Case Title: Mlungwana v. The State

Case Number: CCT 32/18

Law Reference:

Date of Decision: November 19, 2018

Region: Africa

Country: South Africa

Mode of Expression:

Judicial Body:

Type of Law:

Main Theme:

Outcome:

Status:

Tags:

Summary and Outcome:

Facts:

On September 11, 2013 fifteen members of the Social Justice Coalition (SJC) – a membership-based organization lobbying for improved service provision in urban areas (para. 25) – protested at the Cape Town Civic Centre. The SJC members chained themselves together in groups of five and then chained themselves to the railings at the Civic Centre. The SJC had taken the decision to limit the protest to fifteen people as, under the Regulations of Gatherings Act, 1993 (the Act), an assembly of fifteen people or fewer does not require prior notification. However, more SJC members did join the protest and the SJC had been cognisant of the risk that this may happen which may put them at risk of arrest (para. 29). The gathering was peaceful, but police were called and requested that the protesters disperse. When they did not, the police arrested the protesters without resistance (para. 30). Twenty-one of the protesters were charged with contravening section 12(1)(a) of the Act, and alternative with attending a prohibited gather in contravention of section 12(1)(e).

The Act was enacted to “regulate public gatherings and demonstrations” and to ensure that assemblies do not unjustifiably infringe the rights of others (para. 7). The Act requires all conveners of gatherings to give notice about their intended gathering to the officer appointed by a local authority to oversee gatherings. A gathering is defined in the legislation as an assembly of more than fifteen people, whereas a demonstration – which does not require prior notice – is an assembly of fifteen or fewer people. The notice must be given in writing and at least seven days prior to the gathering, and if notice is given less than 48 hours before the intended gathering the officer may prohibit the holding of the gathering. In addition, the officer may also prohibit a gathering if there is credible information that the proposed gathering would result in serious disruption, injury or extensive damage that could not be prevented by police or traffic officers.

Section 12(1)(a) of the Act makes it a criminal offence to convening a gathering without giving the requisite notice. The convenor is the only person criminally liable, but can raise a defence, under section 12(1)(2), that the gathering was spontaneous and it is not a criminal offence to attend a gathering for which no notice has been given (although it is a criminal offence to attend a gathering that has been prohibited by the officer).

At the criminal trial in the Magistrates Court, all the SJC protesters pleaded not guilty both to the main charge and the alternative charge. They argued that the Act does not make it an offence to attend a gathering to which notice had not been given, and they argued that section 12(1)(a) was unconstitutional to the extent that it criminalized the actions of a convener in convening of a gathering without giving notice (para. 31). The Magistrates Court does not have jurisdiction to hear constitutional challenges and convicted the ten protesters it had found were conveners of the gathering and acquitted the other eleven. In assessing the sentence, the Court acknowledged that the gathering had caused no harm to any person or damage to any property and said that the protesters “were at all times … respectful and peaceful” (para. 32). Accordingly, the Magistrate cautioned and discharged the ten convenors and granted them leave to appeal to the High Court to challenge the constitutionality of section 12(1)(a).

In the High Court, Phumeza Mlungwana and the other SJC members argued that section 12(1)(a) constitutes an unjustifiable limitation on the right to freedom of assembly, protected by section 17 of the Constitution as it “dissuades those minded to convene gatherings from venting their frustrations or expressing their views because of the chilling effect this section has on the exercise of the right to assemble” (para. 34). The High Court accepted the SJC’s argument, holding that the provision limited the right because of “the chilling and deterring effect criminalisation had on the exercise of the right to assemble” and held that the limitation was not justifiable (para. 36). The analysis of this judgment can be found here.

As is required, the SJC then approached the Constitutional Court for confirmation of the finding of unconstitutionality. Three *amici curiae* – the non-governmental organisations Equal Education and the Right2Know Campaign, and the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association – were admitted. The State opposed the application and sought leave to appeal the finding of unconstitutionality before the Constitutional Court (para. 40).

Decision Overview:

Petse AJ delivered the judgment of the unanimous Constitutional Court. The central issue for the Constitutional Court was whether section 12(1)(a) of the Regulation of Gatherings Act was a justifiable limitation to the right to freedom of assembly. Petse characterized the issue as whether the “criminalisation of a convener’s failure, wittingly or unwittingly, either to give notice or give adequate notice to a local municipality when convening a gathering of more than 15 persons … [was] constitutionally defensible” (para. 1).

Mlungwana argued that the criminalization of the failure to give notice was “unconstitutional because section 12(1)(a) criminalises the convening of peaceful gatherings simply by reason of the fact that either no notice was given or inadequate notice was given” (para. 4).

The State argued that section 12(1)(a) was “mere regulation” and so there was no limitation to any right (para. 5). In the alternative, the State argued that if a limitation of a right was found to exist that limitation would be justifiable (para. 5). The State’s central argument focused on the way in which crime and punishment served as a deterrent and so was a way to incentivise the giving of notice – which in turn, the State argued, lowered the risk of violence and criminality occurring at the gathering (para. 81).

Although all three *amici* aligned themselves with Mlungwana’s arguments, one of them,Equal Education, specifically emphasized that “the right to freedom of assembly has distinct importance for children” because they cannot vote and so “assembly, demonstrating, and picketing are integral to their involvement in the political process (para. 72).

Section 17 of the Constitution stipulates that “[e]veryone has the right to assemble, demonstrate, picket, and present petitions” and Petse highlighted that the “only internal qualifier is that anyone exercising this right must do so peacefully and unarmed” (para. 43). The Judge clarified that the right under section 17 is only to assemble peacefully and so “it is only when those convening and participating in a gathering harbour intentions of acting violently will they forfeit the right” (para. 55).

Petse rejected the State’s argument that section 12(1)(a) was mere regulation and therefore not a limitation of the right. The Judge noted that in the Constitutional Court case of *Satawu v. Garvas* 2013 (1) SA 83 (CC), the Constitutional Court held that “deterring the exercise of the right in section 17 limits that right”, and so Petse held that section 12(1)(a) could not be *mere regulation* because the criminal sanction acts as a deterrent (paras. 46-47). He added that even though only the convenor of a gathering faces the criminal sanction if no notice is given, the rights of all participants are affected because “[i]f a convener is deterred from organising a gathering, then in the ordinary course (save for the rare spontaneous gathering) a gathering will not occur” (para. 47).

Petse undertook an analysis of international jurisprudence on the right to freedom of assembly, and referred to the UN Human Rights Committee case of *Kivenmaa v. Finland* Comm. No 412/1990, which had held that unless a notification requirement was to protect public safety, health or morals or to ensure the protection of rights and freedom of others such notification could not be considered a permissible limitation (para. 49). He also mentioned the European Court of Human Rights cases of *Kudrevičius v Lithuania* App. No. 37553/05 (2015) and *Novikova v. Russia* App. Nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13 (2016) which had emphasized the chilling effect prior interferences have on the enjoyment of the right to freedom of assembly. He held that this ECtHR jurisprudence demonstrated that “criminalising the failure to give notice for a peaceful assembly quite clearly constitutes a limitation of the right to assemble freely” (para. 54).

Having found that there was a limitation to the right Petse undertook an analysis under section 36 – the general limitations clause – to determine whether the limitation was justifiable. Section 36 requires the court to assess the nature of the right that is being limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and whether there are less restrictive ways through which to achieve the limitation’s purpose.

Petse quoted at length from *Garvas* where the Chief Justice Mogoeng had noted that the historical context of the achievement of the right to freedom of assembly in the post-apartheid Constitution “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” (para. 67). Petse added that “[p]eople who lack political and economic power have only protests as a tool to communicate their legitimate concerns [and] [t]o take away that tool would undermine the promise in the Constitution’s preamble that South Africa belongs to *all* who live in it, and not only a powerful elite” (para. 69).

Petse also referred to the Constitutional Court decisions in *South African National Defence Union v. Minister of Defence* 1999 (4) SA 469 (CC) and *Hotz v. University of Cape Town* 2018 (1) SA 369 (CC) which had emphasised that the rights to freedom of expression and assembly play an important role in furthering the realisation of other rights (para. 70).

In responding to Equal Education’s submissions about the importance of the right to children Petse acknowledged that the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child “specifically protect the child’s right to express its views and to participate in public life” (para. 72).

Petse then examined the purpose of the limitation in section 12(1)(a) which the State had argued was “ultimately to ensure peaceful protests” because notification allows for planning and sufficient deployment of police for the intended gathering (para. 74). The Judge noted that the State cited insufficient resources as one of the reasons for why notice was required and he characterised this argument as being “that the police lack resources to such an extent that the risk of unnotified gatherings must be mitigated through one of the harshest possible ways – criminalisation and punishment” (para. 75). Petse rejected this argument, stressing that “a lack of resources or an increase in costs on its own cannot justify a limitation of a constitutional right” (para. 76) and noted that the State had not provided any evidence for how costs would increase if section 21(1)(a) was declared unconstitutional.

Petse recognised that “[t]his Court cannot ignore the levels of violence witnessed in recent protests in South Africa” and that as section 12(1)(a) seeks to ensure criminality does not occur at protests that is “undoubtedly a legitimate aim” (para. 79). However, the Judge noted that “it cannot be right for the State, in responding to this regrettable phenomenon [of high crime], to employ high-handed countermeasures that unduly limit the right” and that a balance between protecting rights and ensuring safety must be struck (para. 80).

In examining the effects of section 12(1)(a) on the enjoyment of the right, Petse characterized these effects as “severe” because of the breadth of the legislative definition of “gathering” and that the criminalization of conduct is “calamitous” to those charged. The Judge highlighted the chilling effect that criminalization has on individuals thinking about convening or participating in gatherings. Petse also noted that the provision makes no distinction between adult and children participants and held that “[t]o expose children to criminal liability, as section 12(1)(a) does, therefore severely exacerbates the extent of the limitation” and “cannot be justified on any rational basis” (para. 89).

Petse dismissed the argument that the defence of spontaneity in section 12(2) makes the provision reasonable because that defence is available only to those convenors who had planned a demonstration (that is an assembly of fifteen or fewer people) which turned into an unnotified gathering when more people joined the demonstration – and so does not apply to situations where peaceful gatherings are planned but no notice is given (para. 90).

Petse highlighted that the requirement of giving notice created onerous responsibilities on a convenor; they would have to be familiar with the provisions of the Act, ensure that the notice meets the criteria set out in the provision and ensure that the notice is given at least a week before the intended gathering. A notice that did not meet the requirements would still lead to criminal liability for the convener, and Petse noted that even though this may be seen as a mitigating factor in sentencing it “does not detract from the fact that the convener will have to live with a criminal record and its attendant dire consequences” (para. 91).

Petse held that there was no rational connection between section 12(1)(a) and the purpose – to enable the police to prepare for a gathering adequately – for which it was adopted. He gave the example of a convener facing criminal sanction for not giving notice when no police presence was even necessary, and noted that the converse was also true as “sometimes notice may not even be required by police presence to prevent violence will be” (para. 93). Accordingly, he held that “the limitation in question (the criminalisation of a failure to give notice) is neither sufficient nor necessary for achieving the ultimate purpose of that limitation (peaceful protests through police presence)” (para. 93).

In finding that there were less restrictive means through which to achieve the purpose, Petse noted that although criminalisation of failure to give notice may incentivise the giving of notice this is not necessary. Mlungwana and the *amici* had provided various options available to the legislature to incentivise that giving of notice to assist law enforcement in policing assemblies. These included ensuring that any notice specifies that the police cannot restrict the protest, enhancing civil liability for damages caused by a failure to take reasonable steps to prevent damage during a protest (which would include a failure to give notice), relying on existing common law and statutory crimes which govern public disruption and violence, administrative fines or an amendment of the provision so that notice is required only if police presence is also required (para. 96). Petse held that there was no evidence that the purpose of section 12(1)(a) could not be achieved through these less restrictive means.

Accordingly, Petse held that “section 12(1)(a) is not ‘appropriately tailored’ to facilitate peaceful protests and prevent disruptive assemblies” (para. 101). He found that “[t]he right entrenched in section 17 is simply too important to countenance the sort of limitation introduced by section 12(1)(a)” and that the “nature of the limitation is too severe and the nexus between the means adopted in section 12(1)(a) and any conceivable legitimate purpose is too tenuous to render section 12(1)(a) constitutional” (para. 101). The Constitutional Court therefore confirmed the High Court’s finding of unconstitutionality.

Petse also referred to the Human Rights Committee cases of *Levinov v. Belarus* Comm. No. 2082/2011 (2016), *Shumilina v. Belarus* Comm. No. 2142/2012 (2017), *Poplavny v. Belarus* Comm. No. 2139/2012 (2016), *Sudalenko v. Belarus* Comm. No. 2016/2010 (2015), *Praded v. Belarus* Comm. No. 2029/2011 (2014), *Androsenko v. Belarus* Comm. No. 2092/2011 (2016); *Korol v. Belarus* Comm. No. 2089/2011 (2016); *Toregozhina v. Kazakhstan* Comm. No. 2137/2012 (2014) and *Statkevich v. Belarus* Comm. No. 2133/2012 (2015).

The Court also referred to these cases: *Chumak v Ukraine*, App. No 44529/09 (2018); *Lashmankin v Russia* App Nos. 57818/09 and 14 others (2017); *Kasparov v Russia*, App. No. 21613/07 (2014); *Nemtsov v Russia*, App. No. 1774/11 (2014); *Primov v Russia*, App. No 17391/06 (2014); *Taranenko v Russia*, App. No 19554/05 (2014); *Shwabe v Germany*, App. Nos 8080/08 and 8577/08, (2012); *Barraco v France*, App. No 31684/05, (2009); *Djavit An v Turkey*, App No 20652/92 (2003 and *Bączkowski v Poland*, App. No 1543/06, (2007).

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Decision Direction:

Global Perspective:

Case Significance:

Court Documents

Judgment: