CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 32/18

In the matter between:

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

and

THE STATE	First Respondent
MINISTER OF POLICE	Second Respondent

and

EQUAL EDUCATION	First Amicus Curiae
RIGHT2KNOW CAMPAIGN	Second Amicus Curiae
UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION	Third Amicus Curiae

Neutral citation:	*Mlungwana and Others v The State and Another* [2018] ZACC 45
Coram:	Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlanthla J, Petse AJ and Theron J
Judgment:	Petse AJ (unanimous)
Heard on:	21 August 2018
Decided on:	19 November 2018
Summary:	Regulation of Gatherings Act 205 of 1993 — section 12(1)(a) — declaration of constitutional invalidity

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ORDER

On appeal from and in an application for the confirmation of the order of the High Court of South Africa, Western Cape Division, Cape Town, the following order is made:

1. The appeal of the State respondents is dismissed.
2. The declaration by the High Court that section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 is constitutionally invalid is confirmed 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.
3. The declaration of invalidity shall not apply with retroactive effect and shall not affect finalised criminal trials or those trials in relation to which review or appeal proceedings have been concluded.
4. The appeals of the applicants against their convictions in the Bellville Magistrates' Court for contravening section 12(1)(a) of the Regulation of

Gatherings Act 205 of 1993 are upheld and the resultant convictions and sentences are set aside.

5. The Minister of Police is ordered to pay the costs of the applicants in this Court, including the costs of two counsel.

JUDGMENT

PETSE AJ (Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlanthla J and Theron J concurring):

Introduction

[1] Is the criminalisation of a convener's failure, wittingly or unwittingly, either to give notice or give adequate notice to a local municipality when convening a gathering of more than 15 persons, which is what section 12(1)(a) of the Regulation of Gatherings Act[1] (Act) does, constitutionally defensible? This is the central issue in this application and it rests on two further interrelated questions. First, does section 12(1)(a) limit the right entrenched in section 17 of the Constitution? Section 17 guarantees that "[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions". Second, if so, is that limitation reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom?

[2] The answer to these questions, for reasons that will become apparent later, is that section 12(1)(a) constitutes an unjustifiable limitation of the right in section 17. Accordingly, the declaration of constitutional invalidity made by the High Court falls to be confirmed.

[1] 205 of 1993.

[3] The questions alluded to above, and answers thereto, arise against the following background. This is an application for confirmation of a declaration of constitutional invalidity in terms of section 172(2)(d)[2] of the Constitution read with rule 16(4) of the Rules of this Court, and section 15(1)(b) of the Superior Courts Act.[3] The High Court of South Africa, Western Cape Division, Cape Town (High Court) declared section 12(1)(a) of the Act unconstitutional and invalid.[4] The Minister of Police, who is the second respondent in the application, opposes the confirmation application and both respondents seek leave to appeal against the declaration of constitutional invalidity.[5]

[4] The applicants assert that the criminalisation of the failure to give notice or adequate notice is unconstitutional because section 12(1)(a) criminalises the convening of peaceful gatherings simply by reason of the fact that either no notice was given or inadequate notice was given. This, their argument goes, constitutes an unjustifiable limitation of the right in section 17 of the Constitution.

[5] For their part, the respondents contend that section 12(1)(a) of the Act is constitutionally valid. Their primary contention is that the section does not limit any rights in the Bill of Rights because it amounts to mere regulation. Alternatively, to the extent that this Court finds that there is a limitation, the respondents argue that the limitation is justifiable for a variety of reasons.

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[2] The section reads: "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection".

[3] 10 of 2013.

[4] This being an application for confirmation of the High Court's order of constitutional invalidity, this Court's jurisdiction is engaged. The High Court's decision is reported as *Mlungwana v S* [2018] ZAWCHC 3; 2018 (1) SACR 538 (WCC); [2018] 2 All SA 183 (WCC) (High Court judgment). The order of the High Court reads:

> "1. The appellants' appeal against conviction is upheld and the convictions are hereby set aside.
>
> 2. Section 12(1)(a) of the Act is hereby declared unconstitutional.
>
> 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."

[5] See section 172(2)(d) of the Constitution.

[6] The balance of this judgment accounts for the conclusion foreshadowed in paragraph 2 above. First, the general framework of the Act is canvassed to place section 12(1)(a) within its statutory context. Second, the background to this matter is explained. Third, the limitation of the right entrenched in section 17 of the Constitution by section 12(1)(a) of the Act is discussed. Fourth, the unjustifiable effect of this limitation is analysed. Finally, the issue of the just and equitable remedy is considered.

The statutory framework

[7] The object of the Act is to regulate public gatherings and demonstrations.[6] As is manifest from the preamble to the Act, this entails balancing the right to assemble freely and peacefully against the need to ensure that assemblies take proper cognisance of and do not unjustifiably infringe the rights of others.[7]

[8] Central to the Act and to this case are the definitions of a "gathering", "demonstration", and "convener" in section 1 of the Act. A demonstration is defined 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".[8] A gathering is defined 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 organisation, whether or not that party or

[6] Long title of the Act.

[7] The preamble reads:

> "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."

[8] Section 1 definition of "demonstration".

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."[9]

[9] The material difference between the two for present purposes is that a demonstration is an assembly that comprises 15 or fewer people, while a gathering is an assembly that comprises more than 15 people.

[10] In section 3, the Act requires all conveners of gatherings to give written notice of an intended gathering.[10] Written notice is not required for demonstrations,[11] and it is the duty of a convener of a gathering to give notice. Moreover, the duty is only to give written notice. The convener is not obliged to seek approval for the intended gathering.

[11] The Act provides for three types of conveners. First, there are those who, of their own accord, convene a gathering.[12] Second, there are those who are appointed as conveners under section 2(1) of the Act by organisations intending to hold a gathering.[13] Third, there are those who are deemed to be conveners under section 13(3) where their organisation has not appointed them as conveners under section 2(1). Such a person, in the absence of a section 2(1) appointment, is deemed a convener—

(a) if they have taken any part in planning or organising or making preparations for that gathering; or

[9] Section 1 definition of "gathering".

[10] Note however that section 3(1) provides that if a convener is not able to reduce a proposed notice to writing, then the responsible officer at her request shall do it for her.

[11] The only exception is if the demonstration is near certain government buildings in terms of section 7.

[12] Para (a) of the section 1 definition of "convener".

[13] Para (b) of the section 1 definition of "convener". Section 2(1)(a) imposes a general duty on an organisation intending to hold a gathering to appoint a convener and a deputy convener. After such appointment, the organisation is obliged under section 2(1)(b) to notify the responsible officer of the relevant local authority of the convener's name and address.

(b) if they have by themselves or through any other person, either verbally or in writing, invited the public or any section of the public to attend that gathering.[14]

[12] It bears mentioning that even on a cursory reading the definition of a convener, especially under section 13(3), is a broad one. This is a relevant factor when it comes to a consideration of the extent of the limitation brought about by section 12(1)(a).[15]

[13] Notice must be given to the responsible officer at a local municipality within whose jurisdiction the gathering is to take place.[16] A responsible officer is appointed by a local municipality within whose jurisdiction the protest is meant to take place.[17] The notice must be given in writing not later than seven days before the date on which the gathering is to be held,[18] and must include numerous details.[19] Notice can be given

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[14] Id.

[15] This is discussed below at [83].

[16] Section 3(1) and 3(2). If there is no functioning local authority, then notice must be given to a Magistrate within whose jurisdiction the gathering falls. See section 3(4).

[17] Section 2(4).

[18] Section 3(1). If the convener cannot give notice in writing, the responsible officer shall do so on request.

[19] Section 3(3). These details are:

> "(a) The name, address and telephone and facsimile numbers, if any, of the convener and his deputy;
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> (b) the name of the organisation 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;
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> (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;
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> (h) in the case of a gathering in the form of a procession—
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> (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;

less than seven days ahead of the protest, but a reason for the late notice must then be provided.[20] If notice is given less than 48 hours before the intended gathering, then the responsible officer has a discretion to prohibit the gathering.[21]

[14] After notice is given, the responsible officer can decide if negotiations under section 4 are necessary.[22] These negotiations, if deemed necessary, are intended to agree on the conditions of the gathering.[23] These conditions are "to be imposed in respect of the holding of the gathering so as to meet the objects of [the Act]"[24] following negotiations conducted in good faith.[25] In other words, negotiations seek to ensure that the parties agree in good faith to conditions in respect of the proposed gathering to balance the participants' right to assemble freely with any other implicated rights. To this end, the negotiations take place between the responsible officer, an authorised member of the South African Police Service (SAPS),[26] the convener, and any other interested party. If parties cannot agree on conditions, the officer can impose certain conditions unilaterally.[27]

(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."

[20] Section 3(3)(i).

[21] Section 3(2).

[22] Section 4(1). This decision is taken after consultation with an authorised member of the police.

[23] Section 4(2)(b).

[24] Section 4(2)(c).

[25] Section 4(2)(d).

[26] Section 2(2) of the Act which states that an authorised member of SAPS is a suitably qualified policeperson who is appointed to represent the police at negotiations under the Act.

[27] But these conditions can only pertain to ensure the following: that vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded; an appropriate distance between participants in the gathering and rival gatherings; access to property and workplaces; or the prevention of injury to persons or damage to property. See section 4(4)(b). Contravention of such conditions is an offence under section 12(1)(d).

[15] If no notice is given, section 3(5)(a) directs a policeperson who has received information about a gathering through other means to contact the responsible officer. If a responsible officer receives information of a proposed gathering of which no notice has been given, then they are obliged to furnish an authorised member with such information.[28] The responsible officer is then given a discretion to request the convener (if a convener is identified) to comply with the requirements of the Act, including the giving of notice.[29] The responsible officer is not empowered to prohibit the gathering on account only of a lack of notice. The responsible officer can also consult with an authorised member on whether section 4 negotiations are necessary, notwithstanding the absence of notice.[30] Presumably then, the responsible officer, if she deems it necessary, can thereafter call for the section 4 negotiations even though no notice was given.[31] This would include inviting the identified convener to negotiations so that the conditions of the gathering can be agreed on.[32]

[16] If a gathering proceeds without a formal notice, then section 12(1)(a) provides that it is a criminal offence to convene a gathering without giving the requisite notice as prescribed in the Act. It is only a convener who is criminally liable for failure to give notice of a gathering under section 12(1)(a). It is open to a convener to invoke a defence that the gathering concerned took place spontaneously.[33]

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[28] Section 3(5)(b).

[29] Section 3(5)(c). The responsible officer can also take whatever steps they deem necessary, including obtaining the assistance of the police, to identify the convener.

[30] Section 4(1) provides that:

> "If a responsible officer receives notice in terms of section 3(2), *or other information regarding a proposed gathering comes to his attention*, he shall forthwith consult with the authorised member regarding the necessity for negotiations on any aspect of the conduct of, or any condition with regard to, the proposed gathering." (Emphasis added.)

[31] Section 4(2)(b).

[32] It is unclear whether the convener could still be guilty of the offence in section 12(1)(a) if the convener at this stage agrees to participate in the negotiations and the gathering goes ahead under those conditions. But it is unnecessary for this Court to make a definitive determination in this regard.

[33] Section 12(2).

[17] Importantly, all parties agreed that it does not constitute an offence to attend a gathering for which no notice has been given.[34] But it is an offence to attend a prohibited gathering.[35] However, it must be emphasised that an unnotified gathering is not necessarily a prohibited gathering. A gathering can be prohibited if notice is given less than 48 hours before the gathering is meant to commence,[36] or if it is prohibited under section 5.[37] Section 5(1) provides that—

> "[w]hen credible information on oath is brought to the attention of a responsible officer that there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat, he shall forthwith meet or, if time does not allow it, consult with the convener and the authorised member, if possible, and any other person with whom, he believes, he should meet or consult, including the representatives of any police community consultative forum in order to consider the prohibition of the gathering"

[18] Only after this meeting (if possible), and if the responsible officer is convinced on "reasonable grounds" that no amendment to the notice given as contemplated in section 4(2)(b) or no unilateral imposition of conditions as contemplated in section 4(4)(b) would prevent a threat to the rights of others from the proposed gathering, may the responsible officer prohibit the gathering.[38] Nowhere does the Act expressly provide that the mere failure to give notice is a ground to prohibit the gathering and render participation in it an offence under section 12(1)(e). Significantly, section 12(1)(e) requires prohibition to have occurred "in terms of this Act" for participation in the prohibited gathering to be unlawful. Therefore, attending an

[34] A Full High Court has found so in *Tsoaeli v S* 2018 (1) SACR 42 (FB) at para 42.

[35] Section 12(1)(e).

[36] Section 3(2).

[37] It can also be prohibited under section 7, but section 7 is irrelevant for the purposes of this case.

[38] Section 5(2). The decision to prohibit a gathering or impose conditions on a gathering can be taken on review to a Magistrates' Court by the convener of the gathering. See section 6(1).

unnotified gathering is not on its own an offence under section 12(1)(a), because nowhere does the Act prohibit per se an unnotified gathering.

[19] Any ambiguity on this score is vitiated if section 12(1)(e) is interpreted to promote the spirit, purport and objects of the Bill of Rights.[39] The nature and impact of the limitation imposed by section 12(1)(a) on the right to freedom of assembly would proliferate if a failure to give notice also entailed criminalisation under section 12(1)(e) of participation in the unnotified gathering. This interpretation would also run contrary to a well-settled canon of statutory construction that criminal provisions are to be interpreted narrowly and in favour of an accused's liberty.[40] To do otherwise, as *Tsoaeli* rightly held, would offend against the principle of legality in the context of criminal law.[41] Quite clearly then, the failure to give notice would not without more lead to a gathering being liable to be prohibited, and so attending an unnotified gathering ought not to be an offence under section 12(1)(e). Rather, the failure to give notice only results in criminal liability for the convener.

[20] Section 8 of the Act regulates how persons attending a gathering are to conduct themselves regardless of notice.[42] Acting contrary to these provisions is an offence.[43] Section 9 then stipulates the powers police have in relation to gatherings and demonstrations. These powers are wide and exist regardless of whether the gathering was notified.[44] These powers include—

(a) where notice is given, preventing people from deviating from the terms of the notice;[45]

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[39] As courts are required to do under section 39(2) of the Constitution.

[40] *S v Weinberg* 1979 (3) SA 89 (A); All SA 137 (A) at 105C–E; *R v Sachs* 1953 (1) SA 392 (A) at 399H; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 552

[41] *Tsoaeli* above n 34 at para 35.

[42] The section regulates, among other things, the appointment of marshals at the gathering, the prohibition of possessing dangerous weapons at the gathering, and the prohibition of hate speech or incitement at the gathering.

[43] Section 12(1)(c).

[44] Section 9(1) provides that "[i]f a gathering or demonstration is to take place, *whether or not in compliance with the provisions of this Act*, a member of the Police" may invoke various powers.

[45] Section 9(1)(b).

(b) where notice is not given, restricting the gathering to a place or guiding the participants' route to ensure minimal traffic impediments, appropriate distances between rival gatherings, access to property or workplaces, and the prevention of injury or damage to property;[46] and

(c) taking such steps as are necessary to protect persons from injury (or property from damage), whether or not they are participating in the gathering.[47]

[21] Disobeying any lawful instruction of a policeperson, including an instruction to disperse,[48] is an offence.[49]

[22] A convener can be held liable for any riot damage caused by a gathering or demonstration. This liability is civil in nature.[50] The convener is presumed to have acted unreasonably if riot damage occurs as a result of the gathering, but this presumption is rebuttable. If the convener can show – in essence – that the riot damage was not reasonably preventable and foreseen, then they can avoid liability.[51]

[23] The Act also does not preclude the enforcement of other common law and legislative provisions that assist in reducing harm to person and property or proscribe the commission of criminal offences, including the offence of malicious damage to property and public violence, and the applicable by-laws regulating the use of roads and public places.[52]

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[46] Section 9(1)(c).

[47] Section 9(1)(f).

[48] Police can only order a gathering to disperse, regardless of notice being given, in circumscribed instances. Section 9(2)(a) requires a member of SAPS of or above the rank of warrant officer to have reasonable grounds to believe that danger to persons and property, as a result of the gathering or demonstration, cannot be averted by the steps referred to in subsection (1) (which range from negotiation to diversion) before they can order a crowd to disperse.

[49] Section 12(1)(j).

[50] Section 11(1).

[51] Section 11(2).

[52] Sections 9(3), 11(4) and 13(1).

[24] Before moving on to the factual background of this matter, it is necessary to delineate the ambit of the dispute between the parties to promote a better understanding of what this case is not about. First, the definitions of a "gathering" and a "demonstration" are not in issue. Nor is the number of persons required to transform a demonstration into a gathering. Second, the importance of giving notice when convening a gathering is not contested. And neither are the other requirements that must be complied with once written notice has been given to a responsible officer in a local municipality. This judgment has no bearing on the constitutionality or otherwise of these aspects of the Act. What lies at the heart of the dispute between the protagonists is the criminalisation of a failure by any person who convenes a gathering to give written notice or adequate notice as required in terms of section 3 of the Act.

Parties

[25] The applicants are members of the Social Justice Coalition (SJC), which is a membership-based organisation operating within the City of Cape Town and its environs, including Khayelitsha. It was established as a lobby group for provision of municipal services to areas where its members live, and in particular to promote the provision of clean and safe sanitation. SJC has engaged with the City of Cape Town on numerous occasions since 2011 clamouring for the provision of sanitation facilities for the residents of Khayelitsha.

[26] The respondents are the State and the Minister of Police (Minister). The State prosecuted the applicants in the Magistrates' Court on a charge of contravening section 12(1)(a) of the Act. Both the State and the Minister opposed the appeal and the relief sought by the applicants in the High Court to have section 12(1)(a) declared constitutionally invalid. They persist with their opposition in this Court.

[27] Three entities were admitted as amici curiae (friends of the court) initially in the High Court, and later in this Court. They are Equal Education, Right2Know

Campaign,[53] and the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association (Special Rapporteur). Equal Education is a membership-based democratic movement of learners, parents, and community members. Its object is to promote quality education and equality in South African schools "through policy analysis, advocacy, and activism". Right2Know is a non-profit organisation that promotes freedom of expression, access to information, freedom of assembly and the right to protest. Its object is to advocate for the free flow of information necessary for the exercise of human rights, and to ensure that security legislation and the conduct of security agencies, including the policing of gatherings, is consistent with the Constitution. The Special Rapporteur was established as part of the special procedures mechanism of the United Nations Human Rights Council. The incumbent is a human rights expert with the mandate to report and to advise on the rights to freedom and peaceful assembly from a thematic or country-specific perspective.

[28] Broadly, all three amici curiae supported the applicants' constitutional challenge.

Background

The protest

[29] This case is a sequel to the protest that took place on 11 September 2013. Fifteen members of the SJC travelled from Khayelitsha to the Civic Centre[54] in Cape Town pursuant to a decision taken to organise a gathering at the Civic Centre. They chained themselves together in groups of five persons and walked to the staircase leading to one of the entrances to the Civic Centre. There, they chained themselves to the railings. Although the SJC decided to limit the number of participants in the assembly to 15 persons – in order not to render the gathering notifiable – the applicants were cognisant of the existence of a risk that some other members of SJC might join the gathering.

[53] Open Society was admitted as amicus curiae in the High Court. Right2Know were admitted in their stead before this Court.

[54] The Civic Centre houses the offices of the City of Cape Town.

Nevertheless, this foresight and appreciation that this might render them liable for arrest did not deter them. They were joined by other people.

[30] Despite the increased numbers, the gathering was peaceful. Members of the public were not denied ingress to or egress from the Civic Centre. The police who were summoned to the Civic Centre requested the protesters to disperse. When the protesters failed to heed the police's call to disperse, they were arrested without resistance.

[31] Subsequently, 21 of the protesters were charged in the Magistrates' Court with contravening section 12(1)(a) of the Act, and alternatively attending a prohibited gathering in terms of the Act in contravention of section 12(1)(e). At the trial, the protesters pleaded not guilty to both the main and alternative charges. In their plea explanation indicating the basis of their defence in terms of section 115 of the Criminal Procedure Act,[55] the applicants relied on two defences. First, that section 12(1)(e) of the Act does not make it an offence to attend a gathering merely because no prior written notice was given. Second, they impugned the constitutional validity of section 12(1)(a) of the Act to the extent that it renders the convening of a gathering without prior written notice a criminal offence. At the conclusion of the trial, all of the accused persons were acquitted on the alternative count but ten of those who were found to have been conveners were convicted on the main count.

[32] During the sentencing proceedings, the trial Magistrate observed that the applicants "cause[d] no harm to anyone. There were no threats [made]. There was no damage to any property". And that during the protest "emotions were running high". In dealing with the third element of the triad[56] – the interests of the community – the trial Magistrate tellingly observed:

> "[The applicants] were at all times . . . respectful and peaceful. . . . The Court certainly takes into account that it is the very community that they wish to help, hence the reason

[55] 51 of 1977.

[56] See *S v Zinn* 1969 (2) SA 537 (AD) at 540G-H.

> for their protest action, the various letters and engagements with the City and the mayor."

[33] Having regard to the cumulative effect of these factors, the applicants were cautioned and discharged. Subsequently, the trial Magistrate granted the applicants leave to appeal to the High Court solely for the purpose of enabling the applicants to pursue their constitutional challenge to section 12(1)(a) as it was not competent for the Magistrates' Court to adjudicate on this challenge.

The High Court

[34] In the High Court, the applicants predicated their case squarely on their challenge to section 12(1)(a). They asserted that section 12(1)(a) constitutes a limitation of the right to freedom of assembly guaranteed in section 17 of the Constitution. In addition, they argued that the section unjustifiably limits the right to assemble peacefully and unarmed. This was because section 12(1)(a) dissuades those minded to convene gatherings from venting their frustrations or expressing their views because of the chilling effect this section has on the exercise of the right to assemble.

[35] Unsurprisingly, the State and the Minister opposed the appeal and resisted the constitutional challenge. In essence, they argued that section 12(1)(a) does not constitute a limitation of the right entrenched in section 17 of the Constitution. Alternatively, they submitted that if it does, that limitation is reasonable and justifiable under section 36 of the Constitution. In particular, first, the Minister contended that the requirement to give notice serves a legitimate purpose by ensuring that there is proper planning to facilitate the very exercise of the right to assemble. Second, the giving of notice does not impose an onerous duty on the convener of gatherings. Third, in any event section 12(2) of the Act provides for a tenable defence of spontaneity to a charge under section 12(1)(a). Fourth, the criminalisation of the failure to give prior written notice or adequate notice serves as an effective deterrent to the convening of gatherings without notice. This, it was contended, assumes even greater significance when viewed

against the real risk that unnotified gatherings are more likely to be violent, thereby exposing members of the public and property to serious danger.

[36] The High Court held that section 12(1)(a) constitutes a limitation of the section 17 constitutional right. It reasoned that this was because of the "chilling" and deterring effect criminalisation had on the exercise of the right to assemble.[57] The High Court then concluded that this limitation was unjustifiable under section 36 of the Constitution. This was because of the importance of the right,[58] the severity of the limitation occasioned by criminal sanction,[59] and the existence of alternative means to incentivise the giving of notice.[60] These factors, the High Court concluded, outweighed the legitimacy of section 12(1)(a)'s purpose, which is to ensure that the right in section 17 is exercised peacefully and with due regard to others.[61]

[37] It bears emphasising that the applicants did not appeal the trial court's decision on the grounds that their demonstration turned into a gathering spontaneously, and therefore that they should have been acquitted based on section 12(2). Even before this Court, the applicants expressly disavowed any reliance on section 12(2), and only persisted with their constitutional challenge. Before this Court, the respondents, albeit tepidly, submitted that the applicants should be acquitted solely on the basis that their gathering was spontaneous, and that the determination of the constitutionality of section 12(1)(a) consequently does not arise.

[38] There is no tenable reason to decide this matter on the narrow basis advanced by the respondents. This Court has had the benefit of hearing full argument on the constitutionality of section 12(1)(a) from both sides, including the amici curiae. All of the parties accepted that it was the central issue in this matter. This is, however, not to

[57] High Court judgment above n 4 at para 42.

[58] Id at paras 46-7.

[59] Id at para 82.

[60] Id at para 93.

[61] Id at para 56.

say that the defence of spontaneity is irrelevant to the determination of this case. What it means is that the defence of spontaneity is but one of the relevant factors considered when assessing the extent of the limitation imposed by section 12(1)(a).

[39] There are also public policy considerations militating against deciding this matter on such narrow grounds. In *Van der Merwe*, this Court held, albeit in a different context, that even in the absence of a party with proper standing public policy considerations may well dictate that a dispute about legislation which has been declared unconstitutional should be determined to "save disputed provisions from the limbo of indeterminate constitutionality". [62] In *Director of Public Prosecutions*, this Court elaborated on this theme and explained that this was necessary to achieve the "constitutional purpose of avoiding disruptive legal uncertainty". [63] In my judgement, these considerations apply with equal force in a case such as the present where section 12(1)(a) of the Act targets persons who, in the exercise of their constitutional rights, convene gatherings without notice by criminalising non-compliance with its provisions.

In this Court

[40] As already indicated, whilst the applicants and the amici curiae moved for the confirmation of the declaration of constitutional invalidity made by the High Court, the respondents opposed it. The respondents also sought leave to appeal against the declaration.

[41] I now turn to consider whether the High Court's declaration of invalidity should be confirmed. This depends on whether the right in section 17 of the Constitution is limited, and if so, whether that limitation is justified.

[62] *Van der Merwe v Road Accident Fund* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 21.

[63] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 61.

The limitation of the right in section 17

[42] Determining whether a right is limited entails "examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b)".[64]

[43] Section 17 guarantees the right to assemble peacefully and unarmed. The content and scope of this right must be interpreted generously.[65] But its meaning is clear and unambiguous. Everyone has the right to assemble, demonstrate, picket, and present petitions. The only internal qualifier is that anyone exercising this right must do so peacefully and unarmed.[66] "Everyone" in section 17 must be interpreted to include every person or group of persons—young or old, poor or rich, educated or illiterate, powerful or voiceless. Whatever their station in life, everyone is entitled to exercise the right in section 17 to express their frustrations, aspirations, or demands. Anything that would prevent unarmed persons from assembling peacefully would thus limit the right in section 17.

[44] As already indicated, the applicants and the amici curiae contend that section 12(1)(a) constitutes a limitation of the right to assemble, demonstrate, picket, or present petitions peacefully and unarmed. The argument, in a nutshell, is that the right is limited because section 12(1)(a) deters – on pain of a criminal sanction – the exercise of the section 17 right.

[45] The respondents' counter is that section 12(1)(a) amounts to a mere regulation of the right in section 17. They rely on a dictum by this Court in *Garvas* that "[t]he mere legislative regulation of gatherings to facilitate the enjoyment of the right to

[64] *S v Walters, In re: Ex parte Minister of Safety and Security* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) (*Walters*) at para 26.

[65] *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at paras 52-3. This accords with the general approach in South African constitutional law jurisprudence to interpret the scope of rights broadly. See *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 100.

[66] *Garvas* id at para 52.

assemble peacefully and unarmed, demonstrate, picket and petition may not in itself be a limitation [of the right in section 17]".[67]

[46] The respondents' argument is unsustainable. Section 12(1)(a) goes beyond mere regulation. In *Garvas*, this Court considered whether section 11(1) and (2) of the Act – which provides for the civil liability of a convener for riot damage – constituted a limitation of section 17. This Court held that "mere regulation" would not necessarily amount to a limitation of the section 17 right. But the increased cost of organising protest action and the deterrent effect of the civil liability did amount to a limitation.[68] Thus, this Court found that deterring the exercise of the right in section 17 limits that right. The reason is obvious. Deterrence, by its very nature, inhibits the exercise of the right in section 17. Deterrence means that the right in question cannot always be asserted, but will be discouraged from being exercised in certain instances.

[47] In this matter, the criminal sanction in section 12(1)(a) deters the exercise of the right in section 17. The respondents not only admit this, but invoke the self-same deterrent effect to explain section 12(1)(a)'s purpose and justify its provisions.[69] The possibility of a criminal sanction prevents, discourages, and inhibits freedom of assembly, even if only temporarily. In this case, an assembly of 16 like-minded people cannot just be convened in a public space. The convener is obliged to give prior notice to avoid criminal liability. This constitutes a limitation of the right to assemble freely, peacefully, and unarmed. And this limitation not only applies to conveners, but also to all those wanting to participate in an assembly. If a convener is deterred from organising a gathering, then in the ordinary course (save for the rare spontaneous gathering) a gathering will not occur.

[48] This conclusion accords with the findings of several international legal bodies to the effect that criminalising the failure to give notice of an intended assembly limits the

[67] Id at para 55.

[68] Id at paras 57 and 59.

[69] This is considered in more detail below from [74].

right to freedom of assembly.[70] The United Nations Human Rights Committee's (Committee) decision in *Kivenmaa*[71] demonstrates that such criminalisation limits the right in Article 21 of the International Covenant on Civil and Political Rights (ICCPR).[72] Article 21 of the ICCPR provides:

> "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 security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

[49] In that matter, the Finnish government arrested the complainant for convening a public gathering without notice to protest against a visiting foreign Head of State. When assessing the impact this had on the right in article 21, the Committee held that—

> "a 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 ICCPR. . . . [T]he Committee notes that any restrictions upon the right to assemble must fall within the limitation provisions of article 21. 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 and freedoms of others. Consequently, the application of

[70] It is trite that international law must be considered when interpreting the Bill of Rights, including (albeit with less weight) non-binding international law. See section 39(1)(b) of the Constitution; *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 178 fn 28; *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 26; and *Makwanyane* above n 65 at paras 34-5.

[71] *Kivenmaa v Finland* Communication No. 412/1990 UN Doc CCPR/C/50/D/412/1990 (1994) at para 9.2. The United Nations Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) by its State parties. The Committee can also consider inter-state complaints and examine individual complaints with regard to alleged violations of the ICCPR by State parties. Individual complaints can only be considered if a State party has ratified the First Optional Protocol to the ICCPR, as is the case with South Africa. The Committee's decisions are deemed "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." See article 38(1)(d) of the Statute of the International Court of Justice and the Committee's *General comment no 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, UN Doc CCPR/C/GC/33.

[72] South Africa has ratified the ICCPR. See *Kaunda v President of the Republic of South Africa* [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) at para 158.

> Finnish legislation on demonstrations to such a gathering cannot be considered as an application of a *restriction* permitted by article 21 of the ICCPR."[73]

[50] Quite clearly therefore the Committee considered the notice requirement to amount to a restriction of the right in article 21, and that the reason for the limitation needed to fall within one of the purposes mentioned in article 21. In more recent decisions, the Committee has found that requiring conveners to conclude contracts with city services for the maintenance of security, medical assistance and cleaning for gatherings as a precondition for authorisation limits the right in article 21.[74] It has also held that the imposition of an administrative fine for failure to secure authorisation for a gathering is a limitation of the right in article 21.[75] Its approach to the scope of the right to assemble peacefully is thus a broad one, with the primary focus being the justification of the restriction on the right.[76]

[51] Similarly, regarding the right to freedom of assembly under the European Convention of Human Rights (ECHR),[77] the Grand Chamber of the European Court of

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[73] *Kivenmaa* above n 71 at para 9.2.

[74] *Pavel Levinov v Belarus* Communication No 2082/2011 UN Doc CCPR/C/117/D/2082/2011 (2016) at para 8.3; *Zinaida Shumilina v Belarus* Communication No 2142/2012 UN Doc CCPR/C/120/D/2142/2012 (2017) at paras 6.5-6.6; *Anatoly Poplavny and Leonid Sudalenko v Belarus* Communication No 2139/2012 UN Doc CCPR/C/118/D/2139/2012 (2016) at paras 8.4-8.6; *Leonid Sudalenko v Belarus* Communication No 2016/2010 UN Doc CCPR/C/115/D/2016/2010 (2015) at paras 8.5-8.6; *Sergey Praded v Belarus* Communication No. 2029/2011 UN Doc CCPR/C/112/D/2029/2011 (2014) at paras 7.7-7.8.

[75] *Sergei Androsenko v Belarus* Communication No 2092/2011 UN Doc CCPR/C/116/D/2092/2011 (2016) at para 7.6; *Margarita Korol v Belarus* Communication No 2089/2011 UN Doc CCPR/C/117/D/2089/2011 (2016) at para 7.6; *Bakhytzhan Toregozhina v Kazakhstan* Communication No 2137/2012 UN Doc CCPR/C/112/D/2137/2012 (2014) at para 7.6.

[76] In one decision, the Committee goes so far as to say that "as the State party has imposed a procedure for organizing mass events, it has effectively established restrictions on the exercise of the rights to freedom of expression and assembly". See *Marina Statkevich and Oleg Matskevich v Belarus* Communication No 2133/2012 UN Doc CCPR/C/115/D/2133/2012 (2015) at para 9.3.

[77] The right is contained in article 11, which provides:

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

Human Rights (Grand Chamber) held that "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively".[78] The Grand Chamber went on to find that—

> "the interference [with the right in article 11(1)] does not need to amount to an outright ban, legal or de facto, but can consist in various other measures taken by the authorities. The term 'restrictions' in article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards. For instance, a prior ban can have a *chilling effect* on the persons who intend to participate in a rally and thus amount to an interference, even if the rally subsequently proceeds without hindrance on the part of the authorities. A refusal to allow an individual to travel for the purpose of attending a meeting amounts to an interference as well. So too do measures taken by the authorities during a rally, such as dispersal of the rally or the arrest of participants, and penalties imposed for having taken part in a rally."[79]

[52] A Chamber of the Court, in *Novikova*, then reiterated this finding. It observed that—

> "in order to fall within the scope of article 10 or 11 of the Convention, 'interference' with the exercise of the freedom of peaceful assembly or the freedom of expression does not need to amount to an outright ban but can consist in various other measures taken by the authorities."[80]

On the facts of that case, the applicants were expected to pay an administrative fine in terms of Russian law for failure to give notice of a demonstration. The Court found that the relevant laws limited the right in article 11, and resultantly needed to fall within one

[78] *Kudrevičius v Lithuania* [GC], no 37553/05, § 91, ECHR 2015. The Grand Chamber of the Court (which comprises 17 judges) is the appellate chamber of the Court. Its decisions trump decisions of chamber decisions (which comprise seven judges). See articles 26 and 31 of the ECHR.

[79] Id at § 100. References omitted.

[80] *Novikova v Russia*, nos 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, § 106, ECHR 2016.

of the justifications in article 11(2).[81] It reiterated that "a situation of unlawfulness, such as one arising under Russian law from the staging of a demonstration without prior notification, does not necessarily (that is, by itself) justify an *interference* with a person's right to freedom of assembly".[82]

[53] On other occasions, the Court has repeatedly held that the right in article 11 should be interpreted broadly.[83] It has even held that the chilling effect of regulations (in that case refusal to grant authorisation) constitutes a limitation of the right in article 11.[84] In one decision, the Court found with reference to the giving of notice and authorisation:

> "While rules governing public assemblies, such as the system of prior notification, are essential for the smooth conduct of public events since they allow the authorities to minimise the disruption to traffic and take other safety measures, the Court emphasises that *their enforcement cannot become an end in itself*. In particular, where irregular demonstrators do not engage in acts of violence the Court has required that the public authorities show a certain *degree of tolerance* towards peaceful gatherings.
>
> Consequently, the absence of prior authorisation and the ensuing 'unlawfulness' of the action do not give carte blanche to the authorities; *they are still restricted by the proportionality requirement of article 11*. Thus, it should be established why the demonstration was not authorised in the first place, what was the public interest at stake, and what were the risks represented by the demonstration. The methods used by the police for discouraging the protesters, containing them in a particular place and dispersing the demonstration are also an important factor in assessing the proportionality of *the interference*."[85]

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[81] Id at § 110.

[82] Id at § 163.

[83] *Chumak v Ukraine*, no 44529/09, § 36, ECHR 2018; *Lashmankin v Russia*, nos 57818/09 and 14 others, § 404, ECHR 2017; *Kasparov v Russia*, no 21613/07, § 84, ECHR 2014; *Nemtsov v Russia***,** no 1774/11, § 72, ECHR 2014; *Primov v Russia*, no 17391/06, § 116. ECHR 2014; *Taranenko v Russia*, no 19554/05, § 65, ECHR 2014; *Shwabe and M.G. v Germany*, nos 8080/08 and 8577/08, § 103, ECHR 2012; *Barraco v France*, no 31684/05, § 41, ECHR 2009; *Djavit An v Turkey*, no 20652/92, § 56, ECHR 2003.

[84] *Bączkowski v Poland***,** no 1543/06, § 67, ECHR 2007.

[85] *Primov* above n 83 at § 118-9. References omitted. This was then endorsed by the Grand Chamber in *Kudrevičius* above n 78 at § 150.

[54] I return to the meaning of the "degree of tolerance" required by the State when dealing with unlawful, yet peaceful protests below. But for now, it suffices to underscore the point that criminalising the failure to give notice for a peaceful assembly quite clearly constitutes a limitation of the right to assemble freely.

[55] In concluding this part of the limitation analysis, it is necessary to emphasise one issue of fundamental importance. It is this: what has been said on this topic must in no way be understood to imply that the right in section 17 must be exercised otherwise than peacefully and unarmed. As this Court noted in *Garvas*, it is only when those convening and participating in a gathering harbour intentions of acting violently will they forfeit their right.[86] And so long as they act within the parameters prescribed for the exercise of this important right they will be assured of constitutional protection. But not otherwise.

[56] The question to which I now turn is whether the limitation of the right in section 17 by section 12(1)(a) is justifiable.

The justification analysis

[57] The limitation of a right in the Bill of Rights needs to be justified under section 36. This justification analysis "requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment".[87] This weighing-up must give way to a "global judgment on [the] proportionality" of the limitation.[88] It is

[86] *Garvas* above n 65 at para 53.

[87] *Walters* above n 64 at para 27.

[88] *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (1) SACR 414 (CC); 2000 (5) BCLR 491 (CC) (*Manamela*) at para 32. See also *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) (*Bhulwana*) at para 18.

also well-settled that the onus is on the respondents to demonstrate that the limitation is justified.[89]

[58] Section 36 of the Constitution lists factors that bear on this proportionality assessment. These factors include—

(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.

[59] The word "including" in section 36 implies that the list is not exhaustive. Each of these factors is considered in turn.

The nature of the right in section 17

[60] The right to assemble, demonstrate, picket and present petitions is entrenched in section 17 of the Constitution. It provides:

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

[61] The indisputable value and importance of this right was underscored by this Court in *Garvas*. There, Mogoeng CJ, writing for the majority, said:

> "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

[89] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at para 34; *Moise v Greater Germiston Transitional Local Council* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) at para 19.

> 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."[90]

[62] Accordingly, section 17 provides for a solemn undertaking to citizens and non-citizens alike that everyone has a right, peacefully and unarmed, to assemble, demonstrate, picket and present petitions. The language in section 17 is unambiguous: everyone has a right to engage in any of the activities that it spells out. "Everyone" is a word of wide import. In its ordinary sense it is all-inclusive. The only internal qualifier contained in this constitutional provision is that anyone exercising this fundamental right must do so peacefully and unarmed.

[63] The observation of Jafta J in *Garvas* has special resonance in the context of this case. He said:

> "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 exert influence lies in the numbers of participants in the assembly. These rights lie at the heart of democracy."[91]

[64] It is true that barely a quarter of a century ago we emerged from an era in which a substantial majority of the citizenry was denied their inalienable right to participate in the affairs of their country. They were afforded virtually no avenue through which to express their views and aspirations. Taking to the streets to vent their frustration was the only viable avenue they had. It mattered not during the reign of the apartheid regime

[90] *Garvas* above 65 at para 61.

[91] Id at para 120.

that their gatherings were peaceful. They were ruthlessly crushed without any regard for the legitimacy of the grievances underlying their protests.

[65] South Africa's pre-constitutional era was replete with draconian legislation that, in an attempt to preserve the apartheid political order, punished people for assembling when it did not suit the State. The High Court in *Tsoaeli* recalls how Acts such as the Riotous Assemblies Act,[92] the Suppression of Communism Act[93] and the Internal Security Act[94] were used to suppress anti-apartheid assemblies. They did so by giving the State sweeping, unchecked powers to prohibit gatherings that were contrary to "public order".[95] Yet the history of supressing assembly stretches even further back. For example, section 1(12) of the Riotous Assemblies and Criminal Law Amendment Act,[96] as amended in 1930, provided:

> "Whenever the Minister is satisfied that any person is in any area promoting feelings of hostility between the European inhabitants of the Union on the one hand and any other section of the inhabitants of the Union on the other hand, he may by notice under his hand, addressed and delivered or tendered to such person prohibit him, after a period stated in such notice being not less than seven days from the date of such delivery or tender, and during a period likewise stated therein, from being in any area defined in such notice."

[66] In *Sachs*,[97] the applicants had been served with notices prohibiting them from being present in most of (what was then) the Transvaal for a period of 12 months. The reason for this notice – and the reason the applicants had been deemed by the Minister to be "promoting feelings of hostility between Europeans and Natives" – was because the applicants were alleged to have been associated with "communist" gatherings and activities. Needless to say, given the legal policy of the time, the then

[92] 17 of 1956.

[93] 44 of 1950.

[94] 74 of 1982.

[95] *Tsoaeli* above n 34 at paras 18-20.

[96] 27 of 1914.

[97] *Sachs v Minister of Justice; Diamond v Minister of Justice* 1934 AD 11.

Appellate Division unanimously dismissed the applications to review the Minister's decision to ban the applicants from the area defined.

[67] These Acts and cases are not recounted for historical nicety. As the Chief Justice held in *Garvas*:

> "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.
>
> 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.*"[98]

[68] South Africa has come a long way since *Sachs*. Towards the demise of the apartheid era, the then incumbent President appointed the Goldstone Commission to enquire into public violence and the regulation of assemblies. This Commission spawned the Act, which was an attempt to relax the constrictive regulation of assembly by the apartheid government.[99]

[69] Nowadays, progressive constitutional democracies, including our own, recognise that the right to freedom of assembly "is central to . . . constitutional

[98] *Garvas* above n 65 at paras 12-3.

[99] *Tsoaeli* above n 34 at paras 23-4.

democracy".[100] People who lack political and economic power have only protests as a tool to communicate their legitimate concerns. To take away that tool would undermine the promise in the Constitution's preamble that South Africa belongs to *all* who live in it, and not only a powerful elite. It would also frustrate a stanchion of our democracy: public participation.[101] This is all the more pertinent given the increasing rates of protest in constitutional South Africa lately.[102]

[70] Moreover, the right to freedom of assembly enables people to exercise or realise other rights. This is borne out by what this Court said in *SANDU*, where O'Regan J writing for the majority, explained this intersection between various rights afforded by the Constitution thus:

> "[F]reedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial."[103]

[71] This has been echoed by this Court and the Supreme Court of Appeal on multiple occasions; freedom of assembly is directly linked to the rights to freedom of speech,

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[100] *Garvas* above n 65 at para 61.

[101] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 115.

[102] Mbazira "Service delivery protests, struggle for rights and the failure of local democracy in South Africa and Uganda: Parallels and divergences" 2013 *SAJHR* 251 at 266; Omar "A legal analysis in context: The Regulation of Gatherings Act—a hindrance to the right to protest?" 2017 *SA Crime Quarterly* 21 at 22.

[103] *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) (*SANDU*) at para 8. O'Regan J was quoting from *Case v Minister of Safety and Security, Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 608 (CC) at para 27.

freedom of religion, dignity, freedom of association, and to stand or vote for public office.[104] A most recent example of the intersection between the right in section 17 and other rights is *Hotz*.[105] In that case this Court acknowledged that protest (albeit in that case a violent protest) was employed by students to assert their right to further education.[106] In this case, the applicants relied on their right to assemble peacefully to demonstrate that their other rights regarding access to sanitation were not being fulfilled by the City of Cape Town. To limit the right to freedom of assembly therefore poses a real risk of this proliferating into indirect limitations of other rights.

[72] The first amicus curiae, Equal Education, drew this Court's attention to how the right to freedom of assembly has distinct importance for children. Courts are required to consider the effect their orders will have on the interests and rights of children.[107] Ordinarily, the paramountcy of the best interests of children as entrenched in section 28(2) of the Constitution would constitute a distinct cause of action for challenging legislation.[108] But in the context of this case, which is primarily pegged on the right in section 17, the impact of section 12(1)(a) on children should form an integral part and focal point of the justification analysis. In particular, it must be emphasised that for children, who cannot vote, assembling, demonstrating, and picketing are integral to their involvement in the political process. By virtue of their unique station in life the importance of the section 17 right has special significance for children who have no other realistic means of expressing their frustrations. Indeed, this is internationally acknowledged in instruments such as the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child

[104] *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) (*African National Congress*) at paras 124-5; *Hotz v University of Cape Town* [2016] ZASCA 159; 2017 (2) SA 485 (SCA) at para 62.

[105] *Hotz v University of Cape Town* [2017] ZACC 10; 2018 (1) SA 369 (CC); 2017 (7) BCLR 815 (CC).

[106] Id at para 1.

[107] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 74.

[108] See *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) (*TBC*) at para 69.

which specifically protect the child's right to express its views and to participate in public life.[109]

[73] As is manifest from the foregoing discussion on international law, South Africa is not alone in entrenching and placing a high premium on the right to freedom of assembly. The right is widely regarded as a cornerstone to any democratic society.

The importance of the purpose of the limitation

[74] The respondents submitted that the purpose of the limitation is ultimately to ensure peaceful protests. They explain that notice allows for proper planning for the deployment of police, and that the deployment of police in turn reduces the risk of disruptive protests. Not giving notice or giving inadequate notice, it was argued, undermines the police's ability for effective monitoring of gatherings to avert possible violence.

[75] Salutary though this purpose may be, its importance is undercut by at least four fundamental considerations. First, the respondents invoke, at least in part, a lack of resources to justify the need for section 12(1)(a). Their argument is that the police lack resources to such an extent that the risk of unnotified gatherings must be mitigated through one of the harshest possible ways—criminalisation and punishment.

[76] Ordinarily,[110] a lack of resources or an increase in costs on its own cannot justify a limitation of a constitutional right.[111] The reason for attaching less weight to a lack of resources as a purpose for limiting rights is beyond question. Respecting, promoting,

[109] Both instruments guarantee the right of the child to protest. Additionally, article 12(1) of the United Nations Convention on the Rights of the Child provides:

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

[110] There may of course be exceptions, particularly in the context of socio-economic rights.

[111] *Lawyers for Human Rights v Minister of Home Affairs* [2017] ZACC 22; 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC) at para 61.

and fulfilling human rights comes at a cost, and that cost is the price the Constitution mandates the State to bear. Albeit in a different context, this Court in *Tsebe* held:

> "We as a nation have chosen to walk the path of the advancement of human rights. . . . This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid."[112]

[77] This is especially so when, as in this case, the State has not provided evidence demonstrating exactly to what extent costs will increase if section 12(1)(a) is declared unconstitutional.[113] This Court is left none the wiser as to what would happen if the incentive for giving notice were removed entirely, or if other ways of incentivising notice were adopted by the Legislature.[114] There was a paucity of information on the relation between the incentive to give notice, the actual giving of notice, the frequency of violence at unnotified protests, and the attendant costs incurred by SAPS should the incentivising mechanism of section 12(1)(a) with its penal condemnation be removed from the Act. This significantly deflates the importance of the purpose behind section 12(1)(a).

[78] Second, there is a tenuous link between the criminalisation and the achievement of section 12(1)(a)'s ultimate purpose of preventing violent protests. This is discussed fully in paragraph 93 below. In this regard, the State conceded that the section may be overbroad in criminalising a lack of notice at peaceful protests.

[79] Third, section 12(1)(a) apparently seeks to reduce what may already be high levels of criminal activity during protests. This Court cannot ignore the levels of

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[112] *Minister of Home Affairs v Tsebe, Minister of Justice and Constitutional Development v Tsebe* [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC) (*Tsebe*) at para 67.

[113] *Khosa v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 62.

[114] These are considered below from [95].

violence witnessed in recent protests in South Africa.[115] Reducing these crime levels, which the respondents argued is what section 12(1)(a) seeks to achieve, is undoubtedly a legitimate aim. Violent protests implicate the rights of those in the vicinity of the gathering, the police attempting to manage the protest, and the participants themselves. Yet almost two decades ago this Court warned that—

> "[a]lthough the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of section 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights."[116]

[80] This warning resounds against a backdrop of increased incidents at protests, often where there are high numbers of civilian casualties and rights' violations.[117] Nevertheless, it cannot be right for the State, in responding to this regrettable phenomenon, to employ heavy-handed countermeasures that unduly limit the right in section 17 and other rights. The critical question always is how best to strike a balance between the exercise of the entrenched rights and ensuring a safe and secure environment.

[81] Finally, it also means that the respondents have not argued that the failure to give notice is indefensible in a constitutional democracy and should therefore be punished for that reason. The respondents submitted that failure to give notice increases the risk of violence, and so notice should be incentivised. They did not attempt to argue that this escalation of risk is culpable to the extent that it should be criminalised. To do so would have been difficult because, as explained above, there was a paucity of information about the relation between failure to give notice and the increased risk of

[115] See Mbazira and Omar above n 102. See also Marks and Bruce "Groundhog Day? Public order policing twenty years into democracy" 2014 *SACJ* 346 at 351.

[116] *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 68.

[117] For a fuller account of protest incidents, see Marks and Bruce above n 115.

violence. Instead, crime and punishment are resorted to solely for their deterrent effect, so that a legitimate procedural requirement (the giving of notice) is complied with.

The nature and extent of the limitation

[82] It is by now well-settled that the more severe a limitation is, the more powerful the justification for that limitation needs to be.[118] The severity of a limitation is established by considering the impact the limitation has on the right in question, the social position of those affected by the limitation,[119] and whether the limitation is mitigated at all.[120]

[83] The limitation in issue in this application is severe for four reasons. The first reason is that the definitions of gatherings and conveners are broad.[121] These broad definitions expand the scope of criminal liability for contravening section 12(1)(a) in two respects.

[84] Firstly, convening innocuous assemblies without notice will be a crime because of how broadly a gathering is defined. Convening any assembly of more than 15 people in a public space to discuss "principles, policies, actions or failure to act of any government, political party, or political organisation" without notice is a crime. This could extend, as Woolman notes, to "every convenor of a church convocation in a public park—during which issues of moment may be debated and the considered opinion of the community canvassed".[122]

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[118] *Manamela* above n 88 at para 49.

[119] *Sarrahwitz v Maritz N.O.* [2015] ZACC 14; 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC) at paras 46 and 63; *Jaftha v Schoeman; Van Rooyen v Stoltz* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at paras 39 and 43; *Manamela* above n 88 at para 44; *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at paras 8, 66 and 67.

[120] For example, in *Metcash Trading Ltd v Commissioner for the South African Revenue Service* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) at paras 38, 51 and 58, this Court held that the temporary nature of the limitation in a provision in the Value Added Tax Act 89 of 1991 on the right to access courts mitigated the severity of the limitation.

[121] See above at paras 8 and 11 for these definitions.

[122] Woolman "Assembly" in Woolman and Bishop *Constitutional Law of South Africa* 2 ed (Juta & Co, Cape Town 2003) at 23 fn 81.

[85] This breadth and, by all accounts, legislative overreach, point to how section 12(1)(a) results in criminalisation without regard to the effect of the protest on public order. This exacerbates the severity of the limitation. Multiple international legal bodies have condemned the categorical criminalisation of the failure to comply with notice requirements. Instead, the apparent standard required under international law is that every infringement of the right to freedom of assembly must be linked *on the facts* to a legitimate purpose.[123] Thus, restrictions that are blanket in nature – that criminalise gatherings "as an end in itself" – invariably fall foul of being legitimate.[124] Such restrictions will encroach on the right without linking the restriction to a legitimate purpose in every instance of encroachment. To avoid this, restrictions need to be context and fact-sensitive. That section 12(1)(a) does not do so speaks to its unconstitutionality.

[86] Secondly, where a convener is not appointed under section 2, anyone who "has taken *any* part in planning or organising or making preparations for that gathering", however marginal their participation might be, could be criminally liable.[125] The same applies to anyone who by themselves "or through any other person, either verbally or in writing, invited the public or any section of the public to attend that gathering".[126] The reach of criminal liability under section 12(1)(a) is thus exceedingly broad, which aggravates the extent of the limitation of section 17.

[87] The second reason why section 12(1)(a) imposes a severe limitation is that criminalisation has a "calamitous effect" on those caught within its wide net.[127] The

[123] *Kivenmaa* above n 71 at § 9.2; *Praded v Belarus* above n 74 at para 7.8; *Malawi African Association v Mauritania* Communication nos 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98 ACHPR (11 May 2000) at para 111; African Commission on Human and Peoples' Rights Report of the Study Group on Freedom of Association and Assembly in Africa (2014) at 62 para 10; *Oya Ataman v Turkey*, no 74552/01, § 42, ECHR 2006; *Akgol and Gol v Turkey* nos 28495/06 and 28516/06, § 43, ECHR 2011; *Novikova* above n 80 at § 136.

[124] *Primov* above n 83 at § 118.

[125] Section 13(3)(a).

[126] Section 13(3)(b).

[127] *African National Congress* above n 104 at para 129.

possibility of arrest and its aftermath, even without conviction, is a real "spectre" for those seeking to exercise their section 17 right.[128] If convicted, those concerned face punishment, moral stigma,[129] and a criminal record for at least ten years. All of these deleterious consequences of criminalisation severely discourage – and thus limit – the exercise of the section 17 right.

[88] Third, there is a widespread chilling effect that extends beyond those who convene assemblies without notice. A criminal sanction deters others from acting similarly to a convicted criminal. So people may be deterred from convening a gathering and prospective attendees might be dissuaded lest they too be deemed to have convened the gathering without notice.

[89] Finally, the limitation does not distinguish between adult and minor conveners. This means that children – who may not even know about the notice requirements in the Act or have the resources to adhere to the notice requirement – are indiscriminately held criminally liable if they fail to give notice before convening a gathering. This Court has acknowledged how exposing children to the criminal justice system – even if diverted under the Child Justice Act[130] – is traumatic and must be a measure of last resort.[131] To expose children to criminal liability, as section 12(1)(a) does, therefore severely exacerbates the extent of the limitation. Accordingly, to subject children to the full rigour of the penal sanction for which section 12(1)(a) provides, given their vulnerability and lack of self-restraint in comparison to adults, cannot be justified on any rational basis.

[128] *Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at para 40.

[129] *TBC* above n 108 at para 56.

[130] 75 of 2008.

[131] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at fn 20; *Mpofu v Minister for Justice and Constitutional Development* [2013] ZACC 15; 2013 (2) SACR 407 (CC); 2013 (9) BCLR 1072 (CC) at para 1; *TBC* above n 108 at para 74.

[90] The respondents argued that the defence afforded in section 12(2) and the ease of giving notice mitigate the severity of the limitation. True, the severity of the limitation is mitigated by the defence of spontaneity and the relative ease of giving notice. But the viability of this mitigation must not be exaggerated. First, the defence of spontaneity will be unavailable to most conveners, because convening entails an element of planning. It will only avail a limited class of conveners who arranged a demonstration, when that demonstration turned into a gathering without any reasonable foresight on their part. In any event, it will not be available to people who planned a peaceful, unarmed gathering without prior notice. Such conveners' section 17 right will still be severely limited. In a sense therefore, the defence of spontaneity is more illusory than real.

[91] Second, section 3(2), by default, requires notice to be given a week in advance. Section 3(3) requires a long list of details to be provided in the notice.[132] For a notice to be adequate would thus require considerable effort on the part of the convener, first to familiarise herself with the provisions of the Act, and to satisfy the requirements of section 3. And even if they give notice, if their notice is inadequate, then the convener is still criminally liable under section 12(1)(a). The fact that on conviction, the sentencing court may take the attempt to give adequate notice as a strong mitigating factor warranting the most lenient sentence available does not detract from the fact that the convener will have to live with a criminal record and its attendant dire consequences.

The relation between the limitation and the purpose

[92] This factor entails assessing whether the limiting means employed are rationally related to, or reasonably capable of achieving the purpose of the limitation.[133]

[93] As explained above, the respondents argued that the ultimate purpose behind section 12(1)(a) is to ensure police presence in sufficient numbers to manage the

[132] These are reproduced above at n 19.

[133] *Bhulwana* above n 88 at paras 20, 22 and 23.

gathering and prevent violence. But the link between the criminalisation of not giving notice and preventing violent protests through police presence is not a "tight fit".[134] Someone could be criminalised for failing to give notice, and yet police presence to prevent violence at the gathering was not necessary; sometimes notice may not even be required but police presence to prevent violence will be. This is because the requirement to give notice turns on there being more than 15 people; but a disruptive protest does not turn on the number 15. There appears to be no intrinsic magic in the number 15, but this is an issue that need not detain us in the context of this case.[135] This is not to say that there is a problem with requiring a prior notice for a gathering of more than 15 people. It is more to say that the limitation in question (the criminalisation of a failure to give notice) is neither sufficient nor necessary for achieving the ultimate purpose of that limitation (peaceful protests through police presence).

[94] As to section 12(1)(a)'s more immediate purpose – incentivising the giving of notice through the threat of punishment – there is no doubt that criminalising the failure to give notice incentivises the giving of notice to some extent.[136] But criminalisation is not necessary to incentivise the giving of notice. It is to this latter factor that I now turn.

Less restrictive means

[95] A limiting means is unlikely to be proportional if less restrictive means could be used to achieve the same purpose.[137] The existence of less restrictive means does not necessarily render a provision unconstitutional, but it is an important consideration to be weighed up in the proportionality analysis.[138]

[134] Contrast *Garvas* above n 65 at para 81.

[135] As I explained at [24], the applicants have not challenged the number 15 in the definition of a gathering.

[136] This Court has acknowledged that criminalisation has a nominal deterrent effect. See *TBC* above n 108 at para 88.

[137] Id at para 95.

[138] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 49.

[96] The applicants and amici curiae identified various less restrictive means to incentivise the giving of notice under the Act. These are—

(a) notice assures the conveners that the police cannot restrict the protest under section 9(1)(c);

(b) civil liability for riot damage under section 11 that follows from a failure to take reasonable steps to prevent the damage (which includes giving notice);

(c) existing common law and statutory crimes regarding public disruption and violence;

(d) enhanced civil liability for conveners who fail to give notice;

(e) administrative fines; and

(f) amending the definition of gathering such that notice is only required when police presence will be necessary.

[97] The respondents advance two responses to these less restrictive means. First, that none of these place criminal liability at the foot of the convener for failing to give notice. It may be true that there is no other way of punishing a convener for failing to give notice other than criminalising such a failure. But this was not the mainstay of the respondents' case. As explained above, the argument was not that failure to give notice should be criminalised regardless of whether it deters the failure to give notice. Instead, the argument is that the purpose behind section 12(1)(a) is to criminalise failure to give notice precisely because it incentivises the giving of notice. Thus to argue that no other means can punish the convener is to change the purpose of section 12(1)(a) to a purpose that was not substantiated on the papers before us. No argument was made as to why failure to give notice should be criminalised independently of encouraging conveners to give notice.

[98] In any event, the argument loses sight of how conveners who form a common purpose with or are accomplices to crimes committed in a protest would also incur criminal liability.

[99] The respondents' second response is that the applicants have failed to provide evidence of how these less restrictive means incentivise notice as effectively as the criminal sanction does. This argument is misplaced. The onus is on the respondents to prove that the limitation created by section 12(1)(a) is justified.[139] In that event, there is no reason to think why the less restrictive incentives identified by the applicants and amici will not work just as well as criminalisation, without the far-reaching consequences flowing from a conviction.

[100] On the contrary, the applicants and amici curiae have referred the Court to foreign jurisprudence and law where these less restrictive means – particularly administrative fines – are effectively employed.[140] For present purposes, I find it unnecessary to consider the question whether administrative fines in particular, depending on the scheme within which they are enforced, could be unconstitutional. This was not part of the applicants' case.

Conclusion

[101] In balancing the above factors, it becomes clear that section 12(1)(a) is not "appropriately tailored" to facilitate peaceful protests and prevent disruptive assemblies.[141] The right entrenched in section 17 is simply too important to countenance the sort of limitation introduced by section 12(1)(a). Moreover, the nature of the limitation is too severe and the nexus between the means adopted in section 12(1)(a) and any conceivable legitimate purpose is too tenuous to render section 12(1)(a) constitutional. This is even more so when regard is had to the existence of less restrictive means to achieve section 12(1)(a)'s purpose. Consequently, this Court can

[139] See [57].

[140] For example Australia: Peaceful Assembly Act, 1992 (Queensland), Public Assemblies Act, 1972 (South Australia), Public Assemblies and Processions Act, 1984 (Western Australia); Malaysia: Peaceful Assembly Act, 2012; Russia: Russian Constitutional Court Judgment of 10 February 2017 No. 2-П/2017 in the case concerning the review of constitutionality of the provisions of Article 2121 of the Criminal Code of the Russian Federation; The United Kingdom: Public Order Act, 1986; See also *Lashmankin* above n 83 at § 318 for a survey of 27 European countries, all of which employ a range of measures and procedures regarding protests.

[141] *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 49.

only conclude that section 12(1)(a) is unconstitutional. In these circumstances, the underlying reasoning in the judgment of the High Court is correct. It therefore follows that the High Court's declaration of constitutional invalidity must be confirmed subject to some semantic and yet consequential variations to be reflected in the order below.

Remedy

[102] The applicants asked this Court to declare section 12(1)(a) unconstitutional with immediate and retrospective effect. In their answering papers, the respondents did not specifically oppose this remedy or suggest an alternative remedy should this Court find that the section is unconstitutional. But at the hearing, the respondents sought to persuade this Court to suspend its declaration of invalidity and craft an interim order if it finds that the section is unconstitutional. Pursuant to this, this Court afforded the parties an opportunity to file further written submissions on the issue of remedy.

[103] The respondents' submissions on remedy rest on three legs. First, they submit that section 12(1)(a), on the applicant's case, would only be unconstitutional insofar as the gathering convened is peaceful and unarmed. Therefore, to criminalise the convening of violent or armed gatherings would be constitutional, as such gatherings fall outside the ambit of the right in section 17. Accordingly, this Court's declarator of unconstitutionality must be limited to the criminalisation of convening a peaceful and unarmed gathering.[142] Second, this Court's declaration of invalidity should be suspended for 24 months to allow Parliament to amend the Act. Third, in the interim, this Court must read two new elements into section 12(1)(a). The first is that section 12(1)(a) must have a caveat read into it so that only the convening of gatherings that are violent or armed is criminalised. The respondents argue that this would then give effect to the declaratory order made by this Court that section 12(1)(a) is only unconstitutional to the extent that it criminalises the convening of peaceful and unarmed assemblies. The second element would be to read in liability for failure to give notice in the form of an administrative fine. They explain that this is to ensure that there is

[142] This declaratory order must be made under section 172(1)(b) of the Constitution.

sufficient incentive for conveners to give notice, notwithstanding whether their gatherings are peaceful.

[104] As the applicants and the first amicus curiae submitted each of these legs cannot be sustained. The first leg, regarding the scope of the declaratory order, does not account for what this Court held in *Garvas*. In that matter, this Court held that the right in section 17 is limited where conveners with peaceful intentions are deterred from convening gatherings because of the risk that the gathering may turn violent, and that they in turn, as conveners, are sanctioned.[143] This means that section 12(1)(a), even if it contains a caveat that conveners whose gatherings are peaceful and unarmed are not criminalised, will still limit the right in section 17. Conveners with peaceful intentions will be deterred from exercising their right in section 17 lest the gathering turns violent and they (as conveners) are held criminally liable. The respondents have not then explained why or how this limitation would be justifiable.[144] On the contrary, many of the reasons traversed above, especially regarding the breadth of the definitions of "convener" and "gathering", suggest that this limitation would still severely limit the right in section 17. The further problem with the submission is how "peaceful" would be defined in the criminal context. There are also complex questions that come to the fore as to whether liability should be strict, and whether there needs to be an element of causation between the failure to give notice and the ensuing violence. For these reasons, this Court will not limit its declaratory order as sought for by the applicants. It declares below that section 12(1)(a) is unconstitutional in its entirety, because, on the case before this Court, the criminalisation of convening gatherings is unconstitutional—regardless of whether the subsequent gathering is violent.

[105] The respondents' second leg similarly falls to be rejected. On the facts of this case there is no need to suspend the declaration of constitutional invalidity. Ordinarily, an order declaring legislation invalid is suspended only if: (a) the declaration of

[143] *Garvas* above n 65 at paras 56-7.

[144] And it is their onus to discharge. See [57].

invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship; (b) there are multiple ways in which the Legislature could cure the unconstitutionality of the legislation; and (c) the right in question will not be undermined by suspending the declaration of invalidity.[145] In the context of the facts of this case, no lacuna would result if the declaration took immediate effect. As explained above, there is a variety of existing incentives in the Act for the giving of notice. There are also multiple ways in which Parliament could cure the defect in the Act and regulate gatherings in a constitutionally compliant manner. Furthermore, the right to assemble peacefully and unarmed, as explained above, is too important, and the violation of the right by section 12(1)(a) is too severe, for section 12(1)(a) to be countenanced in light of its invalidity.

[106] Nor, apropos the third leg, is a reading down of section 12(1)(a) an option that commends itself for adoption, which also speaks against suspending the declaratory order made by this Court. The respondents' suggestion that this Court reads in liability for administrative fines if a convener fails to give notice is not a just and equitable remedy. As explained above, it may be that administrative fines are also unconstitutional. This would depend on the finer details of the administrative fining system, including most obviously the magnitude of fines and the consequences of failing to pay the fine. As already indicated, this is a matter best left to the Legislature. It is also unclear why in this case, as submitted by the respondents, this Court should delegate to the Minister the duty to construct those finer details in regulations. All of these factors underscore one thing: a decision of the kind suggested by the respondents is intrinsically polycentric and must be left to Parliament to take.

[107] In addition, there are two fundamental reasons as to why this Court ought to decline the respondents' invitation to suspend the declaration of constitutional invalidity coupled with some reading in of certain words to section 12(1)(a) to align it with

[145] Bishop "Remedies" in Woolman and Bishop *Constitutional Law of South Africa* 2 ed (Juta & Co, Cape Town 2003) at 116-123, citing *S v Ntuli* [1995] ZACC 14; 1996 (1) SA 1207 (CC);1996 (1) BCLR 141 (CC), *Mashavha v President of the Republic of South Africa* [2004] ZACC 6; 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC), and *Bhulwana* above n 88 in support of each factor.

constitutional imperatives. First, the respondents' argument is premised on an unproven assumption. The assumption is that unnotified gatherings are inherently prone to becoming violent. The implication of this submission is that gatherings that have been notified would necessarily be peaceful. There was scant evidence put forward by the respondents to underpin this assertion. Second, were this Court inclined to substitute administrative fines for a criminal sanction it would be encroaching on the pre-ordained constitutional province – and exclusive domain – of the Legislature. The sort of decision required of this Court by the respondents is laden with policy considerations that call for judicial deference.

[108] It will be up to the Legislature to revisit the Act, if so minded, in whatever manner it sees fit. As this Court acknowledged for good reasons in *Dawood*, it is ordinarily appropriate "to leave the Legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the Legislature".[146] What is more, there is also an imponderable factor at play here. It is this. If administrative fines are the way to go, should the process adopted to address the defect in the Act involve public participation? If so, how should the public views be canvassed and collated? What form should public participation take? Bearing these in mind, it becomes manifest that this Court is ill-equipped to address those questions. Accordingly, this issue deserves to be "subjected to critical debate" by public representatives and the citizenry rather than being left to this Court for determination. Thus, all of these imponderables ineluctably mean that it is proper for this Court to show deference to the Legislature.

[109] And, even more, as Mogoeng CJ pointed out in *Mhlope*:

[146] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 64. See also *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) at para 21.

> "Separation of powers requires that courts should be cautious not to intrude into the otherwise exclusive domain of other arms of the State unless it is constitutionally permissible to do so."[147]

As already explained above, this is not a case that would justify encroachment into the domain of the Legislature.

[110] In these circumstances, I can conceive of no reason why this Court's disinclination to suspend the declaration of invalidity could result in any administrative dislocation.[148] Nor of any other considerations that militate against granting an order with retrospective effect.[149] But the operation of the order will be limited to cases that have not been finalised or in relation to which review or appeal avenues are still open in terms of the applicable legislation or court rules.

Costs

[111] There is no reason why the general rule that costs should follow the event ought not to apply in this matter. Thus, the applicants – but not the amici curiae – are entitled to their costs. Costs of two counsel will be allowed.

Order

[112] In the result, the following order is made:

1. The appeal of the State respondents is dismissed.
2. The declaration by the High Court that section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 is constitutionally invalid is confirmed 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.

[147] *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) (*Mhlope*) at para 113.

[148] *Bhulwana* above n 88.

[149] Id at para 32.

3. The declaration of invalidity shall not apply with retroactive effect and shall not affect finalised criminal trials or those trials in relation to which review or appeal proceedings have been concluded.
4. The appeals of the applicants against their convictions in the Bellville Magistrates' Court for contravening section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 are upheld and the resultant convictions and sentences are set aside.
5. The Minister of Police is ordered to pay the costs of the applicants in this Court, including the costs of two counsel.

For the Applicants:	M Bishop and P Mdakane instructed by Legal Resources Centre.
For the First and Second Respondent:	K Pillay and M Mokhoaetsi instructed by State Attorney.
For the First Amicus Curiae:	N Luthuli instructed by Equal Education Law Centre.
For the Second Amicus Curiae:	G Budlender SC and M Vassen instructed by Webber Wentzel.
For the Third Amicus Curiae:	B Lekokotla, M Mbatha and M Matlapeng instructed by Seri Law Clinic.