Pillay argued that s 12 (1) (a) strikes an appropriate balance between the right to assemble on the one hand and the need to regulate the gathering to ensure the safety of people and property.

This is particularly so because the sanction imposed for an offence under section 12(1) (a) is very modest as the sentence that may be imposed ranges from a fine to imprisonment of up to one year or a combination thereof. Accordingly, so goes the submission, notwithstanding the fact that that there is an element of 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. Furthermore, the appellants have failed to demonstrate: (a) that the deterrent effect that the Second Respondent relies on in support of criminalisation is unjustified or incorrect, neither did they produce any evidence to show otherwise, or that the alternative measures that they propose will, *"achieve the same ends"* as the criminal sanction that the Minister has opted for.

[90] I now turn to consider the approach of the courts when balancing between the limitation and the purpose and the less restrictive means.

[91] 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."

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 para 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."

In engaging in this exercise, the Court in *Garvas* stated the following:

"[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."

[92] It is well to remind oneself that the narrow issue before this court is whether the s 12 (1) (a) of the RGA criminalising failure to give notice is justifiable in the light of the fact that I have already found the aforesaid section to constitute a limitation of s 17 of the Constitution. It may well be, as contended by counsel for the First Respondent, that the compliance with the s 12 (1) (a) notice requirement is not onerous, or that the prescribed punishment is

moderate. Whether the correct balance is struck, is to my mind questionable. I have in this judgment outlined the calamitous effects of a previous conviction. In *Garvas*, the Court said that the lessons which inform the right of assembly remind us that never again will we allow the right of ordinary people to freedom in all its forms to be taken away and that the inherent power and value of freedom of assembly and demonstration, as a tool of democracy is often used by people who do not necessarily have other means of making their democratic rights count. It is necessary to interrogate how the voiceless people exercise their s 17 rights. This process is outlined in the evidence of the first appellant, Ms. Mlungwana.

[93] Ms. Mlungwana's evidence establishes that the Khayelitsha community had for several years bemoaned and decried the state of ablution facilities without getting a satisfactory response from the City of Cape Town. According to her evidence, the current facilities have resulted in opportunistic criminal elements taking advantage of those using the outside toilets, more especially during the night. The gathering which forms the subject matter of this appeal was organised to draw attention to their plight. It appears from the charge sheet that most of the appellants, (also the conveners) are residents

of Khayelitsha. From the aforegoing, it is easy to discern that central to the people's exercise of the s 17 rights the call to mobilise and organise a demonstration is pivotal. It can be accepted that those who make the clarion call for people to come together in order to demonstrate their dissatisfaction must, in addition to being members of SJC, be leaders in their communities, otherwise they would not, in my view, have the clout to make the call. Bearing in mind that the right of assembly enables people to access their other constitutional rights, the role played by the conveners cannot be over-emphasised. All in all, as was said by the Court in *Garvas,* in considering whether less restrictive means exist to achieve the purpose of the RGA it must first be recognised that the *'freedom of assembly by its nature can only be exercised collectively and the strength to exert influence lies in the number of participants in the assembly'*[26]. Furthermore, recognising that s 17 gives a voice to the voiceless, it follows that the role of conveners is fundamental to the strength and number of participants to exert influence in pursuance of social justice change. As testified to by the First Appellant, the criminal convictions have

[26] Garvas para120

had the effect of silencing the already voiceless people. I find it necessary to quote her uncontroverted evidence again:

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

In this case, I find that because of the disastrous impact of a criminal conviction and the lifelong impact it has on the lives of those convicted of contravening s 12 (1) (a), the criminal sanction is disproportionate to the offence of merely failing to comply with the notice requirement. It is a well-known fact that a criminal conviction endures for ten (10) years after which it may be expunged on application. It matters not that the sentence imposed may be just or lenient, as is the case in the matter at hand. By then an indelible mark would have been recorded against the appellants, hampering almost

every aspect of their lives. Furthermore, it cannot be seriously contested that in the context of the South African society, those most likely to fall foul of s 12 (1) (a) are the very previously disadvantaged communities as they, to a certain extent, remain the voiceless. Although this is quite inadvertent, it also flies in the face of the foundational values of our Constitution, namely, freedom, dignity and equality. Similarly, in the context of the submissions presented by the Equal Education, children who are most likely fall foul of s 12 (1) (a) in pursuance of equal rights to education are those who come from the previously disadvantaged sector of the community. It seems to me that our 'never again' constitutional principle may well ring hollow if provisions of s 12 (1) (a) can remain valid.

[94] Although it falls outside the scope and purview of this judgment to decide on the appropriate remedy, it remains to be said that the following were put forward as less restrictive alternatives to s 12 (1) (a):

94.1 *Enhanced civil liability*

According to Counsel for the Appellants, the State could, instead of the defence currently available in terms of s 11(2) if a convenor fails to give notice, impose civil liability. This, according to the submission is in line with the approach in several countries where reliance to incentivise compliance with the notice requirement.

94.2 Administrative fines

As a further alternative, it was suggested that the State could impose administrative penalties. Because the administrative fines are civil and do not carry with them the sting and stigma attached to a criminal conviction, and that there is furthermore no threat to the deprivation of civil liberties, they are more suited to the circumstances of the present matter.[27]In *Federal-Mogul*, the Competition Appeal Court set out the difference between fines in criminal matters and fines in administrative matters in the following manner:

> "In criminal matters where fines are usually imposed, as opposed to civil matters an administrative penalty may be imposed, the fine which is

[27] Supra at 631

imposed has an alternative sentence usually, a term of imprisonment. The term of imprisonment comes into force in the event of an accused paying the fine, which has been imposed. In civil matters, similar to the matter before the tribunal, in the event of a party failing to pay the administrative penalty, there is no alternative term of imprisonment which can be imposed by the tribunal. Consequently, in the event of the party failing to pay the administrative penalty, the remedy for the tribunal to the affected party may be to proceed with an application for contempt of court or seek conviction or judgment in terms of section 73 and 74 read together with section 75 of the Act. This procedure is totally different to the one referred to above, as applicable to criminal matters. Thus, there is a clear distinction in the nature of the sanction, which is imposed. At this stage of the proceedings, the appellants do not "carry the keys of their own imprisonment in their pockets".

94.3 Re-definition of "gathering"

I have earlier on in this judgment indicated that the appellants allege that the distinction between a gathering and a demonstration is arbitrary and irrational as it is unclear why 16 is an appropriate number to criminalise gatherings. According to the argument, the need for the notice could be limited to cases where a substantial number of participants are expected or for

only certain types of assembly. The explanation proffered by the Second Respondent for the number 16 is simply that there had to be a cut-off number. However, to my mind, the redefinition of gatherings may not be the most appropriate remedy as it would not address most of the pertinent challenges to s 12 (1) (a).

Conclusion

[95] I have in this judgment held that the criminalisation of a gathering of more than 15 on the basis that no notice was given violates s 17 the Constitution as it deters people from exercising their fundamental constitutional right to assemble peacefully unarmed. In my judgment, the limitation is not reasonable and justifiable in an open and democratic society, based on the values of freedom, dignity and equality. In the circumstances, the following order is issued:

95.1 The appellants' appeal against conviction is upheld and the convictions are hereby set aside.

95.2 Section 12 (1) (a) of the RGA is hereby declared unconstitutional.

95.3 The declaration of invalidity is not retrospective, and shall not affect finalised criminal trials, but will apply to any

criminal matters in which, as at the date of this judgment, either an appeal or review is pending or the time for the noting of an appeal has not expired.

Ndita,J

I agree

Magona, AJ