IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 32/18
High Court Case No: A431/15

In the matter between:

PHUMEZA MHLUNGWANA AND NINE OTHERS Applicants

and

THE STATE First Respondent

THE MINISTER OF POLICE Second Respondent

and

RIGHT2KNOW CAMPAIGN Second Amicus Curiae

FILING SHEET

PRESENTED FOR SERVICE AND FILING:

1. Right2Know Campaign's heads of argument; and

2. Right2Know Campaign's practice note.

Dated at SANDTON on 6 JULY 2018.

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SUBMISSIONS ON BEHALF OF RIGHT2KNOW CAMPAIGN

INTRODUCTION

1. On 11 September 2013, the Applicants held a protest outside the Cape Town Civic Centre to demand better sanitation services. The Magistrates' Court found that the gathering was "respectful and peaceful", that there was "no harm to anyone" and that the Applicants' symbolic human chain had not prevented access to the Cape Town Civic Centre. But as the protest had taken place without the Applicants giving prior notice, and the number of participants exceeded 15,[1] they were found guilty of contravening sec 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 (**RGA**). In view of the nature of the protest, the Court cautioned and discharged the Applicants.

2. The High Court found that that sec 12(1)(a) of the RGA unjustifiably limits the right in sec 17 of the Constitution to assemble, demonstrate and picket, and consequently declared sec 12(1)(a) unconstitutional and invalid.

3. The Right2Know Campaign ("**R2K**") intervenes as an *amicus curiae* in order to provide an overview of international and comparative law and

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[1] The exact number of participants is unclear. The Magistrates' Court noted that "[o]n the photographs there are no more than 16, then 17 and then 18 people on or in the vicinity of the chain at any given time in question, this being very different from the officer's evidence that there were about 40 protestors of whom 20 had run away and the rest on the chain then being arrested."

practice on the right of freedom of assembly and the enforcement of prior notice requirements for assemblies.

4. These submissions are structured as follows:

A. We address the relevance of international and foreign law and practice to the present case;

B. We discuss, through an international lens, whether sec 12(1)(a) of the RGA constitutes a limitation on the right of assembly;

C. We summarise the jurisprudence and standards regarding the enforcement of prior notice requirements developed within the United Nations (**UN**) and regional systems for the protection of human rights;

D. We set out the position of a number of foreign jurisdictions on the enforcement of prior notice requirements; and

E. We conclude by submitting that sec 12(1)(a) of the RGA should be declared unconstitutional, as criminalising the failure to give prior notice, in the absence of aggravating elements, is not reasonable and justifiable in an open and democratic society.

A. THE RELEVANCE OF INTERNATIONAL AND FOREIGN LAW AND PRACTICE TO FREEDOM OF ASSEMBLY

5. Section 17 of the Constitution provides that "[e]*veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions*".

6. Section 39 of the Constitution stipulates that when interpreting the Bill of Rights, a court must consider international law and may consider foreign law. In *Government of the Republic of South Africa and Others v Grootboom and Others*,[2] Yacoob J held that sec 39 obliges a court to consider international law as a tool to interpret the Bill of Rights, and cited with approval the dictum of Chaskalson P in *S v Makwanyane and Another*:[3]

> ". . . *public international law would include non-binding as well as binding law. They may both be used under the sec as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission*

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2 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 26.

3 *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]."

7. Yacoob J in *Grootboom* held that while international law can be used as a guide to interpretation, "*where the relevant principle of international law binds South Africa, it may be directly applicable*".[4]

8. South Africa is a State Party to the *International Covenant on Civil and Political Rights* (**ICCPR**)[5] and the *African Charter on Human and Peoples' Rights* (**ACHPR**)[6] which it ratified on 10 December 1998 and 9 June 1996, respectively. Both treaties are directly applicable. Both protect the right to freedom of assembly, and are similar to the provisions of sec 17 of the Constitution.

9. Article 21 of the ICCPR provides that -

"*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in*

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4 *Ibid*, para 26.

5 *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNT.S. 171, *entered into force* 23 March 1976.

6 *African Charter on Human and Peoples' Rights*, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986.

conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

10. Similarly, Article 11 of the ACHPR stipulates that -

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

11. In *South African Transport and Allied Workers Union and Another v. Garvas and Others ("SATAWU")*, which concerned the constitutionality of sec 11(2) of the RGA, this Court referred to findings by both the European Court of Human Rights (**ECtHR**) and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions,[7] whose statements, while not binding on South Africa, elucidate the meaning of international human rights guarantees.

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[7] *South African Transport and Allied Workers Union and Another v. Garvas and Others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae)* 2013 (1) SA 83 (CC), paras 53 and 64.

12. Foreign law is also helpful in considering whether a limitation meets the requirements of sec 36 of the Constitution, which states that limitations on rights must be "*reasonable and justifiable in an open and democratic society*". The practice of other democratic states is thus relevant to whether a limitation meets this standard.

13. This Court has previously had regard to foreign law when considering the proper parameters of freedom of expression in an open and democratic society.[8]

B. SEC 12(1)(a) OF THE RGA LIMITS THE RIGHT TO ASSEMBLE

14. In *SATAWU*, the Court interpreted sec 17 of the Constitution to mean that

> *"everyone who is unarmed has the right to go out and assemble with others to demonstrate, picket and present petitions to others for any lawful purpose. The wording is generous. It would need some particularly compelling context to interpret this provision as actually meaning less than its wording promises. There is, however, nothing, in our own history or internationally, that justifies taking away that promise."*[9]

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[8] See, for example, *Laugh It Off Promotions CC v. South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC), para. 45, citing judgments of courts in Canada, the United Kingdom, the USA and Zambia. See, more generally, A. Lollini, "Legal argumentation based on foreign law – An example from case law of the South African Constitutional Court", 3 *Utrecht Law Review* (2007) 60 – 74, available at https://www.utrechtlawreview.org/article/download/37/37/.

[9] *SATAWU* para. 51: emphasis added.

15. The Court held further that a provision which has the effect that *"organizations that wish to organise protest action ... could be inhibited from doing so"* is *"a limitation of the right to gather and protest."*[10]

16. Sec 12(1)(a) of the RGA criminalises the convening of a gathering without providing timely notice. This is also a limitation on the right of assembly. The freedom of assembly includes the freedom to organise assembly. It is not limited to the freedom to join a spontaneous assembly, or an assembly organised by someone else. The freedom to organise an assembly is limited by the threat of criminal sanction for doing so without giving prior notice. This has a chilling effect on the convening of gatherings and on the right of assembly. This is illustrated by the present case: although the Applicants planned to limit their protest to 15 persons so as to avoid the need to give notice, more people attended the protest, and this resulted in their being arrested, prosecuted and convicted.

17. International precedent supports the view that the criminalisation of the failure to give notice is a limitation on freedom of peaceful assembly.

18. In *Kivenmaa v. Finland*,[11] the convener of a small protest complained to the UN Human Rights Committee (**HRC**) when she was given an administrative fine under Finland's Act on Public Meetings. Like the

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[10] *Ibid* para 57.

[11] *Kivenmaa v. Finland*, UNHRC, Views of 9 June 1994, UN Doc. CCPR/C/50/D/412/1990.

Second Respondent, the Finnish government asserted "*that the right of public assembly is not restricted by the requirement of a prior notification to the police.*"[12] The HRC rejected this view, finding that Finland had violated Kivenmaa's rights to freedom of expression and freedom of peaceful assembly.[13]

19. The ECtHR takes the same approach. In *Novikova and Others v. Russia,* a number of the applicants had been prosecuted for the administrative offence of "*organising or participating in public events without giving prior notification to the competent public authorities.*" The Court held that this constituted an interference with the applicants' rights:

> *"interference with the exercise of the freedom of peaceful assembly or the freedom of expression does not need to amount to an outright ban but can consist in various other measures taken by the authorities ... including, for instance, measures taken before or during an assembly and those, such as punitive measures, taken afterwards.*"[14]

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[12] *Ibid.*, para. 7.8.

[13] *Ibid.*, para. 10.

[14] *Novikova and Others v. Russia*, ECtHR, Judgment of 26 April 2016, para. 106.

C. INTERNATIONAL LAW AND PRACTICE ON PRIOR NOTICE REQUIREMENTS AND THEIR ENFORCEMENT

20. The right of peaceful assembly is a core civil and political right protected by international law. Guarantees of this right are found in Article 20 of the Universal Declaration of Human Rights (**UDHR**)[15] and Article 21 of the ICCPR, and at the regional level, in Article 11 of the African Charter on Human and Peoples' Rights (**ACHPR**), Article 15 of the American Convention on Human Rights (**ACHR**),[16] and Article 11 of the European Convention on Human Rights (**ECHR**).[17]

21. These provisions are to very similar effect: to enjoy protection, an assembly must be peaceful (and, under the ACHR, "without arms"). The treaties permit limitations on peaceful assemblies if three cumulative conditions are met –

    21.1. First, the limitation must be imposed by law;

    21.2. Second, the limitation must pursue a legitimate aim; and

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[15] General Assembly of the UN, *Universal Declaration of Human Rights*, UN Doc A/Res/3/217 A, 10 December 1948.

[16] *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 UNT.S. 123, *entered into force* 18 July 1978.

[17] *Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. No. 5, 213 UNT.S. 222, *entered into force* 3 September 1953.

21.3. Third, the limitation must be necessary in a democratic society (or merely "necessary" under the ACHPR) for the achievement of that aim.

22. The legitimate aims referred to in the second part of this test are confined to certain limited exceptions. The ICCPR for example permits limitations based on "national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others." The regional treaties recognise similar aims, with certain minor differences in wording.[18]

23. The question of to what extent the enforcement of a prior notice requirement is compatible with the three-part test has been the subject of statements and decisions at both the level of the UN and the regional human rights systems. The relevant precedents and standards are described in the following subsecs.

United Nations mechanisms

24. In *Kivenmaa*, the gathering in issue consisted of about 25 persons holding up a banner during welcoming ceremonies for a foreign head of State. The HRC – the body of independent experts charged with monitoring

[18] Under the ACHPR, restrictions may be enacted in the interest of "national security, the safety, health, ethics and rights and freedoms of others"; under the ACHR, "national security, public safety or public order, or to protect public health or morals or the rights or freedom of others"; and under the ECHR, "national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

implementation and giving authoritative interpretations of the ICCPR – recognised that "*a requirement to notify the police of an intended demonstration in a public place ... may be compatible with the permitted limitations laid down in article 21 of the Covenant.*"[19] However, the HRC noted that the enforcement of such a requirement would have to pursue one of the legitimate aims recognised by the ICCPR. It considered that none of these aims was relevant in the case at hand, and consequently, "*the application of Finnish legislation ... cannot be considered as an application of a restriction permitted by article 21.*"[20]

25. In subsequent cases, the HRC continued to insist on an individualised justification for any enforcement measures. In *Praded v. Belarus*, for example, the author of the communication had been given an administrative fine in connection with an unauthorised protest at the Iranian embassy. The HRC held that:

"*[W]hile ensuring the security and safety of the embassy of the foreign State may be regarded as a legitimate purpose for restricting the right to peaceful assembly, the State party must justify why the apprehension of*

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[19] *Kivenmaa v. Finland*, UNHRC, Views of 9 June 1994, UN Doc. CCPR/C/50/D/412/1990, para. 9.2.

[20] *Ibid.*

the author and imposition on him of an administrative fine were necessary and proportionate to that purpose."[21]

26. As Belarus had not submitted any observations on the merits, the HRC found that there had been a violation of Article 21.[22]

African regional mechanisms

27. The African Commission on Human and Peoples' Rights, the body charged with promoting and interpreting the rights guaranteed under the ACHPR, has not yet decided any case concerning prior notice requirements for assemblies.

28. In *Malawi African Association and Others v. Mauritania*, however, the Commission held that the imprisonment of presumed political activists on charges of 'holding unauthorised meetings' constituted a violation of the right to assemble, as -

"The government did not come up with any element to show that these accusations had any foundation in the "interest of national security, the

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[21] *Praded v. Belarus,* UNHRC, Views of 29 November 2014, UN Doc. CCPR/C/112/D/2029/2011, para. 7.8. The Committee has come to similar views in, amongst others, *Zalesskaya v. Belarus,* UNHRC, View of 28 April 2011, UN Doc. CCPR/C/101/D/1604/2007, para. 10.6; *Kovalenko v. Belarus*, UNHRC, Views of 17 July 2013, UN Doc. CCPR/C/108/D/1808/2008, para. 8.8; *Komarovsky v. Belarus,* UNHRC, Views of 4 February 2014, UN Doc CCPR/C/109/D/1839/2008, para. 9.4; *Kuznetsov et al. v. Belarus,* UNHRC, Views of 30 September 2014, UN Doc. CCPR/C/111/D/1976/2010, para. 9.8; *Lozenko v. Belarus*, UNHRC, Views of 21 November 2014, UN Doc. CCPR/C/112/D/1929/2010, para. 7.7.

[22] *Ibid.*, para. 7.9.

safety, health, ethics and rights and freedoms of others", as specified in article 11."[23]

29. This suggests that the Commission, like the HRC, would require it to be shown that the enforcement of a notice requirement pursues a recognised legitimate aim.

30. In 2011, the Commission appointed a Study Group on Freedom of Association,[24] whose mandate was subsequently broadened to include freedom of assembly.[25] In its 2014 report, the Study Group emphasises that the proper purpose of a prior notification regime is not to control the exercise of freedom of assembly, but to enable the State to meet its obligation to facilitate gatherings.[26] Accordingly the Study Group concluded, "*in the case of small public gatherings or gatherings leading to no disruption to others, no notification should be necessary.*"[27] The Study Group considered that the failure to notify may only be sanctioned if coupled with demonstrable harm -

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[23] *Malawi African Association and Others v. Mauritania*, ACHPR, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).

[24] ACHPR, Resolution ACHPR/Res.151 (XLVI) 09 on the need for the conduct of a study on freedom of association in Africa, 25 November 2009.

[25] ACHPR, Resolution ACHPR/Res.229 (LII) 12 on the extension of the deadline for the study on freedom of association and extension of the scope of the study to include freedom of peaceful assembly in Africa, 22 October 2012.

[26] ACHPR, *Report of the Study Group on Freedom of Association and Assembly in Africa*, 2014, p. 60, para. 5, available at http://www.achpr.org/mechanisms/human-rights-defenders/Freedom_of-Association.

[27] *Ibid.*, p. 61, para. 9.

"[C]ore to the idea of a notification regime [is] that no sanctions be imposed merely for failure to notify, as to do so would be to punish people for exercising their right. Rather, sanctions may be imposed only when lack of notification is combined with demonstrable harms. Similarly, no assembly should be dispersed merely for failure to notify."[28]

European regional mechanisms

31. The primary source of guidance on the meaning of Article 11 ECHR is the case-law of the European Court of Human Rights, the judicial arm of the Council of Europe (**CoE**).[29] Also authoritative are the Guidelines on Freedom of Peaceful Assembly,[30] drawn up by a CoE advisory body, the European Commission for Democracy through Law (better known as the **Venice Commission**) in collaboration with the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (**OSCE/ODIHR**).[31]

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[28] *Ibid.*, p. 62, para. 10.

[29] The CoE is an international organization of 47 Member States dedicated to the promotion of human rights, democracy, and the rule of law. Its membership includes all the generally recognised States wholly or partly located on the European continent, with the exception of Belarus, Kazakhstan and the Vatican. All CoE Member States are parties to the ECtHR and have accepted the jurisdiction of the ECHR to hear individual or inter-State applications brought against them alleging violations of the Convention.

[30] OSCE-ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, 2nd edn, 2010, available at https://www.osce.org/odihr/73405?download=true.

[31] The OSCE is a security-oriented intergovernmental organization, whose mandate includes the promotion of human rights, freedom of the press and fair elections. Its 57 Participating States include all CoE members, and also include Canada, the USA and a number of Central Asian nations.

The European Court of Human Rights

32. The ECtHR has developed an extensive body of case-law on the regulation of public gatherings.

33. In the early (2004) case of *Ziliberberg v. Moldova*, the ECtHR held that States have the right to require not just notification, but authorisation for a protest, and that "they must be able to apply sanctions to those who participate in demonstrations that do not comply with the requirement."[32] This position attracted scholarly criticism,[33] and has since been qualified and interpreted as subject to several conditions.

34. In *Oya Ataman v. Turkey*, the applicant had organised a march and statement to the press in central Istanbul. After a number of warnings, the police dispersed the gathering with the use of pepper spray, on the ground that the prior notice required by Turkish law had not been given.[34] The ECtHR emphasised that organisers of demonstrations should in principle respect the applicable rules and that "*notification would have enabled the authorities to ... minimise the disruption to traffic that the demonstration could have caused.*" [35] However, the ECtHR also noted that there "*were at most fifty people, who wished to draw attention to a topical issue*" and

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[32] *Ziliberberg v. Moldova*, ECtHR, Judgment of 4 May 2004, para. 2.

[33] See, for example, D. Mead, *The New Law of Peaceful Protest* (1st edn, Oxford: Hart Publishing, 2010), 91.

[34] *Oya Ataman v. Turkey*, ECtHR, Judgment of 5 December 2006, paras. 4-7.

[35] *Ibid.*, paras. 38-39.

there was "*no evidence to suggest that the group in question represented a danger to public order, apart from possibly disrupting traffic.*"[36] Although the gathering had technically been unlawful,[37] the ECtHR held that the dispersal constituted a violation of freedom of peaceful assembly:

> *"[W]here demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance. Accordingly, the Court considers that in the instant case the police's forceful intervention was disproportionate and was not necessary for the prevention of disorder within the meaning of the second paragraph of Article 11 of the Convention."*[38]

35. In *Akgöl and Göl v. Turkey* and later cases, the ECtHR has stressed that the need "*for the public authorities to show a certain degree of tolerance*" also implies that "*a peaceful demonstration should not, in principle, be made subject to the threat of a penal sanction.*"[39]

36. The facts of *Sergey Kuznetsov v. Russia* bear some similarity to those of the present case. Kuznetsov held a picket with two others at the entrance

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[36] *Ibid.*, para. 41.

[37] *Ibid.*, para. 39.

[38] *Ibid.*, para. 42.

[39] *Akgöl and Göl v. Turkey*, ECtHR, Judgment of 17 May 2011, para. 43. See also *Pekaslan and Others v. Turkey*, ECtHR, Judgment of 20 March 2012, para. 81; *Yilmaz Yildiz and Others v. Turkey*, ECtHR, Judgment of 14 October 2014, para. 46.

to the Sverdlovsk Regional Court, to protest "violations of the human right of access to a court."[40] While he had given prior notice to the authorities, he had done so beyond the prescribed time-limit; as a consequence, he was arrested and given a modest administrative fine.[41] The ECtHR considered that the formal breach of the notification requirement was by itself neither relevant nor a sufficient reason:

"[F]reedom to take part in a peaceful assembly is of such importance that a person cannot be subjected to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as this person does not himself commit any reprehensible act on such an occasion."[42]

37. Since it was "*undisputed that there were no complaints by anyone, whether individual visitors, judges or court employees, about the alleged obstruction of entry to the court-house*" and the demonstrators had shown a cooperative attitude to the police,[43] it was held that Russia failed to demonstrate the required "*very strong reasons for justifying restrictions on political speech or serious matters of public interest.*"[44] The ECtHR emphasised that the fact that "*the amount of the fine was relatively small*

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40 *Sergey Kuznetsov v. Russia*, ECtHR, Judgment of 23 October 2008, para. 5.

41 *Ibid.*, paras. 10-18.

42 *Ibid.*, para. 43.

43 *Ibid.*, para. 44.

44 *Ibid.*, para. 47.

does not detract from the fact that the interference was not "necessary in a democratic society."[45]

38. The ruling in *Novikova and Others v. Russia* sums up the ECtHR's jurisprudence on enforcement of notice requirements in the following terms -

"While rules governing public assemblies, such as the system of prior notification, may be essential for the smooth conduct of public demonstrations, in so far as they allow the authorities to minimise the disruption to traffic and take other safety measures, their enforcement cannot become an end in itself ... The Court reiterates its constant position ... that a situation of unlawfulness, such as one arising under Russian law from the staging of a demonstration without prior notification, does not necessarily (that is, by itself) justify an interference with a person's right to freedom of assembly ... [T]he domestic authorities' reaction to a public event remains restricted by the proportionality and necessity requirements of Article 11 of the Convention."[46]

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[45] *Ibid.*, para. 84.

[46] *Novikova and Others v. Russia*, ECtHR, Judgment of 26 April 2016, para. 136.

39. In *Novikova* the applicants had been given administrative fines for "merely standing in a peaceful and non-disruptive manner at a distance of some fifty metres from each other."[47] Consequently,

"[N]o compelling consideration relating to public safety, prevention of disorder or protection of the rights of others was at stake. The only relevant consideration was the need to punish unlawful conduct. This is not a sufficient consideration in this context ... in the absence of any aggravating elements".

40. The ECtHR also took the opportunity to express its concern at a recent ten-fold increase in the administrative fine which could be imposed under Russian law for organising or participating in a non-notified assembly, noting that "*the high level of fines [is] conducive to creating a "chilling effect" on legitimate recourse to protests.*"[48]

41. In summary, the ECtHR permits the imposition of notice and even authorisation requirements for assemblies, but public authorities must show restraint in the enforcement of such requirements, particularly when a protest relates to a political issue or other serious matter of public interest. Further, the mere fact that the organisers have not complied with applicable procedures does not justify the dispersal of a gathering or the imposition of sanctions, even if a certain degree of disruption to traffic is

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[47] *Ibid.*, para. 99.

[48] *Ibid.*, paras. 210-11.

caused. Such measures are justifiable only when there is a compelling consideration at stake, other than simply upholding the law. The sanctions prescribed by law and imposed in practice must also be proportionate and peaceful protests should not be subject to the threat of a penal sanction.

The Guidelines on Freedom of Peaceful Assembly

42. The OSCE/ODIHR and Venice Commission Guidelines on Freedom of Peaceful Assembly emphasise the need to limit prior notification requirements to what is essential and only for a legitimate aim:

"[I]n an open society, many types of assembly do not warrant any form of official regulation. Prior notification should, therefore, only be required where its purpose is to enable the state to put in place necessary arrangements to facilitate freedom of assembly and to protect public order, public safety and the rights and freedoms of others."[49]

43. The Explanatory Notes suggest exempting assemblies from the prior notification requirement if no disruption is reasonably expected -

"It is good practice to require notification only when a substantial number of participants are expected or only for certain types of assembly. In some jurisdictions there is no notice requirement for small

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[49] OSCE-ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, 2nd edn, 2010, available at https://www.osce.org/odihr/73405?download=true, para 4.1.

assemblies ... or where no significant disruption of others is reasonably anticipated by the organizers (such as might require the redirection of traffic)."[50]

44. Imposing criminal liability for failure to give notice is thus discouraged in such cases, although the Guidelines do not elaborate on this point. They do however suggest more generally that organisers and participants in assemblies should be able to invoke a "*reasonable excuse*" defence, for example after "*either underestimating or overestimating the number of expected participants ... in good faith*" or "*if there are reasonable grounds for non-compliance with the notification requirement.*"[51]

Inter-American regional mechanisms

45. The Inter-American Commission on Human Rights (**IACHR**) is an organ of the Organization of American States, charged with promoting the observance and protection of the rights guaranteed by the ACHR. In a 2006 report, the IACHR recognised that States "*may regulate the use of public space, for example by establishing requirements of prior notice*,"[52] but -

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[50] *Ibid.*, Explanatory Notes, para. 115.

[51] *Ibid.*, para. 110.

[52] IACHR, *Report on the Situation of Human Rights Defenders in the Americas,* OEA/Ser.L/V/II.124, 7 March 2006, para. 56.

"[t]he purpose of regulating the right to assembly cannot be to create the basis for prohibiting the meeting or the demonstration. To the contrary, regulations establishing, for example, advance notice, exist for the purpose of informing the authorities so that they can take measures to facilitate the exercise of the right without significantly disturbing the normal activities of the rest of the community."

46. The Commission reiterated the opinion of its Special Rapporteur for Freedom of Expression, who had stated in a 2002 Report:

"[T]he per se criminalization of public demonstrations is, in principle, inadmissible ... [A]pplication of criminal sanctions ... must be shown to satisfy an imperative public interest that is necessary for the functioning of a democratic society."[53]

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[53] *Ibid.*, para. 61, and IACHR, *Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2002*, OEA/Ser. L/V/II.117, Doc. 5 rev. 1, 7 March 2003, para. 35

D. SELECTED NATIONAL LAW AND PRACTICE

47. Many countries, including established democracies, have not yet brought their domestic legislation in line with the international law norms and standards described in the previous sec. However, emerging best practice is not to treat the failure to provide prior notice as an automatic criminal or administrative offence.

Australia

48. Most Australian jurisdictions have decriminalised the convening of an assembly without prior notice, and some scholars have suggested that criminalisation is unconstitutional.[54] The Commonwealth, Victoria and the Australian Capital Territory do not require prior notification at all.[55] In New South Wales, Queensland, South Australia, Western Australia and the Northern Territory, prior notice is an optional procedure. The incentive to comply is that participants in an assembly where there has been notification and authorisation are immune from criminal (and, in Queensland and South Australia, civil) liability for certain obstruction offences.[56] In Tasmania the law has not been reformed and it is still an

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[54] O'Neill, Rice and Douglas, *Retreat from Injustice: Human Rights Law in Australia*, (2nd edn, Sydney: The Federation Press, 2004), 297.

[55] *Ibid.* See also Douglas, *Dealing with Demonstrations: The Law of Public Protest and Its Enforcement*, (1st edn, Sydney: Federation Press, 2004), 58

[56] *Ibid.* See also Summary Offences Act 1988 (New South Wales), Sections 23 and 24, available at http://www.austlii.edu.au/au/legis/nsw/consol_act/soa1988189/; Peaceful Assembly Act 1992 (Queensland), Sections 6-10, available at

offence to organise a demonstration without a permit, punishable by a fine.[57]

Brazil

49. Article 5(XVI) of the Brazilian Constitution guarantees the right to freedom of peaceful assembly without arms, "*subject only to prior notice to the competent authority.*"[58] Failure to give notice does not constitute a criminal or administrative offence. The authorities have in some instances used civil law to obtain injunctions and damages against the organisers of assemblies which had not been notified.[59] The Supreme Federal Court is currently examining an appeal which challenges the constitutionality of imposing such damages in circumstances where no direct notice was

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https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PeacefulAssA92.pdf; Public Assemblies Act 1972 (South Australia), Sections 4 and 6, available at https://www.legislation.sa.gov.au/LZ/C/A/PUBLIC%20ASSEMBLIES%20ACT%201972/CURRENT/1972.28.UN.PDF; Public Assemblies and Processions Act 1984 (Western Australia), section 9(b), available at https://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:17150P/$FILE/Public%20Meetings%20and%20Processions%20Act%201984%20-%20[01-00-01].pdf?OpenElement; Traffic Regulations (Northern Territory), Regulation 38, available at http://www.austlii.edu.au/au/legis/nt/consol_reg/tr186/.

57 Police Offences Act 1935 (Tasmania), section 49AB(1), available at http://www.austlii.edu.au/au/legis/tas/consol_act/poa1935140/.

58 Constitution of the Federative Republic of Brazil of 5 October 1998, Article 5(XVI). Unofficial English translation available at https://www.constituteproject.org/constitution/Brazil_2014.pdf.

59 See, for example, *Public Ministry of the State of São Paulo v. Syndicate of Workers of the Federal Judiciary in the State of São Paulo*, Court of Justice of São Paulo, Appeal No. 9158154-90.2005.8.26.0000, Judgment of 9 November 2011, available at http://www.mpsp.mp.br/portal/page/portal/cao_urbanismo_e_meio_ambiente/Jurisprudencia/juris_urbanismo/TJSP-AP-9158154-90-2005-8-26-0000-(nov-11)_SP_passeata-indenizacao.pdf.

given of a protest on a motorway, but the authorities appear to have had actual notice as a result of an announcement in the media.[60]

Malaysia

50. Sec 9(1) of Malaysia's Peaceful Assembly Act 2012 requires the organiser of an assembly to give ten days' prior notice to the police. Section 9(5), which prescribes a maximum fine of RM 10,000 (about R 33,200) for failure to comply, has been the subject of two constitutional challenges before the Malaysian Court of Appeal, with contradictory outcomes.

51. The appeal in *Nik Nazmi Bin Nik Ahmad v. Public Prosecutor*[61] was brought by an opposition politician who had been charged in connection with a rally against the alleged rigging of elections. The Court unanimously held that sec 9(5) was unconstitutional.[62] Justice Mohamad Ariff Bin Yusof wrote that -

"The effect of holding sec 9(5) valid will be to hold an organiser criminally liable although the assembly turns out to be peaceful or there

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60 *Unified Syndicate of Petroleum, Petrochemical, Chemical and Plastics Workers of the States of Alagoas and Sergipe and Others v. the Union*, Supreme Federal Court, Extraordinary Appeal (RE) 806339 RG / SE.

61 *Nik Nazmi Bin Nik Ahmad v. Public Prosecutor*, [2014]4 CLJ 944.

62 In view of the importance of the issue, each of the three judges prepared a written opinion. These opinions are available at http://www.kehakiman.gov.my/directory/judgment/file/b-09-303-11-2013_yadatukhamidsultan.pdf (Justice Hamid Sultan Bin Abu Backer); http://www.kehakiman.gov.my/directory/judgment/file/B-09-303-11-2013_YADatoMah.pdf (Justice Mah Weng Kwai) and http://www.kehakiman.gov.my/directory/judgment/file/B-09-303-11-2013_YaDatukAriff.pdf (Justice Mohamad Ariff Bin Yusof).

is full compliance with terms and conditions imposed. There is absent a rational and proportionate connection between legislative measure and legislative objective."[63]

52. In *Public Prosecutor v. Yuneswaran a/l Ramaraj*,[64] decided about 17 months later, a different panel of the Court of Appeals unanimously upheld the constitutionality of sec 9(5). One of the main contentions of the Respondent was that criminalization of failure to give notice is "not 'reasonable' and therefore unconstitutional."[65] The Court declined to rule on this point, noting that the word "reasonable" had appeared in an early draft of the relevant constitutional provision but had been deliberately omitted. Thus, "the framers of our Constitution wanted the Parliament to be the judge of what was "reasonable" and not the Courts."[66]

53. The issue will have to be settled by the Federal Court of Malaysia, the country's highest court.

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63 Opinion of Justice Mohamad Ariff Bin Yusof, para. 43.

64 *Public Prosecutor v. Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47, available at http://foongchengleong.com/judgements/J-09-229-09-2014.pdf.

65 *Ibid.*, para. 58.

66 *Ibid.*, para. 76.

Russian Federation

54. The rights to peaceful assembly and expression are guaranteed in Article 31 of the Constitution of the Russian Federation which states that "*Citizens of the Russian Federation shall have the right to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets.*"

55. The Russian Federation has however enacted restrictive legislation on the convening of public assemblies, and in general has outlawed collective public protest except when expressly pre-approved by the authorities. Breaches of these laws include being subject to administrative fines.

56. In July 2014 the Russian Federation enacted Article 212.1 of the Criminal Code, to provide that in addition to administrative fines for breaking the rules governing the convening of public assemblies, if a person commits more than three violations within 180 days, this is punishable by up to five years' imprisonment. The punishment for repeated violations of the rules governing public assemblies does not differentiate between peaceful and violent protesters.

57. In the *Dadin* case, the Constitutional Court considered the criminalisation of conduct which amounts to a breach of those rules.

58. Ildar Dadin was criminally prosecuted and convicted for participating in four peaceful street protests within 180 days without obtaining prior permission. In December 2015, he was sentenced to three years' imprisonment. This was reduced to two-and-a-half years on appeal.

59. Dadin submitted a complaint to the Russian Constitutional Court, arguing that Article 212.1 violated his constitutional and international law rights. He asserted that Article 212 violated his constitutional rights as it made him criminally liable for a breach of the law for holding a peaceful public event, and that he could be criminally punished where his actions caused no harm to human health or property and created no threat to the security of the population and the environment.

60. On 10 February 2017 the Constitutional Court confirmed that the State may prosecute people for repeated noncriminal offences, but held that the authorities should base a prosecution on "the real scale of public danger", and only jail protesters for breach where the rallies were not peaceful.[67]

61. The Court referred to judgments of the ECtHR on Article 11 of the ECHR which held that rules regulating public assemblies are important for the holding of peaceful public events and allowing the authorities to minimise obstructions to road traffic but "*their execution may not be an end in itself*

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[67] Quotations are from the translation into English of the judgment of the Russian Constitutional Court of 10 February 2017 in the complaint of I I Dadin, under case No. 2-П/2017, available at http://www.ksrf.ru/en/Decision/Judgments/Documents/2017__January_19_2-P.pdf .

and must not create hidden obstacles for the realisation of the freedom of peaceful assembly".[68] The Court held that -

> "*the federal legislator, [in] determining what actions [are] dangerous for [a] person, society and the State [to be] recognized as crimes ... must avoid excessive use of the criminal-law repression, remembering that only circumstances together objectively confirming [a degree of] criminal public danger of unlawful actions, including the scale of [its] prevalence [may result in a criminal sanction*].[69]

United Kingdom

62. In the UK, there is no requirement to give prior notice of a static public assembly (i.e. one that does not move). Under the UK's Public Order Act 1986, senior police officers are permitted to give directions to move an assembly or to limit its duration or the number of participants, where this appears necessary to prevent "disorder, damage, disruption or intimidation."[70] If the organiser knowingly fails to comply, this constitutes an offence, unless it is proved that "the failure arose from circumstances beyond his control."[71]

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68 *Dadin* op cit at page 6.

69 Ibid at page 17.

70 Public Order Act 1986, section 14(1), available at http://www.legislation.gov.uk/ukpga/1986/64.

71 *Ibid.*, section 14(4).

63. Prior notice is only required for "public processions", except funerary processions and those "commonly or customarily held" in the relevant police area.[72] Organisers who fail to give notice when required to do so are liable on summary conviction to a moderate fine.[73]

E. SUMMARY AND CONCLUSIONS: SEC 12(1)(a) SHOULD BE HELD UNCONSTITUTIONAL

64. Three conclusions emerge from this discussion of international and comparative law.

65. First, there is general acceptance that States may impose a requirement of prior notification of assemblies. Nevertheless, the proper aim of such a requirement is not to serve the convenience of the authorities, but to put them in a better position to meet their obligation to facilitate the gathering and manage the flow of traffic. It is accordingly considered good practice to require prior notice only where there is a reasonable expectation of disruption to others. Moreover, failure to give notice does not by itself justify the dispersal of an assembly. Dispersal is permitted only when it is objectively necessary in response to a disproportionate disruption.

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[72] *Ibid.*, section 11(1) and (2).

[73] *Ibid.*, section 11(7) and (10). The maximum imposable fine is level 3 on the standard scale, which currently amounts to £1,000 (about R 17,500). See Criminal Justice Act 1982, section 37.

66. Second, failure to give notice does not justify automatic sanctions against the organisers of or participants in the protest. The weight of opinion at the international level is that sanctions must themselves serve a legitimate aim in the concrete circumstances of the case. In this regard the ECtHR cautions that "*enforcement cannot become an end in itself*" and "*the need to punish unlawful conduct ... is not a sufficient consideration ... in the absence of any aggravating elements.*"[74] Similarly, the Study Group on Freedom of Association and Assembly in Africa considers that "*sanctions may be imposed only when lack of notification is combined with demonstrable harms*".[75]

67. Third, the sanctions imposed must always be 'necessary in a democratic society', implying a requirement of proportionality. The ECtHR considers that "*a peaceful demonstration should not, in principle, be made subject to the threat of a penal sanction*"[76] and has underlined that even a minor administrative fine may be an excessive sanction for failure to give

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74 *Novikova and Others v. Russia*, ECtHR, Judgment of 26 April 2016, para. 136.

75 ACHPR, *Report of the Study Group on Freedom of Association and Assembly in Africa*, p. 60, para.10.

76 *Akgöl and Göl v. Turkey*, ECtHR, Judgment of 17 May 2011, para. 43; *Pekaslan and Others v. Turkey*, ECtHR, Judgment of 20 March 2012, para. 81; *Yilmaz Yildiz and Others v. Turkey*, ECtHR, Judgment of 14 October 2014, para. 46.

notice.[77] The IACHR states that "*criminal sanctions ... must be shown to satisfy an imperative public interest*".[78]

68. We again draw attention to the findings of this Court in *SATAWU* that the wording of sec 17 of the Constitution is "*generous*" and would require "*particularly compelling context to interpret this provision as actually meaning less than its wording promises*" and that there is "*nothing, in our own history or internationally, that justifies taking away that promise*".[79]

69. We submit that sec 12(1)(a) of the RGA is out of step with the international standards in two respects.

70. First, sec 12(1)(a) renders the failure to give notice an automatic offence, irrespective of any demonstrable harm. This is illustrated by the facts of this case; the Applicants were convicted despite the finding that their gathering was peaceful and caused no harm.

71. This is the nub of the problem – sec 12(1)(a) treats compliance with the notice requirement as an end in itself. Such an approach might be easier to defend if notice were required only for gatherings where significant disruption was reasonably expected, but that is not the case.

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[77] *Sergey Kuznetsov v. Russia*, ECtHR, Judgment of 23 October 2008, para. 84.

[78] IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II.124, 7 March 2006, para. 61.

[79] *SATAWU* para 51.

72. Second, it is difficult to reconcile the criminalisation of the failure to give notice with the sec 36 requirement of justifiability in an open and democratic society. Taking a criminal law approach is discouraged in international law. It is true that South Africa is not the only democracy to do so. However as demonstrated above –

72.1. the UK has entirely dispensed with the notice requirement for static assemblies;

72.2. Brazil – a country with a lively protest culture – requires notice, but enforcement is through civil rather than criminal law;

72.3. in most of Australia, notice is an optional procedure which demonstrators can use to protect themselves from liability; and

72.4. in Russia, failure to give notice became a criminal offence only if an individual broke the law several times within a period of 180 days. It appears that since the *Dadin* decision that is no longer the case, as the Russian Constitutional Court has ruled that making a repeated breach of the law relating to the organization or holding of a public event a criminal offence is unconstitutional where the breach is not linked to the loss of the peaceful character of the event.

73. We note that it may be that the RGA imposes criminal liability even on an organiser who has attempted to keep the numbers within 15, simply because an "outsider" has joined the gathering.

74. In the present matter, the Applicants acquired criminal convictions for failure to give notice of a gathering in which they were seeking a response from the City to an ongoing sanitation problem in Khayelitsha. The effect of the s 12(1) (a) sanctions is extremely chilling, having regard to the potential consequences of a criminal conviction.

75. If a non-notified gathering results in violence or damage to property, other offences are available and more appropriate; if it merely results in disruption to traffic, for example, imprisonment would be an excessive sanction.

76. As we have noted, the ECtHR has expressed its concern at the potential chilling effect of the administrative fines available under Russian law.[80] The possibility of imprisonment for up to one year creates a far greater chilling effect and appears wholly unnecessary.

77. We submit that sec 12(1)(a) of the RGA constitutes a limitation on the rights guaranteed by sec 17 of the Constitution that is not reasonable and justifiable in an open and democratic society. The limitation goes beyond what is necessary for its underlying purpose, and less restrictive means exist to achieve that purpose.

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[80] *Novikova and Others v. Russia*, ECtHR, Judgment of 26 April 2016, paras. 210-211.

78. In light of the above, we respectfully submit that sec 12(1)(a) of the RGA should be declared unconstitutional and invalid.

G M BUDLENDER SC

M R VASSEN

Counsel for the *Amicus Curiae*

Chambers, Cape Town

2 July 2018

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 32/18
High Court Case No: A431/15

In the matter between:

PHUMEZA MHLUNGWANA AND NINE OTHERS Applicants

and

THE STATE First Respondent

THE MINISTER OF POLICE Second Respondent

and

RIGHT2KNOW CAMPAIGN Second Amicus Curiae

PRACTICE NOTE OF THE SECOND AMICUS CURIAE:

RIGHT2KNOW CAMPAIGN

A. NATURE OF THE PROCEEDINGS

1. Application for confirmation, in terms of section 172(2)(a) of the Constitution, of an order by the Western Cape High Court that section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 (**RGA**) is unconstitutional.

B. THE ISSUES

2. The central issues are

   2.1. whether section 12(1)(a) limits the rights in section 17 of the Constitution to assemble, demonstrate and picket; and if so,

   2.2. whether the limitation is reasonable and justifiable in terms of section 36 of the Constitution.

C. THE RECORD

3. The whole of the record is relevant.

D. ESTIMATED DURATION OF ORAL PRESENTATION

4. No more than one day is required for oral argument. The Right2Know Campaign ("**R2K**") will need no more than thirty minutes for its oral submissions.

E. SUMMARY OF R2K'S ARGUMENT

5. The R2K supports the relief sought by the Applicants.

6. Relying on international and foreign law, R2K will seek to demonstrate that criminalising the failure to give prior notice of a gathering, in the absence of aggravating elements, limits the section 17 right to assemble, demonstrate and picket, and is not reasonable and justifiable in an open and democratic society.

7. R2K will submit that section 12(1)(a) of the RGA is out of step with international standards in the following respects.

   7.1. It renders the failure to give notice an automatic offence, irrespective of any demonstrable harm, and treats compliance with the notice requirement as an end in itself. Such an approach might be easier to defend if notice were required only for gatherings where significant disruption was reasonably expected, but that is not the case;

   7.2. The criminalisation of the failure to give notice is inconsistent with the section 36 requirement of reasonableness and justifiability in an open and democratic society. Taking a criminal law approach is discouraged in international law.

   7.3. The Applicants acquired criminal convictions for failure to give notice of a gathering in which they were seeking a response from the City to an ongoing sanitation problem in Khayelitsha. The

effect of the s 12(1)(a) sanctions is chilling, having regard to the potential consequences of a criminal conviction.

7.4. If a non-notified gathering results in violence or damage to property, other offences are available and more appropriate; if it merely results in disruption to traffic, for example, imprisonment would be an excessive sanction.

F: MAIN AUTHORITIES RELIED UPON

South African Transport and Allied Workers Union and Another v. Garvas and Others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae) 2013 (1) SA 83 (CC)

Novikova and Others v. Russia, ECtHR, Judgment of 26 April 2016

Akgöl and Göl v. Turkey, ECtHR, Judgment of 17 May 2011

Sergey Kuznetsov v. Russia, ECtHR, Judgment of 23 October 2008

In the complaint of I I Dadin, Russian Constitutional Court case No. 2-П/2017, available at http://www.ksrf.ru/en/Decision/Judgments/Documents/2017__January_19_2-P.pdf

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2 July 2018

Thando Khumalo

From: Lavanya Pillay
Sent: 06 July 2018 11:09
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Cc: Dario Milo; Thando Khumalo
Subject: Mlungwana and Others // The State and Another (CCT Case number: 32/18) [WWA-WS_JHB.FID2065896]
Attachments: R2K heads of argument and practice note 20180706.pdf; R2K heads of argument CC 20180705.doc; R2K practice note CC 20180705.doc

Dear all

The above matter refers.

Please find attached Word and PDF versions of Right2Know Campaign's heads of argument and practice note. Please note that hardcopies of the documents will be filed at court today.

Yours faithfully

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