



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG.**

CASE NUMBER: 49197/2021

- (1) Reportable: Yes
- (2) Of interest to other Judges:
Yes
- (3) Revised: Yes

A handwritten signature in black ink, appearing to read "M. D. ...".

Date 10 June 2022

Heard on: 26 April 2022

Decided on: 10 June 2022

Summary: City of Johannesburg levying of fees for gatherings under the Regulation of Gatherings Act No 205 of 1993 unconstitutional. The City of Johannesburg Policy on the Tariff of charges shall exclude any charge for gatherings, to assemble, to demonstrate, to picket and to present petitions.

ORDER

1. The levying of fees in terms of City of Johannesburg Tariff Determination Policy for the holding of gatherings, assemblies, demonstrations, pickets and to present petitions is declared unconstitutional.
2. The declaration of constitutional invalidity referred to in prayer 1 takes effect from the date of this order.
3. The first respondent shall pay the costs of the first applicant.

JUDGMENT

VICTOR J

Introduction

[1] At the heart of this matter lies the constitutionally enshrined right to protest, which is protected by the Constitution. Specifically, section 17 provides that—

“Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.”¹

¹ It goes without saying that where I refer to the right, it is understood as the right to engage in these activities *peacefully*, this being the form and nature of the exercise given constitutional protection. Nothing in this judgment should be construed to imply that the right in section 17 can be exercised other than peacefully and unarmed.

[2] This application brings to the fore the fact that those wishing to exercise their section 17 rights within Johannesburg Metropolitan Municipality are subject to the City of Johannesburg’s Tariff Determination Policy (the Policy), in terms of which a fee is levied from the convenor of a planned protest which can range between R170 and R15,000. The applicants have approached this Court seeking a declarator to the effect that requesting a fee in terms of the Policy from those who seek to exercise their constitutional right to assemble, demonstrate, picket and petition, is unconstitutional and unlawful. According to the applicants, the imposition of a fee is *ultra vires* the Regulation of Gatherings Act² (the Gatherings Act), which is the primary legislation governing gatherings in South Africa, and is unconstitutional as it compromises the right to protest enshrined in section 17.

[3] “The exercise of the right to assemble by trade unions and other organisations is an important constitutional issue”.³ The right has earned its place in our constitutional legal order, in part because of the role that protests played in our country’s transition from apartheid to democracy, and in part because of the role protest continues to play in holding government accountable to the people of South Africa. Because of this, the right to protest is not a right that can be easily limited, and the manner in which local government regulates protests must ultimately be compatible with the Constitution. This application thus requires me to assess whether the impugned Policy is constitutionally compliant.

[4] Where I refer to “the right to protest” in this judgment, this phrase is a “placeholder” and is to be understood to capture the full extent of the right enshrined in section 17 of the Constitution.

² Act 205 of 1993.

³ *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 33.

Parties

[5] The first applicant is the Right2Know campaign, a democratic activist driven organisation, which focusses on promoting freedom of expression and access to information. It describes itself as an organisation which strengthens and unites citizens to raise public awareness, mobilise communities and undertake research and targeted advocacy that aims to ensure the free flow of information which is essential to democracy. It also mobilises to promote the rights to protest and freedom of expression and to support protesters to understand and defend their rights to challenge the State and private security companies when laws, policies or practices frustrate their activities. The second applicant is the Gauteng Housing Crisis Committee, which was formed by protesting communities seeking to mobilise, organise and unite black working class communities in the struggle for land, employment and adequate housing. The third applicant is Keith Duarte, the convener of the gathering in respect of which this application is launched, and who was required to pay the prescribed fee of R297 to the respondents. I refer to the applicants collectively as “the applicants”.

[6] The applicants approach this Court in their own interest as well as in the public interest. The determination of this matter transcends their interests as it is of public importance. The applicants have standing.⁴

[7] The first respondent is the City of Johannesburg, a local Metropolitan Council established in terms of the Constitution and by Chapter Two of the Local Government Municipal Systems Act⁵ (the Systems Act). The second respondent is the Chief of the Johannesburg Metropolitan Police Department (JMPD), a municipal police service established in terms of section 64 of the South African Police Service Act.⁶ I refer to the first and second respondents together as “the respondents” or “the Municipality”.

⁴ The applicants demonstrated their right to approach this Court terms of section 38 of the Constitution. In *Kruger v President of the Republic of South Africa and Others* [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC), the Constitutional Court endorsed a generous approach to *locus standi* in terms of section 38. In this case the applicants’ standing has not been disputed and they are entitled to launch these proceedings.

⁵ Act 32 of 2000.

⁶ Act 68 of 1995.

[8] The South African Human Rights Commission (the SAHRC) of its own initiative applied to be admitted as an *amicus curiae* (friend of the court). It supports the applicants' case by advancing an overview of international law. It complied with the necessary process⁷ and no party opposed its admission. The importance of the SAHRC's contribution in its role as *amicus curiae* does indeed reflect the underlying theme of a participatory democracy.⁸

Legal framework governing the procedure for exercising the right to process

[9] Before outlining the background to this matter, it is important to briefly introduce the legislative scheme which governs the exercise of the right to protest.

[10] The Gatherings Act regulates, *inter alia*, the process to be adopted before proceeding with a protest. In brief, section 2 provides for the appointment of convenors by those who seek to organise a protest. Section 2(3) provides for meetings and consultations that must take place in order for convenors and officials of the City to discuss the pending gathering. Section 3 requires all convenors of gatherings to give written notice of an intended gathering, lists certain requirements that must be met before a gathering can take place and lists various details that must be contained in the gathering notice. In terms of section 4, when the responsible officer receives notice of a gathering, the convenor and the relevant officials must meet to discuss certain prescribed issues, including *inter alia*, the route of the protests, destination and number of protestors (hereinafter referred to as the "section 4 meeting"), and she or he who receives notice must then consult with the authorised member of the SAPS. Although it is not provided for in the Gatherings Act, typically following the section 4 meeting

⁷ See *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma (Council for the Advancement of the South African Constitution, Ngalwana SC, the Helen Suzman Foundation Amicus Curiae)* [2021] ZACC 2; 2021 JDR 0079 (CC); 2021 (5) BCLR 542 (CC) at paras 75-6.

⁸ Constitutional Law of South Africa, January 2013, 2nd Edition Chapter 8 page 16

the convenor is directed to another municipal office, where they are required to pay a fee. It will become clear shortly that this is the core of the present dispute.

Factual background

[11] On 23 October 2020, members of the applicants held a peaceful protest in the Johannesburg Central Business District. Before the protest, and in line with the provisions of the Gatherings Act, the applicants attended the section 4 meeting with the respondents in order to discuss logistical issues pertaining to the march. After the meeting, as is the procedure of the JMPD, the convenor of the protest was directed to another municipal office, where he was requested to make a payment of R297 to the second respondent. It is common cause that the fee was duly paid, and the protest proceeded as planned.

[12] Where the parties disagree is the legality and constitutionality of the levying of the fee from the convenor. As will be seen in more detail from the parties' submissions below, the applicants aver that the request for a fee was presented as though it was a pre-condition for approval of the protest: the officials of the respondents informed the convenor that if he refused to pay the fee, the intended protest would be deemed unlawful, and no law enforcement agents would be deployed for the protest. This, they argue, constitutes a blatant infringement on the right to protest, hence the present application. Their argument, however, is disputed by the respondents, who aver that in fact, payment of the fee is not a condition but is levied so that the respondents can facilitate the right to protest. And so it is that this matter has arrived at this Court.

Applicants' submissions

[13] The applicants submit that the right to protest, demonstrate and assemble is an important right in our constitutional dispensation, for it is a mechanism which allows people to hold the State and other entities accountable. The right to protest is not conditional upon payment of any fee. Yet, in terms of the Policy, everyone is required to pay a sum of money in order to exercise their constitutionally protected right.

[14] The applicants argue that the Gatherings Act is the only Act of Parliament which regulates the processes leading up to a gathering. Notably, that Act does not provide authority for the levying of a fee from those seeking to exercise their right to protest. Thus, the Policy is *ultra vires* the Gatherings Act: the respondents are not empowered to request payments. Additionally, the Policy is in conflict with the Gatherings Act because it purports to authorise the levying of a fee not authorised by the Act. Yet, section 14 of the Gatherings Act provides that it prevails over any other law applicable. Thus, the Policy must be struck down for illegality to the extent that it applies to protests.

[15] The applicants also argue that the Policy is unconstitutional as it compromises the right to protest enshrined in section 17. According to the applicants, the respondents treat the fee as a pre-condition for the gathering to be approved. The result, they submit, is that those who cannot afford to pay the fee are unable to exercise their rights. The applicants point out that their members are impoverished and vulnerable, and cannot easily afford to pay the fee. Either they must enter into debt or are they are dissuaded from protesting. In this way, the Policy disproportionately disadvantages the most marginalised members of society. Furthermore, if the fee is not paid, the respondents do not deploy adequate policing services. This a chilling effect on the exercise of the right to protest: it gives the impression that the protest is illegal and illegitimate, and places at risk the safety and security of those who participate. Again, this means that the most impoverished are rendered most vulnerable.

[16] The applicants argue that the right to protest necessarily includes the right to protection by the State. Thus, the respondents' argument that they charge fees in order to provide traffic policing measures is untenable.

[17] Furthermore, they argue that all human rights are indivisible and interdependent and one set of rights cannot be enjoyed without others. In this case, the right to assemble intersects with a myriad of other rights such as human dignity, equality, freedom of

speech, religion, belief, opinion, and freedom of association. The prescribed fee, therefore, violates not only the right to protest but infringes the plethora of other rights. Ultimately, the imposition of a fee, “runs counter to the values underpinning our constitutional democracy and cannot be left unchallenged”.

[18] On the basis of all of the above, the applicants argue that the Policy limits section 17. And, because the Policy is a municipal Council resolution, not a law of general application, the respondents cannot invoke the limitation clause of the Constitution found in section 36 to justify the limitation of the right. However, even if this Court did engage in such an analysis, the Policy would not satisfy section 36 because the limitation is not reasonable nor justifiable in an open and democratic society based on dignity, equality and freedom. The Policy does not pass constitutional muster.

Respondents’ submissions

[19] According to the respondents, the impugned fee is not in conflict with, nor is it *ultra vires*, the Gatherings Act. The Municipality is entitled and empowered to impose a levy for providing traffic control services during protests, gatherings and demonstrations. In terms of the Constitution, section 151 provides for the establishment of municipalities which are authorised to govern local government affairs, and for certain powers and functions to be vested in municipal Councils. Reliance is also placed on section 152, in terms of which one of the objects of local government is to ensure the provision of services to communities in a sustainable manner within its financial and administrative capacity. Additionally, section 153(a) provides that “a municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community”.

[20] The power to levy fees also emanates from the Systems Act, so the respondents aver. Section 4 entitles municipal Councils to govern local government affairs and exercise the executive and legislative authority of the municipality. And, in terms of section 4(1)(c)(i), a Council has the right to finance the affairs of the municipality by

charging fees for the provision of certain services. The Systems Act provides that Councils must adopt and implement a tariff policy for fees for services provided either by the municipality or by way of service delivery agreements. Section 74(2) provides various restrictions on the tariffs that can be levied for the services. Finally, section 75A provides for the general power to levy and recover fees, charges and tariffs in respect of any function or service of the municipality.

[21] On the collective basis of these provisions, the respondents argue that a municipality is entitled to levy fees for services. In this particular case, it is entitled to prescribe fees for traffic control services rendered by JMPD during marches, demonstrations and pickets, so that the services can be rendered in a sustainable manner.

[22] According to the respondents, because it is section 75A of the Systems Act that entitles the Municipality to levy fees for traffic control services during protests, the applicants ought to have challenged the constitutionality of the Systems Act, or argued that the Policy was *ultra vires* the Systems Act, not *ultra vires* the Gatherings Act. And, because their attack is misplaced, this Court is hamstrung.⁹

[23] In any event, they argue, just because the Gatherings Act is silent on the question of fees does not mean that charging fees in terms of the Policy is *ultra vires* the Gatherings Act, or is in conflict with it. The Policy and the Gatherings Act are simply governing different subject matters.

[24] The respondents assert that the payment of the fee is not a condition for the event to proceed. Authorisation for the protest is granted at the section 4 meeting, *before* the convener is referred to the Finance Section of JMPD. And, if a convener does not pay the fee, the gathering can still proceed lawfully and unhindered, the JMPD merely will not provide full deployment of services but a minimal service.

⁹ At the hearing this argument was abandoned.

[25] As for whether the fee limits section 17, the respondents argue that the fee charged is not for protest action, it is for traffic control services. The fees levied enable JMPD to ensure that marches, gatherings, demonstrations or pickets take place in an atmosphere that is safe and conducive for the exercise of those rights. Thus, levying fees ensures that the Municipality discharges its obligations as part of the State to respect, promote, protect and fulfil the right to protest, as imposed by section 7(2) of the Constitution.

[26] However, in the event that this Court finds that the Policy limits section 17, the limitation is imposed by way of a law of general application, and the limitation of the right meets the requirements of section 36 of the Constitution. The Policy provides for a discounted fee for NGOs and NPOs. The nominal fee, charged for a legitimate purpose, is not disproportionate. The Policy passes constitutional muster.

SAHRC's submissions

[27] The SAHRC argues that the State has an important obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. In determining what this entails and when interpreting any of the rights in the Bill of Rights, section 39(1)(b) of the Constitution obliges courts to consider international law. The focus of the SAHRC's submissions is that the Policy is inconsistent with international law.

[28] The SAHRC emphasises that this Court should have regard to Article 21 of the International Covenant on Civil and Political Rights ("the ICCPR"),¹⁰ which stipulates:

"The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."

¹⁰ Signed by South Africa on 3 October 1994 and ratified on 10 December 1998.

[29] According to the SAHRC, the fee imposed limits Article 21 and, although Article 21 permits of limitations, the imposed fee does not meet the standard required to constitute a justifiable limitation under international law. The SAHRC relies on several international cases to substantiate the argument that having to apply for permission or pay a fee in order to exercise the right to protest is impermissible. The SAHRC helpfully supplemented its submissions by directing this Court to African regional mechanisms which relate to the right to assembly, demonstration, picket and petition.

[30] The thrust of the SAHRC's submissions is that international jurisprudence on the right to protest demonstrates that the Policy unjustifiably limits the right, and the imposition of a fee should be declared unconstitutional. The import of international law will be discussed in more detail below.

Issues for determination

[31] Because the parties were not united in their understanding of the proper bases for this application, I will outline the scope of this judgment and the key issues.

[32] As mentioned, the respondents took umbrage with the applicants' submission that the Policy is *ultra vires*, and in conflict with, the Gatherings Act. They argue that the proper course of action would have been to challenge section 75A of the Systems Act, that being the provision which empowers municipalities to levy fees for services. As I see it, the applicants would have been misdirected had they launched a challenge to section 75A. Not only is that provision extremely broad (which would have rendered it difficult to challenge), it is important that it is broad. I should think that we can all agree that municipalities, the linchpins of local governance, must be capable of levying fees for certain services. Indeed, section 229 of the Constitution specifically entitles municipalities to impose rates on property and fees for services provided by or on behalf of a municipality. The drafters of the Constitution themselves clearly anticipated that municipalities would need to be able to levy fees to ensure the sustainability of the range of services they provide. Imagine the chaos that would befall local government if the

applicants had successfully challenged section 75A. To have attacked the Systems Act would have been a herculean challenge, and in oral argument the parties agreed that it would not have been an appropriate course of action.

[33] As for the suggestion made by the respondents that the applicants' *ultra vires* challenge was misdirected, charging fees in terms of the Policy is clearly not *ultra vires* the Systems Act. On the contrary, on a textual reading of section 75A, the Municipality is empowered to charge fees for services provided. In other words, the Policy is squarely *intra vires* the Systems Act. So I reject the suggestion that the applicants ought to have argued that the Policy was *ultra vires* the Systems Act. Importantly, however, section 75A of the Systems Act is extremely broad and does not make mention of any power to levy fees *in relation to protests*. Thus, when the Policy purports to levy fees in relation to protests, it amounts to a municipal attempt to regulate protests. In other words, it purports to regulate activity within the purview of that which is regulated by the Gatherings Act.

[34] This is where the problem arises for the respondents' argument. The inescapable fact is that the Gatherings Act is the primary legislation governing the right to assemble, *not the Systems Act*. This being the case, the Systems Act must be read with the Gatherings Act. And, we know from section 14 of the Gatherings Act that "in the case of a conflict between the provisions of [the Gatherings] Act and any other law applicable in the area of jurisdiction of any local authority *the provisions of [the Gatherings] Act shall prevail*". Therefore, where the Systems Act empowers a municipality to enact a Policy which portends to regulate gatherings and which, when implemented, is not empowered by the Gatherings Act, or leads to a result that is in conflict with the Gatherings Act, that *act of Policy implementation* can be said to be *ultra vires* the Gatherings Act. On the basis of this, I do not have an issue with the fact that the applicants argue that the Policy is *ultra vires* the Gatherings Act.

[35] Whether local government was empowered to act and acted rationally when charging fees from the convenor of a protest, which constitute essential issues in this

case, are questions of judicial review. It is notable that the applicants did not bring this application in terms of the Promotion of Administrative Justice Act (PAJA)¹¹. PAJA was enacted to give effect to section 33 of the Constitution (which enshrines the right to “administrative action that is lawful, reasonable and procedurally fair”), and makes provision for courts to judicially review the exercise of administrative power.¹² As the route prescribed by the Legislature for the proper review of executive action, PAJA should be the first port of call.¹³ However, since the parties did not plead PAJA, I am reluctant to engage in such an enquiry: holding parties to their pleadings is, after all, “not pedantry”.¹⁴ The applicants have however, argued that by levying fees for protest action, the respondents acted beyond their powers, which is an issue that lies at the heart of the constitutional principle of legality.¹⁵ The principle of legality governs the

¹¹ Act 3 of 2000.

¹² In *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) at para 24, the Supreme Court of Appeal stated:

“in general terms, administrative action has been described as the conduct of beaurocracy . . . in carrying out daily functions of the State, which necessarily involves the application of policy, with direct and immediate consequences for individuals or groups of individuals.”

¹³ In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) the parties did not raise PAJA. The Court directed them to do so calling for further submissions, stating, at paras 25-7:

“The provisions of section 6 [of PAJA] divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past.

It is clear that PAJA is of application to this case and the case cannot be decided without reference to it. To the extent, therefore, that neither the High Court nor the SCA considered the claims made by the applicant in the context of PAJA, they erred. Although the applicant did not directly rely on the provisions of PAJA in its notice of motion or founding affidavit, it has in its further written argument identified the provisions of PAJA upon which it now relies.

I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action.”

¹⁴ *Garvas* above n 3 at para 114.

¹⁵ In *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC), the applicants based their case on the question of rationality in terms of the Constitutional principle of legality, not that it constituted a reviewable exercise of administrative power under PAJA. This, notwithstanding that PAJA was in operation at the time the proceedings were launched. The Constitutional Court did not consider itself hamstrung by the absence of submissions in terms of PAJA, and found for the applicants on the basis of legality. It found irrationality and concluded that: “it is not necessary for us to reach the question whether the exercise of the power under section 84(2)(j) constitutes administrative action and whether upon its proper construction, PAJA includes within its ambit the power to grant pardon under section 84(2)(j)”. (see para 83).

exercise of all public power, even if it does not amount to administrative action in terms of PAJA. The constitutional principle of legality derives from the principle of the rule of law, a founding value in section 1(c) of the Constitution, which requires that all action and conduct be lawful and constitutional. What is important is that “under our new constitutional order, the control of public power is always a constitutional matter. There are not two systems of law regulating administrative action but only one system of law grounded in the Constitution”.¹⁶ Therefore, courts can review the exercise of public power notwithstanding the absence of pleadings in terms of PAJA, because the public power being exercised must, in order to be constitutional, meet the requirement of legality. This was the case before PAJA, and it remains the case subsequent to PAJA. I am therefore authorised to conduct a legality enquiry of the Policy.

[36] So what are the issues to be determined? Bearing all of the above in mind, I first establish whether levying fees for traffic control services rendered in respect of protests is *ultra vires* the Gatherings Act or irrational, which would render the Policy unconstitutional. If not, the question is whether the Policy limits section 17. If the right to protest is limited, the question becomes whether the limitation is reasonable and justifiable under section 36, for if it is, the Policy will pass constitutional muster. I address the issues in the above order.

Does the Policy meet the constitutional requirement of legality?

[37] The first issue to be determined is whether levying fees in terms of the Policy meets the requirement of legality. The constitutional requirement that the exercise of public power must meet the threshold of legality is a direct acknowledgement that executive and administrative power has not always been so exercised in this country:

¹⁶ See para 22 of *Bato Star Fishing* above n 11, relying on *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241, for example at para 49, where the Court held: “there is only one system of law and within that system the Constitution is the supreme law with which all other law must comply”.

See also *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC), in which it was said at para 48 that “commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control”.

“In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.”¹⁷

[38] Thus, public administration, which is part of the Executive arm of government, is subject to constitutional control. The requirement of legality requires decisions involving public power to be rational¹⁸ and it requires decision makers to act only to the extent that they are empowered. I undertake these enquiries presently.

Is the levying of fees ultra vires the Gatherings Act?

[39] Whether the respondents acted *ultra vires* is a constitutional question of legality:

“The Executive is constrained by the principle that they may not act beyond the powers conferred upon them by law. This principle is fundamental to the rule of law and the legality principle.”¹⁹

Thus, municipalities can only act when they are empowered to do so. And, “in the absence of an empowering provision [a decision] is in violation of the principle of legality and must consequently be set aside”.²⁰

[40] The applicants have argued that the Policy is *ultra vires* the Gatherings Act. As I have said above, I am not troubled by the fact that the applicants have not argued that the Policy is *ultra vires* the Systems Act. Because the Gatherings Act has the final word

¹⁷ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 at para 133.

¹⁸ In *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another* [2021] ZACC 21; 2021 (10) BCLR 1152 (CC), it was said the the impugned decision or action must at the very least comply with the well accepted rationality standard set out in *Pharmaceutical Manufacturers* (above n 14) and *Albutt* (above n 13).

¹⁹ *Minister of Water and Sanitation* id at para 83.

²⁰ Id at para 83.

on exercises of power that regulate gatherings, the question is whether the Municipality acted beyond the scope of the Gatherings Act in levying fees from convenors.

[41] There is nothing in the Gatherings Act that implies that the Municipality has the power to levy fees in respect of protests. It is silent on that. Recalling that the Systems Act likewise does not confer a specific power to levy fees *in respect of protests*, we are faced with a situation in which none of the relevant legislation expressly empowers the Municipality to levy fees from convenors of protests. So, is the “silence” to be interpreted as an indication that the Municipality is empowered to levy fees from convenors? I think not.

[42] In *Fedsure*, the Constitutional Court said that “local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law”.²¹ Importantly, the Court went on, and said that:

“It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that *they may exercise no power and perform no function beyond that conferred upon them by law.*”²²

[43] So, it is not insignificant that the Gatherings Act is silent on whether a fee can be levied from convenors of prospective protests. Of course, one imagines that if levying fees for protests was repugnant to the scheme of the Act, an express prohibition would have been included. However, although the Act does not expressly prohibit the levying of fees, its silence cannot be interpreted to mean that a power exists to levy fees. There simply is no legislation specifically conferring a power to *levy fees in respect of protests*. The levying of fees quite simply falls outside the purview of that which is permitted by the Gatherings Act. There being no power in law to levy fees in respect of protest action implies that doing so amounts to acting beyond the powers vested in

²¹ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (*Fedsure*) at para 54.

²² *Id* at para 58.

the Municipality. Where local government acts *ultra vires*, it acts unconstitutionally.²³ Accordingly, the decision to levy fees from convenors of protests is contrary to the principle of legality. But legality also entails enquiring whether the Policy meets the constitutional requirement of rationality, so I address this presently.

Does the levying of fees from convenors meet the rationality requirement?

[44] Section 75A of the Systems Act clearly endows a wide power on municipalities to impose charges for services. But this does not mean that a municipality has unlimited discretion to impose whatever fee on whatever condition it so wishes. The exercise of discretion by a municipality is subject to the constitutional requirement of rationality.

[45] The leading authority on rationality is *Pharmaceutical Manufacturers*, in which the Constitutional Court maintained that rationality requires there to be a logical connection between a decision or action and the purpose for which the power was conferred.²⁴ Most recently reaffirmed by the Constitutional Court in *Minister of Water and Sanitation*, the question is always “whether there was a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power”.²⁵ The “purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved”.²⁶ Likewise, the enquiry is not concerned with the strength or reasonableness of the connection.²⁷ If, objectively speaking there is not a rational relationship between the scheme adopted and the achievement of a legitimate purpose, the exercise of the power would be arbitrary and would fall short of the standard demanded by the

²³ Id at para 54.

²⁴ *Pharmaceutical Manufacturers* (above n 14), which laid down the principle that for the exercise of public power to be valid, a decision taken must be rationally connected to the purpose for which the power was conferred. This entails determining whether there is a rational link between that decision and the purpose sought to be achieved. See also, *Minister of Water and Sanitation* above n 16 at para 44, which confirmed this requirement.

²⁵ *Minister of Water and Sanitation* above n 16 at para 57.

²⁶ *Albutt* above n 13 at para 51.

²⁷ See for example, *Minister of Water and Sanitation* above n 16 at para 67.

Constitution. “If there is [a rational] connection, the review challenge based on this ground must fail, regardless of the cogency of reasons furnished for the decision in question. This is because rationality is the lowest threshold required for the exercise of public power”.²⁸

[46] In the context of this case then, is there a rational connection? I do not think so. The so-called rationality lies in the respondents’ argument that the reason for charging fees to the convenors of protests is to enable JMPD to provide policing and security services to protestors in a sustainable manner. On the surface of it, this sounds like a rational connection, but alas, that is precisely the nature of sophistry. When one digs deeper, the connection is irrational for the following two reasons.

[47] Firstly, the respondents’ argument belies the fact that the constitutional right to protest inherently includes an obligation on the State to provide whatever security or policing services may be required for the right to be enjoyed. In other words, it is constitutionally bound to provide those services, which obligation is not dependent on payment of a fee. Therefore, I outright reject the argument made by the respondents that the levying of fees is for the purposes of *facilitating* the right to protest and thus, demonstrates that the Municipality is taking seriously its obligation to promote, protect and fulfil the rights in the Bill of Rights. As I said, the right to engage in a protest necessarily includes the right to do so *with the protection of the State*. This much is evident when one has regard to the Preamble of the Gatherings Act:

“WHEREAS every person has the right to assemble with other persons and to express his views on any matter freely in public *and to enjoy the protection of the State while doing so.*”

The right to protest does not exist with some caveat that to be enjoyed with protection from the State, one must first put in place the funds. The applicants are correct in saying

²⁸ Id at para 60.

that they are entitled to full and effective protection *notwithstanding* any absence of payment for those services.

[48] By now, it is well established in human rights discourse that certain rights entail negative obligations whilst others impose positive obligations on the State. In reality, most rights entail a combination of both. This is one such example. Woven into the fabric of the right to protest is the ancillary obligation on the State to provide a safe space for that protest. The Office for Democratic Institutions and Human Rights Guidelines on Freedom of Peaceful Assembly provide the following helpful exposition of a State's positive obligation to facilitate and protect peaceful assembly:

*“It is the primary responsibility of the State to put in place adequate mechanisms and procedures to ensure that the freedom is practically enjoyed and not subject to undue bureaucratic regulation. In particular, the State should always seek to facilitate and protect public assemblies at the organisers’ preferred location.”*²⁹

The Guidelines also expressly state that—

*“The costs of providing adequate security and safety (including traffic and crowd management) should be fully covered by the public authorities. The State must not levy any additional financial charge for providing adequate policing. Organisers of non-commercial public assemblies should not be required to obtain public-liability insurance for their event.”*³⁰

[49] That providing adequate policing services is primarily the responsibility of the State should come as no surprise. For without that, the right to protest becomes a hollow promise. The respondents’ argument then that they need to charge fees for the financial viability of their services is unconvincing as the sums charged are inconsistent with covering the cost of the service.

²⁹ OSCE Office for Democratic Institutions and Human Rights (ODIHR) Guidelines on Freedom of Peaceful Assembly (2nd Ed, 2010) at page 15.

³⁰ Id at page 19.

[50] Secondly, the respondents emphasised that the amount charged is often nominal because NGOs and NPOs are entitled to an 80% discount. In this instance for example, only R297 was paid. In highlighting this submission, the respondents were clearly trying to demonstrate that the Policy is not draconian and therefore, should survive the applicants' challenge. It is of course heartening to hear that NGOs and NPOs have in the past been granted discounted rates, knowing that many protestors will have paid fees before this application seized my attention. But the respondents seem to be unaware that in the same breath, they highlighted a second irrationality of the Policy: how can such a negligible sum possibly account for the thousands of rand that it must cost the Municipality to deploy the necessary services? These token sums are not fit for purpose. As I see it, they are opportunistically levied merely because they can be, which demonstrates that the Policy is patently irrational. There is simply no rational connection between the levying of fees of a negligible amount and the purpose of providing traffic control services.

[51] The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. Thus, the finding that the charging of fees to convenors is irrational renders the specific portion of the Policy unconstitutional.

Does the Policy limit the right to protest?

[52] The applicants came to this Court with another arrow in their quiver, namely that the Policy is unconstitutional because it limits the right to protest. Strictly speaking, the conclusions of unconstitutionality at which I have already arrived render it unnecessary to decide whether the Policy constitutes a limitation of section 17. However, because the right to protest is a cornerstone of our constitutional democracy, I feel compelled to address this argument for the sake of completeness.

[53] When faced with an allegation of a rights infraction, the proper approach is to adopt a two-stage enquiry. First, the focus must be on whether the impugned provision is inconsistent with the Constitution by way of limiting section 17. This requires me to

construe the content of section 17, and to assess whether the Policy limits the right. If the answer yielded is negative, then the enquiry comes to an end. If the answer is in the affirmative, I must embark on a justification analysis with a view to determining whether the limitation meets the requirements of section 36 of the Constitution, for a law that limits a right must meet the requirements of section 36 to pass constitutional muster.

[54] The right to protest is enshrined in section 17 of the Constitution, which, as already outlined, provides that “everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions”. This right is to be interpreted broadly, and the only internal qualifier is that anyone exercising this right must do so peacefully and unarmed.³¹

[55] Section 17 rights have a special place in our Constitutional democracy by virtue of our country’s unforgettable experiences of the struggle against the apartheid regime. Indeed, “in the apartheid era the exercise of these rights, even though they were not constitutionally entrenched, was the only means through which black people in this country could express their views in relation to government decisions that affected their lives”.³² The importance of the right to protest has, as a result, been confirmed in multiple Constitutional Court cases since our transition to a constitutional legal culture. In delineating the importance and scope of the right, I can do no better than cite what was said in *Garvas*, where the Constitutional Court reminded us all that this particular right can only be understood when it is placed within the context of our unique history:

“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

³¹ See *Mlungwana and Others v S and Another* [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) at paras 43 and 62.

³² *Garvas* above n 3 at para 121.

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.

Under apartheid, the State took numerous legislative steps to regulate strictly and ban public assembly and protest. Despite these measures, total repression of freedom of expression through protest and demonstration was not achieved. Spontaneous and organised protest and demonstration were important ways in which the excluded and marginalised majority of this country expressed themselves against the apartheid system, and was part and parcel of the fabric of the participatory democracy to which they aspired and for which they fought.

So the lessons of our history, which inform the right to peaceful assembly and demonstration in the Constitution, are at least twofold. First, they remind us that ours is a “never again” Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away. Second, they 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. Both these historical considerations emphasise the importance of the right.”³³

[56] Ours is not the only country in which the right to protest holds a particularly notable place in the constitutional order because of the role that protests played in the struggle for independence. Nor is it the only country to have grappled with questions of what constitutes a limitation on the right. Because section 39(1)(b) of the Constitution, an interpretative injunction well established in our jurisprudence,³⁴

³³ Id at paras 61-3.

³⁴ *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*) at para 192 emphasised the obligation on courts to consider international law when interpreting the Bill of Rights. However, the Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC), at para 116 stated that:

“What section 39(1)(b) does not do is import some obligation on our domestic courts to depart from South African constitutional rights jurisprudence merely because similar or duplicative provisions exist, and their interpretations have been propounded, at the international level. As this Court itself noted in *Glenister II*:

“[T]reating international conventions as interpretative aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights

obliges courts to consider international law when interpreting the Bill of Rights, I have also had regard to international jurisprudence to inform my understanding of the scope and content of section 17.

[57] The right is enshrined in regional as well as international mechanisms. Under the African Charter on Human and Peoples' Rights (the African Charter),³⁵ Article 11 provides that:

“Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.”

Article 21 of the ICCPR provides:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”

And, Article 11 of the European Convention on Human Rights (ECHR) protects the right to freedom of assembly and association in the following terms:

- “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article

and obligations is tantamount to ‘incorporating the provisions of the unincorporated convention into our municipal law by the back door’.”

³⁵ Signed and ratified by South Africa on 9 July 1996.

shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

The right to protest and freedom of assembly is clearly of international importance. Thus, it is relevant to consider international jurisprudence.

[58] In a case hailed as a landmark ruling on the right to protest in Zimbabwe, its Constitutional Court emphasised that:

“the right to demonstrate and to present petitions [is] one of the rights that form the foundation of a democratic state. . . I am also in full agreement with the observation of the High Court that the attainment of the right to demonstrate and to present petitions was among those civil liberties for which the war of liberation in this country was waged and that these two rights are included in the fundamental rights referred to in the preamble to the constitution.”³⁶

[59] Notably, the rights enshrined in section 17 are not only relevant because of their past. Even today, “in democracies like ours, which give space to civil society and other groupings to express collective views common to their members, these rights are extremely important. It is through the exercise of each of these rights that civil society and other similar groups in our country are able to influence the political process, labour or business decisions and even matters of governance and service delivery. Freedom of assembly by its nature can only be exercised collectively and the strength to exert influence lies in the numbers of participants in the assembly. These rights lie at the heart of democracy”.³⁷ The right to protest unhindered is a crucial tool in the arsenal of citizens of any democracy. As stated by the Constitutional Court of Zimbabwe:

“Protests and mass demonstrations remains one of the most vivid ways of the public coming together to express an opinion in support of or in opposition to a position. Whilst protests and public demonstrations are largely regarded as a means of political engagement, not all protests and mass demonstrations are for political purposes. one

³⁶ *DARE v Saunyama N.O.* [2018] CCZ 5/18.

³⁷ *Garvas* above n 3 at para 120.

can take judicial notice of, in the recent past, a number of public demonstrations that were not political but were on such cross cutting issues as the environment, and/or the rights of women and children. Long after the demonstrations, and long after the faces of the demonstrators are forgotten, the messages and the purposes of the demonstrations remain as a reminder of public outrage at, or condemnation or support of an issue or policy. Clearly, the right to demonstrate creates space for individuals to coalesce around an issue and speak with a voice that is louder than the individual voices of the demonstrators. As is intended, demonstrations bring visibility to issues of public concern more vividly than individually communicated complaints or compliments to public authorities. Demonstrations have thus become an acceptable platform of public engagement and a medium of communication on issues of a public nature in open societies based on justice and freedom.”³⁸

[60] Protesting, demonstrating or picketing allows members of society to hold government and other entities to account. It is an outlet through which citizens can occupy public spaces to voice discontent and have their voices heard. The right enables participatory democracy, so to trammel on the right is to manipulate the path of democracy.

[61] Because freedom of assembly is so integral to any democratic society, its exercise cannot be limited without good reason.³⁹ Again, the reason for this has historical undertones:

“Barely a quarter of a century ago we emerged from an era in which a substantial majority of the citizenry was denied their inalienable right to participate in the affairs of their country. They were afforded virtually no avenue through which to express their views and aspirations. Taking to the streets to vent their frustration was the only viable avenue they had. It mattered not during the reign of the apartheid regime that their gatherings were peaceful. They were ruthlessly crushed without any regard for the legitimacy of the grievances underlying their protests.

³⁸ *DARE* above n 35.

³⁹ *Garvas* above n 3 at para 66.

South Africa’s pre-constitutional era was replete with draconian legislation that, in an attempt to preserve the apartheid political order, punished people for assembling when it did not suit the State.”⁴⁰

Under apartheid, the State took numerous legislative steps to strictly regulate or ban public assembly. Thus, the right to protest emerged as a central tenet of the relationship between citizen and the State in our constitutional dispensation.

[62] Of course, this does not mean that there can be no attempt to regulate gatherings though legislation. Indeed, the Gatherings Act imposes certain requirements and prescribes certain procedures before the right to protest can be lawfully exercised, which serve public purposes and enable the right to be fully enjoyed.⁴¹ In *Garvas*, the Constitutional Court said that “[t]he mere legislative regulation of gatherings to facilitate the enjoyment of the right to assemble peacefully and unarmed, demonstrate, picket and petition may not in itself be a limitation [of the right in section 17]”.⁴² I can accept that there may be certain regulations which do not constitute a limitation of the right. However, on the basis of the Constitutional Court’s assessment of its own judgment in *Garvas*, it is incontrovertible that any regulation which dissuades protestors from exercising their rights goes beyond mere regulation:

“In *Garvas*, this Court considered whether section 11(1) and (2) of the [Gatherings] Act – which provides for the civil liability of a convener for riot damage – constituted a limitation of section 17. This Court held that “mere regulation” would not necessarily amount to a limitation of the section 17 right. But the increased cost of organising protest action and the deterrent effect of the civil liability did amount to a limitation.

⁴⁰ *Mlungwana* above n 29 at paras 64-5.

⁴¹ In Duncan Jane, ‘South Africa’s Doctrinal Decline on the Right to Protest: Notification Requirements and the Shift from Fundamental Right to National Security Threat’ (2020) 10 Const Ct Rev 227, Duncan comments at page 232-3, for example that—

“notification of an intention to stage a gathering serves useful public purposes. It allows them to regulate the time, manner and place of gatherings in ways that satisfy the expressive and associational needs of participants and the safety and mobility needs of the broader public. As gatherings normally obstruct traffic, there are sound reasons for forewarning municipalities to ensure that participants are given rights of way on public streets, while continuing to ensure traffic flow.”

⁴² *Garvas* above n 3 at para 55.

Thus, this Court found that deterring the exercise of the right in section 17 limits that right. The reason is obvious. Deterrence, by its very nature, inhibits the exercise of the right in section 17. Deterrence means that the right in question cannot always be asserted, but will be discouraged from being exercised in certain instances.”⁴³

In essence then, section 17 can be lawfully regulated. But anything that would *prevent* unarmed persons from assembling peacefully would amount to a limitation of the right in section 17.⁴⁴

[63] Having established that the import of *Garvas* was that there is an important distinction between *regulating* the right to protest and *applying measures that inhibit the right*, the Constitutional Court in *Mlungwana* held that the possibility that convenors may face criminal sanctions “prevents, discourages, and inhibits freedom of assembly, even if only temporarily”.⁴⁵ Such sanctions have a deterrent effect on the exercise of the right in section 17.⁴⁶ Thus, “criminalising the failure to give notice for a peaceful assembly quite clearly constitutes a limitation of the right to assemble freely”.⁴⁷

[64] Similar findings have emerged from the international and African jurisprudence I have consulted. The Constitutional Court of Uganda in *Human Rights Network Uganda* recently nullified a public order law which gave police sweeping powers to prohibit public gatherings and protests, noting expressly that part of the problem was that section 8 of Uganda’s Public Order Management Act 2013 was *prohibitory and not regulatory*.⁴⁸

⁴³ *Mlungwana* above n 30 at para 46.

⁴⁴ *Id* at para 43.

⁴⁵ *Id* at para 47.

⁴⁶ *Id*.

⁴⁷ *Id* at para 54.

⁴⁸ *Human Rights Network Uganda and 4 Others v Attorney General (Constitutional Petition-2013/56)* [2020] UGCC 6.

[65] In the Zimbabwean case of *DARE*, the Constitutional Court found that section 27 of the Public Order and Security Act, which prohibits demonstrations without prior authorisation thereby granting wide powers to the authorities to ban public demonstrations for up to one month, was unconstitutional because it infringed the constitutional right to protest, unjustifiably so. It also found that the ban was irrational because the means did not justify the ends.

[66] The decision of the United Nations Human Rights Committee (the Committee) in *Kivenmaa*, upon which our Constitutional Court relied in *Mlungwana*, confirmed that the requirement that a convener give prior notice of a demonstration to avoid criminal liability limits the right in Article 21 of the ICCPR. Although in that case the Committee found that the restriction fell within one of the legitimate purposes mentioned in Article 21, it still found that the right had been limited.⁴⁹

[67] In a range of other cases, the Committee also found that requiring conveners to conclude contracts with city services for, or contribute towards the costs of, policing and the maintenance of security, medical assistance and cleaning for gatherings as a precondition for authorisation, limits Article 21.⁵⁰ And, that the imposition of an administrative fine for failure to secure authorisation for a gathering is a limitation of the right in Article 21.⁵¹ Consistently, the Committee has maintained that contracts with municipalities as well as fines for failure to give notice are undue restrictions, and that “in spite of the fact that these sanctions are less serious than criminalisation, they may still inhibit the freedom of assembly”.⁵²

⁴⁹ *Kivenmaa v Finland* Communication No. 412/1990 UN Doc CCPR/C/50/D/412/1990 (1994) at para 9.2.

⁵⁰ *Pavel Levinov v Belarus* Communication No 2082/2011 UN Doc CCPR/C/117/D/2082/2011 (2016) at para 8.3; *Zinaida Shumilina v Belarus* Communication No 2142/2012 UN Doc CCPR/C/120/D/2142/2012 (2017) at paras 6.5-6.6; *Anatoly Poplavny and Leonid Sudalenko v Belarus* Communication No 2139/2012 UN Doc CCPR/C/118/D/2139/2012 (2016) at paras 8.4-8.6; *Leonid Sudalenko v Belarus* Communication No 2016/2010 UN Doc CCPR/C/115/D/2016/2010 (2015) at paras 8.5-8.6; *Sergey Praded v Belarus* Communication No. 2029/2011 UN Doc CCPR/C/112/D/2029/2011 (2014) at paras 7.7-7.8.

⁵¹ *Sergei Androsenko v Belarus* Communication No 2092/2011 UN Doc CCPR/C/116/D/2092/2011 (2016) at para 7.6; *Margarita Korol v Belarus* Communication No 2089/2011 UN Doc CCPR/C/117/D/2089/2011 (2016) at para 7.6; *Bakhytzhhan Toregozhina v Kazakhstan* Communication No 2137/2012 UN Doc CCPR/C/112/D/2137/2012 (2014) at para 7.6.

⁵² Duncan above n 41 at page 234-5.

[68] The Committee’s General Comment No 37 (2020) on the right of peaceful assembly (Article 21) confirms this approach:

“Having to apply for permission from the authorities undercuts the idea that peaceful assembly is a basic right. Notification systems requiring that those who intend to organise a peaceful assembly must inform the authorities in advance and provide certain salient details are permissible to the extent necessary to assist the authorities in facilitating the smooth conduct of peaceful assemblies and protecting the rights of others. At the same time, this requirement must not be misused to stifle peaceful assemblies and, as in the case of other interferences with the right, must be justifiable on the grounds listed in Article 21. The enforcement of notification requirements must not become an end in itself. Notification procedures should be transparent, not unduly bureaucratic, their demands on organisers must be proportionate to the potential public impact of the assembly concerned, *and they should be free of charge.*”⁵³

[69] General Comment No 37 has been pronounced upon in *Novikova*, where the European Court of Human Rights (“ECtHR”) held that its jurisprudence on enforcement of notice requirements can be summed up in the following terms:

“While rules governing public assemblies, such as the system of prior notification, may be essential for the smooth conduct of public demonstrations, in so far as they allow the authorities to minimise the disruption to traffic and take other safety measures, their enforcement cannot become an end in itself.”

[70] The respondents have attempted to “dress up” the fee by professing that far from limiting the right to protest, they are in fact promoting it because by charging fees they are able to provide traffic control services for the benefit of those who assemble. However, charging a fee to protestors, regardless of whether monies collected are used to provide traffic control services for the benefit of protestors, goes beyond mere regulation because it objectively deters people from freely exercising their rights.

⁵³ *Popova v Russian Federation* (CCPR/C/122/D/2217/2012) at para. 7.5.

[71] The impugned Policy limits the right to protest. The imposition of charges on convenors has the potential to dissuade citizens from exercising their rights. In *Garvas*, the Constitutional Court held that a requirement that significantly increases the costs, not just economically, but socially, of organising protest action amounts to a limitation of the right to gather and protest⁵⁴ because such costs “will render organisations more reluctant to organise marches”.⁵⁵ The imposition of a fee clearly has a chilling effect because it increases the costs of exercising the right. Even if I accept the respondents’ submission that the right to protest is not conditional upon payment of a fee, the chilling effect remains because the Policy creates an impression that non-payment will render the protest unlawful if it proceeds or that it will receive lesser police protection. That is enough of an inhibitor for me to conclude that the Policy limits the right, even if the fee is not, strictly speaking, mandatory.⁵⁶

[72] And this conclusion finds international endorsement. In *Kudrevičius*, the ECtHR held that:

“the interference [with the right in Article 11(1)] does not need to amount to an outright ban, legal or de facto, but can consist in various other measures taken by the authorities. The term ‘restrictions’ in Article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards. For instance, a prior ban (restriction of any form) can have a chilling effect on the persons who intend to participate in a rally and thus amount to an interference, *even if the rally subsequently proceeds without hindrance on the part of the authorities.*”⁵⁷

[73] In *Novikova*, the ECtHR confirmed that the “interference with the exercise of the freedom of peaceful assembly or the freedom of expression does not need to amount to an outright ban, but can consist of various other measures taken by the authorities”.

⁵⁴ See *Garvas* above n 3 at para 138.

⁵⁵ *Id* at para 59.

⁵⁶ Because of this conclusion, it is not necessary for me to determine whether the fee is indeed a condition for the right to protest, an issue that was disputed by the parties.

⁵⁷ *Kudrevičius v Lithuania* [GC] no 37553/05 ECHR 2015 § 91.

And laws which required those exercising the right to pay administrative fines for failure to give notice of a demonstration limited the right to assemble, and resultantly needed to fall within one of the lawful justifications.⁵⁸ In *Sergey Kuznetsov*, the ECtHR stated that the fact that “the amount of the fine was relatively small does not detract from the fact that the interference was not necessary in a democratic society”.⁵⁹ The submission that NGOs and NPOs receive a 80% discount therefore, is not watertight. The imposition of a fee, no matter how small, remains a restriction of the right.

[74] On a conspectus of the above jurisprudence, it is clear that levying fees from the convenors of prospective protests constitutes a limitation of the right to assemble freely. The SAHRC are correct to have advanced the import of international law in emphasising that the Policy has a chilling effect on the exercise of the right. Guided by international law, and what our apex Court held in *Mlungwana* and *Garvas*, I am not of the opinion that as a country we should permit policies that objectively inhibit the exercise of a right which constitutes a cornerstone of our constitutional democracy. It cannot be tolerated that a situation arises whereby the most marginalised members of our society might be deterred from publicly voicing their grievances. To the extent that the respondents have attempted to argue that charging fees gives a platform to those voices, they have pitifully missed the point.

The disproportionate nature of the limitation

[75] I hasten to add that it cannot be ignored that those most adversely affected by the Policy are those who are the most marginalised and impoverished among us. The irony is that those who are the most disfranchised, are precisely those who most rely on exercising the section 17 rights to make their voices heard. As recognised in *Mlungwana*:

⁵⁸ *Novikova v Russia*, nos 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, § 106, ECHR 2016. and § 110 and § 163.

⁵⁹ *Sergey Kuznetsov v Russia*, ECHR, Judgment of 23 October 2008 at para 84.

“People who lack political and economic power have only protests as a tool to communicate their legitimate concerns. To 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. It would also frustrate a stanchion of our democracy: public participation.”⁶⁰

[76] It has not escaped me that the applicants are a group of working class activists who organise protests on bread-and-butter issues, most often issues of housing, local governance and inadequate service delivery. It is integral to the development of our society that these communities can exercise their rights to assemble without being inhibited from doing so because they bring to the fore issues of societal importance. It is concerning that in South Africa, protests have been described as particularly susceptible to government repression, more so than ordinary gatherings:

“This is because protests are a particular species of gathering that are intended to voice dissent, often (but not exclusively) at government policies and/or conduct; hence they are more likely to elicit defensive responses from government entities when they are criticised. As direct expressions of dissent, protests can bring matters to the attention of the authorities that they may not want to hear. Protests are popular and unmediated expressive acts, offering forms of communication to poor and marginalised people who may not otherwise have access to more conventional channels such as the media.”⁶¹

These voices must be given a platform to raise societal issues undeterred.

[77] Secondly, those who are most disenfranchised are the most likely to be unable to afford to pay the charges levied, and thus, are most at risk of facing further exclusion from participatory democracy. Indeed, the present applicants have indicated that those who seek to protest, struggle to meet the costs of doing so under the Policy. A large number of their members come from communities of high unemployment, receive extremely low wages or struggle to make ends meet on meagre basic income grants.

⁶⁰ *Mlungwana* above n 31 at para 69.

⁶¹ *Duncan* above n 41 at page 228.

The Policy therefore, not only limits section 17, it does so disproportionately, deepening the social disadvantages of those already impoverished.

[78] In *Mlungwana*, the Court highlighted that the right to protest must be accessible to all South Africans:

“‘Everyone’ in section 17 must be interpreted to include every person or group of persons – young or old, poor or rich, educated or illiterate, powerful or voiceless. Whatever their station in life, everyone is entitled to exercise the right in section 17 to express their frustrations, aspirations, or demands.”⁶²

It is in this spirit therefore, that I feel compelled to take judicial notice of the disproportionate disadvantage that this Policy imposes on marginalised communities who live in Johannesburg Metropolitan Municipality – within the jurisdiction of the impugned Policy – and wish to exercise their constitutional right to assemble.

[79] I am also particularly troubled by the fact that this Policy applies only to those in this particular Province. Inequality as a ground upon which to challenge the Policy was not raised by the parties and this is not an application in the Equality Court. I nevertheless, feel compelled to acknowledge the discriminatory nature of this Policy: a certain group are more prejudiced than others because of an arbitrary and random decision as to how much must be charged.

[80] Furthermore, the respondents argued that the right to protest is not limited by the imposition of a fee for traffic control services because the right to protest is not conditional upon payment of the fee. Rather, when a fee is not paid the protest can, and often does, go ahead but with only a minimal deployment of JMPD services. I am troubled by this argument, which suggests that those who are most vulnerable will be rendered susceptible to further vulnerability. Those exercising their section 17 rights are entitled to do so with the benefit of a full complement of security and policing

⁶² *Mlungwana* above n 31 at para 43.

services provided by the State, at least to the extent necessary for full and equal enjoyment of section 17 rights. As I have said above, the right to protest includes a guarantee that one can do so with the protection of the State.

[81] On this score, I found the Constitutional Court of Uganda’s judgment in *Human Rights Network Uganda*, particularly insightful. In that case, the Court held that a particular section of the Public Order Management Act, which gave police sweeping powers to prohibit public gatherings and protests was unconstitutional. In reaching this finding, the Court referred to the Supreme Court of Uganda’s judgment in *Muwanga Kivumbi*⁶³ in which it had explained that the police are not entitled to excessively broad powers to ban public gatherings simply on the basis that they might cause a breach of the peace: in the event the police anticipate a breach of the peace, their duty is to provide reinforced deployments and not to prohibit the planned gathering altogether. On the basis of this, in *Human Rights Network Uganda*, the Constitutional Court said that there is a duty to provide reinforced police deployments to supervise public meetings because—

“supervision of public order is a core duty of the police and it cannot be discharged by prohibiting sections of the public from exercising their constitutionally guaranteed rights to demonstrate peacefully or hold public meetings of any nature.”⁶⁴

I, too, am of the view that the supervision of gatherings to ensure public safety and adequate traffic control constitutes one of the core services that South Africans should be entitled to rely upon. Importantly, they should be entitled to do so free of charge.

[82] In *Mlungwana*, the Constitutional Court noted that the respondents had attempted to invoke a lack of resources to justify the need for section 12(1)(a) of the Gatherings Act (the impugned rights limiter). In that case, the argument was that the police lacked resources to deal with unnotified gatherings, thus the need to mitigate the

⁶³ *Muwanga Kivumbi v Attorney General (Constitutional Appeal 6 of 2011)* [2017] UGSC 4.

⁶⁴ See *Human Rights Network Uganda* above n 46 at page 17.

likelihood of gatherings occurring without prior notice. To that, the Constitutional Court said:

“Ordinarily, a lack of resources or an increase in costs on its own cannot justify a limitation of a constitutional right. The reason for attaching less weight to a lack of resources as a purpose for limiting rights is beyond question. *Respecting, promoting, and fulfilling human rights comes at a cost, and that cost is the price the Constitution mandates the State to bear.*”⁶⁵

[83] Ours is a constitutional democracy that has chosen to advance the project of human rights. This comes at a cost, and not one that should fall upon the shoulders of the most marginalised among us. It matters not whether the fee was a pre-condition for the exercise of the right to protest. What is important is that those who cannot afford to pay, if they are not discouraged from protesting that is, exercise their rights with a sub-standard degree of commitment on the part of the State to protecting and promoting the rights being exercised.

[84] The respondents submit that the non-payment of fees does not mean that no protection is offered by the State because even where fees are not paid, the South African Police Service (SAPS) are still deployed for crowd control purposes. This does not, in my view, satisfy my concern which remains that those who do not, or cannot, pay the prescribed fee are entitled to a lesser quality of rights enjoyment. Commenting on the “odious practice of levying policing fees” in Johannesburg, Duncan notes that not only is “policing already paid for from the fiscus, and therefore [levying fees leads to] public-order policing being paid for twice over” the practice also “leaves gatherers vulnerable to harassment and even attack if they proceed with their gathering without

⁶⁵ *Mlungwana* above n 31 at paras 75-6. See also, *Lawyers for Human Rights v Minister of Home Affairs* [2017] ZACC 22; 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC) at para 61 where the Constitutional Court said:

“A limitation of rights like physical freedom cannot be justified on the basis of general facts and estimates to the effect that there will be an increase in costs. The mere increase in costs alone cannot be justification for denying detainees the right to challenge the lawfulness of their detention. Moreover, section 34(1) requires that the arrested foreigners be informed of the right to challenge the decision to deport them on appeal and ask that their detention be confirmed by warrant of a court. If each foreigner decides to exercise these rights, an increase in costs would be unavoidable.”

having paid the fee”.⁶⁶ That some of the most marginalised communities are placed at risk by this Policy is intolerable.

Does the limitation meet the section 36 requirement?

[85] Given that the Policy limits section 17, the second part of the enquiry usually entails considering whether the limitation is permissible. Section 7(3) of the Constitution provides that the rights in the Bill of Rights are not absolute and can be subject to limitations. The right to protest is among those rights that can be limited. South Africa has a general limitation clause in the form of section 36 of the Constitution, which stipulates that rights may be limited, albeit only in terms of law of general application and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It has been well established in our jurisprudence that:

“This justification analysis requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment. This weighing-up must give way to a global judgment on [the] proportionality of the limitation. It is also well-settled that the onus is on the respondents to demonstrate that the limitation is justified.”⁶⁷

And, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Notably, a limitation that does not comply with the limitations requirements set out in section 36, infringes the right in question.

[86] In this case, the right to protest is limited by a municipal Policy. The parties debated at length whether the limitation on the right to protest by virtue of the impugned Policy was legitimate and justifiable. However, I will not expound upon these arguments because the section 36 analysis is actually not relevant to this matter. This is for the simple reason that a right in the Bill of Rights can only be lawfully limited by

⁶⁶ Duncan above n 41 at page 239.

⁶⁷ *Mlungwana* above n 31 at para 57.

a law of general application, and the impugned Policy is not a law of general application. As stated in *Dladla*:

“for the limitations to be justified under section 36, they must first and foremost be authorised by a ‘law of general application’ [which] is a threshold test which must be met before a justification analysis may begin [. . .] absent that law, the [respondents] may not invoke section 36 in an attempt to justify the limitations created by the rules in question.”⁶⁸

[87] During the hearing, counsel for the respondents attempted to argue that because the Policy was drafted as a result of empowering legislation, the policy constituted a law of general application. Having applied my mind to it, I cannot accept this submission. The limitation on the right to protest is found in a Policy, not a law. That is the end of the matter. Therefore, the respondents cannot invoke the limitation clause of the Constitution to attempt to justify the limitation the Policy imposes. It would be inappropriate for me, having found that this Policy does not constitute a law of general application, to engage in a section 36 analysis.

What is the appropriate remedy?

[88] I have found that the Policy is irrational, *ultra vires* the Gatherings Act, and limits section 17 of the Constitution. As for what constitutes the appropriate remedy, I am guided by section 172(1) of the Constitution, which prescribes that—

“When deciding a constitutional matter within its power, a court—

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity. . .”

⁶⁸ *Dladla and Another v City of Johannesburg and Others* [2017] ZACC 42; 2018 (2) BCLR 119 (CC); 2018 (2) SA 327 (CC) at para 52.

[89] Section 2 of the Constitution also proclaims its supremacy and declares that law or conduct inconsistent with it is invalid. Therefore, the unconstitutionality that is found in the Policy means that it must be declared invalid. However, the Policy must be declared invalid only to the extent of its constitutional inconsistency. This means that the Policy, which provides for a range of tariffs to be levied for municipal services, remains in operation but only to the extent that it does not purport to levy fees from convenors in respect of protest action – which I have found is unconstitutional.

[90] In accordance with section 172, I am entitled to make any remedy that is equitable in the circumstances. I was initially concerned that the notice of motion was impossibly broad. In oral argument, counsel for the applicants conceded that much of the relief they sought was inappropriate, narrowing the relief they seek only to the declaration of unconstitutionality to the extent that the Policy authorises the respondents to levy fees from those who seek to exercise their right to protest. I declare that wherever the Policy purports to apply to a gathering, it simply will not have any effect as of the date of this judgment.

[91] Section 172(1)(b)(i) of the Constitution provides that, in crafting a just and equitable remedy, a court may limit the retrospective effect of a declaration of invalidity. The parties agreed that if this Court finds that the levying of fees is unconstitutional, any declaration of invalidity should not have retrospective effect. This is indeed the only common sense approach. To give the declaration of invalidity retrospective effect would be to declare any fee collected since the Policy came into effect until the date of this order, invalid and repayable. I need say no more than that this would cause untold mayhem for the Municipality's budget, which would ultimately only disadvantage the community the Municipality exists to serve. The declaration of invalidity has prospective effect only.

[92] In considering the appropriate remedy, I am reminded of the applicants' argument that there was no way for them to challenge the Policy but to approach this Court seeking a declarator. It is true that the options available to the applicants were

limited. Section 6 of the Gatherings Act provides for reviews and appeals, but only in respect of either a decision to impose a condition on a gathering (in terms of section 4(4)(b)), or when a gathering is prohibited (in terms of section 5(2)). In other words, the Gatherings Act has an in-built limitation on what types of decisions may be challenged, that is, decisions or actions made *in terms of* the Gatherings Act. Of course there is no provision in the Gatherings Act to review or appeal a Policy which limits section 17 by imposing fees on convenors, for the simple reason that there is no provision in the Gatherings Act that authorises a Policy to impose a fee on convenors. Problematically, it is precisely because the Policy exists beyond the scope of the Gatherings Act that the Act does not provide an avenue of recourse to those in the position of the applicants. Limited in their options for recourse, I commend the applicants' willingness to embrace the challenges of litigation by bringing this matter of public importance to this Court.

[93] The sliding scale of fees granting some accommodation to NGOs and others cannot be interpreted as being constitutionally compliant. The finding of unconstitutionality means that this Court ought to order the levying of fees for that portion of the Policy relating to the charging of fees for a gathering as unconstitutional.

Costs

[94] The question of costs is a simple one. The applicants are successful and are awarded costs as in the ordinary course. There is no reason to depart from the ordinary rule. In oral argument, the SAHRC stated that it does not seek a costs order. In participating in these proceedings, it is discharging its constitutional mandate as a Chapter 9 institution. Thus, whilst I am grateful for the submissions made, I too see no reason why the amicus curiae in assisting the Court ought to be awarded costs.

[95] In *Hoffmann*, the amicus curiae asked for an order that the unsuccessful respondent pay its costs. Ngcobo J for the Court stated the general principle as follows:

“An amicus, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs.”⁶⁹

Conclusion

[96] The applicants approached this Court requesting that it measure a municipal Policy against the Constitution, the supreme law of South Africa against which every law, regulation and Policy must be measured. Specifically, at issue is whether the Johannesburg Metropolitan Municipality is authorised to levy fees for the provision of traffic control services in respect of prospective protest action.

[97] Notwithstanding that the respondents were empowered to enact a municipal Policy to determine tariffs for services rendered, the act of levying fees in terms of such Policy is constrained by the Constitution: the Policy must meet the requirement of legality and the must not infringe on rights in the Bill of Rights. A Policy will pass constitutional muster if (a) it is rationally related to the achievement of a legitimate purpose; (b) it is not *ultra vires* the empowering legislation; and (b) it does not infringe a right in the Bill of Rights. The impugned policy does not meet any of these requirements. I have found that the impugned Policy is inconsistent with the Constitution to the extent that it limits the right to protest, there is no rational connection between the levying of fees and the purpose for doing so, and in levying fees, the respondents acted beyond the powers conferred upon it.

[98] In our constitutional democracy, the importance of the right to protest militates against charging convenors for traffic control services, which unequivocally inhibits the exercise of the right. *Mlungwana* took us in the right direction, finding that a convener’s mere failure to give notice of an intention to hold a gathering should not be criminalised.

⁶⁹ *Hoffman vs South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1

However, the present application has exposed that despite the advances made in *Mlungwana*, there is still a long way to go:

“Instead of recognising protest as a democratic right and legitimate form of expression, increasingly protests have been framed as threats to domestic stability and, consequently, national security. This doctrinal shift has provided the framework for municipal overreach around gatherings, and specifically protests, and over-policing of public order situations. *Mlungwana* has taken an important step towards reforming a regulatory process for gatherings that has become increasingly problematic over the years: a process that has alienated more protesters and exacerbated state-society conflict. But, unless the [*Mlungwana*] judgment is followed by a deeper and more consistent ideological and doctrinal commitment to respecting the right to protest and ensuring a more genuine incorporation of the masses into the political system. . . then the changes are likely to be limited.”⁷⁰

[99] The commitment required to fully protect the right to protest, stave off arbitrary municipal regulation of gatherings, and promote democracy is certainly one with which the Judiciary should concern itself.⁷¹ In this case, this commitment has required this Court to measure the impugned Policy against the requirements of the Constitution. Whilst the Judiciary clearly has a role to play, “relying on the courts only to review municipal decisions is problematic for conveners who may lack access to legal services”.⁷² As a constitutional democracy, it is imperative that we move towards a

⁷⁰ See Duncan above n 41 at page 249.

⁷¹ Id at page 239, where Duncan points out that:

“Johannesburg is not the only municipality that requires the payment of a policing fee. The traffic department of the Emfuleni Municipality has required conveners to pay a policing escort fee, even in respect of protests. In contrast, the Langeberg Municipality made it clear that, for the 2016-2017 period, all events that required traffic escorts would need to pay an escort fee ‘except political demonstrations, marches and picketing’. In the case of the Ba-Phalaborwa Municipality, a march planned protest by an organisation called the Ba-Phalaborwa Unemployment Community was banned partly because there was no proof that they had paid an application fee.”

There is still a long way to go.

⁷² Duncan above n 41 at page 247.

position of facilitating rather than repressing those who seek to exercise their constitutional rights to protest. The applicants brought this application in their interest and in the public interest. This is indeed a matter of public concern, and it is my hope that this judgment will have implications for the exercise of the right to assemble, for the applicants and for the public at large.

Order

1. The levying of fees in terms of City of Johannesburg Tariff Determination Policy for the holding of gatherings, assemblies, demonstrations, pickets and to present petitions is declared unconstitutional.
2. The declaration of constitutional invalidity referred to in prayer 1 takes effect from the date of this order.
3. The first respondent shall pay the costs of the first applicant.



**VICTOR J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Counsel for applicant: Adv M Marongo

Attorney for applicant: The Centre for Applied legal Studies

University of the Witwatersrand

Counsel for Human Rights Commission:

Adv A Nase

Adv N Nakeng

Counsel for respondents: Adv M K Mathipa

Attorney for respondents: Attorneys Mojela Hlazo