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 MANKQO	Third Appellant
NOMHLE MACI	Fourth Appellant
ZINGISA MRWEBI	Fifth Appellant
MLONDOLOZI SINUKU	Sixth Appellant
VUYOLWETHU SINUKU	Seventh Appellant
EZETHU SEBEZO	Eighth Appellant
NOLULAMA JARA	Ninth Appellant
ABDURRAZACK ACHMAT	Tenth Appellant

and

THE STATE	First Respondent
THE MINISTER OF POLICE	Second Respondent
EQUAL EDUCATION	*Amicus Curiae*
OPEN SOCIETY JUSTICE INITIATIVE	*Amicus Curiae*
UNITED NATIONS SPECIAL RAPPORTEUR	

ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION *Amicus Curiae*

EQUAL EDUCATION'S HEADS OF ARGUMENT

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INTRODUCTION

1. The *amicus curiae* is Equal Education ("**EE**"), a member-based democratic movement of learners[1], parents, teachers and community members, all of whom make up the essential body of stakeholders in South African schools. EE is a registered non-profit organisation which operates throughout South Africa.

2. The primary focus of EE lies in the general social imbalances that prevail in South African society particularly as pertaining to the country's education system. Recognising these social imbalances as a remnant and legacy of the apartheid system, one of EE's primary objectives is overcoming that legacy through advancing a struggle for equal and quality education for all in South Africa.

3. EE aims to hold government accountable to its citizenry. Among other things, EE looks generally at government policy as a whole as well as government's obligation to deliver basic services (particularly to under-privileged communities) in line with that policy, and examines how these

[1] Section 1 of the South African Schools Act 84 of 1996 defines 'learner' as any person receiving education or obliged to receive education in terms of that Act.

impact on the citizen's access to education. To this end, since inception in 2008, EE has led campaigns and activities aimed at improving the overall efficacy of South Africa's education system.

4. EE's core membership base which consists of high school learners, known as 'Equalisers', often engage in advocacy programmes to advance their right to education. These activities take the form of research work, campaigns, litigation and protest action. EE's activities always seek to promote the values of the Constitution. EE's focus and attention are directed by the interests of its members, who are largely from working-class and poor communities.

5. The ability to picket, demonstrate and engage in a wide variety of protest actions, is crucial to the work of EE's membership and maintaining a robust space for civil society engagement with the state. This is vital to the democratic project and to the work of EE's members in furthering the right to basic education.

THE PURPOSE OF THESE SUBMISSIONS

6. The appellants challenge the constitutionality of section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 ("the Gatherings Act") in that it criminalises a protest solely on the basis that more than 15 persons attended it and no prior notice was given.

7. EE intervenes as an *amicus curiae* to make submissions from the perspective of children[2] in general and Equalisers in particular who, in the process of exercising their constitutional right to protest, often find themselves falling foul of the provisions of section 12(1)(a) read with section 3 of the Gatherings Act. When this happens, these children are immediately vulnerable to arrest; they possibly face the prospect of being taken through the spectrum of the criminal justice system and potentially having to stand trial; and ultimately, if convicted, they end up with a criminal record.

8. In these submissions EE seeks to advance the principle that children have a very special place in life which the law should reflect.[3] In line with this principle it will be argued that when the law exposes children to arrest for participating in an otherwise necessary and peaceful protest action

[2] Section 1 of the Children's Act 38 of 2005 defines 'child' as a person under the age of 18 years; so does section 28(3) of the Constitution.
[3] *May v Anderson*, 345 U.S. 528, 536 (1953).

involving even 1 person above the apparently arbitrary maximum requirement of 15 persons, simply because no prior notice was given, the law fails to protect the interests of children.

9. EE's submissions will show that criminalising peaceful protest action in the circumstances of the case against the Appellants, circumstances which often prevail when Equalisers engage in EE activities, violates the Constitution. Such a violation has serious implications for children in particular.

10. These submissions are made mindful of the legal principle on the role of *amicus* as enunciated in the case of *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others,*[4] namely that:

> "*The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn... [A]n amicus has a special duty to the court…*

[4] 2002 (5) SA 713 (CC).

to provide cogent and helpful submissions that assist the court."[5]

11. In this matter the Appellants were convicted merely for exercising their right to protest for delivery of clean and safe sanitation services by government. Learners and Equalisers in particular, often have to engage authorities, in similar circumstances as the Appellants did in this matter, in order to campaign for clean and safe sanitation services for their schools. When those engagements fail, as was the case with the Appellants, participation in protest action is an important avenue to advocate for authorities to take action.

12. Giving notice for a protest against particularly government functionaries is often impractical, or, as happened in this matter, more protesters attend than originally planned.

13. Viewed from this perspective, the criminalisation of protest action under these circumstances is unreasonable and unjustifiable in an open and democratic society, and therefore falls to be declared to be at variance with the values and spirit of the Constitution.

[5] 2002 (5) SA 713 (CC) para 5.

14. EE's submissions proceed as follows:

14.1. outlining the historical role of protest in advancing the right to education;

14.2. identifying the implicated constitutional provisions;

14.3. setting out the scope and effect of the impugned provision in relation to children;

14.4. highlighting the nature and importance of the right to protest for children;

14.5. demonstrating the manner in which the impugned provision fails to ensure the best interests of the child;

HISTORICAL ROLE OF PROTEST IN ADVANCING THE RIGHT TO EDUCATION

15. EE's submissions emphasise the importance of the right to protest for children. By engaging in protest action as a mechanism of drawing attention to problems that afflict public education, Equalisers (and other

learners) continue on a long history in the South African context of marginalised children and students using protest action as a means of struggle and political self-actualisation.

16. The earliest recognisable forms of organised and peaceful student protests can be traced as far back as 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.[6] The Soweto Uprising, and its catalytic student 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 an unjust society at large.

17. In the wake of the Soweto uprising, student organising continued across the country and, tragically, state repression was used to quell the power of student mobilisation. Mass arrests and police sweeps targeted at children were regularly used by the Apartheid government to restrict freedom of

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

expression and protest.[7]

18. Whilst apartheid and colonial rule created a particular vacuum for political expression, protest remains a critical element of political and communal expression for learners.

19. Mindful of this history and recognising the protection of peaceful protest in the Constitution, Equalisers regularly hold peaceful gatherings, demonstrations, pickets and marches. Equalisers have participated in gatherings in, amongst others, Cape Town, Johannesburg, Tshwane, Polokwane North and Bhisho.

20. The ability of Equalisers and learners in general to gather, picket, demonstrate and engage in a wide variety of protest action, without an unnecessary or unreasonable bureaucratic hindrance, is a core element of their right to freedom of political expression and their right to participate in political life.

21. As a movement mandated to promote and defend democratic rights such as the right to assemble, EE has a vested interest in ensuring that the

[7] Ibid.

space for democratic engagement is protected and widened, especially for Equalisers (inclusive of minor children).

THE IMPLICATED CONSTITUTIONAL PROVISIONS

22. It is submitted that section 12(1)(a) of the Gatherings Act, the impugned provision, criminalises and ultimately frustrates and undermines a variety of constitutionally entrenched rights of children who participate in otherwise necessary and peaceful protest action in order to advance their legitimate interests. The constitutional provisions that are violated by the impugned provision are, namely:

22.1. section 17 of the Constitution, which provides:

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

22.2. section 28(2) of the Constitution, which provides:

> *"A child's best interests are of paramount importance in every matter concerning the child."*

SECTION 12(1)(a) INCONSISTENT WITH THE PROVISIONS OF SECTION 17 OF THE CONSTITUTION

23. Section 17 of the Constitution extends the right to assemble, demonstrate, picket and present petitions to *everyone*. Protest action falls within the ambit of section 17. The composite nature of *everyone* means that the right extends to children.

24. The only constitutional prerequisites to the exercise of this right are that the protest must be conducted peacefully and unarmed.

25. By requiring the giving a notice in order to hold a protest which otherwise complies with the constitutional prerequisites in section 17, section 3 of the Gatherings Act encroaches on a constitutionally entrenched right.

26. It is EE's case that section 12(1)(a) of the Gatherings Act goes even further, by criminalising what would otherwise be a constitutionally compliant exercise of the right to protest.

27. The effect is that a person who fails to give notice is criminally liable merely on the basis of strict liability, unless they can show that the gathering took place spontaneously. This is unjustifiable and impermissible.

THE SCOPE AND EFFECT OF THE IMPUGNED PROVISION IN RELATION TO CHILDREN

The Gatherings Act and the scope of the impugned provision

28. Section 12(1)(a) of the Gatherings Act ("impugned provision") renders it an offence for any person – including children - to convene a gathering, including a peaceful gathering, in circumstances where there has been a failure to provide notice or adequate notice of such gathering. The impugned provision reads as follows:

> *"Any person who –*
>
> *convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3 - shall be guilty of an offence and on conviction liable… to a fine not exceeding R20 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."*

29. The impugned provision has application to the "*convener*" of a

"*gathering*", which terms are defined in the Gatherings Act as follows–

29.1. Section 1(iv) of the RGA defines a "convener" as:

> *"(a) Any person who, of his own accord, convenes a gathering, and*
>
> *(b) In relation to any organization or branch of any organization, any person appointed by such organization or branch in terms of section 2(1);"*

29.2. Section 1(vi) of the RGA defines "gathering" as,

> *"[A]ny assembly, concourse or procession of more than 15 persons in or on any public road… , 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 organisation, whether or not that party or organisation is registered in terms of any applicable law, are discussed, attacked, criticised, promoted or propagated; or*

(b) held to form pressure groups, to hand over petitions to any person, or to mobilise 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"

30. The criminal offence envisaged by the impugned provision is triggered by the mere failure of a convenor of a gathering to have provided notice of the gathering. The requirement to provide notice of an intended gathering is set out in section 3 of the Gatherings Act as follows:

"(1) The convenor 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 convenor is not able to reduce a proposed notice to writing the responsible officer shall at his request do it for him.

(2) The convenor 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 convenor 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 convenor prohibit the gathering."

31. It bears emphasis that the impugned provision criminalises any gathering convened without notice, even where the gathering is necessary and peaceful and regardless of whether the participants are children. In other words, it is immediately an offence for a child to convene or participate in a peaceful gathering merely by virtue of the fact that the child did not provide notice or adequate notice of the gathering, where more than 15 persons assemble.

32. Understandably, children, such as the Equaliser members of EE, are unlikely to – by themselves - have access to resources and practical means to fulfil the written notice requirement. It is not unsurprising then for gatherings organised by or amongst children to fail to meet the notice requirement. These children face the threat of their conduct being criminalised under the impugned provision and could be subjected to the criminal justice system.

33. As EE submits below, this is unduly restrictive and an unconstitutional limitation on a child's right to peaceful protest and assembly, suffocating the potential for children to participate freely in political life and expression.

34. In this regard, it is important to set out the criminal processes that a child would be subjected to in circumstances where the impugned provision is applied.

The application of the Child Justice Act in relation to the impugned provision

35. A child who convenes a gathering, even a peaceful gathering, is in terms of the impugned provision committing an offence. This has serious consequences for the child –making the arrest of the child possible, and initiating entry into the traumatising criminal justice system.

36. The Child Justice Act 75 of 2008 ("Child Justice Act") establishes a criminal justice system for children, who are in conflict with the law and are accused of committing offences.[8]

[8] The Act applies to children under the age of 18 and, in certain circumstances, may apply to a person under the age of 21 (Section 1 of the Child Justice Act).

37. The Child Justice Act categorises offences committed by children in relation to their seriousness. The offences considered to be the least serious are listed in Schedule 1 of the Act (including theft of property valued under R2500, trespass, malicious injury to property valued at R1500, common assault and blasphemy, among other petty offences). Schedule 2 lists more serious offences, which include public violence, arson, housebreaking and assault with grievous bodily harm, among other offences. The most serious offences are listed in Schedule 3 and include rape, terrorism, and murder, among other serious offences.

38. In addition to specifically listed offences, the Child Justice Act also categorises statutory offences according to the maximum penalty imposed by another statute.

39. In terms of the impugned provision, the failure to give notice of a peaceful gathering or assembly is an offence that carries penalty of a fine or maximum of one year's imprisonment.

40. Statutory offences which carry a penalty of imprisonment of more than three months but less than 1 year are categorised as Schedule 2 offences under the Child Justice Act. Peaceful protest without notice is thus

categorised as an offence falling within the scope of Schedule 2 of the Child Justice Act – alongside serious offences such as arson, housebreaking and assault with grievous bodily harm.

41. It is striking that in our constitutional democracy, political expression of children in the form of a peaceful gathering can, for mere failure of meeting a procedural requirement, be considered as a criminal offence at all, let alone an offence within the same category of seriousness as arson and housebreaking.

42. The Child Justice Act sets out the procedures that apply to children alleged to have committed a Schedule 2 offence.

Arrest and detention

43. Children alleged to have committed Schedule 2 offences are susceptible to being arrested.

44. A child who has convened a gathering, but has failed to provide notice, may therefore be arrested by a police officer. This prospect alone is

traumatising. Following from there, even under the Child Justice Act, the child must be subject to various taxing and strenuous processes.

45. Within 24 hours, a probation officer will be informed of the child's arrest. The child must then be subject to an assessment by the probation officer which includes, among other things, estimating the child's age if it is uncertain and gathering information about any previous conflicts with the law the child may have had.

46. The probation officer will formulate recommendations regarding the release or detention and placement of the child and establish the prospects for diversion of the matter. Upon completion of the assessment, the probation officer compiles a report that will be submitted to a presiding officer in a preliminary inquiry.

47. It should be noted that a child arrested for a Schedule 2 offence will be detained throughout the assessment processes, and will need to be granted bail before release. A child seeking bail will have to be subjected to a determination by a prosecutor in terms of section 25 of the Child Justice Act read with section 59A of the Criminal Procedure Act.

Diversion

48. The Child Justice Act does envision the possibility of "diversion" for a child charged with contravening the impugned provision. There are two levels of diversion, which include a variety of measures, such as, community service, an apology, referral to intensive therapy, and placement under supervision of a probation officer, with conditions restricting the movement of the child.[9]

49. Significantly, a child suspected of having committed a Schedule 2 offence may only be diverted by a prosecutor after being subjected to a process of investigation at a preliminary enquiry.[10]

50. A prosecutor must obtain authorisation of the Senior Public Prosecutor in order to grant a diversion order.[11] Alternatively the presiding officer may refer the matter to the child justice court, where a diversion order may be granted by the presiding officer there prior to the close of the

[9] Child Justice Act, section 53(3).
[10] Child Justice Act, section 52.
[11] Child Justice Act, section52(2) read with National Director of Public Prosecutions' Directives, Government Gazette No. 33067 Notice No. 252 (31 March 2010) ("NDPP Directives"), paras F(9) and H(10).

prosecution's case.[12]

51. It bears emphasis that whilst diversion is aimed at minimising the traumatising effects of the criminal justice system for children, it is entirely discretionary. Furthermore, it is the very fact of criminalisation – as imposed by the impugned provision – which leads to a position where children engaged in otherwise necessary and peaceful protest and assembly are vulnerable to entering the child justice process.

Record of offence

52. A child who has contravened the Gatherings Act under the impugned provision will have the offence placed on their official records – as a Schedule 2 offence.

53. In cases where a child who is found guilty of contravening the Gatherings Act is not diverted, they will obtain a criminal record with long-term consequences. This record may only be expunged after a period of 10 years has elapsed.[13]

[12] Child Justice Act, section 67.
[13] Child Justice Act, section 87.

54. Whilst diversion of a child does not lead to a criminal record, there is still a record of the order. The Director General of the Department of Social Development[14] must establish and maintain a register of children in respect of whom a diversion order has been made in terms of the Child Justice Act. A record of the child's offence and diversion order is therefore maintained and will be taken into account should the child again be alleged to have committed an offence.

Summary of the scope and effect of the impugned provision in relation to children

55. The scope and effect of the impugned provision on children can be summarised as follows:

55.1. The impugned provision applies to anyone who contravenes the formal notice requirement of the Gatherings Act, including minor children who have convened a peaceful protest.

55.2. The mere failure to provide notice of a gathering is criminalised.

[14] In consultation with the Director General of the Department of Justice and Constitutional Development and the National Commissioner of the South African Police Service.

55.3. A child who convenes a gathering is - merely for having failed to provide adequate notice of the gathering - vulnerable to arrest, regardless of whether the gathering was peacefully constituted.

55.4. When arrested, the child will be required to interact with an array of officials within the criminal justice system, including police officers and prosecutors.

55.5. After facing questioning or discussions with a police officer, diversion of the child may be considered but this is entirely within the discretion of relevant officials.

55.6. Where diversion is not granted, a child may face conviction and a criminal record.

55.7. Even where diversion is granted, a record of the offence and the diversion order will be maintained.

56. For a child, the implications of criminalisation and the processes described above are drastic.

57. EE thus submits that the mere fact of criminalising a peaceful protest for

failure to provide notification limits the right to freedom of assembly in terms of section 17 of the Constitution.

58. In the next section, EE submits that the limitation imposed on the right to protest by the impugned provision does not pass muster as reasonable and justifiable when the nature and importance of the right to protest and the best interests of the child is properly considered.

NATURE OF THE RIGHT TO PROTEST FOR CHILDREN

59. We have already outlined the historical role and importance of the right to protest in South Africa. Pursuant to that history, section 17 of the Constitution generously protects peaceful and unarmed assembly, demonstration and protest as follows:

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

60. The right has been understood to mean that 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.[15]

61. Section 36(1)(a) of the Constitution requires the Court to consider the nature of the right to protest in its assessment of whether the limitation is reasonable and justifiable in an open and democratic society.

62. EE submits that when this Honourable Court considers whether the impugned provision imposes a reasonable and justifiable limitation on the right to protest, it is essential for the Court to take into account the nature and importance of the right to protest *for children*.

Importance of the right to protest to realising children's right to political expression and participation

63. Protection of the right to protest has special significance for children, undoubtedly one of the most vulnerable groups in our society. Section 19(3) of the Constitution confers the right to vote only on adult citizens. As a result of their inability to vote, children lack a critical aspect of

[15] *South African Transport and Allied Workers Union and Another v Garvas and Others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae)* 2013 (1) SA 83 (CC) at para 52 ('*SATAWU v Garvas')*

political power.[16] Protest is therefore an important way in which children's voices are heard. If deprived of a voice at the ballot box and in protest, children will have limited meaningful ability to self-advocate when their rights are infringed.

64. As for child participation in matters concerning a child, Section 10 of the Children's Act lends specific weight to the child's right to meaningful participation in matters affecting them:

> *"every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."*

65. In *SATAWU v Garvas*, the Constitutional Court powerfully explained the importance of the right to protest in ensuring that the most vulnerable are afforded a space for political participation:

> *"[T]he 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.*

[16] *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC) at para 19.

This right will, in many cases, be the only mechanism available to them to express their legitimate concerns."[17] (Emphasis added).

66. The right of children, as individuals and as a collective, to be heard and participate in all matters affecting them has also been firmly entrenched in international law. Section 39 of the Constitution requires that such international law be considered when interpreting rights in the Bill of Rights.

67. The *UN Convention on the Rights of the Child* (the UNCRC),[18] recognise children's right to freedom of association and to freedom of peaceful assembly.

"1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly. 2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the

[17] *SATAWU v Garvas* at para 61
[18] Article 15. The UN *Convention on the Rights of the Child* (UNCRC). Accessible at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx. South Africa ratified the Convention on the Rights of the Child in 1995. See http://indicators.ohchr.org/.

rights and freedoms of others."

68. Article 12 of the *UN Convention on the Rights of the Child* , as ratified by South Africa, places an obligation on states to ensure that children's right to be heard is respected, protected and fulfilled:

> *"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely <u>in all matters</u> affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."* (Emphasis added).

69. General Comment 12[19] on Article 12 published by the UN Committee on the Rights of the Child explains:

> '*[T]he right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention.*'[20]
>
> …

[19] UNCRC *General Comment no. 12 (2009) The right of the child to be heard.* Accessible at http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf

[20] UNCRC *General Comment 12*, above note 25 at para 2.

"These processes are usually called participation. The exercise of the child's or children's right to be heard is a crucial element of such processes. The concept of participation emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children's lives."[21]

…

"States parties must assure that the child is able to express her or his views "in all matters affecting" her or him….the child must be heard if the matter under discussion affects the child…"[22]

70. South Africa therefore has binding international law obligations to ensure that children's participation and freedom of expression is protected to the fullest extent possible.

71. The protection afforded to children's expression and participation in international law informs an understanding of the nature and importance

[21] UNCRC *General Comment*, above note 25 at para 13.

[22] UNCRC *General Comment*, above note 25 at para 26.

of the Constitution's protection of the right to protest for children.

The right to protest is inextricably linked to freedom of expression and dignity of the child

72. Constitutional protection of the child's right to peaceful and unarmed protest is inextricably linked to protection of their rights not only to freedom of expression, but also to dignity.[23]

73. In *South African National Defence Union v Minister of Defence and Another*, the Constitutional Court recognised the relationship between various rights and their importance to our democracy. O'Regan J, writing for the Court, stated:

> "*[Freedom of speech] is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17). These rights taken*

[23] Section 10 of the Constitution provides: *"Everyone has inherent dignity and the right to have their dignity respected and protected."*

together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of likeminded people to foster and propagate such opinions."[24] (Emphasis added).

74. Ensuring children the broadest space for free expression of ideas is crucial to their development. Individually and collectively, children are "*independent social beings… and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood.*"[25] It is in recognising the inherent worth of individual children, and the value of the choices that they make, that we realise their right to dignity.[26]

75. The right of children to free expression is also recognised in international law. The UNCRC in article 13 provides that children have the right to freedom of expression.

[24] *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 at para 8
[25] *S v M* 2008 (3) SA 232 (CC) paras 18 -19.
[26] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) at para 52 ('*Teddy Bear Clinic').*

"*(1) The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.*

(2) The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (ordre public), or of public health or morals." (Emphasis added).

76. Article 7 of the African Charter on the Rights and Welfare of the Child (ACRWC)[27] on freedom of expression, states:

"Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws." (Emphasis added).

[27] African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990) (available on http://www.achpr.org/instruments/child/)

77. In summary, the right to protest is a crucial mechanism for realising children's right to participation, freedom of expression, and dignity, and limitations thereon must be restricted.

78. As explained above, the impugned provision is exceptionally broad in scope and the effect on children is harsh. In the next section, EE submits that the impugned provision – which criminalises peaceful protest - violates the best interests of the child principle and renders the limitation unreasonable and unjustifiable.

THE IMPUGNED PROVISION VIOLATES THE BEST INTERESTS OF THE CHILD

Criminalisation of peaceful protest is not in the best interests of the child

The Best Interests of the Child principle

79. The exercise of the right to protest and any limitations thereon must, in respect of children, be viewed through the prism of section 28(2) of the Constitution, which requires that:

"[a] child's best interests are of paramount importance in every matter concerning the child."

80. The best interest of the child principle has been firmly entrenched in international law. Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) states that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." (Emphasis added).

81. Article 4(1) of the African Charter on the Rights and Welfare of the Child (ACRWC) places the best interests of the child as the primary consideration in all matters concerning the child as follows:

"In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration." (Emphasis added).

82. Interpreting section 28 of the Constitution in light of international law, the Constitutional Court has repeatedly emphasised the need to take a child-centred approach when determining the best interest of the child.[28]

83. In *S v M (Centre for Child Law as amicus)*[29] ("*S v M*"), the Court held that law enforcement must always be child-sensitive and that courts and administrative authorities are constitutionally bound to consider the effects of their decisions on children's lives.[30]

84. Section 28(2) is both a self-standing right and a guiding principle in all matters affecting children. [31] Section 28 "protects children against the undue exercise of authority".[32]

85. The Constitutional Court has also affirmed that the best interests of the child is a standard of review against which the constitutional validity of statutory provisions must be tested.[33] In *The Teddy Bear Clinic for Abused Children and Rapcan v Minister of Justice and Constitutional*

[28] Id para 15.
[29] *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC).
[30] *S v M* para 15.
[31] See *Minister for Welfare v Fitzpatrick* at para 17; *Fraser v Naude* at para 9.
[32] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) at para 25.
[33] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC) ; 2009 (11) BCLR 1105 (CC) (15 July 2009); *C and Others v Department of Health and Social Development, Gauteng and Others* (CCT 55/11) [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) (11 January 2012).

Development and Others[34] (" the Teddy Bear Clinic case"), the court held that section 28(2) plays at least two separate roles as a guiding principle and as a "*standard against which to test provisions or conduct which affect children in general*."[35]

86. The court held further that the best-interests principle can be employed not only in circumstances where legislation is inflexible in a particular case but also where the statutory provision is against the best interest of children in general.

"The best-interests principle also applies in circumstances where a statutory provision is shown to be against the best interests of children in general, for whatever reason. As a matter of logic what is bad for all children will be bad for one child in a particular case."[36] (Emphasis added).

87. EE submits that the impugned provision – in criminalising peaceful protest and political expression of children - violates the section 28(2) guarantee that children's best interests are of paramount importance in

[34] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (1) SACR 327 (CC).
[35] *Teddy Bear Clinic* para 69.
[36] *Teddy Bear Clinic* para 71.

all matters concerning children.

Criminalisation and best interests of the child

88. It is established law that subjecting children to the criminal justice system, whether by arrest or detention, must be a measure of last resort and in instances where they have committed serious offences.

89. The impugned provision, through criminalisation, makes children vulnerable to arrest and prosecution merely for having failed to meet a notice requirement. This means that a child who has participated in an otherwise peaceful and orderly protest may be threatened with arrest and subjected to the trauma of the criminal justice system.

90. It is established in international law that measures relating to criminalisation should be a last resort in the case of children. Article 37(b) of the UNCRC states—

> *"No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall*

be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;" (Emphasis added).

91. These principles have been firmly supported by our courts. In *S v M*, the Court emphasised the need to protect children from avoidable trauma in the context of a criminal process:

> *"[F]oundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."*[37]

92. It stands to reason that the criminalisation of children for exercising their right to peaceful and unarmed protest is extremely harmful to children. For this reason, subjecting children to the criminal justice system must always be a measure of last resort.

93. This was echoed by the Constitutional Court in *Mpofu v The Minister of*

[37] *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC) at para 19.

Justice and Constitutional Development,[38] where the Court held that detention of a child offender must be a measure of last resort and for the shortest period of time. [39]

94. Whilst the Child Justice Act seeks to ameliorate the trauma of the criminal justice process for children through mechanisms such as diversion, this does not save the overly broad scope of the impugned provision. As the Court has stated in the *Teddy Bear Clinic* case:

> *"In principle, and as this Court has made plain, the existence of prosecutorial discretion cannot save otherwise unconstitutional provisions. If the discretion to prosecute exists, the prospect of an adolescent being arraigned under the impugned provisions is ever-present. For the reasons set out above, any such prosecution will invariably infringe the best-interests principle, as well as the affected adolescent's rights to privacy and human dignity. In other words, the mere existence of a prosecutorial discretion creates the spectre of prosecution, which undermines adolescents' rights. Furthermore, the discretion cited by the respondents only occurs at*

[38] 2013 (2) SACR 407 (CC) at para 1.
[39] *Mpofu v The Minister of Justice and Constitutional Development* 2013 (2) SACR 407 (CC) at para 1.

the stage of deciding whether to prosecute, by which time the adolescent involved may already have been investigated, arrested and questioned by the police. In any event, while the arguments in relation to prosecutorial discretion may be relevant when considering the extent of the limitation of section 28(2) of the Constitution, they are irrelevant when considering whether the right has been limited at all."[40] (Emphasis added).

95. Compounding the negative effects of criminalisation on children, as described above, a child convicted of an offence under the impugned provision will potentially have a criminal record for an offence considered to be in the same category as offences such as housebreaking and arson. This will have long-term and serious effects on the child's access to opportunities, in addition to the stigmatisation.

96. In the case of diversion, a record of the child's offence and diversion order is maintained and taken into account should the child again be alleged to have committed an offence. This again is a harsh consequence for a child exercising their right to protest.

[40] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (1) SACR 327 (CC) at para 76.

97. Criminalisation creates social stigma for the individual, and a criminal record makes it harder to find work, travel or study. The Constitutional Court has recognised the seriousness of criminalisation.

98. In *Democratic Alliance v African National Congress* the Constitutional Court held that criminalisation provisions are tough on, and with 'calamitous effect' on the person who falls foul of them.[41] This echoes Skweyiya, J's statement in the *Teddy Bear Clinic – case that*, "*An individual's human dignity comprises not only how he or she values himself or herself, but also includes how others value him or her. When that individual is publicly exposed to criminal investigation and prosecution, it is almost invariable that doubt will be thrown upon the good opinion his or her peers may have of him or her*."[42] (Emphasis added).

99. In *J v National Director of Public Prosecutions and another (Childline South Africa and others as amici curiae)*[43], the Constitutional Court observed (para 35) that it had previously held that the "best-interests" or

[41] *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at para 129
[42] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (1) SACR 327 (CC) at para 56.
[43] 2014 (7) BCLR 764 (CC).

"paramountcy" principle creates a right that is independent and extends beyond the recognition of other children's rights in the Constitution.[44] The "ambit of the (best-interests provision) is undoubtedly wide."[45]

100. The Court continued (at para 36) to state that the contemporary foundations of children's rights and the best-interests principle encapsulate the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and to develop her moral compass. The Court noted that it had emphasised the developmental impetus of the best-interests principle in securing children's right to "learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood."[46]

101. In the recent Free State High Court decision, *Tsoaeli v S,*[47] the court dealt with the interpretation of s 12(1)(e), and held that gatherings where

[44] *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) ('*Fitzpatrick*') at para 17. See also *Fraser v Naude and Others* [1998] ZACC 13 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 9.
[45] *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at para 15.
[46] *S v M* at para 19.

[47] *Tsoaeli and Others v S* (A222/2015) [2016] ZAFSHC 217 (17 November 2016) *('Tsoaeli')*

no notice is given should not be criminalised. The court held that, "*[T]he right to freedom of assembly is central to our constitutional democracy and exists primarily to give a voice to the powerless. Given the 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.*"[48] (Emphasis added).

102. The effect of criminalisation - including stigmatisation and trauma – is not in the best interests of the child in circumstances where the conduct that is the subject of the offence is simply the convening of a peaceful gathering without notice.

103. For the reasons set out above, it is evident that the criminalisation of peaceful gatherings under the impugned provisions is in violation of the "best interest of the child" principle. The impugned provision therefore

[48] *Tsoaeli* at para 41.

cannot withstand scrutiny as a reasonable and justifiable limitation on the child's right to protest.

CONCLUSION

104. In conclusion, Section 17 of the Constitution extends the right to assemble, demonstrate, picket and present petitions to *everyone*, including children.

105. As observed by the Constitutional Court, the "best-interests" or "paramountcy" principle creates a right that is independent and extends beyond the recognition of other children's rights in the Constitution.

106. EE submits that by creating, indiscriminately, a criminal offence for failure to give notice to convene a protest of more than 15 persons, section 12(1)(a) of the Gatherings Act violates the best-interests of the child principle and thereby fails to give effect to the other internationally recognised principle that children have a very special place in life which the law should reflect.

107. To that extent, it is prayed that section 12(1)(a) of the Gatherings Act be declared to violate the best interests of the child principle, and thereby invalid and inconsistent with the Constitution.

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