IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal No.: A222/2015

In the appeal between:-

PATRICIA TSOAELI AND OTHERS Appellant

and

THE STATE Respondent

CORAM: MOLEMELA, JP *et* MOLOI, ADJP *et* LEKALE, J

JUDGMENT BY: MOLEMELA, JP

HEARD ON: 8 AUGUST 2016

DELIVERED ON: 17 NOVEMBER 2016

Introduction

[1] This is an appeal against the judgment of the Regional Court sitting in Bloemfontein in terms of which the ninety four appellants were convicted of contravention of section 12(1)(e) of the Regulation of Gatherings Act, 205 of 1995 ("the RGA") and sentenced to a wholly

suspended sentence of a fine of R600,00 or three months' imprisonment. The appeal is before us with the leave of the trial magistrate. The appeal was initially enrolled for a hearing before two Judges. Subsequent to a discussion held by the panel, the court was re-constituted and the matter was argued before three judges as contemplated in section 14(3) of the Superior Courts Act 10 of 2013.

[2] The record reflects that 105 persons were initially charged with contravention of section 12(1)(a), 12(1)(e) and 12(1)(g) of the RGA but were subsequently charged only with contravention of section 12(1)(e) of the RGA. Further particulars to the charge sheet were requested and were subsequently supplied. Charges were withdrawn against 22 accused persons and the trial proceeded only in respect of the 94 appellants. The appellants objected to the charge sheet as contemplated in section 85(1) of the Criminal Procedure Act 51 of 1977 on the basis that the charge did not disclose an offence. It was contended on the appellants' behalf that attendance of a gathering for which no prior notice of the intention to hold such gathering was given, was not prohibited in terms of the RGA and was therefore not an offence. The trial magistrate dismissed this objection. The appellants all pleaded not guilty to the charge and did not disclose the basis of their defence. The State tendered the evidence of four police officials and one official from the local authority. Certain admissions[1] were made in

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[1] The following admissions were read into the record:- "

(1) We have attended a demonstration or gathering on 10 July 2014 outside Bophelo House, Bloemfontein in the Free State.

(2) We attended the demonstration or gathering to protest our summary dismissal from our jobs as community health workers to demand the MEC of Health to meet us as undertaken on 27 June 2014 to further our campaign to fix the corrupts of health services that is the responsibility of the Free State Health Department under the watch of the MEC.

The demonstration or gathering was not prohibited by the local authority in terms of the provisions of section 3(2) , section 5 or section 7 of the Act where there is not an offence in terms of section 12(1)(e) of the Act to attend a demonstration for which no notice has been given. We conducted ourselves in a peaceful manner throughout the demonstration and gathering and we co-operated and we were peacefully arrested by the South African Police Serve at approximately [there is becomes slightly technical] at approximately 02:00 in the

terms of section 220 of the Criminal Procedure Act 51 of 1977. None of the appellants testified in their defence. They were subsequently convicted and sentenced to a fine of R600 or 3 months imprisonment wholly suspended for three years.

[3] The facts that led to the appellants' prosecution were related by police officers serving in the Public Order Policing Unit. According to their testimony, the 94 appellants were part of the staff establishment of the Free State Department of Health. Pursuant to being advised of their dismissal, the dismissed employees, most of whom were volunteers, decided to hold a night vigil outside the headquarters of the Department of Health (Bophelo House) in protest against their dismissal and the generally unsatisfactory conditions that prevailed in the provincial healthcare system. The first group of protestors gathered outside the premises of Bophelo House on the night of the 9th July 2014. They were singing and chanting. The police were summoned to the place of the gathering at about 02h00. Upon arrival at Bophelo House the police demanded to know whether the local authority had duly been notified about the intention to have the gathering as contemplated in the RGA. A few individuals who identified themselves as the leaders of the group answered in the affirmative. When the police demanded to see documentary proof, none was provided to them. The police officials then notified the crowd that the gathering was illegal and ordered them to disperse. A few protestors left but the majority of them did not oblige. The police arrested about 80 protestors and transported them to various police stations where they were detained. The police learnt that the protestors were members of the Treatment Action Campaign (TAC).

[4] After sunrise on the same morning, a second group of protestors gathered outside Bophelo House and started chanting and singing.

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morning and at approximately 13:00 of the same day on 10 July as set out in the annexures attached hereto." (See p391-392 of the record.)

The public order police officers were summoned to the scene at about 11h00. They found about thirty people singing and chanting at the scene. Two of these people identified themselves as Mohaswa and Godfrey and claimed to be the leaders of the group. After establishing from an official of the local authority that no such notice had been given by the protestors, the police officials initially spoke to these leaders separately, informing them that their gathering was illegal. The police then conveyed the same information to the crowd and ordered them to disperse. A few of the protestors left the scene but the rest of them dug their heels in and continued singing and chanting, stating that they, too, were prepared to face arrest like their "comrades" who had been arrested earlier.

[5] It is common cause that even though both groups of protestors were chanting and singing prior to their arrest, they were not armed and were not violent. It is also common cause that no injuries were sustained by any individuals, nor was any property damaged. Although the second group of protestors was at some stage blocking the entrance of Bophelo House and thus hindering cars from entering or leaving the premises, they moved away when one of the police officials instructed them to clear the path. The traffic in the vicinity of Bophelo House was not disrupted. None of the protestors tried to resist arrest; they voluntarily boarded the police vehicles. It was not in dispute that out of the total number of people arrested, charges were withdrawn against twenty six of them and the trial then proceeded in respect of ninety four appellants.

[6] In her judgment, the trial magistrate mentioned that the State had not adduced evidence that served to prove beyond reasonable doubt that the appellants had convened the gathering in question. She found that the State had proven beyond reasonable doubt that all the appellants

had attended a gathering for which no prior notice was given to the responsible officer[2], by so doing contravening section 12(1)(e) of the RGA.

The issue to be decided

[7] The crisp issue is whether the trial court erred in finding that the appellants' attendance of a gathering for which no prior notice was given to the responsible officer rendered them guilty of contravention of section 12(1)(e) read with section 1, 3, 4 and 13 of the RGA. The ancilliary issue is whether the trial court correctly interpreted the provisions of section 12(1)(e) of the RGA.

[1]

The parties' submissions

[8] Counsel for the appellants argued that the trial magistrate had erred in finding that the appellants contravened the provisions of section 12(1)(e) by attending a gathering in respect of which no prior notice was given to the responsible officer as such attendance was not specifically prohibited in terms of the RGA and therefore did not constitute a crime. He argued that the appellants' conviction for the mere attendance of that gathering violated the principle of legality as expressed in the maxim *nullum crimen sine lege*, was accordingly flawed and fell to be set aside. He contended that arresting the appellants for their mere attendance of the two gatherings amounted to an infringement of the appellants' constitutionally protected right to protest.

[9] Counsel for the State argued that even though the RGA does not define the word 'prohibit' or expressly state that the attendance of a gathering for which no prior notice was given is an offence, this could be inferred

[2]In terms of section 1 of the RGA, a 'responsible officer' is a person appointed by the local authority to perform functions in terms of the RGA. An 'authorized member' is a police official who represents the police at consultations or negotiations contemplated in section 4 of the RGA. In terms of section 3(1) of the RGA, a convener must give notice of his / her intention to have a gathering to the responsible officer. Once a responsible officer receives notice of a proposed gathering, he/she shall forthwith consult with the authorized member regarding the necessity for negotiations on any aspect of the proposed gathering.

from the tenor of the whole Act. He reasoned that since the requirement to give notice for gatherings was couched in peremptory terms in section 3(1)[3] of the RGA, failure to give prior notice resulted in such gatherings being 'automatically prohibited'. He contended that failure to provide prior notice would deny the local authorities and law enforcers of an opportunity to do a proper risk assessment that could serve as a basis for prohibiting a gathering where circumstances warranted this and this could be to the detriment of innocent people who may sustain injuries in such gatherings.

Applicable Law

[10] It is clear that at the crux of this matter is the interpretation to be attached to section 12(1)(e) read with section 1, 3, 4 and 13 of the RGA. As with the interpretation of any other statutory provision, the starting point is to have regard to the "words used in the document"[4], which entails considering the actual wording used in the afore-mentioned and related sections of the RGA.

Salient provisions of the RGA relevant to this case

[11] The purpose of the RGA is "to regulate the holding of public gatherings and demonstrations at certain places; and to provide for matters connected therewith". The Preamble to the RGA recognizes the right of every person 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. It further states that "the exercise of such right shall take place peacefully and with regards to the rights of others".

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[3]Section 3(1) provides that "the convener of a gathering shall give notice in writing signed by him of the intended gathering in accordance with the provisions of this section: Provided that if the convener is not able to reduce a proposed notice to writing the responsible officer shall at his request do it for him."

[4]*Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4 SA 593 (SCA) at para [18].

[12] Section 1 of the RGA defines a gathering as "any assembly, concourse or procession of more than 15 persons in or on any public road or any public place or premises wholly or partly open-air at which the principles, policy, actions or failure to act of any government, political party or political organisation are discussed, attacked, criticized, promoted or propagated or held to form pressure groups, to hand over petitions to any person or to mobilize or demonstrate support for or opposition to the views, principles, policy or actions or omissions of any person or institution including any government, administration or governmental institution".

[13] Section 3 of the RGA provides as follows:-

> "3 Notice of gatherings
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> (1) The convener of a gathering shall give notice in writing signed by him of the intended gathering in accordance with the provisions of this section: Provided that if the convener is not able to reduce a proposed notice to writing the responsible officer shall at his request do it for him.
>
> (2) The convener shall not later than seven days before the date on which the gathering is to be held, give notice of the gathering to the responsible officer concerned: Provided that if it is not reasonably possible for the convener to give such notice earlier than seven days before such date, he shall give such notice at the earliest opportunity: Provided further that if such notice is given less than 48 hours before the commencement of the gathering, the responsible officer may *by notice to the convener prohibit the gathering.*
>
> (3) The notice referred to in subsection (1) shall contain at least the following information:
>
> *(a)* The name, address and telephone and facsimile numbers, if any, of the convener and his deputy;
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> *(b)* the name of the organization or branch on whose behalf the gathering is convened or, if it is not so convened, a statement that it is convened by the convener;
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> *(c)* the purpose of the gathering;
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> *(d)* the time, duration and date of the gathering;
>
> *(e)* the place where the gathering is to be held;
>
> *(f)* the anticipated number of participants;

(g) the proposed number and, where possible, the names of the marshals who will be appointed by the convener, and how the marshals will be distinguished from the other participants in the gathering;

(h) in the case of a gathering in the form of a procession-

(i) the exact and complete route of the procession;

(ii) the time when and the place at which participants in the procession are to assemble, and the time when and the place from which the procession is to commence;

(iii) the time when and the place where the procession is to end and the participants are to disperse;

(iv) the manner in which the participants will be transported to the place of assembly and from the point of dispersal;

(v) the number and types of vehicles, if any, which are to form part of the procession;

(i) if notice is given later than seven days before the date on which the gathering is to be held, the reason why it was not given timeously;

(j) if a petition or any other document is to be handed over to any person, the place where and the person to whom it is to be handed over.

(4) If a local authority does not exist or is not functioning in the area where a gathering is to be held, the convener shall give notice as contemplated in this section to the magistrate of the district within which that gathering is to be held or to commence, and such magistrate shall thereafter fulfil the functions, exercise the powers and discharge the duties conferred or imposed by this Act on a responsible officer in respect of such gathering.

(5) *(a)* When a member of the Police receives information regarding a proposed gathering and if he has reason to believe that notice in terms of subsection (1) has not yet been given to the responsible officer concerned, he shall forthwith furnish such officer with such information.

(b) When a responsible officer receives information other than that contemplated in paragraph *(a)* regarding a proposed gathering of which no notice has been given to him, he shall forthwith furnish the authorized member concerned with such information.

(c) Without derogating from the duty imposed on a convener by subsection (1), the responsible officer shall, on receipt of such information, take such steps as he may deem necessary, including the obtaining of assistance from the Police, to establish the identity of the

convener of such gathering, and may request the convener to comply with the provisions of this Chapter."

[14] Section 4 provides as follows:-

"4 Consultations, negotiations, amendment of notices, and conditions

(1) If a responsible officer receives notice in terms of section 3 (2), or other information regarding a proposed gathering comes to his attention, he shall forthwith consult with the authorized member regarding the necessity for negotiations on any aspect of the conduct of, or any condition with regard to, the proposed gathering.

(2) *(a)* If, after such consultation, the responsible officer is of the opinion that negotiations are not necessary and that the gathering may take place as specified in the notice or with such amendment of the contents of the notice as may have been agreed upon by him and the convener, he shall notify the convener accordingly.

(b) If, after such consultation, the responsible officer is of the opinion that negotiations are necessary, he shall forthwith call a meeting between himself and-

(i) the convener;

(ii) the authorized member;

(iii) any other responsible officers concerned, if any; and

(iv) representatives of such other public bodies, including local authorities and police community consultative forums, as in the opinion of such responsible officer or officers ought to be present at such meeting, in order to discuss any amendment of the contents of the notice and such conditions regarding the conduct of the gathering as he may deem necessary.

(c) At the meeting contemplated in paragraph *(b)* discussions shall be held on the contents of the notice, amendments thereof or additions thereto and the conditions, if any, to be imposed in respect of the holding of the gathering so as to meet the objects of this Act.

(d) The responsible officer shall endeavour to ensure that such discussions take place in good faith.

(3) If a convener has been notified in terms of subsection (2) *(a)* or has not, within 24 hours after giving notice in terms of section 3 (2), been called to a meeting in terms of subsection (2) *(b)* of this section, the gathering may

take place in accordance with the contents of the notice and in accordance with the provisions of section 8, but subject to the provisions of sections 5 and 6.

(4) *(a)* If agreement is reached at the meeting contemplated in subsection (2) *(b)* the gathering may take place in accordance with the contents of the notice, including amendments, if any, to such contents, on which agreement was reached at the meeting, but subject to the provisions of sections 5 and 6.

(b) If at a meeting contemplated in subsection (2) *(b)* agreement is not reached on the contents of the notice or the conditions regarding the conduct of the gathering, the responsible officer may, if there are reasonable grounds therefore, of his own accord or at the request of an authorized member impose conditions with regard to the holding of the gathering to ensure-

(i) that vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded; or

(ii) an appropriate distance between participants in the gathering and rival gatherings; or

(iii) access to property and workplaces; or

(iv) the prevention of injury to persons or damage to property.

(c) A responsible officer who imposes any condition or refuses a request in terms of paragraph *(b)* shall give written reasons therefor.

(5) *(a)* The responsible officer shall ensure as soon as possible that a written copy of the notice, including any amendment thereof and any condition imposed and the reasons therefor, is handed to the convener and the authorized member who, and to every party which, attended the meeting referred to in subsection (2) *(b)*: Provided that if the identity or whereabouts of the convener is unknown, or if in view of the urgency of the case it is not practicable to deliver or tender the said written notice and reasons to him, the notice shall forthwith, notwithstanding any provision to the contrary in any other law contained, be published in one or more of the following manners:

(i) In a newspaper circulating where the gathering is to be held; or

(ii) by means of the radio or television; or

(iii) by the distribution thereof among the public and the affixing thereof in public or prominent places where the gathering is to be held; or

(iv) by the announcement thereof orally where the gathering is to be held; or

(v) by affixing it in a prominent place at the address of the convener specified in the notice.

(b) The convener and the authorized member shall, respectively, ensure that every marshal and every member of the Police at the gathering know the contents of the notice, including any amendment or condition, if any.

(6) *(a)* If a gathering is postponed or delayed, the convener shall forthwith notify the responsible officer thereof and the responsible officer may call a meeting as contemplated in subsection (2) *(b)*, and thereupon the provisions of subsections (2) *(c)* and *(d)*, (3), (4) and (5) shall apply, *mutatis mutandis*, to the gathering in question.

(b) If a gathering is cancelled or called off, the convener shall forthwith notify the responsible officer thereof and the notice given in terms of section 3 shall lapse.

(7) If a responsible officer is notified as contemplated in subsection (6) *(a)* or *(b)*, he shall forthwith notify the authorized member accordingly.

[15] Section 5 is couched as follows:-

"5 Prevention and prohibition of gathering

(1) When credible information on oath is brought to the attention of a responsible officer that there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat, he shall forthwith meet or, if time does not allow it, consult with the convener and the authorized member, if possible, and any other person with whom, he believes, he should meet or consult, including the representatives of any police community consultative forum in order to consider the prohibition of the gathering.

(2) If, after the meeting or consultation referred to in subsection (1), the responsible officer is on reasonable grounds convinced that no amendment contemplated in section 4 (2) and no condition contemplated in section 4 (4) *(b)* would prevent the occurrence of any of the

circumstances contemplated in subsection (1), he *may prohibit* the proposed gathering.

(3) If the responsible officer decides to prohibit the gathering, he shall in a manner contemplated in section 4 (5) *(a)*, *notify the convener*, authorized member and every other person with whom he has so met or consulted, of the decision and the reasons therefor." (My emphasis).

[16] Section 12 is set out as follows:-

"12. Offences and penalties

(1) Any person who-

(a) convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3; or

(b) after giving notice in accordance with the provisions of section 3, fails to attend a relevant meeting called in terms of section 4(2)(b); or

(c) contravenes or fails to comply with any provision of section 8 in regard to the conduct of a gathering or demonstration; or

(d) knowingly contravenes or fails to comply with the contents of a notice or a condition to which the holding of a gathering or demonstration is in terms of this Act subject; or

(e) in contravention of the provisions of this Act convenes a gathering, or convenes *or attends* a gathering or demonstration *prohibited in terms of this Act;* or

(f) knowingly contravenes or fails to comply with a condition imposed in terms of section 4(4) *(b)* , 6(1) or 6(5); or

(g) fails to comply with an order issued, or interferes with any steps taken, in terms of section 9(1) *(b)* , *(c), (d)* or *(e)* or *(2)(a);* or

(h) contravenes or fails to comply with the provisions of section 4(6); or

(i) supplies or furnishes false information for the purposes of this Act; or

(j) hinders, interferes with, obstructs or resists a member of the Police, responsible officer, convener, marshal or other person in the exercise of his powers or the performance of his duties under this Act or a regulation made under section 10; or

(k) who is in possession of or carrying any object referred to in section 8(4) in contravention of that section, shall be guilty of an offence and on conviction liable-

(i) In the case of a contravention referred to in paragraphs (a) to)j), to a fine or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment; and

(ii) In the case of a contravention referred to in paragraph (k), to a fine or to imprisonment for a period not exceeding three years.

(2) It shall be a defence to a charge of convening a gathering in contravention of subsection *(1)(a)* that the gathering concerned took place spontaneously."

[17] It is trite law that the purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law[5]. In the case of *Natal Joint Municipality Pension Fund v Endumeni Municipality*[6] the court stated that in interpreting legislation or other statutory instrument, regard must be had to its context, taking into account "the circumstances attendant upon its coming into existence". In order to give full context to the RGA, it is necessary to first consider a brief history behind its promulgation[7].

Brief history of the RGA

[18] In the interests of not over-burdening this judgment, reference will be made only to salient provisions of the pre-constitution Acts that have analogous provisions. In the past, the responsibility to approve gatherings rested with the magistrates, and the police played a major role in this regard. The *Riotous Assemblies Act 17 of 1956* and the *Suppression of Communism Act 44 of 1950, the Internal Security Act* 74

[5]*Bertie van Zyl (Pty) Ltd & Another v Minister of Safety and Security and Another* 2010 (2) SA 181 (CC).at para [21].
[6]2012 (4) SA 593 (SCA).
[7]In *Natal Joint Municipality Pension Fund v Endumeni Municipality,* the court stated that in interpreting legislation or other statutory instrument, regard must be had to its context, taking into account "the circumstances attendant upon its coming into existence".

of 1982 were the three central pieces of legislation enabling state authorities to prohibit and criminalise marches, gatherings and demonstrations.

[19] In terms of section 2(1) of the Riotous Assemblies Act[8] a magistrate, with the authorisation of the Minister of Justice, had the power to prohibit a public gathering if he/she was of the view that such a gathering was not in the interests of public order. The Minister of Justice had a wide discretion to prohibit a particular public gathering from taking place, or to prohibit a particular person from attending a particular gathering. Further sections of that Act enabled the Minister of Justice to impose blanket bans on gatherings in any public place for such period as he specified. Section 2(4)(b) of the Riotous Assemblies Act provides that "any person who, *in contravention of a notice delivered or tendered to him in terms of sub-section (3),* attends any public gathering, shall be guilty of an offence and liable on conviction to the penalties prescribed for a contravention of sub-paragraph (i) of paragraph (a)." (My emphasis)

[20] Section 46(1) of the Internal Security Act[9] gave magistrates the right to prohibit all gatherings in their district for a period of forty-eight hours if they believed that the gathering would endanger public peace. Alternatively the magistrate could allow a gathering to take place, but impose conditions on how it took place. In terms of section 46(3), the Minister of Justice had the power to prohibit any gathering, if he deemed it "necessary or expedient". The Minister of Justice's view as to the necessity or expediency of the prohibition was regarded as conclusive, and could not be challenged on objective grounds.

[8]Act 17 of 1956.
[9]Act 74 of 1982.

[21] Significantly, section 57(1)(a), (b) and (c) of the Internal Security Act, stipulated that any person who convened or publicised or attended a gathering *after its prohibition* was guilty of an offence *unless he could satisfy the court that he had not had any knowledge of the prohibition*. Although the Internal Security Act served as the primary legislative tool to restrict political activity and freedom of assembly, other legislation also played a role. Several sections of the Internal Security Act[10] have since been repealed by the RGA.

[22] The *Demonstrations In or Near Court Buildings Prohibitions Act 71 of 1982* was introduced to prohibit gatherings and demonstrations in or near court buildings. It was obviously directed at quelling protests during political trials and against the treatment of persons held under security legislation. The *Gatherings and Demonstrations Act 52 of 1973* preventing gatherings and demonstrations in a specified open area surrounding Parliament was also still in effect. In addition, other pieces of legislation such as the *National Roads Act 54 of 1971*, the Trespass Act were all utilised by state authorities to ensure that protests were as restrictive as possible. Overzealousness on the part of police often resulted in unnecessary injuries and loss of lives as a result of the use of excessive force during protests marches and gatherings, as a result of which violence and disruptions became the order of the day.

[23] In 1991 the State President appointed the Goldstone Commission[11] to investigate public violence in South Africa, its nature and causes. The Commission's functions were *inter alia* to report to the State President and to recommend steps to be taken to avoid the violence. A panel of local and international experts assisted the Commission and consulted with various interest groups enquiring into the regulation of gatherings

[10]Section 46(1) and (2), 47, 48, 49, 51, 53, 57 and 62 of the Internal Security Act 74 of 1982 have been repealed.
[11]The Commission was appointed in terms of the Prevention of Public Violence Act 139 of 1991.

and protest marches with a view to curbing violence as far as possible. After these consultations, the panel produced a report[12], which culminated in the publishing of a draft Bill. Further drafts were published after the panel had incorporated comments from various bodies.

[24] The RGA repealed the Gatherings and Demonstrations in the Vicinity of Parliament Act, the Demonstrations in or near Court Buildings Prohibition Act, Gatherings and Demonstrations at or near the Union Buildings Act, and certain provisions of the Internal Security Act. These statutes, having been promulgated in the apartheid era, were widely regarded as being of a draconian nature.

Application of the law to the facts

[25] It is now a trite principle of our law that a court interpreting legislation is bound to read the relevant statute through the prism of the constitution in accordance with the prescripts of the provisions of section 39(2) which demands an interpretation which promotes the spirit, purport and objects of the bill of rights.[13]

[26] It is evident from the preamble of the RGA that, unlike its pre-constitution counterparts, the RGA recognises fundamental rights that

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[12]The report of the panel was published in 1992 in Heyman (Ed) *Towards Peaceful Protest in South Africa: Testimony of multinational panel regarding lawful control of demonstrations in the Republic of South Africa.*

[13] In the case of City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd & Others (Dark Fibre Africa (RF) (Pty) Ltd and others as Intervening Parties) 2015 (11) BCLR1265 (CC) par [115] the court stated as follows:-

"It is by now commonplace in our constitutional jurisprudence that all statutes must be interpreted through the prism of the Bill of Rights. Approached on this footing, the general rule is that a statute must be given its ordinary grammatical meaning, unless to do so would result in absurdity or create discord with the Constitution. And, most importantly, in following these interpretive prescripts, where it is reasonably possible, legislation must be given a meaning that preserves its constitutional validity"

are embodied in section 16[14] and 17[15] of the Constitution. Unlike its forerunners, the RGA does not provide for a summary prohibition of a gathering. Instead provides for a consultative process through the creation of a so-called "safety triangle" – the convener of a gathering, a responsible officer of the local authority and the authorized member of the South African Police Service. Unlike its predecessor, the RGA creates appeal and review procedures. It is quite evident from these provisions that the iron-fist approach towards protest action manifested in the holding of gatherings and demonstrations in the past has, by virtue of the RGA, been replaced by a more amicable and transparent consultative process.[16] The highest court in the country, in the case of SATAWU and Another v Garvas[17] had occasion to make some pronouncements on the RGA. The pronouncements, although made in the context of assessing the constitutionality of section 11 of the RGA, are foundational in the approach that courts should follow when interpreting the RGA. The Constitutional Court stated as follows:

> "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

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[14] "Freedom of expression
16. (1) Everyone has the right to freedom of expression, which includes—
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
(2) ……".

[15] Section 17 of the Constitution Act provides:-
"Assembly, demonstration, picket and petition
17. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions"

[16] This consultative process is encapsulated in section 4 of the RGA.
"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."

[17] SATAWU and Others v Garvas and Others [2012] ZACC 13 at para [61]

> one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms."

[27] Turning to the language used in the impugned provision, a reading of section 12 in its entirety makes it clear that the legislator intended to create a series of offences. A reading of section 12(1)(e)[18] reveals the usage of two different phrases, namely "in contravention of this Act" in relation to a convenor, and "prohibited in terms of this Act" in relation to those who "convene or attend" the gathering. There was a debate about the implication of the usage of the comma to separate the first part of the provision from the second and about what the legislator intended by using the phrase "in contravention of this Act" in the first part of the provision and the phrase "prohibited in terms of this Act" in the second part of the sentence. The crux of the matter is the interpretation to be attached to the phrase "prohibited in terms of this Act". In trying to discern the context and purpose of this provision, it is necessary to read the impugned text in the context of the whole Act, including its historical context. This inevitably takes us to the provisions of the RGA which make reference to the word "prohibition". These are embodied in sections 3(2), 5 and 7 of the RGA. Section 7[19] refers to gatherings in

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[18] "[Any person who] in contravention of the provisions of this Act convenes a gathering, or convenes or attends a gathering or demonstration prohibited in terms of this Act [shall be guilty of an offence and on conviction liable- in the case of a contravention referred to in paragraphs (a) to)j), to a fine or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment".

[19] **7 Demonstrations and gatherings in vicinity of courts, buildings of Parliament and Union Buildings**

(1) Subject to the provisions of subsection (2) all demonstrations and gatherings- *(a)* in any building in which a courtroom is situated, or at any place in the open air within a radius of 100 metres from such building, on every day of the week, except Saturdays, Sundays and public holidays; and *(b)* in the areas defined in- (i) Schedule 1; and (ii) Schedule 2, are hereby prohibited.

(2) The provisions of subsection (1) shall not apply-*(a)* to any demonstration or gathering referred to in subsection (1) *(a)* for which permission has, on application to the magistrate of the district concerned, been granted by him in writing; or

(b) within the area contemplated in subsection (1) *(b)* (i), to any demonstration or gathering within such area for which permission has, on application to the Chief Magistrate of Cape Town, been granted by him in writing; or

vicinity of courts, parliament and the Union Buildings and are not applicable to the facts of this case. It therefore warrants no further mention.

[28] Counsel for the State argued that a gathering for which no prior notice was sought falls foul of section 12(1)(e). According to him such a gathering is "automatically prohibited". It must be borne in mind that in terms of section 12(1)(a), a person who convenes a gathering in respect of which no notice or no adequate notice was given in terms of section 3 commits an offence. Notably, there is no similar provision in respect of an attendee. I find it perplexing why another clause, (section 12(1)(e) would still cater for the same scenario by again including a convener. The appellants contend that the phrase "prohibited in terms of this Act" relates to situations where a prohibition contemplated in section 3(2), 5 and 7 is extant. They submit that an interpretation that seeks to penalise attendees of a gathering violates the principle of legality which finds expression in the maxim *nullum crimen sine lege.*

The *nullum crimen sine lege* principle

[29] The principle of legality is regarded as a grounding value for the legality of legislative and administrative measures taken by public authorities. The principle of legality in criminal law is also known as the *nullum crimen sine lege* principle. This principle is now firmly established as

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(c) within the area contemplated in subsection (1) *(b)* (ii), to a demonstration or gathering within such area for which permission has, on application to the Director-General: Office of the State President, been granted by him in writing.

(3) Any application for permission contemplated in subsection (2) shall be made to the person empowered to grant such permission, within a reasonable time before such demonstration or gathering is to take place.

(4) When credible information on oath that there is a threat as contemplated in section 5 (1), is brought to the attention of a person who has already granted permission in terms of subsection (2), he may, subject to the application, *mutatis mutandis*, of the provisions of section 5, revoke such permission, and thereupon the provisions of section 6 (6) shall, *mutatis mutandis*, apply to the demonstration or gathering in question.

part of our law [20]. Snyman[21] posits that its most important facets may be formulated as follows:- An accused may not be found guilty of a crime and sentenced unless the type of conduct with which he is charged (a) has been recognized by the law as a crime; (b) in clear terms; (c) before the conduct took place; (d) without the court having to stretch the meaning of the words and concepts in the definition to bring the particular conduct of the accused within the compass of the definition and (e) after conviction the imposition of punishment also complies with the four principles set out immediately above."

[30] The *nullum crimen sine lege* principle is consistent with Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides as follows:

> "(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

[31] An analogous provision in the Universal Declaration of Human Rights is Article 11(2) which provides as follows:-

> "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

[32] The European Courts have repeatedly considered the effects of this article. In the English case of *R v Rimmington*[22] Lord Bingham eloquently summarised the application of the *nullum crimen sine lege* principle as follows:-

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[20] *DPP v Prins* 2012 (2) SACR (SCA) 183 at para [7].
[21] CR Snyman Criminal Law (5th ed, 2008) at 36.
[22] [2005] UKHL 63 at para [33].

"34 These common law principles are entirely consistent with article 7(1) of the European Convention, which provides:

'No punishment without law

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

The European Court has repeatedly considered the effect of this article, as also the reference in article 8(2) to "in accordance with the law" and that in article 10(2) to "prescribed by law".

35 The effect of the Strasbourg jurisprudence on this topic has been clear and consistent. The starting point is the old rule nullum crimen, nulla poena sine lege (Kokkinakis v Greece [1993] ECHR 20*;* (1993) 17 EHRR 397*, para 52; SW and CR v United Kingdom* [1995] ECHR 52*;* (1995) 21 EHRR 363*, para 35/33): only the law can define a crime and prescribe a penalty. An offence must be clearly defined in law (SW and CR v United Kingdom), and a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, the consequences which a given course of conduct may entail (Sunday Times v United Kingdom (1979) 2 EHRR 245, (1979) 2 EHRR 245, para 49; G v Federal Republic of Germany (1989) 60 DR 256, 261, para 1; SW and CR v United Kingdom, para 34/32)."*

[33] The principles summarised by Lord Bingham have been applied in decisions of the European Court of Human Rights. In *Scoppola v Italy (No 2)*[23] stated that:

"92. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see S W v the United Kingdom and C R v the United Kingdom, 22

[23] **[2009] ECHR 1297** at para [92].

November 1995, para 34 and 32 respectively, Series A nos 335-B and 335-C, and Kafkaris, cited above, para 137).

[34] In Kononov v Latvia[24] the European Court of Human Rights, sitting as a Grand Chamber stated as follows:-

> "1. The guarantee enshrined in Article 7, an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment. Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable."

[35] As previously alluded to, the nub of this matter is whether section 12(1)(e) as it stands, creates an offence. The afore-mentioned authorities in relation to Article 7 of the European Convention have persuaded me to find that section 12(1)(e) is not couched in a language that unequivocally proclaims that a gathering for which no prior notice was given is automatically prohibited. I do not imagine that such a result, with grave consequences of imprisonment up to a period of a year, ought to be inferred from this provision when it is capable of a meaning that recognizes the right to peaceful demonstrations and gatherings and therefore passes constitutional muster. The interpretation that

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[24] (Application no. 36376/04), judgment delivered on 17 May 2010.

counsel for the State urges us to follow indeed offends against the principle of legality as expressed in the maxim *nullum crimen sine lege.*

[36] Counsel for the State criticised the appellants' contention that the RGA specifically prohibits the convening of a gathering without prior notice but purposefully does not do so in respect of an attendee. He submitted that such a proposition amounts to a narrow interpretation of section 12(1)(e) and cannot be countenanced. Counsel for the appellants reasoned that penal legislation requires a narrow interpretation. The remarks made by the Supreme Court of India[25] are apposite. That court stated that:-

> "It is a basic principle of criminal jurisprudence that a penal statute is to be construed strictly. If the act alleged against the accused does not fall within the parameters of the offence described in the statute the accused cannot be held liable. There is no scope for intendment based on the general purpose or object of law. If the Legislature has left a lacuna, it is not open to the Court to paper it over on some presumed intention of the Legislature".

[37] It is also prudent to take note of the following remarks made by the European Court of Human Rights in the case of Kononov v Latvia[26]:-

> "Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and *the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law.* This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. (My emphasis)

[25]The Assistant Commissioner, ... vs M/S. Velliappa Textiles Ltd. & Anr on 16 September, 2003
[26]Fn 20 at para 85.

[38] Counsel for the State argued that an interpretation that concludes that section 12(1)(e) does not create an offence in respect of attendees of a gathering which was held without prior notice would undermine the objects of the RGA and would render the requirements for the giving of notice nugatory. It needs to be borne in mind that section 12(1)(a) of the RGA states in unequivocal terms that any person who *convenes* a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3 shall be guilty of an offence. This provision confirms that there are grave consequences for leaders who convene gatherings without having provided prior notice of the intended gathering. Where a gathering is not peaceful, the police retain their statutory and common law powers to arrest the culprits[27].There is therefore no basis for concluding that an interpretation which is proposed by the appellants would emasculate the RGA.

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[27] Section 13 of the RGA provides as follows:-

"**13 Interpretation**

(1) The provisions of this Act shall not be so construed as to detract from-

(a) the provisions of the-

(i) Control of Access to Public Premises and Vehicles Act, 1985 (Act 53 of 1985); or

(ii) Dangerous Weapons Act, 2013; or

(iii) Arms and Ammunition Act, 1969 (Act 75 of 1969); or

(iv) Trespass Act, 1959 (Act 6 of 1959); or

(v) Criminal Procedure Act, 1977 (Act 51 of 1977); or

(b) the rights of any person regarding self-defence, necessity and protection of property; or

(c) any power conferred or duty imposed on the Minister or any member of the Police or the public under any law or the common law.

(2) The provisions of section 111 of the Road Traffic Act, 1989 (Act 29 of 1989), shall not apply in respect of a gathering or demonstration held in accordance with the provisions of this Act.

(3) For the purpose of this Act, where a convener has not been appointed in terms of section 2 (1), a person shall be deemed to have convened a gathering-

(a) if he has taken any part in planning or organizing or making preparations for that gathering; or

(b) if he has himself or through any other person, either verbally or in writing, invited the public or any section of the public to attend that gathering.

[39] Furthermore, if one were to agree with the State counsel's submission that section 12(1)(e) of the RGA constitutes an automatic prohibition, that would beg the question why the legislator would, having unequivocally set out the position regarding the convener in section 12(1)(a) of the RGA, again in section 12(1)(e) seek to repeat the same offence in relation to a convener. It is undisputable that the only sections of the RGA that make reference to a prohibition are section 3(2), section 5 and section 7 of the RGA, respectively. In my view, section 12(1)(e) relates to situations where the gathering has specifically been prohibited in terms of section 3(2), 5 or 7 of the RGA. It follows then that the attendance that is proscribed and criminalised is that of a gathering for which a prohibition has already been issued and communicated to the convener as contemplated in section 3(2), section 5 or section 7 of the RGA. I am of the view that the correct interpretation is the one that accepts that there is a distinction of circumstances in section 12(1)(a) and (e) of the RGA and that accepts that the phrase "prohibited in terms of this Act" cannot be taken out of the equation when interpreting section 12(1)(e).

[40] The provisions of section 12(2) also warrant mention. Section 12(2) provides that "it shall be a defence to a charge of convening a gathering in contravention of subsection (1)(a) that the gathering concerned took place spontaneously." This provision obviously recognizes that some protest gatherings happen spontaneously thus thwarting the giving of prior notice. This defence obviously speaks to the *mens rea* element of the offence. The interpretation contended for by the State, which propounds that attendance of a gathering for which no prior notice was given to authorities is *automatically prohibited* clearly has no merit and is inconsistent with the objects of the RGA and the spirit and purport of our Constitution. As elucidated in the paragraphs of this judgment dealing with the history of the RGA, even 'draconian' pre-constitutional

legislation proscribed only the attendance of a gathering for which a prohibition had been issued and communicated to the convener. The historical context of the RGA also favours an interpretation in terms of which the phrase "prohibited in terms of this Act" must be considered to refer to a prohibition that had been issued by the authorities and communicated to the convener and other stakeholders as contemplated in section 4(5)[28] of the RGA.

[41] I echo the sentiments expressed by the court in the *Garvas*[29] case. Indeed, the right to freedom of assembly is central to our constitutional democracy and exists primarily to give a voice to the powerless. Given the constitutionally protected right to peaceful assembly, a provision which allows for unarmed and peaceful attendees of protest gatherings to run the risk of losing their liberty for up to a period of one year and to be slapped with criminal records that will, in the case of the appellants,

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[28] Section 4(5) provides:-

(5) *(a)* The responsible officer shall ensure as soon as possible that a written copy of the notice, including any amendment thereof and any condition imposed and the reasons therefor, is handed to the convener and the authorized member who, and to every party which, attended the meeting referred to in subsection (2) *(b)*: Provided that if the identity or whereabouts of the convener is unknown, or if in view of the urgency of the case it is not practicable to deliver or tender the said written notice and reasons to him, the notice shall forthwith, notwithstanding any provision to the contrary in any other law contained, be published in one or more of the following manners:

(i) In a newspaper circulating where the gathering is to be held; or
(ii) by means of the radio or television; or
(iii) by the distribution thereof among the public and the affixing thereof in public or prominent places where the gathering is to be held; or
(iv) by the announcement thereof orally where the gathering is to be held; or
(v) by affixing it in a prominent place at the address of the convener specified in the notice.

(b) The convener and the authorized member shall, respectively, ensure that every marshal and every member of the Police at the gathering know the contents of the notice, including any amendment or condition, if any.

(6) *(a)* If a gathering is postponed or delayed, the convener shall forthwith notify the responsible officer thereof and the responsible officer may call a meeting as contemplated in subsection (2) *(b)*, and thereupon the provisions of subsections (2) *(c)* and *(d)*, (3), (4) and (5) shall apply, *mutatis mutandis*, to the gathering in question.

(b) If a gathering is cancelled or called off, the convener shall forthwith notify the responsible officer thereof and the notice given in terms of section 3 shall lapse.

(7) If a responsible officer is notified as contemplated in subsection (6) *(a)* or *(b)*, he shall forthwith notify the authorized member accordingly.

[29] Supra, 2013 (1) SA 83 (CC).

further reduce their chances of gaining new employment for merely participating in peaceful protest action, undermines the spirit of the Constitution.

[42] On the basis of all the reasons I have canvassed above, I find that section 12(1)(e) as it currently stands, does not create an offence for attendees who participate in a gathering for which no prior notice was given to the authorities mentioned in the RGA. The appeal must therefore succeed.

[43] I now venture into an aspect that was not canvassed by the appellants in the appeal but which is evident from the record and is foreshadowed in the standard of proof in criminal trials. It seems to me that even on the acceptance of the trial magistrate's interpretation of section 12(1)(e) of the RGA, not all the elements of the alleged offence were proven. The police officers that testified averred that the self-proclaimed leaders of the first group informed them that they had given prior notice of their intended gathering and even claimed to have documentary proof. This was said in the presence of the protestors. Significantly, the RGA only requires the giving of prior notice; it does not require that consent be granted[30]. It is clear that at the time of the protest gathering, the protestors had been led to believe that prior notice was given. Yet, this critical piece of evidence, which has a bearing on the appellants' *mens rea*, was not explored by the trial magistrate. With regards to the second gathering, Captain Lesimola repeatedly stated in his examination-in-chief, under cross-examination and during re-examination that he considered the second gathering to be spontaneous and said that he considered a spontaneous gathering to

[30]Section 4(3) provides:- "4(3) If a convener has been notified in terms of subsection (2) *(a)* or has not, within 24 hours after giving notice in terms of section 3 (2), been called to a meeting in terms of subsection (2) *(b)* of this section, the gathering may take place in accordance with the contents of the notice and in accordance with the provisions of section 8, but subject to the provisions of sections 5 and 6."

be one that was “not arranged or authorised”. Section 12(2) expressly gives a convener a defence if a gathering occurred spontaneously. There is no reason why the same defence would not be available to the attendees. In so far as the state did not prove all the elements of the offence, it failed to discharge the onus of proving its case beyond reasonable doubt. This is another reason why this appeal ought to succeed.

[44] Given the conclusion that this court has reached, it is not necessary to adjudicate on the appellants’ conditional application in respect of the constitutionality of section 12(1)(e) of RGA.

Costs

[45] With regards to costs pertaining to a previous postponement of the matter, this court notes that in the case of DPP v Prins[31], the Supreme Court of Appeal held that if a question of the constitutionality of a statutory offence arises in the course of a criminal trial in the magistrates’ court, the proper approach is to conduct the trial, subject to a reservation of rights in relation to the point of unconstitutionality, and then to raise that point in an appeal. The appellants were therefore well within their rights in applying for the application for leave to appeal to be argued in the same proceedings as the application for an order of constitutional invalidity. The Acting Deputy Judge President acceded to this request and his directions in that regard were duly communicated to the respondents. Despite the fact that the Acting Deputy Judge President issued a directive ordering that the appeal and the conditional application be heard simultaneously, the Minister of Police, who was a party in the conditional application, did not file any papers. Both the appeal and conditional application had to be postponed in order to allow the Minister to file papers so as to ensure that the court would

[31]Fn 17 at para [23].

have the benefit of all arguments in case the court were to conclude that the said provision was interpreted correctly by the trial court, thus, triggering consideration and determination of the conditional application. As the Minister's failure to file any papers led to the postponement of the matter, the Minister must therefore pay the wasted costs occasioned by that postponement.

[46] In the result, the following order is made:

1. The appeal against the appellants' conviction succeeds.
2. The appellants' conviction is set aside.
3. The sentence imposed on the appellants by the court *a quo* is set aside.
4. The Minister of Police is ordered to pay the wasted costs occasioned by the postponement of the matter on 20 June 2016.

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M.B. MOLEMELA, JP

I concur.

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K. J. MOLOI, ADJP

I concur.

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L. J. LEKALE, J

On behalf of appellant:	Adv. R. Mastenbroek With Adv. M. Morris Instructed by: Webbers Attorneys BLOEMFONTEIN
On behalf of respondent:	Adv. K. G. Mashamaite Instructed by: The Director: Public Prosecutions BLOEMFONTEIN