IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No. A71/2016

In the matter between:-

TREATMENT ACTION CAMPAIGN AND 94 OTHERS Applicants

and

MINISTER OF POLICE 1st Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2nd Respondent

DIRECTOR OF PUBLIC PROSECUTIONS: FREE STATE 3rd Respondent

FILING NOTICE: FIRST RESPONDENTS
HEADS OF ARGUMENT

PLEASE TAKE NOTICE THAT the First Respondent's Heads of argument is filed evenly herewith.

SIGNED at **BLOEMFONTEIN** on this 25th day of **JULY 2016.**

P.P SMoleko

SS JONASE/mem
ATTORNEY FOR 1ST RESPONDENT
(DULY ADMITTED I.T.O SEC. 4 (2) OF THE ACT (ACT 62 OF 1995) TO APPEAR IN THE HIGH COURT OF SOUTH AFRICA (FREE STATE PROVINCIAL DIVISION)
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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: **A71/16**

In the matter between:

TREATMENT ACTION CAMPAIGN	First Applicant
PATRICIA TSOAELI AND NINETY FOUR OTHERS	Second to Ninety-Fifth Applicants

and

MINISTER OF POLICE	First Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE	Third Respondent

HEADS OF ARGUMENT ON BEHALF OF THE FIRST RESPONDENT

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INTRODUCTION

1. The only substantive relief sought in this application is an order declaring section 12(1)(e) of the Regulation of Gatherings Act No 205 of 1993 ("**the Gatherings Act**") to be inconsistent with section 17 of the Constitution and invalid.[1]

2. Section 12(1)(e) of the Gatherings Act provides as follows:

> "12 Offences and penalties
>
> (1) Any person who-
>
> (e) 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
>
> shall be guilty of an offence and on conviction liable-
>
> (i) in the case of a contravention referred to in paragraphs (a) to (j), to a fine or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment; and
>
> (ii) in the case of a contravention referred to in paragraph (k), to a fine or to imprisonment for a period not exceeding three years."

3. It should be noted that although certain submissions are made as to the proper interpretation of section 12(1)(e) ("**the interpretation argument**"), no order is sought in respect thereof.

4. These Heads of Argument are structured as follows:

   4.1. First, we address the interpretation argument.

   4.2. Second, we address the alleged unconstitutionality of the impugned

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[1] NM; par 1.

provision.

4.3. Third, we address the question of remedy.

4.4. Finally, we address the issue of costs.

THE INTERPRETATION ARGUMENT

5. The Applicants contend that the Court a quo erred by interpreting the Gatherings Act "to mean that the failure to give notice of a gathering in terms of section 3 of the Act: (a) that such a gathering per definition becomes prohibited; and (b) the subsequent attendance of such a gathering constitutes a criminal offence."[2]

6. According to the Applicants[3]:

6.1. A gathering is only "prohibited" where it is expressly declared to be so in terms of specific provisions of the Gatherings Act.

6.2. There was no such express prohibition of the gathering which the Applicants attended.

6.3. A failure to give notice of a gathering does not render such a gathering to be automatically prohibited.

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[2] FA; par 24.
[3] FA; par 25.

7. In **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) the SCA summarised the current approach to statutory interpretation in the following way:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

8. In line with the above principles, the Respondent submits that the interpretation argument must fail for the following reasons[4]:

8.1. First and as a point of departure, section 3 of the Gatherings Act makes clear that its provisions concerning the provision of notice are peremptory, with the only discretionary element being the timing of such notice. It further provides that if such notice is given less than 48 hours before the commencement of the gathering, the responsible

[4] Supplementary AA; par 36.

officer may by notice to the convener prohibit the gathering. 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 (under any circumstances) if no notice at all is given. In their Supplementary Heads of Argument, the Applicants contend that the Respondent has wrongly conflated the exercise of a discretion with an automatic prohibition.[5] This is not correct. The Respondent's submission is advanced on the following basis: that on the Applicants' approach, there is no prohibition of whatsoever nature if no notice has been given at all; yet, there may be a prohibition if notice is given less than 48 hours prior to the gathering. Such an interpretation, we respectfully submit, makes a nonsense of section 12(1)(e) of the Gatherings Act.

8.2. Second, the opening words to section 12(1)(e) refers to, "in contravention of the provisions of this Act"; it is clear that a failure to give notice is in contravention of section 3 of the Gathering Act. Section 12(1)(e) refers to a gathering or demonstration that is "prohibited". Accordingly, the question to be posed is whether a gathering which is in contravention of section 3 of the Gatherings Act is permissible; if it is not, then it follows that it is prohibited. We respectfully submit that such a gathering is indeed prohibited.

8.3. Third, had the Legislature intended for section 12(1)(e) to refer only to those provisions in the Gatherings Act which expressly prohibit a gathering by expressly referring to "prohibited", it would have expressly

[5] SHOA; par 6.

referred by section to the specific provisions in question as it has done in section 12(1)(a), (b), (c), (f)(g)(h) and (k); it did not do so but instead opted for broader language of a "contravention" of the Act.

8.4. Fourth, on the Applicants' version, attendance at a gathering at which no notice has been given carries with it no consequence at all. This could clearly not have been the intention of the Legislature. The Applicants, in their Supplementary Heads of Argument contend that this submission is incorrect because the Gatherings Act "anticipates very serious consequences to be visited once a gathering proceeds un-notified".[6] Significantly, on the Applicants' own version none of these consequences are visited upon attendees of a gathering in respect of which no notice has been given, but rather the convenor of such a gathering.[7] Accordingly, on the Applicants' version, despite attendees participating in an unlawful gathering or despite such a gathering potentially becoming violent, there is no criminal consequence of whatsoever nature visited upon an attendee.

8.5. Finally, in their Supplementary Heads of Argument the Applicants contend that even if the impugned provision is capable of the interpretation proposed by the Respondent, it should give way to an interpretation that does not criminalise a gathering in respect of which no express prohibition has been issued.[8] While we do not take issue with the principle of interpretation as set forth by the Constitutional Court in

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[6] SHOA; par 7.
[7] SHOA; par 7.1. to 7.5.
[8] SHOA; par 12.

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 2001 (1) SA 545 (CC), we submit that on the express wording of the impugned provision, such an interpretation will be unduly strained. The interpretative principle as recognised by the Constitutional Court is as follows:

> "[22] The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.
>
> [23] In De Lange v Smuts NO and Others, Ackermann J stated that the principle of reading in conformity does
>
> > 'no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution.'
>
> Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.
>
> [24] Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a

judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."

THE CONSTITUTIONAL ARGUMENT

9. According to the Applicants, if section 12(1)(e) is interpreted in a manner that criminalises the mere attendance of a gathering, which has not been expressly prohibited in terms of the Gatherings Act but in regard to which no notice was given to the relevant authorities, then it "plainly limits" the constitutional rights entrenched in sections 17 (freedom of assembly), 10 (the right to human dignity), 16 (the right to freedom of expression)and 18 (the right to freedom of association).[9]

10. It is trite law that it is for the Applicant to prove the facts on which it relies for the claim for an infringement of a constitutional right. In **Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) SA 984 (CC)**, the Constitutional Court held as follows:

> "[44] The task of determining whether the provisions of s 417(2)(b) of the Act are invalid because they are inconsistent with the guaranteed rights here under discussion involves two stages: first, an enquiry as to whether there has been an infringement of the s 11(1) or 13 guaranteed right; if so, a further enquiry as to whether such infringement is justified under s 33(1), the limitation clause. The task of interpreting the chap 3 fundamental rights rests, of course, with the Courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of the particular right in question. Concerning the second stage, '(it) is for the Legislature, or the party relying on the legislation, to establish this justification (in terms of s 33(1) of the Constitution), and not for the party challenging it to show that it was not justified'."

11. As a point of departure, section 17 of the Constitution provides as follows:

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[9] FA; par 36.

"Section 17 of the Final Constitution provides: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

12. The predecessor to section 17, *viz*, section 16 of the Interim Constitution provided: "Every person shall have the right to assemble and demonstrate with others peacefully and unarmed and to present petitions."

13. The Respondent has submitted: (a) that there is no constitutional infringement as alleged; and (b) in the event that this Court was to find otherwise then, the notice provisions (section 3) as read with the offence provision in section 12(1)(e) constitutes a reasonable and justifiable limitation on the section 17 rights.[10]

14. As regards, the threshold for the limitation of a constitutional right, section 36 of the Constitution provides as follows:

"36 Limitation of rights

(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.

[10] Supplementary AA; par 37 and 38.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

15. The legal principles pertaining to the application of section 36 of the Constitution are well established. We emphasise the following:

15.1. As a starting point, it is important to note that where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law — usually the organ of state responsible for its administration — must put material regarding such considerations before the court.[11]

15.2. A limitation will not be proportional if other, less restrictive means could have been used to achieve the same ends. And if it is disproportionate, it is unlikely that the limitation will meet the standard set by the Constitution, for s 36 'does not permit a sledgehammer to be used to crack a nut'.[12]

15.3. A provision which limits fundamental rights must, if it is to withstand constitutional scrutiny, be appropriately tailored and narrowly focused.[13]

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[11] 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 par 19. See too: Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Dev 2014 (2) SA 168 (CC).

[12] S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC) at par 34.

[13] Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) at par 49.

15.4. However, the state ought to be given a margin of appreciation in relation to whether there are less restrictive means available to achieve the stated purpose.[14]

16. In their Supplementary Heads of Argument, the Applicants criticise the Respondent for failing to place any "factual material or policy considerations" in support of its limitation argument.[15] It is respectfully submitted that the criticism is unwarranted:

16.1. In the first instance, the failure to submit such material may "in appropriate cases" tip the scales against Government.[16]

16.2. Second and in any event, the submission is wrong on the facts in that the Respondent has explained inter alia the deterrent effect of criminalisation.

17. In applying section 36 of the Constitution, the Respondent has emphasised the following[17]:

17.1. As regards the nature of the right, section 17 of the Constitution protects peaceful and unarmed gatherings; accordingly the right itself as protected is by no means unqualified. The procedural requirements under the Gatherings Act (including the notice provisions in section 3 thereof) are aimed at ensuring the exercise of the right in section 17 in a

[14] S v Makwanyane and Another 1995 (3) SA 391 (CC) at par 104.
[15] SHOA; par 16.
[16] 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 par 19.
[17] Supplementary AA; par 40 to 42.

peaceful and unarmed manner and to allow the picketing and presentation of petitions. Differently put, the impugned provision facilitates the exercise of the constitutional right as opposed to impedes the right.

17.2. As regards the importance and purpose of the limitation:

17.2.1. The reason for notification, is in order to ensure that proper planning can take place and in particular, depending on the nature of the information regarding the gathering, for a sufficient number of police officers to be deployed and to be made available on stand-by should the need so arise.

17.2.2. The failure to provide any notification means that the requisite police resources may not be available and crucial issues, such as planning, in respect of marshals etc. cannot occur. The result of this is that it increases the risk of the gathering descending into chaos and not being peaceful. This, in turn, may lead to an infringement of other persons' rights including posing a risk to their person and property.

17.2.3. The reason as to why attending a gathering in respect of which no notice has been given is an offence in terms of section 12(1)(e) is the deterrent effect that the criminalisation of such conduct has. Simply put, in the absence of a criminal sanction, persons would be able to attend gatherings in

respect of which no notice has been given without any adverse consequence at all.

17.3. The fact that a gathering may subsequently prove to be peaceful does not serve to excuse the failure to have complied with the notice requirements. This would not be known at the time when compliance with the notice requirements must take place and further if a gathering subsequently proves to be disruptive, chaotic and non-peaceful, there would be little recourse available to persons who have been adversely affected.

17.4. As regards the proportionality enquiry in section 36(c), (d) and (e) of the Constitution:

17.4.1. The notice provisions in section 3 applies only in respect of a gathering (i.e. more than 15 persons). There is good reason for this; there is a far greater risk of protests descending into chaos when its participants exceed 15 persons. There is accordingly an element of risk by virtue of this factor alone.

17.4.2. There are no less restrictive means that can have the same deterrent effect as section 12(1)(e) does.

17.4.3. The attendance of a gathering in respect of which no notice has been given is a serious matter. Such a gathering could potentially result in an infringement of a host of other rights of other persons, including their safety and their right peaceful

and unarmed assembly; there is a proportionality between section 12(1)(e) and the purpose it seeks to achieve.

17.4.4. In matters such as these the state ought to be given a margin of appreciation in relation to whether there are less restrictive means available to achieve the stated purpose.[18]

18. We accordingly submit that to the extent that this Court finds there to be an infringement of any of the constitutional rights relied upon, it is subject to a reasonable and justifiable limitation in terms of section 36 of the Constitution.

THE REMEDY

19. In the event that this Court finds that: (a) there is a constitutional infringement; and (b) the evidence and arguments advanced on the Respondent do not constitute a reasonable and justifiable limitation in terms of section 36 of the Constitution, then we submit that in any event, the Order sought in paragraph 1 of the Notice of Motion is overbroad for the following reasons:

19.1. There is no attempt to limit its retrospective effect. Accordingly, the Order as sought will apply in respect of persons who have already been criminally convicted pursuant to the impugned provision. We submit that the Order ought to be qualified so that it has no effect on cases that have been finally determined.

19.2. The consequence of the Order (as currently framed) is that there is no

[18] See S v Makwanyane and Another 1995 (3) SA 391 (CC) at par 104. See too: Teddy Bear Clinic – par 95

criminal sanction (or indeed any sanction) visited upon a person who attends a gathering in respect of which no notice has been given. Accordingly, even if such a gathering becomes violent (and is therefore not protected by section 17 of the Constitution), there is no criminal sanction that will ensue in respect of persons attending such a gathering.

COSTS

20. The Applicants seek a punitive costs order against the Respondent in respect of the wasted costs for the hearing on 20 June 2016.[19]

21. It is submitted that there is no basis for such an Order for the following reasons:

21.1. As is apparent from the Notice of Motion and paragraph 18 of the founding affidavit, this application was instituted on a conditional basis (i.e. in the event that the Court dismissed the appeal).

21.2. The Respondents accordingly adopted the approach that the present challenge was premature, pending the finalisation of the appeal and depending on its outcome.[20]

22. It is respectfully submitted that there was no intention on the part of the Respondent to ignore a court order or directive; at best, it misunderstood the import of the directive issued by the Deputy Judge President. That ought, it is respectfully submitted, not to constitute a basis for a punitive costs order. The

[19] SHOA, par 20 and following.
[20] AA; par 11.

Respondents seek an Order that the costs of the hearing of 20 June 2016 be costs in the cause.

23. In the circumstances, it is submitted that the application falls to be dismissed with costs.

KARRISHA PILLAY
25 July 2016
Chambers
Cape Town