IN THE MAGISTRATES' COURT FOR THE DISTRICT OF CAPE TOWN

(HELD AT CAPE TOWN)

Case No: 14/985/2013

In the matter between:

PHUMEZA MHLUNGWANA	First Applicant
XOLISWA MBADISA	Second Applicant
LUVO MANKQA	Third Applicant
NOMHLE MACI	Fourth Applicant
ZINGISA MRWEBI	Fifth Applicant
MLONDOLOZI SINUKU	Sixth Applicant
VUYOLWETHU SINUKU	Seventh Applicant
EZETHU SEBEZO	Eighth Applicant
NOLULAMA JARA	Ninth Applicant
ABDURRAZACK ACHMAT	Tenth Applicant

and

THE STATE	Respondent

APPLICANTS' SUBMISSIONS

(APPLICATION FOR LEAVE TO APPEAL)

INTRODUCTION

1. The first to tenth applicants (accused No's 1, 3, 5, 12, 15, 16, 17, 18, 19 and 21 at the trial) were convicted on 11 February 2015 on the main charge of contravention of section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 ("the RGA"). The sentence imposed by the learned Magistrate at the conclusion of the trial was a caution and discharge.

2. This is an application for leave to appeal in terms of section 309B of the Criminal Procedure Act 51 of 1977 ("the CPA") against the conviction of the accused on the main count of contravention of section 12(1)(a) of the RGA.

3. The accused seek leave to appeal on the following grounds of law set out in their amended Notice of Appeal[1]:

   3.1 By criminalising the convening of a gathering merely because no notice was given, section 12(1))(a) of the RGA limits the right to freedom of assembly in section 17 of the Constitution;

   3.2 That limitation is not reasonable and justifiable in terms of section 36(1) of the Constitution;

   3.3 Accordingly, the section must be declared unconstitutional and invalid;

   3.4 If the section is declared invalid, the basis for the conviction falls away.

[1] Record, p 25 -26

THE APPLICABLE TEST

4. In deciding whether leave to appeal should be granted, a court is required to consider whether there are reasonable prospects of success. The Supreme Court of Appeal in *S v Smith*[2] described the test to be applied as follows:

> "*What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal*."

THE FACTUAL BASIS FOR THE CONVICTIONS

5. It was common cause at the trial that the accused had convened a "gathering" as defined in the RGA at the offices of Mayor Patricia De Lille on 11 September 2013, and that no notice of the gathering had been given in terms of section 3 of the RGA.[3]

6. The purpose of the gathering was to protest against the failure of the City of Cape Town ("the City") to provide proper sanitation services to residents of informal settlements and the City's lack of consultation with communities regarding the implementation of a janitorial service. Accused No. 1 (Ms Phumeza Mlungwana) testified on behalf of the accused and provided a detailed factual background to the work of the Social Justice Coalition ("SJC") and their unsuccessful engagements with the City concerning for the three years which preceded the protest action on 11 September 2013.

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[2] *S v Smith* 2012 (1) SACR 567 (SCA) at para 7. See also *S v Kruger* 2014 (1) SACR 647 (SCA) at para 2

[3] See Admissions by the Accused in terms of section 220 of the CPA

7. A detailed affidavit was handed into court setting out the history of the applicants' grievances as well as the frustrations which the SJC and the communities experienced with the council and mayor in alleviating the plight of the communities. The protest action embarked upon by the applicants was decided upon after various agreements failed to address the plight of poor sanitation in the area.[4]

8. The applicants had decided not to give notice of their proposed action as there would be no more than 15 people protesting. This was confirmed in the letter to the mayor dated 11 September 2013 setting out the grievances of the SJC which informed her that 15 people would be protesting outside the Civic Centre on 11 September 2013.[5]

9. The protest action took the form of the applicants chaining themselves across the steps at the Cape Town Civic Centre entrance. Other protestors and members of the SJC were present, but according to Ms Mlungwana, these members were never intended to engage in the protest action but were only there to render support where needed.[6]

10. The court found that at no stage were these individuals "*asked to remain neutral and not to join the protest*".[7] However, according to Ms Mlungwana, when the police arrived she had pointed at that they were in their rights as there were only 15 people protesting and need not have given notice to do so. In addition, she testified that she had spoken to the group and told them that they only wanted 15 people "*as this would keep them within the*

[4] Judgement, p 161, line 20 - 25

[5] Judgement, p 162, line 5 - 10

[6] Judgement, p 162, line 20

[7] Judgement, p 163, line 3

law and that if there was anyone who no longer wanted to be part of the protest, they were free to leave."[8]

11. A significant feature of this matter is the absence of any evidence during the trial indicating that the protest action by the applicants on 11 September 2013 was anything other a dignified, peaceful and non-violent protest on a human rights issue of significant public importance.

12. A number of photographs were handed into court as exhibits. The court found that "*it is clear from the photographs that where the group had chained themselves that entry to the Civic Centre was not blocked off*".[9] The court discounted the evidence of state witnesses Prins and Peterson "*that there about 40 protestors of whom 20 had run away and the rest on the chain being arrested*". The court found in contrast that the photographs depicted "*no more than 16, then 17 and then 18 people on or in the vicinity of the chain at any given time in question*".[10]

13. State witness Peterson testified that the entrance to the Civic Centre had been prohibited by the protestors and that "*no one would be able to pass under their arms*." He conceded however that he did not see any such refusal by those on the chain to allow anyone into the building and told the court that "*the protestors were peaceful*"[11]. The court found that "*from the photographs, there is nothing to suggest that they were not*."[12]

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[8] Judgement, p 163, line 20

[9] Judgement, p 164, line 15

[10] Judgement, o 164, line 15 - 22

[11] Judgement, p 165, line 1 - 5

[12] Judgement, p 165, line 9. See also p 164, line 19 where the court found that in contrast to the evidence of the state witness "*on one of the photographs one can clearly see another stairwell and people, in fact, making use of it, thus gaining access to the Civic Centre from another point*".

14. Ms Mlungwana was emphatic in her evidence that the number of protestors were intended to be 15 people at all times and that "*they never intended exceeding that number as they wanted to remain within the realms of the law*."[13] The court noted that "*when she asked for those chained to be kept as 15, there was no resistance, but complete co-operation*." The court however found that "*clearly this could have been done earlier too before the police arrived*."[14] The court in this regard also found that the accused "*did not stop*" the additional protestors who joined them.[15]

15. In the light of the admissions by the accused that they were the "*convenors*" as defined in the RGA, that no notice had been given in terms of section 3 and having found that the number of protestors exceeded 15 and thereby constituted a "*gathering*" as defined in the RGA, the court convicted the accused on the main count of contravening section 12(1)(a) of the RGA.

THE CONSTITUTIONAL DEFENCE

16. The applicants at the outset of the trial tendered a plea explanation in terms of section 115 of the CPA.

17. The second leg[16] of the plea explanation made the submission that the criminalisation of merely convening or attending a gathering without giving notice is unconstitutional and invalid. To that extent, section 12(1)(a) and 12(1)(e) of the RGA are inconsistent with the Constitution and invalid.

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[13] Judgement, p 165, line 11

[14] Judgement, p 165, line 15

[15] Judgement, p 166, line 23

[16] The court acquitted accused 2, 4, 6, 8, 10,13, 7,9,11, 14 and 20 on the second leg advanced in the plea explanation being that section 12 (1)(e) of the RGA was not applicable on the facts (Judgement, p 167, line 20)

18. The plea explanation stated that the grounds on which the constitutionality of these provisions would be challenged would be set out more fully on appeal if necessary.[17] An affidavit was filed during the trial setting out more fully the basis for the plea and the anticipated constitutional challenge to the provisions of sections 12(1)(a) and 12(1)(e) of the RGA.

19. The Magistrates Court is a creature of statute and was precluded by law from determining the accused's defence set out in the section 115 plea explanation. Only the High Court has the jurisdiction to do so. In terms of section 170 of the Constitution, a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

20. The court was required to decide the matter on the basis that section 12(1)(a) of the RGA was consistent with the Constitution and valid. This is so by virtue of the provisions of section 110 of the Magistrates' Courts Act 32 of 1944 which provides as follows*:*

> *"110. Pronouncements on validity of law or conduct of President.*
>
> *(1) A court shall not be competent to pronounce on the validity of any law or conduct of the President.*
>
> *(2) If in any proceedings before a court it is alleged that—*
>
> *(a) any law or any conduct of the President is invalid on the grounds of its inconsistency with a provision of the Constitution; or*
>
> *(b) any law is invalid on any ground other than its constitutionality,*
>
> *the court shall decide the matter on the assumption that such law or conduct is valid: Provided that the party which alleges that a law or conduct of the President is invalid, may adduce evidence regarding the invalidity of the law or conduct in question."*

[17] Admissions in terms of section 220, para 10.2

PROSPECTS OF SUCCESS

21. It is submitted that a court of appeal could reasonably arrive at a conclusion that by criminalising the convening of a gathering merely because no notice was given, section 12(1))(a) of the RGA unreasonably and unjustifiably limits the right to freedom of assembly in section 17 of the Constitution and is accordingly unconstitutional and invalid.

22. Section 17 of the Constitution provides that everyone has the rights, peacefully and unarmed, to assemble, demonstrate, to picket and to present petitions. The related rights to freedom of expression and freedom of association are entrenched in section 16 and section 18. Read together, these rights are the foundations of the Constitution's vision of a society in which human rights are respected and democratic values of equality, human dignity and freedom are protected and promoted.

23. According to *Currie and De Waal*[18] the RGA itself contains no explanation for the distinction between demonstration and gatherings and the 15 person threshold "*must be viewed as arbitrary*". The authors go on to state that:

> "*Even if we accept the proposition that the State may legitimately restrict demonstrations as of right, the definitions of demonstration and gathering under the RGA not only inhibit the exercise of assembly but criminalise gatherings that pose absolutely no threat at all to order, property or other public goods"*

[18] Currie and De Waal, "*The Bill of Rights Handbook*", Juta, Sixth Edition at p 387

24. The distinction which the RGA draws between a "*gathering*" and a "*demonstration*" and its imposition of criminal liability in section 12(1)(a) for convening a "*gathering*" in respect of which no notice in terms of section 3 has been given, may well be found void for vagueness and over breadth. The rule of law requires that rules be stated in a clear and accessible manner.[19]

CONCLUSION

25. In the context of de-segregation and civil rights protests in the state of Alabama in the United States over fifty years ago, Judge Frank Johnson stated the following in *Williams v Wallace*[20]

> *"…it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner* ***should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous****.(own emphasis) The extent of the right to demonstrate against these wrongs should be determined accordingly*."

26. The applicants in this case find themselves with criminal records after engaging in a peaceful act of protest aimed at bringing attention to an ongoing violation of the fundamental rights of residents of informal settlement to human dignity: their ability to have access to toilets and sanitation without fear of being murdered or sexually assaulted.

27. There are reasonable prospects of a court of appeal finding the provisions of section 12(1)(a) of the RGA to be unconstitutional and invalid and that the convictions of the applicants on the basis of this provision cannot stand.

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[19] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 47

[20] *Williams v. Wallace,* 240 F. Supp. 100**,** Middle District of Alabama, Northern Division**,** March 17, 1965

28. It is accordingly submitted that the application for leave to appeal against the applicants' convictions on the main count of contravention of section 12(1)(a) of the RGA ought to be granted.

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9 July 2015