Testing the judiciary's appetite to reimagine protest law

A case note on the SJC10 case

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Judgment in the long-awaited SJC10 case was handed down on 24 January 2018. This case marks a victory for the collective bane on civil society – that of the criminalisation of a convener of a protest for the failure to provide notice. It goes a long way to opening the space for more serious engagement on the legitimacy of the Regulation of Gatherings Act 1993 and its possible reformulation to give effect to section 17 of the Constitution – the right to peaceful and unarmed assembly. This appeal to the high court was brought by the SJC on very limited grounds, focusing only on the requirement to provide notice – a strategy that has paid off, as the contested section of the Regulation of Gatherings Act was declared unconstitutional. This case note dissects some of the key arguments raised by the SJC and by the state, and analyses the court's reasoning in reaching this finding.

A number of the articles in the December 2017 edition of *SACQ*, which focused on protest, made reference to the SJC10 case, for which judgment was pending at the time of publication. The case was important because it challenged the requirement – set out in the Regulation of Gatherings Act 1993 (RGA) – that the convener of a gathering of more than 15 people must notify the relevant municipal authority in order to comply with the requirements for a lawful protest.[1] A number of authors in the edition pointed to issues with the administrative requirements of the RGA, including the one that saw the SJC10 arrested and charged.[2] Many in the public interest law space were watching the case carefully, because it tested the judiciary's appetite for reforming the law that regulates protest in South Africa.

On 24 January 2018, a unanimous judgment was handed down by Ndita J and Magona AJ in the Western Cape High Court, which upheld the constitutional arguments made by

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the SJC10 and declared section 12(1)*(a)* of the Act unconstitutional in so far as it criminalises a convener for failure to provide notice. This case note addresses the judgment and highlights its importance in terms of South Africa's jurisprudence on protest.

The basics: understanding the case

The Social Justice Coalition (SJC) is a civil society organisation that advocates for better access to socio-economic rights, particularly for those living in informal settlements.[3] On 11 September 2013, members of the SJC participated in a gathering at the Civic Centre in the City of Cape Town. The SJC activists had not provided notice in terms of the RGA. During the trial, the SJC10 argued that the event was initially planned as a picket.[4] In terms of the Act, there is no notice requirement for a picket, and so none was served. However, section 3 of the Act requires notice for a gathering, which is defined as 'an assembly, concourse or procession of more than 15 persons' in a public space.[5] A group of 15 members chained themselves to each other and to the railings at the entrance to the Civic Centre. There was some disagreement between the parties during trial about whether the entrance to the Civic Centre was blocked by the human chain. In the end, the trial court appeared to accept the version of the appellants that there was no blockage, relying on photographs handed in as evidence that members of the public had made use of another stairway to gain access to the Civic Centre.[6]

During the course of the picket, the people who were chained to the railings switched places and, as it happened, at various points the number of protesters grew to more than 15.[7] This increase in number beyond the threshold of 15 meant that the event changed in definition from a picket (which requires no notice) to a gathering, which requires notice under section 3.

The police arrested 21 people on the scene. Ten SJC activists were charged in the magistrates' court in Cape Town with contravening section 12(1)*(a)* of the Act by unlawfully and intentionally convening a gathering without giving the required notice to the relevant municipal authority.[8] In the alternative, they were charged with attending a gathering where no notice had been given.[9] Although 21 activists were initially arrested, the court distinguished between members who had been part of organising the event, and those who had not. This is relevant because section 12(1)*(a)* is only applicable to *conveners* of a gathering. A convener is defined as:

(a) any person who, of his own accord, convenes a gathering; and

(b) in relation to any organization or branch of any organization, any person appointed by such organization or branch in terms of section 2(1).[10]

The SJC10, who had been identified as conveners of the event and charged with contravention of the RGA, pleaded not guilty. At trial they were convicted on the main charge – unlawfully and intentionally convening a gathering without giving the required notice to the relevant municipal authority. The sentence handed down was a caution, which meant that no period of imprisonment or a fine was ordered.[11]

The trial court (and later the appeal court) was not immune to the context surrounding the SJC protest. The appeal court factored in the significant role of SJC in Khayelitsha and its ongoing and lengthy engagement with the City of Cape Town. In this sense, there is recognition by the court that protests occur when other mechanisms or avenues of engagement have failed.[12]

The SJC10 were awarded leave to appeal by the trial court against their conviction for

contravention of section 12(1)*(a)*. The appeal is based on arguments that section 12(1)*(a)* is unconstitutional and therefore invalid. While this challenge was a narrow one, targeting only the criminalisation of the failure to provide notice, the case provided an opportunity to test the judiciary's appetite for bringing the Act in line with the constitutional right to protest.

This is a landmark case because it is the first direct challenge to the RGA. The judgment is welcomed for upholding the constitutional challenge to the Act. This represents the judiciary's willingness to develop a statute enacted pre-Constitution, and further advances the right to protest. The case must be understood in light of the social and legal context for protest, and I turn to that issue next. The note will begin by contextualising the Act in terms of South Africa's social, political and legal history. The arguments made before the court and the reasoning of the court will be discussed, with a view to analysing the significance of this case for the right to protest.

The Act's legal and social context

Part of the importance of challenging the Act stems from its legal and social context, and questions raised around the RGA's appropriateness in South Africa's constitutional democracy. The Act was enacted in 1993, during the last days of apartheid.[13] Although negotiations for a democratic South Africa were already underway,[14] it could be argued that the Act is tainted by its moment in time. This was a time when dissent was criminalised.[15] The intention of the legislature in 1993 may have been to restrict the right to protest.[16] However, the Act must now be interpreted through the prism of the Constitution. Any piece of legislation must be in line with the 'spirit, purport and objects' of the Constitution.[17]

Notwithstanding its contentious start, the Act is the leading piece of legislation giving effect to section 17 of the Constitution, which provides the right to assemble peacefully.[18] Legislation that gives effect to a provision of the Constitution becomes the direct means of regulation of conduct, and cannot be circumvented by recourse to the Constitution as a first resort.[19] What this means is that conduct related to protest is bound to comply with the Act (unless the Act conflicts with the Constitution). This first direct challenge by the SJC against the Act is therefore a step in the direction of reimagining legislation to give effect to section 17.

The fact that protest is protected in both our interim and final Constitution reflects the importance of protest in our society. The preamble to the Act also recognises this, stating that:

> [E]very 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; and the exercise of such right shall take place peacefully and with due regard to the rights of others.[20]

This means that not only is the right to protest available to everyone in South Africa, but that persons who protest can expect protection from state bodies such as the police.[21] However, various accounts, from civil society organisations in particular, have argued that the Act fails to give effect to the right in section 17,[22] giving rise to the impetus to challenge the Act.

Principal arguments made to the court

There are many potential grounds of challenge to the Act.[23] The challenges raised by the SJC10 in this case relate to the constitutionality of the criminalisation for failure to provide notice as provided for in section 12(1)*(a)* of the Act. This issue was the most well-publicised controversy related to the Act because of

the criminal consequences attached to the administrative requirement to provide notice, and the publicity around this case.

The fact that the SJC case raised only a limited challenge is in some ways a pity as it does not challenge the legitimacy of the Act in and of itself. On the other hand, this does create the scope for challenging the Act as a long-term project and leaves open the opportunity for further cases to be brought in the future. Judges can only decide the specific dispute before them. The SJC10 narrowed their complaint to the criminalisation for failing to provide notice (and not the notice requirement itself). It was strategic to challenge low-hanging fruit; that is, the aspect of the Act that was clearly ripe for criticism.[24]

The constitutional challenge raised by the SJC10 is that criminalising the act of convening a gathering without notice effectively makes it a crime to hold a peaceful gathering (if notice is not given).[25] This goes further than the internal limitations in section 17 of the Constitution, which only specifies that a protest should be peaceful and those participating must be unarmed.[26] The SJC therefore argued, in essence, that the consequence of this provision of the RGA is that ordinary people will be deterred from exercising their constitutionally-protected right to protest,[27] or may risk criminalisation for doing so if they are not aware of the administrative requirements under the Act.

There are a number of arguments made by the second respondent, the Minister of Police, who opposed the application for appeal (hereafter, referred to as 'the Minister'). The first respondent, the state, did not oppose the application for appeal, choosing to abide by any decision by the court. The Minister's arguments were largely two-fold: firstly, that the purpose of the notice requirement is to allow for proper police planning, including the distribution of police resources, and secondly that the criminalisation of the failure to provide notice deterred those intending to protest from doing so without giving notice. The Minister's heads of argument for the appeal contended that:

> The reason as to why convening a gathering in respect of which no notice has been given is an offence in terms of section 12(1)*(a)* is the deterrent effect that the criminalisation of such conduct has. Simply put, in the absence of a criminal sanction, persons would be able to convene gatherings in respect of which no notice has been given without any adverse consequence at all. The criminalisation of such conduct undoubtedly has a serious deterrent effect.[28]

The overarching argument by the Minister is that the rights of protesters cannot take precedence over other competing rights,[29] for example, the right to safety and security of other persons.

Analysis of the court's reasoning

Amid much celebration from the gallery in the room, the court upheld the appeal against the conviction of the 10 appellants and declared section 12(1)*(a)* unconstitutional in so far as it criminalises convening a gathering where no notice was provided. This was a decided victory for the SJC and for many social organisations that have been engaged in battle with municipalities over the notorious notice requirement in section 3 because it is onerous and overly administrative.[30] It is also a marked move towards the possibility of further successful challenge to the Act because it shows that courts may be willing to develop the Act in line with the constitutional right to protest.

In assessing the arguments made by both the SJC10 and the Minister, the court had to balance the protection of the right to protest (essentially arguments raised by the SJC10) with the importance of the purpose of the

criminalisation for failure to provide notice, such purpose argued by the Minister to be to deter protests without notice. The right to protest in section 17 of the Constitution is a broadly-drafted provision that does not contain requirements to provide notice for logistical planning, nor the consequences for failing to give notice. The Act, by requiring notice for this purpose, serves to limit the right to protest. A court faced with such a constitutional challenge has to determine if the right to protest is unreasonably narrowed by the criminalisation for failing to give notice.

The court considered the two-part test to determine if the right is unjustifiably infringed: firstly, whether the right is limited, and secondly, whether such limitation is reasonable and justifiable in a democratic society.[31] A limitation of a constitutional right occurs where a law or the implementation of a law restricts the enjoyment of that right. In relation to part one, the court found that the facts of this case, where all the conveners were arrested and convicted of failing to provide notice, reflect a clear limitation of the right to protest.[32] The court noted here that the 'effect of section 12(1)*(a)* appears to be quite chilling'. This kind of strong language reflects the court's concern with the criminalisation of protest.

The second part of the test is the more important and complex one, because not every limitation of a right in the Bill of Rights will be deemed unconstitutional.[33] If the reason for the limitation is acceptable, the infringement may not be unconstitutional.[34] For example, the police are granted powers to search and seize for the purposes of a criminal investigation.[35] This is considered a reasonable restriction on the right to privacy.[36]

Section 36 of the Constitution requires that a court use five factors to determine whether a limitation is justified or not. These factors are the nature of the right,[37] the importance of the purpose of the limitation,[38] the nature and extent of the limitation,[39] the relation between the limitation and its purpose,[40] and whether there are less restrictive means to achieve the purpose.[41] The court in this matter did conduct this five-pronged inquiry – although this note only highlights a few of the most salient points.

The court references the Constitutional Court case in *SATAWU v Garvas*, leaving no doubt of its understanding of the importance of the right to protest:

> 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 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 following 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.[42]

The court, in referencing *SATAWU v Garvas*, highlights the importance of the right and sustains the need to protect the right to protest.

The next point of inquiry is whether the reason for the limitation is compelling, and not just generally useful.[43] The Minister's primary arguments were that the notice requirement was included to ensure that the police could plan the allocation of resources effectively. The Minister argued that the criminalisation of the failure to provide the notice acts as a deterrent.[44] The

Act, however, goes further than regulating the logistical details of a protest. Section 9, which details the powers of the police during a gathering, is especially problematic. While the police would ordinarily have jurisdiction to monitor an event that involves a large group of people in a public space, section 9 gives explicit and specific authority to the police to intervene in various stages of the protest.[45]

The court reiterates that section 9 demonstratively gives the police powers to manage a gathering reasonably.[46] This would seem superfluous in light of the police's general duties and powers in the Constitution.[47] The need for specific police powers in the Act is perhaps a relic of its time and context, where the role of the police in protest was at the forefront of the minds of the legislative drafters and Parliament. Thus, the limitation is not necessary for the police role that is highlighted by the Minister. A more important critique is that the court accepted the Minister's assertion that the notice requirement assists the police with proper planning, seemingly without really interrogating the plausibility of this claim. The SJC10 did not dispute that providing notice was important. In fact, they agreed that giving notice was useful to provide the opportunity to engage the municipal authority on issues related to logistics, including traffic and safety.[48] The emphasis on proper planning is therefore misplaced as a reason to explain the importance of the limitation and misplaced as a reason accepted by the court.

The Minister's contention in respect of the deterrent effect of criminalising conveners warrants attention. As described earlier, the Minister argued that without a serious consequence, the convening of protests without notice will not be deterred.[49]

The issue of deterrence in the criminal justice system is an ongoing one. The court in *S v J* said,'[I]t is deterrence (including prevention) which has been described as the "essential", "all important", "paramount" and "universally admitted" object of punishment.'[50] In contrast, post-Constitution the court in *S v Makwanyane*,[51] while interpreting the right to life in relation to the death penalty, weighed up the need for deterrence with the availability of other alternatives. Mahomed J specifically clarified that '[c]rime is a multi-faceted phenomenon. It has to be assaulted on a multi-dimensional level to facilitate effective deterrence.'[52]

There must be a strong likelihood that the limitation will achieve its intended purpose, and that there are no means of achieving the purpose with less restriction on the right.[53] The Minister conflated the purpose of the notice requirement (which was not a point of contention) with the purpose of the criminalisation for failure to give notice. The court, by accepting the deterrence argument and finding that there is a legitimate purpose served by the limitation,[54] fell into this trap as well.

The court, in my view, did not take an holistic approach to the section 36 factors. The court could have gone further in considering the deterrence argument in light of the other factors and weighing up whether criminalisation does serve a legitimate purpose in this context.[55] The court should have balanced its recognition of the importance of protest against the need to deter the convening of gatherings without notice.

The court itself admits that deterrence should not be the primary factor when weighing up the importance of the limitation:

> The effect of the limitation therefore is not only to punish the convenors for failing to serve a notice, it is also to deter people from exercising their right to free assembly. That much is clear from the fact that deterrence is one of the purposes of criminal punishment.

> It is well established that deterrence is the use of punishment to prevent the offender from repeating his offence and to demonstrate to other potential offenders what will happen to them if they follow the wrongdoer's example.[56]

Following this reasoning, the court ultimately found that section 12(1)*(a)* was unjustifiable, but its acceptance of the deterrent effect of criminalisation placed too much emphasis on the importance of deterrence, negating some of its earlier discussion on the context of protest in South Africa.

The court makes no distinction between a crime that harms (whether it be a person, property or society), and the regulatory crime that is created by section 12(1)*(a)*, aimed at facilitating the exercise of a constitutionally protected right.[57] Thus while the court reached a sound final conclusion, the reasoning skips some steps of logic in so far as it deals with deterrence as a stand-alone factor.

The appellants argued that section 12(1)*(a)* is arbitrary in that it treats all types of gatherings equally in terms of whether notice is required or not. Specifically, they argued that this is a false equivalence in that some gatherings require police resources, while others do not.[58] The appellants did not raise an issue in relation to the definition, which means that – because the judgment does not distinguish different types of gatherings – the Act in effect remains over-broad in criminalising all gatherings.[59] The court commendably deals with this issue by its own hand, suggesting that an alternative to criminalisation could look to defining what a 'gathering' is.[60] The court cautions that this will not solve all issues related to section 12(1)*(a)*. This is something that should be done in any event, even if it is to clarify the confusion created by the differing language in section 17 and the Act.

There are a number of extremely laudable aspects to this judgment. Firstly, the judgment contains a clear recognition of and respect for the importance of protest in South Africa's history. Secondly, it shows a concerted effort to balance the often competing interests of protesters and the state. Thirdly, the judgment articulates the possible alternative consequences to criminalisation for failing to provide notice, which is beyond the scope of the court.[61] Finally, the judgment refers extensively to international law in so far as it relates to the arguments made in support of the appellants by the *amici curiae*.[62]

The court's section 36 analysis achieves what is intended by the limitations clause: a balance between competing rights.[63] In this case, it is the rights of those who protest and the state, particularly the police, in maintaining order. By maintaining the importance of the notice period for planning (although this was not disputed by the appellants) and simultaneously recognising the chilling effect that criminal sanctions have on those wanting to protest, the court strikes a healthier equilibrium in the Act.

Conclusion

This judgment is a big step in the legal arena to challenge the most directly controversial aspect of the RGA, that of the criminalisation that attaches to a convener for failure to provide notice. The judgment tries to find a balance between the various competing interests, particularly the right of ordinary members of the public to protest, and the interests of the police to fulfil their constitutional mandate to maintain order and safety.

The judgment ends by quoting the phrase used in *SATAWU v Garvas* of a '"never again" Constitution'.[64] This strong statement suggests that the court was not shying away from its duty to interpret legislation in light of the Constitution. Although this note argues that the court could have gone further in grappling with the section

36 factors, the court did what it was asked: to consider whether section 12(1)*(a)* goes too far in regulating protest.

This was the first court challenge to the Act. It opens the door to further strategic litigation, perhaps leading up to challenging the Act's constitutionality as a whole. The right to protest and the Act are likely to remain an interesting and evolving area of the law in the near future.

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Notes

1 Regulation of Gatherings Act 1993 (Act 205 of 1993), section 12(1)(a).

2 N Ally, Failing to respect and fulfil: South African law and the right to protest for children, *South African Crime Quarterly*, 62, 2017; A Skelton and M Nsibirwa, #SchoolsOnFire: criminal justice responses to protests that impede the right to basic education, *South African Crime Quarterly*, 62, 2017; J Omar, A legal analysis in context: the Regulation of Gatherings Act – a hindrance to the right to protest?, *South African Crime Quarterly*, 62, 2017; L Chamberlain and G Snyman, Lawyering protest: critique and creativity – where to from here in the public interest legal sector, *South African Crime Quarterly*, 62, 2017.

3 Social Justice Coalition (SJC), http://www.sjc.org.za/, accessed 18 February 2018.

4 One of the idiosyncrasies of the Act is the differing language used by the Regulation of Gatherings Act compared to section 17 of the Constitution. 'Picket' is a word used in section 17, but it does not appear in the Act. The most analogous term present in the Act is 'demonstration', defined as 'any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action'.

5 Regulation of Gatherings Act, section 1.

6 *S v Phumeza Mlungwana and 20 Others* 14/985/2013, para. 164.

7 *Phumeza Mlungwana and 20 Others v State and Others* A431/15, para. 11.

8 *S v Phumeza*, para. 164.

9 *Phumeza v S*, para. 3.

10 Regulation of Gatherings Act, section 1.

11 *S v Phumeza*, para. 180–181. The appeal court considered the leniency of the sentence handed down. The court correctly put more store on the criminal conviction and its negative consequences than on the type of sentence. *Phumeza v S*, para. 93.

12 K von Holdt et al., *The smoke that calls: insurgent citizenship, collective violence and the struggle for a place in the new South Africa*, Johannesburg: Centre for the Study of Violence and Reconciliation, University of the Witwatersrand, 2011, 33.

13 The Goldstone Commission was a judicial commission authorised by the Prevention of Public Violence and Intimidation Act 1991 (Act 139 of 1991) to consider matters related to public violence. Out of its recommendations, the Act was drafted.

14 The Constitution of the Republic of South Africa (Act 200 of 1993), commonly referred to as the Interim Constitution, included a provision that is substantively the same as section 17 of the Constitution.

15 *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC), para. 62; J Rauch and D Storey, The policing of public gatherings and demonstrations in South Africa 1960–1994, Truth and Reconciliation Commission (TRC), 1998, 3.

16 Omar, A legal analysis in context, 25; P Hjul, Restricting freedom of speech or regulating gatherings?, *De Jure*, 2013, 458.

17 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), section 39(2) requires that a court, in interpreting legislation, must 'promote the spirit, purport and objects of the Bill of Rights'.

18 Constitution, section 17. 'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.'

19 *South African National Defence Union v Minister of Defence* 2007 8 BCLR 863 (CC); 2007 5 SA 400 (CC), para. 51.

20 Regulation of Gatherings Act, preamble.

21 Omar, A legal analysis in context, 25.

22 S Booysen, Public participation in democratic South Africa: from popular mobilisation to structure co-operation and protest, *Politeia*, 28, 2009, 12; Chamberlain and Snyman, Lawyering protest, 15.

23 Omar, A legal analysis in context.

24 Ibid., 27.

25 *Phumeza v S,* para. 16.1.

26 The internal limitations in section 17 are that the protest must be peaceful and unarmed.

27 *Phumeza v S*, para. 16.2.

28 *Phumeza v S*, Heads of Argument, Minister of Police, para. 65.3. The author was fortunate to have had sight of this document.

29 *Phumeza v S*, para. 21.

30 Chamberlain and Snyman, Lawyering protest, 16.

31 Constitution, section 36; *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC), para. 44.

32 *Phumeza v S*, para. 42.

33 The Bill of Rights is enshrined in chapter 2 of the Constitution.

34 I Currie and J de Waal, *The Bill of Rights handbook*, 5th edition, Johannesburg: Juta & Co, 2005, 164.

35 Criminal Procedure Act 1977 (Act 51 of 1977), chapter 2.

36 Constitution, section 14.

37 Ibid., section 36(a). This refers to the aim, purpose and scope of the right.

38 Ibid., section 36(b). How important the limitation is must be considered.

39 Ibid., section 36(c). The scope of the limitation is a factor, i.e. the right should not be too far infringed.

40 Ibid., section 36(d). This refers to whether the purpose behind the limitation actually achieves the purpose at which it is purportedly aimed.

41 Constitution, section 36(e). A court must consider whether an alternative is available that may infringe less on the right's enjoyment.

42 *SATAWU v Garvas*, para. 63.

43 D Meyerson, *Rights limited: freedom of expression, religion and the South African Constitution*, Johannesburg: Juta & Co, 1997, 36–43. This distinction is important when assessing whether there is a direct link between an expressed purpose of a limitation and the success in meeting that purpose.

44 *Phumeza v S*, para. 50–52.

45 For example, the police may prevent or move participants to a different place (section 9(1)(b)), may order the participants of a protest to disperse (section 9(2)), or use force in the case of serious damage to persons or property (section 9(2) *(d)* and *(e)*).

46 *Phumeza v S*, para. 33.

47 Section 205(3) of the Constitution articulates the police's duties to 'prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.

48 The accused's Heads of Argument can be found at SJC, Resources, para. 31, http://www.sjc.org.za/resources (accessed 1 August 2017).

49 *Phumeza v S*, para. 51.

50 *S v J* 1989 (1) SA 669 (A), para. 682G.

51 *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

52 Ibid., para. 291.

53 *S v Manamela* 2000 (3) SA 1 (CC), para. 32.

54 *Phumeza v S*, para. 56.

55 The court focused its discussion on the impact of criminalisation on an accused's life, including loss of employment. *Phumeza v S*, para. 81–83.

56 Ibid., para. 85.

57 The appellants make this argument strongly and it is reflected in the judgment. Ibid., para. 55.

58 Ibid., para. 87.

59 Ibid., para. 80. Counsel for the appellants provided a useful example to explain the importance of the distinction of substantively different types of gatherings: '[In] a situation where 10 people decide to protest by lying in the middle of a busy road, the police would be required to address the situation, acting in accordance with provisions of s 9 of the RGA, yet those conveners were not required to give notice under the RGA.'

60 Ibid., para. 94.3.

61 Ibid., para. 94.1–94.3.

62 The portion of the judgment dealing with international law can be found at para. 61–76. The arguments raised by the amici are beyond the ambit of this case note. There were three amici curiae: the Open Society Justice Initiative, the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, and Equal Education.

63 SA Karim and C Kruyer, *Rhodes University v Student Representative Council of Rhodes University*: The constitutionality of interdicting non-violent disruptive protest, *South African Crime Quarterly*, 62, 2017, 100.

64 *SATAWU v Garvas*, para. 63.