IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, HELD IN BLOEMFONTEIN

Case number: A71/2016

In the matter between:

TREATMENT ACTION CAMPAIGN & 94 OTHERS	Applicants
and	
MINISTER OF POLICE AND TWO OTHERS	Respondents

FILING SHEET: REPLYING AFFIDAVIT TO FIRST RESPONDENT'S SUPPLEMENTARY AFFIDAVIT

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REPUBLIC OF SOUTH AFRICA
11 -07- 2016
DB
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GRIFFIER
VRYSTAAT HOOGGEREGSHOF BLOEMFONTEIN

To: **The Registrar**
High Court
Bloemfontein

And to: **THE STATE ATTORNEY**
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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

CASE NO: A71/2016

In the matter between:

TREATMENT ACTION CAMPAIGN & 94 OTHERS	Applicants
and	
MINISTER OF POLICE	First Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS: FREE STATE	Third Respondent

REPLYING AFFIDAVIT TO FIRST RESPONDENT'S SUPPLEMENTARY AFFIDAVIT

I, the undersigned

ANELE BOYCE YAWA

Hereby state under oath:

1. I am an adult male and the General Secretary of the Treatment Action Campaign NPC ("TAC"). I deposed to the founding affidavit and to the replying affidavit

(dated 8 June 2016) in this application, and am duly authorized to depose to this affidavit on behalf of the applicants.

2. The contents of this affidavit are both true and correct and, unless the context indicates otherwise, within my personal knowledge. Where I make legal submissions, I do so on the advice of the applicants' legal representatives.

3. I have read the First Respondent's Supplementary Affidavit, which was filed on behalf of the Minister of Police ("the Minister") on 4 July 2016 pursuant to the order of this Court dated 20 June 2016. I respond to the contents of that affidavit here.

4. I have not responded to each allegation in the Minister's answering affidavit. Instead, I deal in brief with each of the issues raised. I am advised that these will be dealt with in more detail in legal argument. Where I do not respond to a particular allegation, I pray that it be taken to have been denied.

Authority

5. At paragraph 1 of the answering affidavit, the deponent alleges that she is duly authorized to depose to the affidavit on behalf of the Minister. However, she does not substantiate this assertion with any evidence of a delegation of authority by the Minister.

Non-joinder and misjoinder

6. I note that the Minister now accepts (at paragraph 4 of the answering affidavit) that he is responsible for the administration of the Act, and has therefore been correctly joined as the first respondent in this application. That the Minister declines to, and espouses an inability to, provide reasons for his "clearly wrong" submission is a matter of concern. It continues a pattern of concerning conduct throughout these proceedings.

7. However, the Minister now asserts (at paragraph 7 of the answering affidavit) that this application is flawed in that the applicants failed to join "the relevant local authority". I deny that there has been any non-joinder.

8. The local authorities referred to in the Act are, through their appointed representatives, responsible for its implementation on a day-to-day basis. They are not responsible for the overall administration of the Act.

9. I am advised that the officials responsible for day-to-day implementation of legislation do not have a direct and substantial interest in the outcome of a challenge to the constitutional validity of that legislation. Uniform Rule 10A requires only that the Minister responsible for the overall administration of the Act be joined.

10. On these grounds, I deny that there is a material non-joinder.

The requirement of notice

11. The Minister dedicates a large portion of the answering affidavit to justifying the importance of providing notice of an intended gathering, and the role of the convenor in securing the necessary notice and making arrangements for the conduct of the gathering.

12. We contest neither the role of convenors in providing notice nor the value of their doing so. However, the Minister fails to take the following into account:

    12.1. The applicants have not challenged the constitutional validity of the requirement of notice *per se*;

    12.2. None of the accused applicants was charged with convening a gathering without providing the requisite notice; and

    12.3. The statute contains no obligation on an attendee to provide notice of an intended gathering.

13. The answering affidavit deals in detail with the process in planning a gathering, including the necessary arrangements to ensure the safety of the attendees. This fails to take account of the fact that the attendees of a gathering are seldom involved in the planning phase. The logic of the Act derives precisely from the distinct roles of convenors and attendees. Indeed, an attendee will not necessarily have knowledge of a gathering before it commences.

14. In this context, imposing an obligation on each attendee to ensure that notice of the gathering has been given would be impractical and unreasonable. It would offend the foundational values of our Constitution, including open democracy and freedom.

15. Such an obligation would require each and every attendee taking part in the gathering to–

15.1. Establish precisely who the convenor of the gathering is;

15.2. Approach the convenor directly to determine whether the requisite notice has been given, before participating in the gathering. This would presumably be required on arrival at the gathering, whether before its commencement or during the course of the gathering;

15.3. Satisfy herself or himself, following an exchange with the convenor in the midst of the gathering, that notice of the gathering was provided; and

15.4. Join the gathering only if and when he or she is satisfied that the notice requirements in the Act have been complied with.

15.5. Alternatively, a prospective attendee would need to consult the responsible officer in the municipality concerned.

16. I deny that it is reasonable to expect each and every attendee of a gathering to ensure that the requisite notice has been provided, as the Minister avers he expects of them at paragraph 69 of the answering affidavit. Indeed, to expect the attendees to take these steps or to face criminal sanction would place a disproportionate burden on them.

17. Rather than deterring gatherings that do not meet the requirements of the Act, therefore, imposing these duties on attendees would deter gatherings in their entirety. This is contrary to the spirit of the Act and the right to assemble as guaranteed in section 17 of the Constitution.

18. As the Minister himself concedes at paragraph 68, such duties elevate the notice requirement to a requirement of "permission" for the exercise of the right. This undermines the import of the Act, which, as the Minister points out at paragraph 12.1, marks a shift from an application procedure to a notification procedure.

Consequences of a failure to give notice

19. The Minister asserts that the importance of the notice provisions would be undermined if there were no consequences for a failure to provide notice. This assertion is baseless. The very first offence created in the statute sanctions the conduct of a convenor who organises a gathering but fails to give notice.

20. The deponent makes no distinction in this regard between a convenor's failure to give notice and an attendee's failure to ensure that the requisite notice has been given before participating in a gathering.

21. I therefore deny that there are no consequences for attending an un-notified gathering. In any event:

21.1. In the event that a gathering leads to violence or damage to property, the harm that arises is not caused by a failure to give notice, but rather by that violence or disruption that ensues. I therefore deny that there is any need to impose consequences on the absence of notice *per se*.

21.2. I am advised that where there is a threat of disruption, injury or damage to property, there are other remedies in the Act to hold those responsible to account. For example –

21.2.1. Section 9 of the Act deals with the powers of police, which includes their powers in the context of disruption, injury or damage to property that arises in the course of a gathering; and

21.2.2. Section 11 of the Act deals with liability for damage arising from gatherings.

22. As such, there are adequate provisions setting out the consequences for any harm that may arise during the course of the gathering. These are applicable whether or not notice of the gathering is provided.

23. In any event, even if it were necessary to impose sanctions for a failure to give notice of a gathering (which is denied), the Minister has not established why these consequences must be borne by the attendees of the gathering, who do not participate in its organization and who bear no obligation to give notice.

The interpretation argument

24. The applicants' legal representatives have dealt with the interpretation argument at length, during the trial of the accused applicants and in the heads of argument filed in the appeal.

25. I do not intend to repeat these contentions here.

26. The interpretation argument is essentially one that relies on the distinction between automatic prohibition of a gathering, and the local authority (or a court of law) exercising a discretion to issue a notice of prohibition of the gathering. The applicants maintain that a gathering will only be prohibited where positive steps to prohibit the gathering are taken.

27. In other words, where no notice is given, the gathering will not and cannot be automatically prohibited. A responsible officer may, however, exercise his or her discretion to give notice of prohibition in appropriate circumstances.

The constitutional challenge

28. The Minister repeatedly avers that the right to gather as guaranteed in section 17 of the Constitution is not unqualified. The applicants accept this. However, any regulation or limitation on the right to assemble must be reasonable and justifiable in terms of section 36 of the Constitution.

29. The Minister asserts at paragraph 37 that the notice requirement "does not result in an infringement of the rights". Aside from misconstruing the precise infringement at issue, the Minister does not provide any substantiation for such a claim. It is not the notice requirement that offends the Constitution; it is the (proposed) criminalization of the attendance of an un-notified meeting.

30. In the alternative, in seeking to justify the limitation, the Minister relies on the importance of the notice provisions and the consequences of a failure to make the necessary safety arrangements for a gathering. However, there is nothing in this justification to link the analysis to the attendees, and to justify why they should bear the burden of ensuring that notice has been provided before participating in a gathering. The Minister has not identified any relationship between the criminal sanction and incentivizing the provision of notice.

31. Moreover, as I stated above, it is not even the lack of notice itself that causes harm; rather, it is the disruption, injury and damage to property that may arise during a gathering. In the circumstances that these do arise, or that there is a risk of them arising, there are adequate powers in the Act to address them.

32. The effect of criminalizing attendance at a gathering for which no notice has been given goes much further than deterring "unlawful gatherings"; the impact would be to discourage prospective attendees from attending gatherings at all. This would have a chilling effect on the exercise of a constitutionally protected fundamental right.

33. This will be dealt with in detail in legal argument.

Consequences of the conduct of the Minister of Police

34. The Minister of Police failed to provide this Court with a substantive response to the constitutional challenge prior to the 20 June 2016 hearing. This occurred despite the directive handed down by Judge Moloi in a pre-trial hearing on 20 May 2016, which the representatives for the Minister failed to attend despite express invitation. The conduct of the Minister was the sole cause for the wasted costs incurred as result of the postponement ordered by this Honourable Court on 20 June 2016.

35. It is common cause that the Minister was fully aware of the directive of the Court yet chose not to provide the Court a substantive response.

36. The appellants (and co-applicants) are, for the most part, entirely unable to fund themselves their attendance of and participation in these proceedings. They are fortunate to have secured free legal representation. The logistics of their individual attendance has, however, been funded by the first applicant and other organisations such as Amnesty International. However, these logistics are costly and resources are extremely limited. The TAC has already spent the entirety of its allocated budget for this matter. The accused applicants' ability to attend court on the next hearing date will depend on our ability, and theirs, to raise sufficient funds.

37. In the circumstances, taking into account the function played by the first applicant, the nature of public interest litigation of this kind, the circumstances of the appellants and co-applicants, the history of the criminal case and appeal, I request the Honourable Court to order the Minister to pay such costs as can be taxed pertaining to the wasted costs occasioned by the hearing on the 20th of June 2016.

Conclusion

38. For the reasons set out above, the applicants persist with the relief we seek in the notice of motion. In particular –

38.1. We maintain that, on a proper interpretation, there can be no automatic prohibition of a gathering and therefore participation in a gathering for which no notice has been given is not a criminal offence.

38.2. Should the Court disagree with this interpretation, we assert that section 12(1)(e) of the Act, which criminalises attendance at a gathering for which no notice has been given, should be declared inconsistent with the Constitution and set aside.

ANELE BOYCE YAWA

Signed and sworn to before me at Durban North SAPS on the 11 day of July 2016, the deponent having acknowledged that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath, and that he considers the prescribed oath to be binding on his conscience.

COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
THE COMMANDER
2016 -07- 11
DURBAN NORTH
CRIME PREVENTION
KWAZULU-NATAL