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 AND 20 OTHERS Accused

ACCUSED'S HEADS OF ARGUMENT

I INTRODUCTION

1. The accused are all charged with attending and convening a gathering without notice. The accused have plead not guilty to the charges. However, their plea explanation demonstrates that, with one exception, they do not dispute the facts alleged by the state.

2. Accused 1, 3, 5, 12, 15, 16, 17, 18, 19 and 21 ("**the convenor accused**") accept that they convened the gathering without giving the required notice. Accused 2, 4, 6, 7, 8, 9, 10, 11, 13, 14 and 20 ("**the attending accused**") do not admit that they convened a gathering. All the accused admit that they were part of a gathering of more than 15 people on 11 September 2013.

Some admit that they chained themselves to the railing, others admit only that they were present and sang songs and carried posters.

3. The accused, however, raise two defences:

   3.1. First, with regard to the charge of contravening s 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 ("**RGA**"), the accused contend that the legislation is unconstitutional ("**the constitutional defence**");

   3.2. Second, with regard to the charge of contravening s 12(1)(e), the accused contend that it does not in fact prohibit the conduct they admit they committed ("**the interpretation defence**").

4. This court does not have the jurisdiction to adjudicate the constitutional defence.[1] That question must be left to the High Court on appeal. However, this court has the power in terms of s 110 of the Magistrates' Court Act to make findings of fact that will be relevant to the argument on appeal.[2] In addition, it has jurisdiction to determine the interpretation defence.

5. These submissions are therefore structured as follows:

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[1] Constitution s 172(2)(a).

[2] Section 110 reads:

110 Pronouncements on validity of law or conduct of President

(1) A court shall not be competent to pronounce on the validity of any law or conduct of the President.

(2) If in any proceedings before a court it is alleged that-

(a) any law or any conduct of the President is invalid on the grounds of its inconsistency with a provision of the Constitution; or

(b) any law is invalid on any ground other than its constitutionality,

the court shall decide the matter on the assumption that such law or conduct is valid: Provided that the party which alleges that a law or conduct of the President is invalid, may adduce evidence regarding the invalidity of the law or conduct in question.

5.1. First, I set out the findings of fact the accused submit this court should make with regard to the constitutional defence, and briefly describe that defence;

5.2. Second, I deal with the interpretation defence in two sections:

5.2.1. I summarise the three basic principles that apply to the interpretation of s 12(1)(e); and

5.2.2. I explain why s 12(1)(e) cannot be interpreted to make it a crime to attend a gathering that was convened without notice, nor to doubly criminalise convening a gathering without notice.

5.3. Third, I draw the relevant conclusions for the guilt or innocence of the accused.

II CONSTITUTIONAL DEFENCE

6. In this Part, I first submit that this court should make findings of fact in four areas:

6.1. The nature of the City of Cape Town's notice procedure under the RGA;

6.2. The motivation for the gathering on 11 September 2013;

6.3. The conduct of that gathering; and

6.4. The effect of protest.

7. Second, I outline the constitutional defence the accused will raise on appeal.

The City's Notice Procedure

8. The RGA does not require people who wish to organise a gathering to apply for permission to do so. Nor is there any requirement for a permit to be issued. Convenors are merely required to give notice of their intention to convene a gathering.[3] If the local authority wishes to object to the gathering it is entitled to do so, but if it does not, the gathering can proceed.

9. Mr Da Silva testified that, despite there being no requirement for an application in the RGA, the City requires those who want to give notice of a gathering to complete an application and obtain a permit.[4] Under cross examination, he admitted that this procedure was not only incompatible with the RGA, but that it would appear very different to those who wished to hold a gathering.[5] He stated that it was "*a clear misnomer, which should be addressed*".[6]

The Motivation for the Gathering

10. The accused are all members of the Social Justice Coalition ("**SJC**"). The SJC is a membership based organization based in Khayelitsha. It was formed in 2008, with the objective to "*advance the Constitution, promote accountability in governance and also ensure and promote active citizenship*".[7] One of the SJC's primary campaigns is the "*clean and safe*

[3] Record p 22 line 24 – p 23 line 4.

[4] Record p 22, lines 20-23.

[5] Record p 24, lines 12-16.

[6] Record p 24, line 19.

[7] Record p 62, lines 20-22.

sanitation for all" campaign.[8] The purpose of the campaign is to ensure that everybody in Khayelitsha has access to adequate sanitation and that those sanitation facilities are properly maintained.[9] The lack of sanitation poses serious threats to the health, safety and dignity of Khayelitsha's residents.[10]

11. The SJC began work on its sanitation campaign in 2010 by trying to raise awareness about the issue.[11] When mayor Patricia De Lille was elected in 2011, the City of Cape Town ("**the City**") began to cooperate with the SJC to work on the problem of sanitation.[12] The City agreed to establish a janitorial service to ensure that sanitation facilities were cleaned and maintained.[13] The service began to be implemented in 2012.[14]

12. However, there were immediately problems with the service. It was designed and implemented without proper consultation with the community and without a policy or operational plan. The janitors lacked the necessary training and equipment and were unable to do their jobs.[15] The SJC engaged with the City about the flaws in the implementation of the janitorial service and the need for a policy.[16] In late 2012, they made a commitment to develop the policy and plan.

13. However, despite the commitment, no policy or plan was developed. The SJC continued to follow up with the City in the first half of 2013 – through

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[8] Record p 64, lines 8-9.

[9] Record p 64 line 22 – p 65 line 2.

[10] Record pp 65-68.

[11] Record p 70, line 1.

[12] Record p 74, lines 20-23.

[13] Record pp 75-76.

[14] Record p 77, line 4.

[15] Record pp 77-78.

[16] Record p 79, lines 2-8.

letters and emails – to attempt to get a plan developed.[17] On 25 June 2013,[18] the SJC held a march to the City and delivered a memorandum to the Mayor.[19] Between 300 and 400 people participated in the march, which was organised with the requisite notice to the City.[20]

14. In response to the march, Councillor Sonnenberg claimed that the City had developed an operational plan, however that plan was not publicly available.[21] The SJC instructed its attorneys to write to the City to demand a copy of the plan.[22] The City provided a policy that was clearly inadequate.[23] The SJC then instructed its attorneys, on 13 August 2013,[24] to write another letter to the City requesting an urgent meeting.[25] The City responded that it was only able to meet in October.[26]

15. The SJC took the view that this was "*unacceptable*".[27] The SJC regarded the matter as urgent because it had been working with the City since 2011 and there was still no implementation plan and problems with the janitorial service were getting worse.[28] The SJC convened a mass meeting where its members discussed how to respond to the City's offer of a meeting in October.[29] The

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[17] Record p 80 line 12 - p 80 line1.

[18] Exhibit B, p 4.

[19] Exhibit C.

[20] Record p 84, lines 18-21.

[21] Record p 85, lines 19-24.

[22] Record p 87, lines 2-6.

[23] Record p 87, lines 10-23.

[24] Exhibit B, p 4.

[25] Record p 88, lines 14-20.

[26] Record p 89, lines 2-3.

[27] Record p 89, line 9.

[28] Record p 89, lines 11-21.

[29] Record p 91, lines 4-12. The meeting happened in the week prior to the protest, probably on Thursday 5 September 2013. Record p 122, lines 4-5.

members "*spoke strongly about their frustration with the City*" both for the poor communication, and the fact that "*people's experiences of sanitation [were] still the same.*"[30] The members stated that "*we need to have a protest, go big and show the city that we're very serious, we mean business.*"[31]

16. Following the mass meeting, the SJC held a special executive council meeting to decide what action to take.[32] That meeting was attended by the Convenor Accused.[33] It was decided that it was necessary to take public action because merely writing again would not help.[34] The meeting decided to picket at the Civic Centre to force the City to publicly acknowledge their responsibilities and act on them.[35] The Convenor Accused decided that they would not give notice, and that only 15 people would attend the picket so that they would comply with the RGA.[36] The decision not to give notice was based on two concerns: the need to act urgently, and in order to show the City "*how frustrated we are because we were not going to leave there, the plan was we are not going to leave there until they come and acknowledge our demands.*"[37]

17. A caucus meeting was held on the Monday or Tuesday before the protest of all those who would be involved to plan for the protest.[38]

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[30] Record p 92, lines 7-12.

[31] Record p 93, lines 6-8.

[32] Record p 93, lines 14-15.

[33] Record p 94 line 23 – p 95 line 12.

[34] Record p 95 line 19 – p 96 line 4.

[35] Record p 96, lines 5-16.

[36] Record p 97, lines 1-7.

[37] Record p 98, lines 4-6.

[38] Record p 128 lines 18-23.

The Protest

18. The protest took place on 11 September 2013. Fifteen people went by taxi from Khayelitsha to the Civic Centre and arrived at about 9:00.[39] The fifteen people then chained themselves together in groups of five and walked to the staircase leading to one of the entrances to the Civic Centre, where they chained themselves to the railing.[40]

19. This Court should make the following findings concerning the conduct of the protest.

20. The protest did not prevent people accessing the Civic Centre. The staircase to which they chained themselves was only one of several ways to access that entrance to the Civic Centre.[41] There were also other entrances for people to access the Civic Centre.[42] It was not the protestors' intention to prevent access,[43] and people were able to go underneath the protestors' arms.[44] People in fact used the entrance during the protest, although it was eventually closed.[45]

21. The protest was peaceful and respectful. The protestors held placards and sang songs, but the protest was always peaceful.[46] Accused 1 negotiated calmly and respectfully with Captain Prins when he asked them to leave.[47]

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[39] Record p 99, lines 5-20.

[40] Record p 99 line 24 – p 100 line 13.

[41] Record p 101, lines 7-11.

[42] Record p 101, lines 12-17.

[43] Record p 101, lines 18-19.

[44] Record p 107 lines 3-7. Officer Peterson's evidence to the contrary should be rejected. Record p 38, lines 11-14. He offered contradictory versions (at first stating it would be impossible, then conceding it would only be difficult) and his version is inconsistent with the photographic evidence.

[45] Record p 107, lines 8-11.

[46] Record p 43, lines 8-14.

[47] Record p 111, lines 16-21.

22. There were approximately 16 people chained together. The accused admit that although initially 15 people were chained together,[48] later 16 of them were chained to the railing.[49] The photographs of the protest also show that approximately 16 people were chained together.[50] Some people joined the chain, and others left the chain during the protest. When Captain Prins asked them to leave, they realized that there were more than 15 people in the chain and offered to get the extra people to leave the chain.[51] The 15 people were nominated from the various branches and the executive structure.[52]

23. The remaining accused were not chained, but participated in the protest.[53] There were less than 10 other SJC members[54] present who were singing and chanting and holding placards.[55] They were there to support those chained to the railings by sending media statements, bringing files and getting food.[56] They moved closer and further away from the railings, but were sometimes as close as a metre and a half away.[57] The accused accept that all 21 accused attended the gathering.

24. The accused did not resist arrest and nobody attempted to run away. All those who were part of the chain were arrested.[58] They were still chained

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[48] Record p 104, lines 15-16.

[49] Plea Explanation at para 7.1.

[50] Exhibits F and G. While it appears that 17 people may have been chained,

[51] Record p 110, lines 11-16.

[52] Record p 131-132.

[53] Plea Explanation at para 7.2.

[54] Record p 136, lines 15-17.

[55] Record p 104 line 23 – p 105 line 7.

[56] Record p 137, lines 15-17.

[57] Record p 139 line 13 – p 140 line 10.

[58] Record p 113, line 7.

together when they were arrested.[59] Some, but not all, of the unchained protestors were also arrested.[60] Nobody tried to run away.[61]

The effect of protest

25. Protest has been an effective method for the SJC to achieve its goals. For example, it aided in the establishment of the Khayelitsha Commission of Inquiry.[62] The arrest of the accused for protesting has had a chilling effect on future protests by the SJC. As Accused 1 put it:

> *[P]eople are arrested even though they are arrested for raising issues that are dear to their hearts and issues that are very important, but obviously going forward it does affect when people need to protest again they're going to think twice: are we going to be arrested. Because if you think back we weren't violent, we weren't disrupting anything, but still we were arrested and so people are going to think twice even though they feel they've tried every possible avenue to be heard and they're not heard, but they are going to think twice for them to participate in a public or an action of this sort.*[63]

[59] Record p 113, line 16.

[60] Record p 113, lines 8-11.

[61] Record p 113, lines 3-5; lines 12-22. Officer Petersen's testimony to the contrary should be rejected as implausible. Record p 35, lines 1-2. On his own version there were at least 12 policemen present and they were all required to arrest 15 protestors who were chained to each other. It appears clearly from Exhibit J that the protestors were still chained together when they were arrested. He also stated that only those who were chained were arrested. Yet the photographic evidence demonstrates that there were, at most, 17 people chained together. His version is patently false.

[62] Record p 117, lines 9-21.

[63] Record p 118, lines 2-11.

26. The protest also had an important impact that would not have been achieved if the SJC had sought to obtain a permit.[64]

The Constitutional Argument

27. It is not necessary, at this stage, to set out the accused's constitutional challenge to s 12(1)(a) and (e) in any detail. However, for the assistance of the court in understanding the accused's defence, I summarise it here.

28. Section 17 of the Constitution reads: "*Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.*" To the extent that ss 12(1)(a) or 12(1)(e) make it a crime to convene or attend a peaceful, unarmed gathering, they plainly limit the right to assemble in s 17. The only question is whether that limitation is justifiable in terms of s 36(1) of the Constitution.

29. The Accused do not argue that the Constitution requires that people be able to gather without any restriction, or without any requirement that they give notice. They argue only that it is unconstitutional to criminalise peaceful, unarmed, non-disruptive protests merely because: (a) there are more than 15 people; and (b) no notice was given.

30. Criminalisation is a serious limitation. Not only does it make criminals of people who are merely exercising their constitutional rights, it deters people from doing so. There must be a strong justification for such a severe limitation.

31. Notice serves the vital purpose of allowing local authorities to regulate gatherings by, for example, providing police, or blocking off roads. But if the gathering does

[64] Record p 118-119.

not block traffic, prevent access to public buildings, or otherwise interfere with the rights of others, the mere fact that no notice was given should be irrelevant.

32. It is possible for the local authority and the police to regulate disruptive gatherings without any need to criminalise the failure to give notice. If a gathering (including one convened without notice) is disruptive, the police are empowered to regulate the gathering, or ask the protestors to disperse.[65] Failure to obey a police order is a crime.[66] The accused do not challenge that. Blocking roads or access to buildings is also criminal. As is any form of vandalism or other violence. Those offences are more than sufficient to achieve the purposes that are ordinarily achieved by requiring that notice should be given in advance.

33. The only remaining purpose of criminalising the failure to give notice is to incentivise convenors to give notice. But that is not sufficient to justify the limitation. First, it provides no reason to criminalise attending a gathering. Second, there is no constitutional value in disincentivising peaceful, non-disruptive protests. Third, the giving of notice will sometimes prevent the gathering from occurring, or it delay there are far less restrictive ways to incentivise convenors to give notice of a gathering. The RGA could impose administrative fines that would not result in a criminal record. Or it could affect the liability of convenors for any damage caused by the gathering, or increase the penalties for other offences.

34. In short, criminalisation of gatherings of more than 15 people without notice is like using a steamroller to crack a peanut. It is far too broad for the purpose, and there are less restrictive means available to achieve the same end.

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[65] RGA s 9.

[66] RGA s 12(1)(g).

III INTERPRETATION DEFENCE

35. The accused submit that, properly interpreted, s 12(1)(e) does not criminalise convening or attending a gathering without the requisite notice. Accordingly, all the Attending Accused should be acquitted. The Convenor Accused can be convicted only of contravening s 12(1)(a). In this Part:

35.1. I set out the basic interpretive principles;

35.2. I explain how they affect the interpretation of s 12(1)(e); and

35.3. I show what that means for the accused.

Basic Principles

36. The accused rely on three general principles in support of the interpretation defence.

37. First, it is one of the cardinal rules of statutory interpretation that a statute "*should be construed so that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant*".[67] Or, as the Supreme Court of Appeal has put it, "*every word in a statute must be given a meaning to avoid surplusage*".[68] And Mokgoro J explained the rule as follows: "*we must read the text as a whole, assigning a meaning to every word and phrase, and not permitting any portion of the text to be rendered redundant.*"[69]

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[67] *Attorney General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436, quoting *R v Bishop of Oxford* (1879) 4 QBD 245 at 261.

[68] *Thorpe and Another NO v BOE Bank Ltd and Another* 2006 (3) SA 427 (SCA) pat para 10.

[69] *Case and Another v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at para 57 (concurring).

38. Second, all legislation must be interpreted to "*promote the spirit, purport and objects of the Bill of Rights*".[70] This requires that courts adopt the interpretation of legislation that "***better*** *promotes*" that end.[71] As long as the interpretation is not "*unduly strained*"[72] courts must prefer it even if it is not the most obvious.[73] Accordingly, if one interpretation will make it easier to exercise the right of freedom of assembly, that interpretation must be preferred.

39. Third, where penal statutory provisions are vague or ambiguous they must be interpreted *in favorem libertatis*.[74] Where courts are dealing with statutes that create criminal offences with the potential of imprisonment, they must adopt the interpretation that criminalises the narrowest possible range of conduct.

Interpretation of s 12(1)(e)

40. Section 12(1)(e) of the RGA provides that a person commits an offence if he or she "*in contravention of the provisions of this Act convenes a gathering, or convenes or attends a gathering or demonstration prohibited in terms of this Act*". The section prohibits two types of conduct:

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[70] Constitution s 39(2).

[71] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC) at para 45.

[72] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC) at para 24.

[73] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) at para 53.

[74] See, for example, *Jaga v Dönges N.O. and Another* 1950 (4) SA 653 (A) at 657, 661 and 668; *R v Jack* 1953 (2) SA 624 (A) at 627.

40.1. Convening a gathering "*in contravention of*" the RGA; and

40.2. Convening or attending a gathering or demonstration "*prohibited in terms of this Act*".

41. The accused make two arguments regarding the proper interpretation of s 12(1)(e):

41.1. First, it should not be interpreted to criminalise convening a gathering without notice as that is already specifically prohibited by s 12(1)(a); and

41.2. Second, a gathering that occurs without notice is not a gathering or demonstration "*prohibited in terms of this Act*".

Conduct already criminalised

42. Section 12(1)(a) criminalises convening "*a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3*". Following the doctrine of non-redundancy, s 12(1)(e) should be interpreted not to cover convening gatherings without notice, but only to cover other contraventions of the Act. If s 12(1)(e) includes the act of convening a gathering without notice, then s 12(1)(a) would serve no purpose; it would criminalise conduct that was already fully covered by s 12(1)(e).

43. Section 12(1)(e) serves as a catch-all provision to capture any contravention of the Act that is not covered by the other criminal prohibitions in s 12(1). Most obviously, s 12(1)(e) covers convening or attending gatherings where notice was given, but the gathering was nonetheless prohibited in terms of ss 3(2), 5 or 7. There are likely many other contraventions of the Act that could

not reasonably be included in the other provisions of s 12(1). But it is not necessary or appropriate to double-criminalise conduct that is already criminalised by s 12(1)(a).

Prohibited gathering

44. While the proscription of convening applies to gatherings that are either in contravention of, or prohibited in terms of the RGA, s 12(1)(e) only prohibits attending a gathering if the gathering is "*prohibited in terms of this Act*". A gathering convened without notice is not such a "*prohibited*" gathering.

45. The RGA deals expressly with the prohibition of gatherings. The following provisions are relevant:

45.1. Section 3(2) allows the responsible officer to prohibit a gathering if notice is given less than 48 hours before the gathering. It is important to note that, even if notice is given one hour before the gathering, the responsible officer has a discretion whether or not to prohibit the gathering. If he elects to do so, he must give notice to the convener.

45.2. Section 5 permits the responsible officer to prohibit a gathering if he has reasonable grounds to believe that it "*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*".[75] If he has this suspicion, he must consult with the relevant parties, including the convener.[76] If he is of the view that no

[75] RGA s 5(1).

[76] RGA s 5(1).

amendments to the nature of the gathering would avert the consequences, "*he may prohibit the proposed gathering*". He is then required to notify all those concerned of his decision in terms of s 4(5)(a). Section 4(5)(a) requires the notice to be delivered to the convener or, if that is not possible, to be published in a manner that will bring it to the attention of likely attendees.

45.3. Section 7 prohibits gatherings in and outside courts and certain other areas, although conveners may apply for permission to hold gatherings in those areas.

46. Both s 3(2) and s 5 afford the responsible officer a discretion to permit or prohibit a gathering. In addition, they both require that the responsible officer notify the relevant parties of his decision. This is vital because those convening and especially those attending the gathering must know whether or not it has been prohibited.

47. There is no section in the RGA that prohibits a gathering merely because it will involve more than 15 people. The only relevant section is s 3(1), which reads: "*The convener of a gathering shall give notice in writing signed by him of the intended gathering in accordance with the provisions of this section: Provided that if the convener is not able to reduce a proposed notice to writing the responsible officer shall at his request do it for him.*" The RGA does not state that, if the convener fails to give the required notice, the gathering is prohibited.

48. This is not an oversight, but the manifest purpose of the Act. Ordinarily, a person attending a gathering will not know whether or not the convenor has given the necessary notice. They will be invited to attend a gathering and will

assume that the convener will have given the relevant notice and will inform the attendees if the gathering has been prohibited. If she hears nothing, she will assume that the gathering is legal.

49. By only prohibiting attendance at gatherings that have been expressly prohibited, the RGA strikes the correct balance between order and the right to freedom of assembly. When a gathering is prohibited under s 3(2) or s 5, the attendee will receive notice of it, either through the convener, or through the other methods identified in s 4(5)(a). She is also deemed to be aware of the express prohibitions in s 7 of the RGA. If she nonetheless participates in the gathering, she will contravene s 12(1)(e). But where the gathering is not prohibited, the RGA allows her to attend, and punishes only the convener who arranged the gathering without giving the necessary notice (although we argue that prohibition is unconstitutional).

50. This approach is buttressed by the provisions of s 9(c) which provides for the powers of police in the instances where the required notice was not given 48 hours before the gathering. This will obviously include situations where no notice was given at all. Section 9(c) affords police the power to ensure that traffic is least impeded, to ensure access to property and workplaces and the prevention of injury or damage to property. It contemplates that the police may decide to manage the gathering, and allow it to continue, even though it was convened in contravention of the Act. It would be nonsensical to afford the police the power to permit the gathering to continue, yet to criminalise all those who attend it.

51. Accordingly, the best textual interpretation of s 12(1)(e) is one that does not make it criminal to convene or attend a gathering for which no notice has

been given. Even if that were not the best textual interpretation, it is plainly a plausible interpretation. It must be preferred to an alternative interpretation in terms of which attending a gathering without notice is criminalised because it better promotes the right to freedom of assembly, and it is *in favorem libertatis*.

52. The Constitutional Court has emphasised the importance of the right to assemble in the following words:

> *The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights.*[77]

53. Clearly, where it is possible to interpret the RGA to avoid violating this fundamental right, that interpretation should be preferred.

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[77] *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC) at para 61.

Application

54. Only the Convenor Accused convened the gathering. The Attending Accused only attended the gathering. The state has led no evidence to suggest that the other accused were involved in convening the gathering.

55. Accordingly, the Attending Accused cannot be convicted of contravening s 12(1)(a). They also cannot be convicted of contravening s 12(1)(e) for the reasons given above: it does not criminalise attending a gathering without notice.

56. By contrast, the convenor accused may be found guilty of an offence under s 12(1)(a) by this court, although the accused argue that the offence is unconstitutional. However, they too should not be found guilty of an offence under s 12(1)(e). For the reasons given earlier, s 12(1)(e) should not be interpreted to criminalise conduct that is already criminalised by s 12(1)(a). While it prohibits some actions by conveners, it does not prohibit convening a gathering without notice. And that is the only conduct that has been established against the convenor accused.

57. In sum, the accused submit that:

    57.1. Accused 2, 4, 6, 7, 8, 9, 10, 11, 13, 14 and 20 should be acquitted of all charges;

    57.2. Accused 1, 3, 5, 12, 15, 16, 17, 18, 19 and 21 may only be convicted of count 1, but the accused will argue on appeal that the offence is unconstitutional.

MICHAEL BISHOP

Counsel for the accused

Chambers, Cape Town

23 July 2014