

**IN THE MAGISTRATES' COURT FOR THE DISTRICT OF CAPE TOWN**

**HELD AT CAPE TOWN**

Case No: 14/ 985/2013

In the matter between:

**THE STATE**

and

**PHUMEZA MLUNGWANA & 20 OTHERS**

Accused

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**AFFIDAVIT**

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I, the undersigned,

**PHUMEZA MLUNGWANA**

do hereby make oath and say:

1. I am an adult female resident at L691 Gwabeni Crescent, Site B in Khayelitsha. I am the general secretary of the Social Justice Coalition and I attest to these events in both my representative and personal capacity. I am the first accused in this matter.

2. The facts as stated herein are true and correct and save where it appears to the contrary within my own personal knowledge and belief. Where I make legal submissions, I do so on the advice of my legal representatives. I believe that advice to be correct.
3. I am currently facing criminal charges in the Cape Town Magistrate's Court along with 20 other accused in the matter of *S v Mlungwana and 20 Others*. We are charged with two offences under the Regulations of Gatherings Act 205 of 1993 ("**the RGA**"):
  - 3.1. Convening a gathering without notice in violation of section 12(1)(a) of the RGA (read with sections 1, 2, 3 and 12(2)); and
  - 3.2. Convening a gathering without notice or attending a gathering or prohibited demonstration in contravention of section 12(1)(e) of the RGA (read with sections 1, 2, 3 and 12(2)).
4. Copies of the charge sheets are attached, marked **PM 1**.
5. This affidavit is being handed in simultaneously with our plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 ("**the CPA**"), and with a list of admissions in terms of section 220 of the CPA. The purpose of this affidavit is to place our arrest in context, to elaborate upon the events leading to our arrest and further to relieve the State of the need to call any witnesses in our criminal case.

6. In addition, we intend to challenge the constitutionality of various sections of the RGA. We accept that this Court lacks the jurisdiction to consider those challenges. Those challenges will be pursued on appeal. However, it is necessary for us to lay the factual and legal foundation for that challenge before this court. This affidavit serves that end.
  
7. I attest to this affidavit for and on behalf of all 21 accused in this matter. A list of the accused is attached, marked **PM 2**. The accused, whose confirmatory affidavits will be filed with this affidavit at the hearing of the matter, are the following persons, listed in sequence as the first to twenty-first accused:
  - 7.1. Mlungwana, Phumeza (myself);
  - 7.2. Tokota, Luthando;
  - 7.3. Mbadisa, Xoliswa;
  - 7.4. Vika, Ntuthuzelo (incorrectly given in the charge sheet as “Ntukuzelo”);
  - 7.5. Mankqa, Luvo;
  - 7.6. Sindisiwe, Luthango;
  - 7.7. Tyulu, Phumzile;
  - 7.8. Notywala, Axolile (incorrectly given in the charge sheet as “Notawana”);

- 7.9. Oosthuizen, Craig (incorrectly given in the charge sheet as “Oostenhuizen”);
- 7.10. Swartbooi, Sonwabile (incorrectly given in the charge sheet as “Swart Booi”);
- 7.11. Ramaipato, Sade;
- 7.12. Maci, Nomhle;
- 7.13. Peter Mbadu, Angy (incorrectly given in the charge sheet as “Mbayi”);
- 7.14. Qezo, Zukiswa (incorrectly given in the charge sheet as “Qeja”);
- 7.15. Mrwebi, Zingisa;
- 7.16. Sinuku, Mlondolozzi;
- 7.17. Sinuku, Vuyolwethu;
- 7.18. Sebezo, Ezethu;
- 7.19. Jara, Nolulama (incorrectly given in the charge sheet as “Jana”);
- 7.20. Mbadu, Isaac;
- 7.21. Abdurrazack “Zackie” Achmat.

8. The remainder of this affidavit is structured as follows:
  - 8.1. First, I describe the Social Justice Coalition;
  - 8.2. Second, I narrate the SJC's struggle to secure better sanitation for the people living in informal settlements in the City of Cape Town, particularly in Khayelitsha;
  - 8.3. Third, I provide the accused's version of the events of 11 September 2013;
  - 8.4. Fourth, I expand on the reasons why the criminalisation of gathering without notice is unconstitutional.

## **II THE SOCIAL JUSTICE COALITION**

9. The SJC is a Cape Town-based community movement established in 2008 as a non-profit organisation. It is a registered public benefit organisation with the Department of Social Development with the number 067-689-NPO. I attach a copy of the SJC's constitution as annexure **PM 3**.
10. The SJC's objectives, as set out in its Constitution, are as follows:
  - 10.1. To organise people of all backgrounds to address crime, corruption, poor service delivery, unemployment, homelessness, ill-health, hate crimes, and unequal and poor education;

- 10.2. To promote awareness of rights and the utilization of these rights to hold government accountable;
  - 10.3. To build a grassroots movement which campaigns non-violently for government to design and implement policies that redress the imbalances of the past and reduce inequality and poverty;
  - 10.4. To build a movement of individuals united across the divisions of race, gender, class and nationality dedicated to building active citizenship;
  - 10.5. To uphold the rights in our Constitution that the Constitutional Court and the judiciary have upheld since the advent of democracy in 1994;
  - 10.6. To use community organizing, petitions, protest, education, litigation, partnership, media, parliament and the courts to advance the agenda of the SJC;
  - 10.7. To campaign for improved access to basic services for everyone, particularly those living in poor and working class communities;
  - 10.8. To advocate for the delivery of services and infrastructure through meaningful engagement and cooperation between affected communities and government.
11. The SJC is funded through charitable foundations such as the Raith Foundation, Millennium Trust, the Ford Foundation, and Atlantic

Philanthropies. As a social movement, we are politically independent, open to members of all political parties and as our record shows (when necessary) equally critical of the African National Congress and the Democratic Alliance. While we are critical of government when it is justified, we recognise the need to work with government to achieve our goals.

12. The primary campaigns of the SJC are focused on:
  - 12.1. The provision of safe, clean sanitation and water in informal settlements;
  - 12.2. Building safe communities free from violence and crime through the rule of law; and
  - 12.3. Working for open, accountable, and ethical government based on the supremacy of the Constitution.
13. The SJC focuses on improving access to basic services in historically poor and underdeveloped communities. The SJC works with other non-governmental organisations and with organs of state to achieve this.
14. The SJC is based in Khayelitsha. The organisation has 1500 members across its 11 branches and over 80 partner organisations and many supporters in Cape Town and beyond. The SJC is a democratic, membership-based social movement. The majority of its members are working-class and poor

individuals, most of whom live in the informal settlements of Khayelitsha in Cape Town. All the accused are members or supporters of the SJC.

15. The SJC was one of several organisations that petitioned the Premier to establish a commission of inquiry into the state of policing in Khayelitsha. That complaint led to the establishment of the O'Regan-Pikoli Commission of Inquiry where the SJC has been one of the primary complainants and participating in the proceedings of the Commission.

### **III SAFETY AND SANITATION IN KHAYELITSHA**

16. In my experience, toilets in informal settlements are not private spaces where a grandmother, child or any other person can undertake one of the most basic human functions. The SJC's campaign for clean and safe toilets started because most of our members and residents of informal settlements believe that one of the most dangerous things to do in an informal settlement is to try and relieve themselves. A toilet or using the bush is a place of danger where violence against the person in the form of assault, robbery and sometimes even rape and murder occur daily. Together with water access points, they are also places of ill-health.
17. The rights to human dignity, freedom and security of the person – especially safety and psychological integrity, health and privacy – are among the most basic rights and freedoms violated when using toilets. The absence of safe and healthy sanitation has a profound impact on one's daily existence. It



affects people's dignity and their right of access to a healthy environment. It makes them more vulnerable to disease and to crime.

18. Over the course of the O'Regan-Pikoli Commission of Inquiry, the Social Justice Coalition, Treatment Action Campaign, Equal Education, Ndifuna Ukwazi, and the Triangle Project placed a number of cases before the Commission. The cases represent a microcosm of life in Khayelitsha and the context in which crime and policing occurs with respect to sanitation and include the following examples:
  - 18.1. In 2009 Ntombentsha Beja, at the age of 74, was stabbed in the chest while going to a community toilet in Makhaza.
  - 18.2. In 2010 Makhosandile 'Scare' Qezo was stabbed in the face while relieving himself in a bush, as there were no accessible toilets nearby.
  - 18.3. Nandipha Makeke was raped and murdered while using a communal toilet on 16 December 2005.
  - 18.4. In 2009 Zanele Xaki, a 15 year-old child from RR section, was crossing the intersection of Pama and Lansdowne to go to a toilet in the evening when she was knocked down by a car.
19. In his report to the O'Regan-Pikoli Commission of Inquiry, Professor Jeremy Seekings revealed that only 38% of the Khayelitsha population live in formal housing: 15% live in backyard dwellings and 46% in shacks.

20. Professor Seekings confirmed that 7%, or 8 000, Khayelitsha households are forced to use bucket toilets, and 10% reported not having any access to a toilet at all. Access to basic services in general is poor, with one in three households not having access to water; one in four not having access to a flush toilet connected to a sewage system; and one in five not having access to electricity or regular refuse collection.
21. According to the City of Cape Town's Water Services Development Plan (2013), 40% of all homes in Cape Town's informal settlements, almost 80,000 in number, had to share communal toilets at a ratio greater than one toilet to five households and did not have access to what is termed "basic sanitation". Further, the 2011 Census found that more than 29,000 homes have no access whatsoever to any sanitation facility including communal toilets. The Census also found that almost 50 000 households were making use of bucket latrines in Cape Town.

#### **IV THE SJC'S SANITATION CAMPAIGN**

22. The SJC has been campaigning for improved access to sanitation and related services in Cape Town's informal settlements since 2010. Through research, education and advocacy, we developed the SJC's Clean and Safe Sanitation Campaign.
23. The early stages of the sanitation campaign involved drawing attention to the problem, and beginning engagement with the City. On 23 March 2010, the

SJC organised a symbolic queue of approximately 600 people outside a public toilet on the Sea Point Promenade. The protest was part of World Toilet Queue – an international demonstration scheduled to coincide with World Water Day – to highlight the plight of the 2,5 billion people worldwide who do not have access to basic sanitation. It was used to draw attention to the lack of basic sanitation services in the City of Cape Town and how this affects residents' health and safety; as well as the disproportionate investment in formal as opposed to informal settlements. The City publicly condemned the Toilet Queue.

24. As a result of the event, and pressure from the SJC for the City to address sanitation issues, meetings took place with the then-Mayor Dan Plato, who remained largely hostile towards the SJC. Later in that year, the SJC forced the City to release its Makhaza open air toilet report, which it had refused to release publicly. When Patricia De Lille replaced Mayor Plato in 2011, the engagement continued with her, however in a more open manner. The meetings concerned the provision of sanitation services across the City, but in particular in regard to sanitation services in informal settlements.
25. On 27 April 2011, the SJC held a Freedom Day March of over 2000 people, where residents, members, and supporters queued for a toilet outside the Mayor's office. The queue was led by the Most Reverend, Archbishop Thabo Makgoba. We called for the adequate maintenance, monitoring, and coordination of existing sanitation facilities; and the initiation of broad-based

meaningful engagement to plan for long-term delivery of sanitation facilities

26. During this period, the SJC also monitored and measured the extent to which the sanitation facilities were used and maintained in some of Khayelitsha's informal settlements. In particular we monitored the development and maintenance of the toilets in RR section in Khayelitsha where 240 toilets were used by 3000 households. The national norms and standards require that there should be 5 households per toilet. The ratio in RR section was over 12 households to 1 toilet, more than double the recommended number. Moreover, many of these toilets were unusable as a result of poor quality materials and irregular maintenance on the part of the City. We regularly reported faults to the City's Technical Operation Centre. We also regularly addressed letters and correspondence to the Mayor, the Premier and their staff regarding the provision of sanitation services.
27. The SJC found that it was often difficult to get information regarding the provision of sanitation services. At times we were forced to apply for that information in terms of the Promotion of Access to Information Act 2 of 2000 and we did so. In this manner we accumulated substantial knowledge regarding sanitation in the City.
28. By 2011, Mayor Patricia de Lille had expressed a willingness to engage with our organisation and made a commitment to the improvement of sanitation services particularly in informal settlements. The City at that stage

acknowledged that the sanitation backlog in the informal settlements alone as of June 2011 stood at 81 603 households, consisting of between 300,000 and 400,000 people. We were of the view that under any circumstances that ought to be seen as a crisis.

## **V THE SJC'S STRUGGLE FOR A POLICY AND PLAN FOR THE JANITORIAL SERVICE FOR FLUSH TOILETS IN INFORMAL SETTLEMENTS**

29. A primary demand over the duration of the SJC's sanitation campaign has been for adequate maintenance of existing sanitation facilities. To this end the SJC lobbied for a janitorial service for flush toilets in informal settlements across Cape Town.

30. In what follows I describe three general phases of the SJC's engagements with the City in regard to the development of a policy and implementation plan for the janitorial service. It is a story of an attempt at cooperation and engagement, but continued broken commitments on the part of the City and the Mayor. In order to provide a full picture of this development, I attach a timeline summarising the activities that the SJC has engaged in to attempt to ensure that the service functioned optimally and that the City followed through on its commitments to develop a policy and implementation plan for the service. The timeline begins in 2010, and ends in 2013 when we were arrested. It is attached as annexure **PM 4**.

31. The first phase was characterised by critical, but open engagement between

the SJC and the City; and calls by the City for the SJC to assist in the development of a policy and plan for the janitorial service. At the first Cape Town Sanitation Summit in September 2011, hosted by the SJC and opened by Mayor Patricia De Lille, a janitorial service for Cape Town's informal settlements was discussed and the City committed to the possibility of establishing this service soon thereafter.

32. The SJC believed that this was a significant advance in regard to the provision of sanitation services in our City and had the potential to positively affect hundreds of thousands of people who make use of communal toilets in the City's informal settlements. The service was the first of its kind in Cape Town and one of the few operating in the country.
33. At the time we welcomed the service and commended the Mayor. I attach a copy of a press statement released at the time as annexure **PM 5**. It was agreed that the SJC would assist by monitoring the service and pass on its findings to the City.
34. Initially, both the Mayor and Councillor Shehaam Simms (the then Mayoral Committee Member for Utility Services) requested assistance from the SJC to develop a policy and plan for the janitorial service. The SJC provided a formal submission for this purpose to the City in March 2012. I attach the submission as annexure **PM 6**. We were assured by Councillor Shehaam Simms in a meeting on 23 March 2012, that a policy and plan would be developed with the

assistance of this submission.

35. After the service was rolled out it became evident that the City had done so without developing a policy and plan as they committed to previously. On 1 June 2012 the SJC wrote to the City to raise several concerns about the rollout, and to request a policy and plan. On 8 June 2012 Cllr. Simms responded to say that a policy and plan did not currently exist, but that they were being developed.
36. During the second phase, the SJC continued to engage with the City on the policy and plan development through various meetings, letters, and its monitoring reports; and the City made firm commitments to develop the policy and plan as a result of serious shortcomings with the implementation of the service. These commitments by the City were not met.
37. On 20 September 2012 the SJC highlighted serious shortcomings in the implementation of the service in its first quarterly monitoring report of sites where the janitorial service was operating. Some of the problems we experienced were:
  - 37.1. Many toilets remained in a state of disrepair despite janitors reporting the failures to the City;
  - 37.2. Most janitors were not inoculated and were also not provided with full uniform and protective wear which compromised their personal health

and safety;

- 37.3. It took 3 months for janitors to be provided with cleaning materials to clean toilets – prior to that they had only rakes and brooms;
  - 37.4. No training was provided to janitors on how to conduct repairs, and many were unsure of their responsibilities;
  - 37.5. None of the janitors were provided with written particulars of their employment – in violation of the Basic Conditions of Employment Act 75 of 1997 – and most were unsure of their employment period;
  - 37.6. There was no meaningful engagement with communities on how the service would function; and
  - 37.7. Janitors were unable to clean toilets which were locked and generally received no support from the City in addressing this challenge.
38. In a meeting on 1 October 2012 Mayor de Lille made several commitments, including that a draft janitorial policy and plan would be produced by the end of October 2012, and a standard operating procedure would be in place for the 2013/14 year.
39. On 2 October 2012, Mayor De Lille released a public statement admitting that “the City of Cape Town has not managed this programme effectively”. She committed to improving implementation of the service and to holding a mini-



summit within a month “to provide the basis for the development of a City Policy on Janitorial Services”. I attach a copy of the statement as annexure **PM 7**. These deadlines were not met.

40. On 6 December 2012, following another SJC monitoring report showing major shortcomings with the janitorial service, the City committed to delivering a formal timeframe for the development of a policy and plan by the time of a meeting to be scheduled for early January 2013. I attach the minutes of the meeting reflecting that commitment as annexure **PM 8**.
41. Despite several attempts by the SJC to schedule the January meeting it never took place. The City again failed to meet its own deadline of developing the timeframe or holding the mini-summit, and took no steps to schedule the January 2013 meeting.
42. In the third phase, the SJC tried numerous methods to force the City to take action on its unfulfilled commitments. By April 2013, the SJC and the City were regularly clashing about the failure of the City to develop the policy and plan and consequently the failure to properly implement the janitorial service.
43. In April 2013 SJC also published a report of the Khayelitsha Mshengu chemical toilet social audit. The report found that both the City of Cape Town and the private contractor it had hired to clean and maintain chemical toilets in Khayelitsha’s informal settlements were failing in their duties. The City was failing to monitor the contractor and the contractor was not delivering proper

services. This resulted in the violation of the rights to health and dignity for the many people who have to make use of these toilets. This undoubtedly increased the tension. The social audit into chemical toilets in Khayelitsha indicates how citizens can work alongside government in monitoring service provision and that communities themselves can participate in the monitoring of service delivery and so hold leaders accountable. I attach a copy of the report as annexure **PM 9**.

44. On 25 June 2013, hundreds of Khayelitsha residents and SJC members marched peacefully to the Civic Centre. The SJC presented a memorandum to the Mayor's office demanding amongst other things that the City produce – within 2 weeks – an urgent timeline for the development of a policy and plan for janitorial services for flush toilets in informal settlements. I attach a copy of this memorandum as annexure **PM 10**.
45. In July 2013 the SJC released a monitoring report of the janitorial service covering the months of January to May 2013. It found that the problems that had been previously identified and brought to the attention of the City had not been addressed and that several aspects of the janitorial service in Khayelitsha had deteriorated during 2013 with severe consequences for both janitors and affected communities. I attach a copy of the report as annexure **PM 11**.
46. By July 2013 the City had still not produced the timeframe for the development

of the policy and plan and had ignored requests from the SJC for updates on the development of the policy and plan. The SJC was thus forced to instruct their lawyers at the Legal Resources Centre to take legal action against the City. Councillor Ernest Sonnenberg, Mayco Member for Utility Services, had in a press statement referred to the existence of a document called an “operational policy” for janitorial services of flush toilets in informal settlements following the submission of the Memorandum. The SJC had never seen that document. We instructed our attorneys to issue a formal letter of demand to the City demanding that it release the document. I attach a copy of that letter as annexure **PM 12**. It was only on the eve of proceeding to litigation that the document was finally released. The SJC received the ‘operational policy’ titled, ‘System Procedure: Janitorial Services’, signed on 17 July 2013 – on the same day it was sent – by the acting Water and Sanitation Director, Peter Flower.

47. Subsequent to the release of the document the SJC asked for an urgent meeting with the Mayor to discuss the “*development of an operational plan for implementation of the janitorial service that is fair, sustainable, and reasonable*”. The letter, dated 13 August 2013, requested a response by 23 August 2013. A copy of the letter is attached as annexure **PM 13**.
48. Unfortunately, this request received a response in which the Mayor proposed that a meeting take place on 8 or 17 October 2013. In the context of the urgency of the problem, the SJC’s consistent attempts to engage with the City, and the City’s unfulfilled commitments over such an extended period of time,

this proposal was entirely unreasonable. We in the SJC considered this an insult to affected communities and destructive of any real potential or moving forward cooperatively with the Mayor on these issues. We phoned the Mayor's office to request an earlier date. We were informed that there was no possibility of an earlier date.

## **VI THE PROTEST**

49. We accordingly decided to object to the Mayor's conduct, which had the effect of side-lining this issue. We decided to protest by assembling outside the offices of Mayor Patricia de Lille on 11 September 2013. This decision was not taken lightly. The urgent need of the residents of Khayelitsha for the janitorial service to be implemented effectively – which had been delayed by two years of broken promises from the City – prompted our actions.
50. We were frustrated by the City's sustained inaction and believed that more traditional methods of engagement and protest had failed to achieve the urgent action required. We believed that the intransigence of the City had left us with little alternative.
51. We knew that the RGA permitted a gathering of 15 people or less without the requirement of giving notice. We therefore originally planned a demonstration where exactly 15 people would be directly involved, in order to remain within the terms of the law. However, we still recognised the risk that we would be confronted or arrested by the police. We were always willing to take that risk

in order to raise awareness about the problem of sanitation.

52. There are regular mass meetings with SJC branches to report back on our campaigns and to get feedback from the membership of the organisation. At one of these meetings in 2013 we were reporting back on the janitorial service and we were going through the 'operational policy' document that the City had provided to us point by point. Members were already aware of the history of the problems we were experiencing in getting the janitorial service operating effectively and the way that the City had reneged on its commitments to do so.
53. When the contents of the document were being discussed, a number of members voiced the opinion that they felt that community members and their representatives were not being taken seriously by the City and that we needed to try other avenues to ensure that the City would respond and develop a proper plan for the janitorial service. Members suggested that they would support a peaceful act of civil disobedience to make a strong statement.
54. The leadership, myself included, convened a special Executive Council meeting to discuss this option. With the mandate of the members, we discussed at length the potential outcomes of such an action including the political and legal ramifications and the way that it would be perceived by government, the public and others. Given the situation we faced a decision was taken to support such an action and plans were taken to implement it.
55. Following from this decision, on the morning of 11 September 2013,

approximately 15 SJC members, including myself, were picked up from Khayelitsha and dropped off at Hertzog Boulevard in the vicinity of the Cape Town Civic Centre at around 09:00 AM.

56. We then walked towards one of the entrances of the Civic Centre. As planned, we quickly chained ourselves to the railings of the stairs outside the entrance.
57. We chained ourselves together in sets of five people using metal chains and padlocks. There were three sets of five people so as to keep the number of participants to 15 as we were aware that the RGA makes provision for 15 to protest without giving the local authority notice of the protest.
58. We were never at the actual entrance to the building, but the stairs that led to the entrance. When people wanted to access the stairs we let them pass and did not inconvenience anyone considerably. People did not need to ask us to be let through; as someone approached we made room for them to pass easily.
59. We began to sing songs of activism and struggle. We also held placards expressing our demands. Some of these placards read:
  - 59.1. *“Arrest us if you want, we are not going anywhere”*;
  - 59.2. *“Mayor, No Lies, No Delays”*;

59.3. *“No more false promises, Mayor De Lille!”*.

59.4. *“Safe toilets now!”*

60. However, while there were only 15 people chained together, approximately ten other members of SJC were present in the vicinity. It was part of the plan that they would support those members who were chained to the fence. Some of them were holding placards, joined in struggle songs and otherwise supported those who were chained together. It is fair to say that the additional members, despite not being chained together, became part of the gathering and we collectively proceeded with the protest. As I explain below, some of the accused fall into this category of protestors.
61. Some media also gathered as we had sent an e-mail to the media which included a media statement. I attach a copy of the e-mail as annexure **PM 14**. The statement was also forwarded to the Mayor, Councillor Sonnenberg, and other City officials.
62. Our action drew the attention of security guards who were stationed in the vicinity of that entrance. After approximately 20 minutes – it was now around 10h00 – more security guards came out.
63. A person who identified himself as a member of the Mayoral Protection Unit spoke to us, and to me directly after I had identified myself as part of the leadership. I do not recall his name. He enquired as to why we had chained

ourselves to the railings. I explained to him our demands and why we had taken such action.

64. He asked me if we had made an appointment to see the Mayor. I responded that we had not done so for that day. I told him that we had communicated our demands to the Mayor's office telephonically that morning. Later, at approximately 10h47, we also sent an email to the Mayor's PA, Monique Sharffenorth. The email included a copy of the press release we had sent out earlier in the day. It was addressed to the Mayor and other City officials and stated that the SJC would not leave the Civic Centre until the Mayor acknowledged our demands. A copy of the email and the attachment is attached as annexure **PM 15**.
65. That member of the Mayoral Protection Unit then said he was going to talk with the Mayor's office. He also warned us that there would be consequences for our actions. I told him that we did not want to cause trouble and that all we wanted was for the Mayor to hear our demands and to meet with us. He left.
66. By this stage – at around 10H10 – approximately 10 members of SAPS had arrived on the scene. They asked us what we were doing and why we had chained ourselves to the railing. We informed them of our demands and our intention to remain until the Mayor met our demand for a meeting.
67. The member of the Mayoral Protection Unit returned and informed us that the Mayor would not be coming to talk to us and no representation was going to



be sent. We were extremely disappointed by this response, but were determined to remain chained to the railings until we were removed, or the Mayor agreed to meet with us.

68. At this point, which was around 12H00, approximately 20 more members of the police – both SAPS and Metro Police – arrived on the scene bringing the number of police to approximately 30. Surprisingly, some police were armed and wearing bullet proof vests.
69. One officer spoke to me directly in English instructing us to leave because our gathering was illegal. I do not know the officer's name, but I assume from the statements in the docket that it was Captain Walter Prins.
70. This member of the SAPS asked me whether we had a permit for our gathering. I informed him that we did not. I note that a permit is not required in order to protest in terms of the RGA; the only requirement is that notice is afforded to the local authority. I return to this distinction below.
71. I told Captain Prins that we wanted to speak to the Mayor and that we would not leave until she met our demand. I told him that we were willing to be arrested if necessary.
72. Captain Prins then told me that we that we had 5 minutes to disperse. He did not use a loud hailer or a megaphone and at no point did the police attempt to address all of us at once. Instead the officer spoke to me in English and I had

to convey the message to my comrades by translating it into Xhosa.

73. He also instructed another police official to count how many we were and how many women and men were in the group. Once he was provided with this information he communicated it to another officer by way of a two-way radio.
74. After a few minutes, at approximately 12h15, Captain Prins came to speak to me again. He reiterated that if we did not leave we would be arrested. Again the police were speaking to me personally and I relayed the message to the group. I again informed Captain Prins that the group would not disperse unless the Mayor agreed to meet us, or we were arrested. At this point there were approximately 6 police vehicles on the scene.
75. We then discussed amongst ourselves that if anybody was uncomfortable with being arrested – because at this stage it was clear it was going to happen – they should unchain themselves. Three people chose to unchain themselves, but remained in the vicinity. They were: Luvo Mankqu; Nomveliso Lungo and Mlondolozzi Sinuku. At this point, therefore, there were 12 of us chained together.
76. When the rest of us did not unchain ourselves from the railings and leave, the police started arresting people. This happened at around 12h30. In order to arrest us, an official of the City then came down and started cutting the chains in order to arrest us. This made it more difficult to determine who in the area was part of the demonstration and who was not.

77. As the chains were cut, the 12 of us on the chain were arrested. Other members of SJC who had been supporting those chained to the railing then approached us as we were being put into the van. The police arrested some of them at that stage as well.
78. However, not all the SJC members in the vicinity were arrested. It is not clear to me how the police determined whom to arrest and whom not to arrest. Some of the people who were arrested had not at any stage of the protest chained themselves to the railing.
79. In fact some of our staff members only approached us as we were being put into the van and we were then able to hand some of our jerseys, cameras etc. to them. One of them, Ms Sade Ramaipato, was simply told that she should now join us in the van. She was there as part of her duties as an SJC employee. She provided water and other assistance to the people who were chained up, but did herself not join in the singing of songs.
80. I must stress that, throughout the gathering, every single SJC member was disciplined and did not resort to violence or insult of any kind. The gathering was peaceful and orderly. Nor did anybody resist arrest. While no one was seriously injured, as the police were arresting us they did drag and pull people into the vans.
81. I must also emphasise that, while we were chained across the entrance to the Civic Centre, we did not prevent people from accessing the building. We

allowed those who wished to access the building through that entrance to pass through the chain. In addition, there are alternative entrances to the building nearby. I accept, however, that some people may have been inconvenienced by our presence.

82. In all 21 of us were arrested and were taken to the police station in the CBD and held in custody until approximately 22h30 that evening. We were then released on warning to appear in court in this matter.

## **VII LEGAL DEFENCES**

83. The first charge is that the accused contravened section 12(1)(a) of the RGA in that each of us *“IN THAT upon or about 11 September 2013 and at or near Civic Centre, Cape Town in the District of the Cape, the accused unlawfully and intentionally convened a gathering in protest against poor sanitation services without giving the relevant municipal authority any notice that such gathering would take place”*.
84. The second charge is that the accused contravened section 12(1)(e) of the RGA (read with sections 1, 2, 3 and 12(2)) *“IN THAT upon or about 11 September 2013 and at or near Civic Centre, Cape Town in the District of the Cape, the accused unlawfully and intentionally attended a gathering in protest against poor sanitation services without notice and the required permission from the relevant municipal authority.*

85. As is clear from the above, the accused admit that:

85.1. They convened and/or attended a gathering of approximately 20 people; and

85.2. They did not give the City notice of that gathering.

86. In the notice in terms of section 220 of the CPA that will be filed with this affidavit, each accused admits whether he or she convened or attended the gathering, or both convened and attended it.

87. The elements of the offences that we have been charged with are:

87.1. Section 12(1)(a):

87.1.1. Convening;

87.1.2. A gathering;

87.1.3. Without giving notice in terms of the RGA.

87.2. Section 12(1)(e):

87.2.1. Convening or attending;

87.2.2. A gathering;

87.2.3. In contravention of the RGA or where such gathering is prohibited in terms of the RGA.

88. In light of the above, the accused raise two defences:

88.1. First, it is submitted that section 12(1)(e) of the RGA is not applicable to the accused in this matter.

88.2. Secondly, and in any event, the criminalisation of merely convening or attending a gathering without giving notice is unconstitutional and invalid. To that extent, section 12(1)(a) and 12(1)(e) of the RGA are inconsistent with the Constitution and invalid.

**The first defence: section 12(1)(e) is not applicable**

89. The provision criminalises attending or prohibiting a gather “*in contravention of the [RGA]*” or where such gathering is “*prohibited in terms of the [RGA]*”. This is distinct from the specific offence in section 12(1)(a), which refers to attending or convening a gathering in respect of which the requisite notice has not been given. Properly interpreted, section 12(1)(e) does not *prohibit* attending a gathering for which notice has not been given, and attending or convening such a gathering is not “*in contravention of the [RGA]*” in any respect other than that it constitutes an offence in terms of section 12(1)(a). Legal argument in this regard will be advanced at the trial.

90. I set out the basis for the constitutional challenge below.

**The second defence: constitutional challenge to the impugned provisions**

91. The second defence is directed at section 12(1)(a) and, if (contrary to the first defence above) section 12(1)(e) is found to be applicable, also at section 12(1)(e). It is submitted that the impugned provisions are inconsistent with the Constitution and invalid to the extent that they impose criminal liability on a person for the conduct of convening or attending a gathering in respect of which no notice was given.
92. The constitutional challenge falls outside the jurisdiction of the Magistrates' Court and will be moved in the High Court. However, in terms of section 110 of the Magistrates' Courts Act 44 of 1932, this court has the power to receive the evidence that will inform the constitutional challenge.
93. The constitutional challenge is narrowly tailored and I emphasise that the challenge is not concerned with:
  - 93.1. The legal requirement to give notice of a gathering – the challenge is directed only at the criminalisation of the failure to do so, not the other legal consequences that flow from the failure to give notice or the requirement to do so;
  - 93.2. The other criminal offences created by the RGA in relation to the conduct of attendees at a gathering.
94. Section 17 of the Constitution reads: "*Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.*"

The right itself is not made subject to the requirement of notice. Accordingly, criminalising an unarmed and peaceful assembly merely because no notice was given limits the right in section 17 of the Constitution.

95. Sections 12(1)(a) and 12(1)(e) of the RGA have precisely that effect. Section 12(1)(a) makes it a crime to convene 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*” unless a notice is given in terms of section 3.
96. As I have submitted above, section 12(1)(e) makes it a crime to convene a gathering “*in contravention of the provisions of [the RGA]*” or to attend “*a gathering or demonstration prohibited in terms of this Act*”. It is submitted that the failure to give notice of a gathering does not mean that the gathering is “*prohibited in term of this Act*”. If this is so, section 12(1)(e) is not applicable to the accused.
97. However, if we are wrong on that interpretation, then clearly section 12(1)(e), too, limits the right to peaceful assembly.
98. The question then is whether that limitation is justifiable in terms of section 36(1) of the Constitution. That section reads:

*“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,*



*taking into account all relevant factors, including-*

- (a) *the nature of the right;*
- (b) *the importance of the purpose of the limitation;*
- (c) *the nature and extent of the limitation;*
- (d) *the relation between the limitation and its purpose; and*
- (e) *less restrictive means to achieve the purpose.”*

99. The accused will argue that criminalising peaceful, unarmed gatherings merely because no notice was given is unconstitutional. When the five factors listed in section 36(1)(a)-(e) are considered, that conclusion is inescapable.

#### Importance of the right

100. The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing from its denial under apartheid.

101. 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 was part and parcel of the fabric of the participatory democracy to which they aspired and for which they fought.
102. So the lessons of our history, which inform the right to peaceful assembly and demonstration in the Constitution, are at least twofold.
  - 102.1. 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.
  - 102.2. 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.
103. The importance of the right is borne out in the facts of our protest. We were advocating for one of the most basic requirements for a dignified life: access to safe and secure sanitation. We had tried numerous other means to get the

state to address our concerns. We were met with inaction and broken promises. Our protest at the Mayor's building was the only way we could see to shine a light on the problem and force the Mayor to take our demands seriously.

#### The importance and purpose of the limitation

104. The requirement of giving notice clearly serves a legitimate purpose. It is intended to allow the local authority and the police to provide the appropriate resources to regulate the gathering. The accused and the SJC do not for one moment suggest that some notice requirement is unconstitutional.
105. Our attack is not directed at the requirement of notice in general or the other legal consequences of failing to give notice, such as the possibility of the protest being interdicted and the prospect of civil liability for the organisers. The challenge is directed only at the *criminalisation* of the failure to give notice of a peaceful, unarmed and non-disruptive gathering. For the reasons we expand on below, there is no justification for criminalisation in those circumstances.

#### The nature and extent of the limitation

106. The limitation is serious and far-reaching.
107. First, it makes criminals of people who, like the accused, were merely exercising their democratic right to protest. People who convene or attend

gatherings with 16 or more people become criminals, no matter the nature of the gathering, the number of people, the importance of the issue, the extent of disruption, the location of the gathering, or the reason notice was not provided. There are no exceptions, no discretion and no scope to distinguish between gatherings where notice would have made a difference, and gatherings where notice would have made no difference.

108. Making an act criminal is not the only way to prevent it, or to dissuade people from engaging in it. Indeed, it is the most extreme way to attempt to force people to give notice. Not only will those who are caught by the provision face a fine or imprisonment, they will also have a criminal record. That criminal record will affect their ability to find employment, study and travel. All because no notice was given that they were going to exercise their constitutional right to protest. This consequence apparently flows even where an individual attending the commission was not responsible for convening it and was unaware whether notice was given.

109. Second, it applies to any gathering of more than 15 people in a public space regardless of the circumstances or the actual conduct of the participants. A gathering is defined extremely widely. It includes “*any assembly, concourse or procession of more than 15 persons*”:

109.1. at which the principles, policy, actions or failure to act of any government, political party or political organisation, whether or not that

party or organisation is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or

- 109.2. held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.
110. It does not matter whether the gathering will impede traffic, create a risk of public violence or whether it actually requires the intervention of law enforcement. If 16 people walk down the pavement to take a petition to their local councillor without giving notice, they commit a crime. If 20 people gather in a public park to sing songs protesting government policy, they commit a crime. If 30 people gather in a public space to form a new “*pressure group*” they become criminals. A group of people who become aware of recent crime committed by the police cannot peacefully gather at their local police station with placards demanding action unless they have given notice to the local authority.
111. Third, the existence of such a severe limitation will inevitably prevent people from engaging in legitimate forms of protest. While the police may not always strictly enforce the law in the manner they did in this case, the existence of the law will have a chilling effect on protest because people will be concerned that

they will be arrested.

The relation between the limitation and the purpose, and less restrictive means

112. The limitation is unbearably overbroad. It goes much further than is needed to achieve the limited purpose at stake: giving the relevant authorities notice of protests that are likely to disrupt traffic, or otherwise require regulation by the police or municipal officials.
113. It is absurd to suggest that every single gathering of more than 15 people requires such notice, failing which all attendees should be found to have committed a crime. There are thousands of such meetings of people everyday that proceed without any disruption. When a group of friends walks down the pavement to a restaurant. When they meet in a park for a picnic, they cause no disruption that requires the intervention of the police. Yet, according to the RGA, if the purpose of the meeting is to express political speech, it cannot be allowed to proceed without notice to the local authority. In short, while the underlying purpose is valid, the RGA goes far further than is necessary to achieve it.
114. In addition, there are far less restrictive means to achieve the purpose:
- 114.1. The criminal offence relating to the failure to give notice could be applied only to larger gatherings that will almost certainly require intervention and regulation. 50 or a 100 would be a far more

reasonable number.

- 114.2. The requirement of giving notice could be enforced without criminalising the conduct. For example, it could be enforced by administrative fines, interdictory proceedings and even civil liability. It could be enforced only against the convenors and not against those who merely attend the gatherings. It could be enforced by increased penalties for any additional offences that are committed if no notice is given.
- 114.3. But most importantly of all, the ability to maintain public order can be achieved merely by relying on the other existing offences in the RGA and other relevant statutes and by-laws. The other offences under the RGA and other relevant laws require more than merely attending a gathering in respect of which no notice was given. The actual behaviour and conduct of the participants is the focus, not merely their presence at a gathering.
- 114.4. If a group refuses to comply with an order of a police officer given under section 9, they can be arrested and charged under section 12(1)(g). If a gathering is contrary to any of the requirements for the conduct of gatherings in section 8, the protestors can be arrested and charged under section 12(1)(c). Such a charge would not have violated our constitutional rights in the same way. Instead, we were

arrested and charged with gathering without a notice. That crime is unnecessary, and unjustifiable against the background of other means through which the necessary degree of public order can be maintained.

## **VIII CONCLUSION**

115. In the circumstances, it is submitted that section 12(1)(e) of the RGA is not applicable to the accused in the present matter.
116. In addition, and in any event, section 12(1)(a) and, if applicable, section 12(1)(e) of the RGA are inconsistent with the Constitution and invalid. An order to this effect will be sought on appeal before a court with jurisdiction to rule on the constitutionality of legislation.

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**PHUMEZA MLUNGWANA**

I certify that on this            day of **JULY 2014**, in my presence at **CAPE TOWN** the deponent signed this declaration and declared that she/he:

- a) knew and understood the contents hereof;



- b) has no objection to taking this oath;
- c) considered this oath to be binding on her/his conscience and uttered the words “ I swear that the contents of this declaration are true, so help me God”.

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**COMMISSIONER OF OATHS**