THE FAILURE TO PROVIDE NOTICE OF AN INTENDED GATHERING

Mlungwana v The State (CCT32/18) 2018 ZACC 45 (CC)

1 Introduction

Section 3 of the Regulation of Gatherings Act 205 of 1993 (RGA) requires the local authority within a municipal area to be notified of an intended gathering by the convener of such gathering. This notice is only required when the gathering will be attended by more than 15 people (s 1 of the RGA). The notice must contain all the important information pertaining to the protest (s 3(3)). Failure by the conveners of the gathering to provide such notice was regarded as a criminal offence in terms of section 12(1)(*a*) of the RGA. The Western Cape High Court in *Mlungwana v The State* (2018 (1) SACR 538 (WCC)) declared section 12(1)(*a*) of the RGA to be unconstitutional. The court found that the criminalisation of the failure of a convener to provide notice in terms of section 3 of the intended protest infringed the right to assemble as provided for in section 17 of the Constitution (*Mlungwana v The State* (WCC) *supra* par 95). The matter was referred to the Constitutional Court for confirmation of the Western Cape High Court judgment. The State further appealed the Western Cape High Court's judgment. The Constitutional Court confirmed the judgment of the Western Cape High Court (*Mlungwana v The State* (CCT32/18) 2018 ZACC 45 (CC) par 112). The judgment of the Constitutional Court may have unintended consequences. The purpose of this case note is to discuss the unconstitutionality of section 12(1)(*a*) of the RGA.

2 Background of the case

The facts of the case are that, on 11 September 2013, the accused persons protested at the Civic Centre in Cape Town by chaining themselves to the entrance of the building (*Mlungwana v The State* (WCC) *supra* par 3–11). The protest was directed at the poor state of sanitation in Khayelitsha, which is situated on the outskirts of Cape Town. It was alleged by the prosecution that the accused persons failed to provide the City of Cape Town with notice, as required by section 3 of the RGA, of their intention to protest. Subsequently, the accused persons were arrested and charged in terms of section 12(1)(*a*) of the RGA for failing to notify the City of Cape Town of the intended gathering (*Mlungwana v The State* (WCC) *supra* par 3–11). The accused admitted to their failure to provide the required notice. However, they argued that the reason for the failure to notify the local authority of the intended protests was that they only anticipated a maximum of 15

protesters. Since they did not anticipate more than 15 protesters, the RGA, they argued, did not require any notice of the intended protest (*Mlungwana v The State* (WCC) *supra* par 3–11; see s 1 of the RGA with regard to the definition of demonstrations and gatherings with reference to the limitation on the number of participants). During the course of the protest, more individuals joined the initial group of 15 protesters, which increased the number of protesters. This resulted in a contravention of the RGA with the effect that the convening of the protest was regarded as illegal (*Mlungwana v The State* (WCC) *supra* par 3–11; s 1 of the RGA).

A magistrates' court found that regardless of the accused's expectation that there would only be 15 protesters, they did not have any preventative measures in place to limit the number of protesters to 15. After the accused were informed that they would be arrested for convening an illegal protest, they attempted to minimise the number of protesters to meet the threshold of 15. Unfortunately, section 12(1)(*a*) of the RGA had already been contravened when the number of protesters escalated to more than 15 people (*Mlungwana v The State* (WCC) *supra* par 3–11; s 1 of the RGA). Thus, the court found the accused guilty of the offence.

The convicted persons appealed to the Western Cape High Court against the finding of the magistrates' court that they contravened section 12(1)(*a*) of the RGA. The appeal was that section 12(1)(*a*) of the RGA unreasonably and unjustifiably limits the freedom of assembly as provided for in section 17 of the Constitution of the Republic of South Africa, 1996 (the Constitution) by criminalising a gathering where no notice was provided (*Mlungwana v The State* (WCC) *supra* par 5).

3 Judgment of the Western Cape Division of the High Court

The Western Cape High Court held that the criminalisation of the failure to provide a notice of the intended protests violated and limited the right to freedom of assembly as provided for in section 17 of the Constitution. Furthermore, the limitation of the right to freedom of assembly was unreasonable and unjustified in an open and democratic society founded on values of freedom, dignity and equality (*Mlungwana v The State* (WCC) *supra* par 94). The court continued that the criminalisation also has a chilling and deterring effect on the right to assemble (par 42). Ultimately, the court declared section 12(1)(*a*) of the RGA to be unconstitutional (par 94). The unconstitutional declaration is not retrospective and has no effect on finalised criminal proceedings unless an appeal or review of such matter is pending. Although the matter was referred to the Constitutional Court for confirmation, the respondents also appealed against the judgment, arguing that the notice is required to facilitate the right to protest (*Mlungwana v The State* (CC) *supra* par 5; see also Maregele "State to Appeal Landmark Gatherings Act Ruling" (22 February 2018) https://www.groundup.org.za/article/state-appeal-landmark-gatherings-act-ruling/ (accessed 2018-11-26)). It appears from the wording in the RGA that the Act seeks to regulate and facilitate how this right is exercised (see s 4 of the RGA). However, the question is whether the notice as part of the regulation and facilitation of this

right unjustifiably limits the right as provided for in section 17 of the Constitution.

4 Arguments of the parties before the Constitutional Court

The central issue before the Constitutional Court was whether the criminalisation of the convener's failure to provide notice of a gathering to a local municipality is constitutionally defendable. The appellants (supported by the following *amicus curiae*: Open Society Justice Initiative, United Nations Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association, and the Equal Education Law Centre) argued that unconstitutionality arises as section 12(1)(*a*) constituted an unjustified limitation of the right to protest as provided for in section 17 of the Constitution (*Mlungwana v The State* (CC) *supra* par 4). The respondents (the State and the Minister of Police) argued that section 12(1)(*a*) of the RGA is constitutionally sound in that it does not limit any of the rights in the Constitution. Furthermore, they argued that if the court found that there is indeed a limitation of any right in the Bill of Rights, that this limitation is justified in that the notice requirement as well as the criminalisation of the failure to meet this requirement is a mere regulation (*Mlungwana v The State* (CC) *supra* par 5). The respondents submitted that there is a nexus between the limitation and the purpose of such limitation in that unnoticed gatherings tend to be disruptive and violent, and that therefore the notice is required to prevent these features (*Mlungwana v The State* (CC) *supra* par 107).

5 Judgment of the Constitutional Court

The Constitutional Court dismissed the appeal and confirmed the declaration of invalidity of section 12(1)(*a*) of the RGA by the Western Cape High Court "to the extent that it makes the failure to give notice or the giving of inadequate notice by any person who convened a gathering a criminal offence" (*Mlungwana v The State* (CC) *supra* par 112). The court emphasised the importance of the right to assemble and held that there is no nexus between the limitation and the purpose of such limitation as argued by the respondents (*Mlungwana v The State* (CC) *supra* par 93). The nexus refers to the assumption that unnoticed gatherings tend to result in disruption and violence. However, this argument by the respondents is flawed as the submission of a notice does not eliminate the potential or occurrence of disruption or violence. Thus, the absence of a notice does not give rise to disruption or violence.

6 Discussion of the Constitutional Court judgment

In this part, a brief background to the RGA as well as the relevant provisions of the RGA are discussed and an analysis of the Constitutional Court judgment follows.

6 1 Brief background to the RGA

In 1991, former President FW de Klerk appointed the Commission of Inquiry regarding the Prevention of Public Violence and Intimidation under the leadership of retired judge Richard Goldstone (Goldstone Commission). The Goldstone Commission was tasked with investigating the disruptive and violent nature of protests in South Africa and to make recommendations for a new approach to be adopted in order to curb the occurrence of such protests (Ngcobo "Local Authorities and the Regulation of Assemblies and Demonstrations: The WSSD as a Case Study" in Ndung'u *The Right to Dissent: Freedom of Expression, Assembly and Demonstrations in South Africa* (2003) 74). The apartheid government had a restrictive approach to assemblies in that certain legislation prohibited and criminalised assemblies (see Suppression of Communism Act 44 of 1950; Internal Security Act 44 of 1950; Public Safety Act 3 of 1953; Riotous Assemblies Act 17 of 1956; Dangerous Weapons Act 71 of 1968; Gatherings and Demonstrations Act 52 of 1973; Internal Security Act 74 of 1982; Dangerous Weapons Act 71 of 1968). A balance between the right to assemble and the protection of the public order as well as the interest of others was needed in South Africa (Woolman "Freedom of Assembly" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2013) 43–46). As a result, the RGA was drafted and enacted (it must be noted that the RGA only came into operation in 1996, after the Constitution). The RGA relaxed the restrictive regulations of assembly of the apartheid government, including the permission-seeking process requirement (*Mlungwana v The State* (CC) *supra* par 68; see also Delaney "The Right to Freedom of Assembly, Demonstration, Picket and Petition within the Parameters of South African Law" in Clark, Dugard, Duncan, Moyo, Plagerson, Tissington, Ulriksen, Veriava and Wilson (eds) *Socio-Economic Rights – Progressive Realisation?* (2016) 3–4). The Goldstone Commission was of the view that gatherings must be recognised as an essential form of democratic expression (*Mlungwana v The State* (CC) *supra* par 3). The RGA accordingly recognises the right to protest and makes provision for the peaceful and unarmed exercise of this right (preamble of the RGA; see also ss 4, 5, 8 and 11 on the specifics for the exercise of the right to assemble). It seems that the main aim with the drafting and enactment of the RGA was to be less restrictive but also to curb the violence of gatherings as experienced in the apartheid era.

6 2 Relevant provisions of the RGA

The preamble of the RGA purports to balance the right to assemble with not unjustifiably infringing the rights of others (preamble of the RGA; also see *Mlungwana v The State* (CC) *supra* par 7). This balancing process also includes the protection and the facilitation of the right to assemble (Delaney in Clark *et al Socio-Economic Rights – Progressive Realisation?* 3). The purpose of the RGA is to facilitate (this role to be fulfilled by the local authority (municipalities)) and to regulate the holding of gatherings and demonstrations and various related matters (see the purpose of the RGA). One of the matters relates to the required notice of the intended gathering as provided for in section 3 of the RGA.

Section 3(1) of the RGA requires the convener of a gathering to provide written notice to the local municipality of their intention. If the notice is not provided seven days before the gathering, reasons therefor must be provided (s 3(3)(*i*) of the RGA). The following information about the gathering must be provided in the section 3 notice: details of the conveners or organisation, time, duration, date and place, as well as the number of participants (s 3(3)(*a*)–(*f*)). The notice must also further indicate who the marshals will be and how they will be recognised (s 3(3)(*g*)). If the gathering is to be a procession, further details must be provided (see s 3(3)(*h*)).

It seems that the information is required to provide the police, local authority and conveners with the opportunity to adequately prepare for the intended protest to ensure that it is functional and exercised in a civil manner. They have to ensure the safety not only of the wider public but also those who actively participate in the gathering (see s 4 of the RGA). However, section 3 does not mention that permission must be sought by means of the required notice. At this point, it must be emphasised that the duty is only to provide notice and not to seek permission from the municipality for the intended gathering (*Mlungwana v The State* (CC) *supra* par 10; see also Delaney in Clark *et al Socio-Economic Rights – Progressive Realisation?* 2–8*)*. Municipalities often view the notice as a permission-seeking process but this is not envisaged by the RGA (*Mlungwana v The State* (CC) *supra* par 8). This misperception may require municipalities to revisit the current practices in relation to the notice required by section 3 of the RGA.

After the above information has been provided, the responsible officer, who is a police representative, must consult the authorised member (s 4(1) of the RGA; see s 1 of the RGA for the definition of an authorised member – that is, a member of the police authorised in terms of s 2(2) to represent the police as contemplated in the said section). After completion of the consultation, section 4(2)(*b*) provides for a process of negotiations between all the relevant stakeholders (these stakeholders include the convener, the authorised member and other responsible officers concerned, as well as representatives of other public bodies) if the responsible officer deems it necessary. The purpose of the negotiations is to discuss the gathering itself and any possible amendments to the provided notice (s 4(2)(*b*)). If deemed necessary, the responsible officer may in terms of section 4(4)(*b*) impose conditions regarding vehicular or pedestrian traffic; set an appropriate distance between the participants and rival gatherings; prohibit or regulate access to property or workplace; or impose the condition that injuries to persons and damage to property in relation to the gathering must be prevented (s 4(4)(*b*)). The conditions have the purpose of improving the facilitation of the gathering as well as allowing for adequate preparation for the intended gathering. Despite the RGA's good intentions envisaged with the required notice, the responsible officer may not prohibit any gathering on the basis that no notice was provided by the convener of the intended gathering (*Mlungwana v The State* (CC) *supra* par 15). Furthermore, a gathering taking place without the required notice is not necessarily a prohibited gathering (*Mlungwana v The State* (CC) *supra* par 17; see s 5 of the RGA on the prohibition of demonstrations and gatherings. A discussion of this section falls outside the scope of this case note).

However, in terms of section 12(1)(*a*) of the RGA, a person is guilty of an offence for convening a gathering without a notice in terms of section 3 of the RGA. Before the declaration of unconstitutionality of this section by the Western Cape Division of the High Court and the confirmation thereof by the Constitutional Court, the notice in terms of section 3 was deemed a prerequisite by local authorities in order to exercise the right to assemble and the failure to adhere thereto was punishable by either a fine or imprisonment following a conviction (s 12(1)(*i*) of the RGA: if an accused is convicted, a fine not exceeding R20 000 or imprisonment not exceeding one year may be imposed).

6 3 Analysis of the Constitutional Court judgment

The Constitutional Court embarked on a justification analysis in terms of section 36 of the Constitution in order to determine whether section 12(1)(*a*) of the RGA limits the right to assemble and whether such limitation would be reasonable and justified in an open and democratic society founded on human dignity, equality and freedom (*Mlungwana v The State* (CC) *supra* par 1).

When courts engage in a justification analysis, the following factors must be taken into account when assessing the justifiability of a limitation of a constitutional right – namely, the nature of the right (s 36(1)(*a*) of the Constitution); the importance of the purpose of the limitation (s 36(1)(*b*)); the nature and extent of the limitation (s 36(1)(*c*)); the relation between the limitation and its purpose (s 36(1)(*d*)); and whether there are less restrictive means to achieve the purpose (s 36(1)(*e*)). The Constitutional Court assessed the above-mentioned factors in order to determine whether section 12(1)(*a*) of the RGA unjustifiably limits the right to assemble as provided for in section 17 of the Constitution. In other words, does the criminalisation of a failure to provide notice unjustifiably limit the right to assemble?

From the onset, the court emphasised the importance of the right to assemble in any democratic society. Despite the fact that the right to assemble may be regarded as the bedrock of a democratic society, the right is increasingly manipulated and repressed by local authorities (*Mlungwana v The State* (CC) *supra* par 10; see also Delaney in Clark *et al Socio-Economic Rights-Progressive Realisation?* 2–8*)*. The court referred to *SATAWU v Garvas* (2012 8 BCLR 840 (CC)), in which the value and importance of this right was underscored (*Mlungwana v The State* (CC) *supra* par 61). The right to assemble is often regarded as a vehicle that provides the vulnerable and those with no political or economic power with a voice and mechanism, not only to participate in advancing their rights and freedoms but also to express their concerns and frustrations (*SATAWU v Garvas supra* par 61; see also *Mlungwana v The State* (CC) *supra* par 61; see also Delaney in Clark *et al Socio-Economic Rights-Progressive Realisation*? 2). It is important that marginalised members of society have mechanisms through which they can participate in the affairs of government and also make their dissatisfaction with the state of affairs known. Compelling a convener to provide notice of an intended gathering, as well as criminalisating a failure to provide such notice, has a chilling and deterring effect on the exercise of this right (see *Mlungwana v The State* (CC) *supra*

par 46 and 47 on the deterring effect). It is clear that the right to assemble is important to participate in affairs affecting citizens; to view the notice as a permission-seeking process may be regarded as a hindrance in the exercise of this important right.

This right to assemble is also of particular importance since it may be regarded as an enabling right. Thus, the right is necessary to advance other civil, cultural, economic, political and social rights (Delaney in Clark *et al Socio-Economic Rights – Progressive Realisation?* 2) but it also enables citizens to exercise or realise these rights (*Mlungwana v The State* (CC) *supra* par 70). Therefore, the court argued that an unjustifiable limitation of the right to assemble would result in an indirect limitation of other constitutionally entrenched rights (*Mlungwana v The State* (CC) *supra* par 71). As indicated above, the right to assemble may be the only avenue available to marginalised members of a community to express their views, opinions and concerns, and the limitation of this right might lead to further infringement of their other constitutional rights.

With regard to the importance of the purpose of the limitation, the respondents argued that the purpose of the limitation is to ensure that a gathering is conducted in a non-disruptive and peaceful manner and, furthermore, that the notice enables the police to effectively monitor the protest in order to prevent or control any disruption or violence (*Mlungwana v The State* (CC) *supra* par 74). However, there was no evidence to suggest that gatherings where a notice was provided were eventually non-disruptive and peaceful. According to the court, there seems to be no explicit link between gatherings where notice was provided and the absence of disruption and violence. Thus, no nexus between the limitation of the right to assemble and the purpose of such limitation exists (*Mlungwana v The State* (CC) *supra* par 107). The argument by the respondents could not be upheld as the occurrence of disruption or violence does not stem from the failure to provide a notice. This is also indicated since there is a lack of evidence to suggest otherwise.

The court went on to deal with the nature and extent of the limitation of the right. The court held that the limitation of the right to assemble is too severe for four reasons. First, the definitions in the RGA are too broad in that the criminal liability for a failure to provide notice may be expanded (*Mlungwana v The State* (CC) *supra* par 83; the court indicated that convening innocuous gatherings without the required notice will be regarded as a crime in terms of s 12(1)(*a*) of the *RGA*. Woolman's example of "every convener of a church convocation in a public park – during which issues of moment may be debated and the considered opinion of the community canvassed" is used to indicate the broad scope of the criminalisation. The court added that s 12(1)(*a*) does not take cognisance of the effect the gathering will have on public order). Secondly, any person who partakes in the planning or organising of the gathering may be held criminally liable if no convener is appointed in terms of section 2 of the RGA (*Mlungwana v The State* (CC) *supra* par 86). Thirdly, the criminalisation may have a chilling effect on gatherings in that people might be deterred from attending or convening a gathering (*Mlungwana v The State* (CC) *supra* par 88; see also par 46 and 47 for more on the deterring effect of the criminalisation). Lastly, the fact that

no distinction is drawn between adult and minor conveners may result in minors being held criminally liable for failing to provide prior notice. These factors exacerbate the extent of the limitation (*Mlungwana v The State* (CC) *supra* par 89).

In assessing the nexus between the limitation and its purpose, the Constitutional Court found that the link between the criminalisation of the failure to provide prior notice and the prevention of violent or disruptive protests is not a "tight fit" (par 93). In this respect, the respondents argued that the notice is required in order for the police to prepare adequately to control the gathering and prevent disruption or violence (par 93). As argued elsewhere, the fact that notice of the intended gathering is provided does not mean that police presence is necessary to control and prevent disruption or violence during such. Equally, it is argued that when unnoticed gatherings take place, it does not mean that such gathering will automatically result in disruption or violence. There is no clear and obvious link between the criminalisation of unnoticed gatherings and the prevention of disruptive or violent gatherings. Thus, there is no need as such to criminalise the failure to provide a notice.

The last factor required the court to assess whether less restrictive means exist in order to incentivise the giving of notice of intended gatherings. However, the mere existence of less restrictive means does not automatically render the criminalisation of unnoticed gatherings unconstitutional (*Mlungwana v The State* (CC) *supra* par 95). In this regard, the court found that less restrictive means exist (see par 96 with the list of less restrictive means identified by the applicants).

In conclusion, the court was of the view that when the above-mentioned factors are assessed and balanced, the only conclusion that can be drawn is that section 12(1)(*a*) of the RGA is not appropriately tailored to facilitate non-disruptive and peaceful protest as argued by the respondents. The court emphasised the importance of the right entrenched in section 17 of the Constitution and the severe nature of the limitation imposed by the criminalisation of the failure to provide notice of a gathering (*Mlungwana v The State* (CC) *supra* par 101). Furthermore, the court found that the respondents' argument that unnoticed gatherings tend to become disruptive and violent is unfounded. There was no evidence placed before the court to suggest that this is indeed true. This affirms the court's reasoning that there is no link between the limitation and the purposes of such limitation. Therefore, section 12(1)(*a*) of the RGA was declared unconstitutional (*Mlungwana v The State* (CC) *supra* par 107).

7 Conclusion

This Constitutional Court judgment clarifies that the RGA requires a notification process to precede the occurrence of a gathering. This in itself is not a permission-seeking process, but merely required to notify the local authority of the intended gathering. However, the notification process is often portrayed by local authorities as a permission-seeking process during which permission to gather is often denied. Upon the failure to provide such notice, section 12(1)(*a*) of the RGA (prior to it being declared unconstitutional)

would then traditionally come into operation. The failure of the conveners to provide notice would be criminalised and they would be subjected to certain sanctions. According to the Constitutional Court, the criminalisation of the failure to provide notice has a chilling effect on the exercise of the right, which constitutes an unjustified limitation of that right.

The respondents unsuccessfully argued that the purpose of the notice is to adequately prepare for the gathering in order to prevent any violence and disruption. The reality is that protests are more often than not disruptive and violent. That a notice as envisaged by the RGA is capable of ensuring that gatherings are non-disruptive and peaceful seems unlikely. With the drafting and enactment of the RGA, a shift away from the constrictive approach by the apartheid government to a more liberal approach was envisaged to enable citizens to gather unarmed and peacefully when the need arises. However, in the current climate of protest as experienced in South Africa, it would seem that the RGA is not geared to deal with the increasing number of disruptive and violent protests.

Despite this judgment, local authorities still regard the notice as permission seeking, thus requiring a permit for the intended gathering. The effect of this misdirection by the authorities is that the police are still called in to disperse gatherings that lack a permit. This in itself may be regarded as an unlawful act by the police. Communities may no longer be prohibited to gather without a permit and when proceeding with such action may not be subjected to criminal sanctions. (For recent examples of this misdirection, see Charles "Activists Slam Cops over Ruling on Protests" (2018-11-26) *Cape Argus* and Charles "Right to Protest Under the Spotlight After Activist's Arrest" (2019-02-07) *Cape Argus*). Perhaps there is a need for municipalities to be educated on the effect of the judgment as well as to revisit the current practices in relation to gatherings.

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