IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no: A222/2015

Case no: A71/2016

In the two matters between:

PATRICIA TSOAELI AND 93 OTHERS Appellants

and

THE STATE Respondent

As well as:

TREATMENT ACTION CAMPAIGN First Applicant

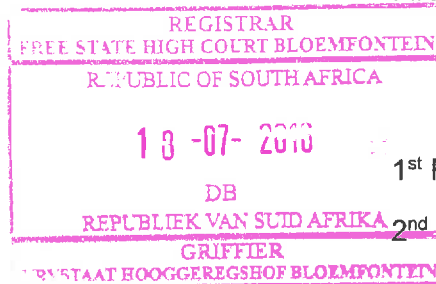
And 95 others

and

MINISTER OF POLICE 1st Respondent

NDPP 2nd Respondent

DPP, FREE STATE



FILING SHEET: APPELLANTS' AND APPLICANTS'

SUPPLEMENTARY HEADS OF ARGUMENT

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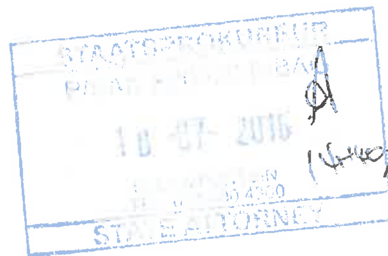

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___ day of JULY 2016.

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APPELLANTS' AND APPLICANTS'

SUPPLEMENTARY HEADS OF ARGUMENT

Introduction

1. These heads of argument are filed in response to the Honourable Court's ruling on 20 June 2016 that the conditional constitutional challenge (case no: A71/2016) be heard together with the appeal (case no. A222/2015) and that the Minister of Police ("the first respondent") file supplementary papers.

2. Having considered the first respondent's supplementary affidavit filed on 4 July 2016, the appellants (applicants) confirm the original submissions made in the heads of argument filed on 30 May 2016.

3. These supplementary heads of argument only deal with the following three issues:

   3.1. Why the first respondent's proposed interpretation of the Regulation of Gatherings Act (205 of 1993) is incorrect;

   3.2. The first respondent's failure to present evidence to support the submissions made as regards limitation; and

   3.3. Why the Honourable Court should make a cost order against the first respondent as regards the wasted costs incurred on 20 June 2015.

Incorrect interpretation of the RGA

4. At the core of the first respondent's argument on both the interpretation and the conditional constitutional challenge lie the following two interrelated assertions:[1]

   4.1. It makes little sense that a gathering may be prohibited if notice is given less than 48 hours prior thereto, but that it is not prohibited if no notice at all is given.

   4.2. If the appellants' proposed interpretation of the RGA is accepted it means that attendance of an un-notified gathering carries no consequences at all.

5. Both these assertions are incorrect.

6. The first assertion is incorrect because it conflates, and wrongly so, the exercise of a discretion with automatic prohibition.

   6.1. When notice of less than 48 hours is given, the responsible officer <u>may</u> exercise a discretion to prohibit the gathering.

[1] Contained in para 36.1 and 36.4 of the supplementary affidavit.

6.2. There is nothing in the statute to suggest that, accordingly, it follows that the absence of notice should result, inevitably, in automatic prohibition.

7. The second assertion is incorrect because the RGA anticipates very serious consequences to be visited once a gathering proceeds un-notified.

7.1. The consequences are, however, visited not upon the attendees but upon the convenors, as per section 12(1)(a) of the RGA.

7.2. This is in accordance not only with the structure of the Act, but also with the fundamental and qualitative difference in role and function between a convenor and an attendee.

7.3. It is, however, up to the police to investigate and detect the identity and conduct of the convenors; i.e. the persons who actually organised the gathering.

7.4. With reference to facts of the appeal, this was never done in this instance.

7.5. The interpretation of the statute should not be bent to compensate for inability of the police to do their work.

Incorrect textual reading

8. In addition, the first respondent advances a particular, albeit incorrect, textual reading of section 12(1)(e).[2]

8.1. The Minister argues that the language of section 12(1)(e) of the Act makes clear that any gathering in contravention of the provisions of the Act – including a gathering for which no notice in terms of section 3 has been given – is prohibited.

[2] In para 36.2 of the supplementary affidavit.

8.2. He states that a failure to give notice of a gathering is clearly in contravention of section 3 of the Act, with the inevitable result that the gathering is prohibited.

8.3. The Minister argues that the definition of "prohibited" as used in the second clause of the provision (after the comma) is contained in the first clause of the provision (before the comma).

9. The Minister's interpretation is, with respect, incorrect. On a plain reading, section 12(1)(e) of the Act creates three separate offences:

9.1. Convening a gathering in contravention of the provisions of the Act;

9.2. Convening a prohibited gathering; and

9.3. Attending a prohibited gathering.

10. There is nothing to support a reading of section 12(1)(e) that equates a gathering that does not comply with the provisions of the Act with a prohibited gathering. Not only does this undermine the requirement of express prohibition as addressed in full in our heads of argument of 30 May 2016, but it also requires a strained interpretation of section 12(1)(e), one that defies basic grammatical and linguistic logic.

11. In *Centre for Child Law* [3] the following was said on this subject:

> *"There is a long line of judgments of this Court in which we have repeatedly emphasized the rule, by now axiomatic, that where a statutory provision is reasonably capable of a construction that would bring it in line with the Constitution, it is that construction which must be preferred provided that it is not strained."*

12. Even if the provision was capable of the interpretation proposed by the Minister, therefore, it should give way to the one that gives fullest effect to the gathering rights, namely the interpretation that does not criminalise a gathering in respect of which no express prohibition has been issued.

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[3] *Centre for Child Law v Minister for Justice and Constitutional Development and others* 2009 (6) 632 (CC) at para 108.

Failure to produce evidence to support limitation

13. The first respondent firstly denies that the criminalisation of the attendance of an un-notified gathering limits the right contained in section 17 of the Constitution. This assertion is manifestly baseless and warrants no further response.

14. More important is the first respondent's dealing with the limitation argument; which (after all) was the main reason for its citation as first respondent.

15. The Constitutional Court had made clear in *Moise* [4] what is required of litigants in the position of the first respondent.

> *"It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court.*
>
> *It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity – indeed an obligation – to do so. The obligation includes not only the submission of legal argument but <u>the placing before Court of the requisite factual material and policy considerations</u>. Therefore, although the burden of justification under s 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment."* (Our emphasis)

16. The first respondent has elected to place no factual material or policy considerations before this Honourable Court in support of its limitation argument.

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[4] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC) at para 19.

16.1. No detail as regards the number of un-notified gatherings in the province (or the country) has been provided.

16.2. No facts have been presented as to why these kind of gatherings pose a larger or lesser threat (or any threat at all) when compared to notified gatherings.

16.3. No comparative analysis between notified and un-notified gatherings (and the rle of convenors) and the harm or prejudice caused) is provided.

16.4. An entire business unit with a national presence (the Public Order Policing Unit) exists within the organogram of the South African Police Service, and yet no evidence as to its work or experience with gatherings is provided.

17. Nevertheless, the argument as regards limitation is advanced.

18. This is not only an impermissible mode of litigation. It has to lead to the conclusion that the first respondent is not possessed of the facts to back up its proposed interpretation.

19. Moreover, the first respondent's limitation argument fails to address any relationship between the criminal sanction imposed on attendees of a gathering and incentivising the provision of notice. Any rational connection between the limitation and its purpose is therefore absent.

Costs

20. Regardless of the outcome of this application, we submit that the Minister should be held liable for the wasted costs of the hearing of 20 June 2016, and for such costs to be calculated on an attorney and client scale.

21. In this regard we note the comments made by this Court at the hearing on 20 June 2016 regarding the conduct of the Minister, and his failure to put up a substantive defence despite a directive that the constitutional challenge would be heard on that day:

> *"So the direction issue by the acting Deputy Judge President was of no consequence in your view?. . . Because you have basically ignored it".*[5]

22. We submit that in these circumstances a punitive costs order is justified.

23. The purpose for the making of costs orders on an attorney and client scale was set out in *Nel*[6] in

> *"The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party <u>will not be out of pocket</u> in respect of the expense caused to him by the litigation."* (Own emphasis.)

23. Given the applicants' circumstances and the first respondent's conduct in dealing with this matter, it would be inappropriate for the applicant to be left out of pocket insofar as it pertains to the appearance of, at least, 20 June 2016.

Counsel for the appellants and applicants

Rudolf Mastenbroek

Byron Morris

Nikki Stein

18 July 2016

Chambers, Sandton

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[5] Transcript of the hearing of 20 June 2016, p 64 line 23 – p 64 line 21.

[6] *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607.