

REPORTABLE



THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 2580 / 2007

In the matter between:

JACQUELINE GARVIS

First Plaintiff/ Respondent

THURAYA NAIDOO

Second Plaintiff/Respondent

CHINATOWN (RSA)
INTERNATIONAL TRADING CC

Third Plaintiff/Respondent

ANEES SOEKER

Fourth Plaintiff/Respondent

ANDREW NJIOKWUEMGI

Fifth Plaintiff/Respondent

DOLORES ROSANNE REITZ

Sixth Plaintiff/Respondent

MAURICE ROBERTSON

Seventh Plaintiff/Respondent

HAROLD BURGER

Eighth Plaintiff/Respondent

versus

SOUTH AFRICAN TRANSPORT
AND ALLIED WORKERS UNION

Defendant/Applicant

and

MINISTER FOR SAFETY AND SECURITY

Third Party

REPORTABLE JUDGMENT: 9 SEPTEMBER 2010

Judgment:

HLOPHE, JP

Counsel for Plaintiffs:

Advocate Anton Katz SC and Darryl Cooke

Instructing Attorney:

Fairbridges Attorneys.

F. Stewart.

Counsel for Defendant:

Advocate Eduard Fagan SC and Saul Miller

Instructing Attorney:

Bernadt Vukic Potash & Getz Attorneys.

W Field.

Counsel for Third Party:

Advocate Karrisha Pillay

Instructing Attorney:

The Office of the State Attorney, Cape Town.

A. Marsh-Scott.

Date of Hearing:

26 MAY 2010

Date of Judgment:

9 SEPTEMBER 2010



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HLOPHE, JP:

Introduction

- [1] The plaintiffs (*respondents in the conditional claim in reconvension*) have instituted an action for damages against the defendant (*applicant in the conditional claim in reconvension*) in terms of section 11(1) of the Regulation of Gatherings Act 205 of 1993 ("the Act"), alternatively, under the common law. The events giving rise to the action arose out of a protracted strike organised by the defendant, the South African Trade and Allied Workers Union (SATAWU) on 16 May 2006 in the Cape Town City Bowl. The plaintiffs subsequently alleged that the strike led to the destruction and damage of the plaintiffs' property by the members of SATAWU.
- [2] Counsel for the plaintiffs was Mr Katz SC, who appeared together with Mr Cooke.
- [3] Mr Fagan SC, who appeared together with Mr Miller, represented the defendant in court in these proceedings.
- [4] Counsel for the Minister for Safety and Security, the third party, was Miss Pillay.

Factual Background

- [5] On 16 May 2006 a gathering was convened under the auspices of the defendant (SATAWU), in the Cape Town City Bowl in terms of and as defined in the Regulation of Gatherings Act 205 of 1993. The gathering escalated into a full scale riot leading to the destruction, damage and loss of property of the plaintiffs.
- [6] In this particular case the march was organised within a volatile milieu. The protracted industrial action had been acrimonious and had given rise to the deaths of nearly 50 people pursuant to strike related

violence. Furthermore, there had been previous instances of damage to the Cape Town Municipal Council and private property.

- [7] The plaintiffs are a disparate group of persons. They are brought together by the mutual misfortune of having been victims of the violence (the riot damage) perpetrated during the march.
- [8] A letter of demand was duly addressed to the defendant. When it became apparent that the defendant would not pay the claim the plaintiffs instituted action for damages against the defendant on 6 March 2008. The defendant responded by delivering a plea, a notice in terms of Rule 16A (1) of the Uniform Rules of Court, a conditional claim in reconvention, and a third party notice. The plaintiffs then delivered a plea in the conditional claim in reconvention. The third party also delivered a plea to the third party claim and a plea to the conditional claim in reconvention.
- [9] The defendant, however, pleaded the following as an alternative defence, in its papers before this court:

"that if the trial court finds that the defendant is liable to the plaintiffs in terms of section 11(1) of the Act and that the defendant is not entitled to succeed with the defence contained in section 11(2) of the Act, the words "and was not reasonably foreseeable" in section 11(2) (b) of the Act ("the offending words") are inconsistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution")".

- [10] By agreement between the parties, an order of court was granted on 13 April 2010, in terms of which the constitutional point had to be decided prior to and separately from the other matters in issue in this action.

Issues to be decided

[11] The sole issue to be decided is the following:

Whether the inclusion of the words "*and was not reasonably foreseeable*" in section 11(2)(b) of the Regulation of Gatherings Act 205 of 1993 is inconsistent with section 17 and/or section 23 of the Constitution of the Republic of South Africa, 1996 and is hence invalid, and if so, the consequences thereof.

Relevant provisions of the Regulation of Gatherings Act 205 of 1993

[12] The Act was brought into operation by proclamation of President Mandela on 15 November 1996¹. The Act recognises the right to assemble. Furthermore, the procedure for organising a gathering was changed from an "*application*" procedure to a "*notification*" procedure. The legislation under the old regime did not deal specifically with the issue of civil liability arising from damage or loss suffered as a result of a march or gathering. Later, however, section 11 (1) read with section (2) of the second and further drafts of the Bill² that were published as well as the Act³ provided that where riot damage occurs as a result of a gathering, every organisation on behalf of or under whose auspices the gathering was held, shall be jointly and severally liable for that riot damage as joint wrongdoers, unless certain facts can be proved. In other words, the Regulation of Gatherings Act⁴ now makes provision for civil liability to ensue to an organisation or trade union under whose auspices a gathering is conducted and requires of such trade union or organisation to prove all three elements of section 11(2) in order to escape liability for "riot damage" as it is defined in the Act.

¹ Government Gazette No 1762, Regulation Gazette No 5807.

² Regulation of Gatherings Bill; note 18 below.

³ Regulation of Gatherings Act 205 of 1993.

⁴ Above note 3.

[13] In order to convene a gathering contemplated in the Act, it is necessary for the Trade Union or an organisation organising the march to comply with the various procedural steps as contained in sections 2, 3 and 4 of the Act.

[14] In general terms, this requires:

14.1 the Trade Union or such organization to appoint a convenor of the gathering, the local authority to identify a responsible person and the South African Police Service to appoint a suitably-qualified member to represent them at the consultations and negotiations contemplated in the Act;

14.2 the convenor to give notice of the gathering as set out in section 3⁵ of the Act;

⁵ Section 3 of the Regulation of Gatherings Act 205 of 1993 states:

Notice of gatherings

(1) The convenor 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 convenor is not able to reduce a proposed notice to writing the responsible officer shall at his request do it for him.

(2) The convenor 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 convenor 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 convenor 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 convenor and his deputy;
- (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 convenor;
- (c) the purpose of the gathering;
- (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 convenor, 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-

14.3 the parties must then consult, negotiate and reach agreement on the conduct, organisation and control of the intended gathering. In the event that no such agreement is reached regarding the aforementioned, the Act empowers the local authority to impose conditions on the intended gathering with the view, inter alia, to preventing injury to persons or damage to property.

-
- (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;

- (ii) 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;
- (f) 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.

[15] Section 5⁶ of the Act further sets out the circumstances in which the responsible officer (i.e. the responsible person appointed by the local authority) may prohibit a gathering. This is where credible information on oath is brought to the attention of the 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 the threat.

[16] Section 8 further sets out in specific terms the conduct required of various parties involved in the gathering. This includes:

16.1 the appointment by the convenor of the requisite number of marshals as per the notice of the gathering and informing such marshals timeously of the conditions to which the gathering is subject⁷;

16.2 control of the participants in the gathering and taking the steps necessary to ensure that the gathering at all times proceeds peacefully and that there is compliance with the provisions of

⁶ Section 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 convenor 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 convenor, authorized member and every other person with whom he has so met or consulted, of the decision and the reasons therefore.

⁷ Section 8 (1) and (2) of the Act.

section 8 and the applicable notice and conditions.⁸

[17] Lastly, section 9 sets out the powers and duties of the police, which powers include in certain instances the use of deadly force to prevent injury to persons and property.

[18] The Act also makes provision for liability for damage arising from a gathering or demonstration. Section 11 provides as follows:

(1) If any riot damage occurs as a result of-

- (a) a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;
- (b) a demonstration, every person participating in such demonstration, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefore in terms of this subsection.

(2) It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves-

- (a) that he or it did not permit or connive at the act or omission which caused the damage in question; and
- (b) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question **and was not reasonably foreseeable**; and
- (c) that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.

(3) For the purposes of-

- (a) recourse against, or contribution by, any person who, or organization which, intentionally and unlawfully caused or contributed to the cause of any riot damage; or

⁸ Above note 5.

(b) contribution by any person who, or organization which, is jointly liable for any riot damage by virtue of the provisions of subsection (1), any person or organization held liable for such damage by virtue of the provisions of subsection (1) shall, notwithstanding the said provisions, be deemed to have been liable therefore in delict.

(4) The provisions of this section shall not affect in any way the right, under the common law or any other law, of a person or body to recover the full amount of damages arising from the negligent, intentional act or omission, or delict of whatever nature committed by or at the behest of any other person.

Evaluation of Arguments and Evidence

[19] Before I begin with my evaluation of the evidence, it is imperative to mention that although the defendant indicated that the words "*and was not reasonably foreseeable*" as contained in section 11(2) (b) of the Act infringe on section 17⁹ and/or 23 of the Constitution, Counsel for the defendant did not present any argument on the alleged infringement of the section 23¹⁰ right. They have, however, filed extensive argument on the infringement of the section 17 right. Be that as it may, the other

⁹ Section 17 states:

- " (1) Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions

¹⁰ Section 23 of the Constitution states:

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right -
- (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right-
- (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right-
- (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation...

parties to this application have therefore limited their argument to the alleged infringement of section 17 of the Constitution.

[20] Mr Fagan SC for the defendant argued that the offending words "*and was not reasonably foreseeable*" in section 11(2)(b) result in the defence contained in section 11(2) not being available to the defendant. The non-availability of the defence prevents the defendant, at least sometimes and in some circumstances, from demonstrating and peacefully assembling. Therefore, so ran the argument, these offending words in section 11(2) have the result that section 11 of the Act impairs the constitutional right to demonstrate and assemble as contained in section 17¹¹ of the Constitution.

[21] In amplification of their argument, Mr Fagan contended that in all instances where an intended gathering takes place where there is a threat of violence, it is inevitable that the content of the discussions between the parties involved in the requisite consultations and negotiations will deal with the potential for injury to persons or damage to property and the appropriate means of minimising the same. Furthermore Mr Fagan argued that the defendant took various steps in terms of the Act to ensure that the gathering took place peacefully and without incident. These included the following:

21.1 Communicating to its members at all material times that the gathering was to be peaceful, that no traditional weapons were to be carried at the gathering, and that no alcohol was to be consumed immediately prior to or at the gathering;

21.2 Ensuring that it had approximately 500 marshals in place on the day of the gathering, and that such marshals not only accompanied the defendant's members forming part of the gathering on public transport from their respective areas to the

¹¹ Above note 9.

city centre, but also performed their marshalling duties during the gathering itself;

21.3 Making an announcement to the participants in the gathering immediately prior to the intended march that such participants were not to carry traditional weapons, and that any participant in the gathering who was carrying a traditional weapon should bring it to the vehicle hired by the defendant to lead the gathering;

21.4 Issuing various warnings to the participants of the gathering advocating that the gathering was to proceed in an orderly fashion and that the participants should not cause damage to property and attack the non-striking workers in the security sector;

21.5 Requesting the local authority to clear the roads of all vehicles and for barricades to be put up along the route of the march in order to minimise the risk of damage being caused to these vehicles and to make controlling the participants in the gathering easier,

[22] Mr Fagan therefore submitted that the defendant took all reasonable steps to prevent the act relied upon by the plaintiffs for their claims in terms of section 11(1) of the Act, because they foresaw that acts such as those relied upon might occur. However, as a result of the offending words, referred to above, the defendant will be unable to satisfy the requirements for the defence set out in section 11(2) of the Act. Thus the defence contained in section 11(2) is unavailable to the defendant and that the latter would then face the spectre of extensive liability. Such liability has the potential to bankrupt the defendant.

[23] Mr Katz SC for the plaintiffs argued that section 17 of the Constitution has no application to gatherings which result in riot damage. The rights

set out in section 17 (and relied upon by the defendant) are conditional on the gathering being "peaceful". Where riot damage is caused, the gathering is obviously not peaceful and therefore section 17 does not protect riotous gatherings. The internal modifiers in section 17 play a similar role to those which limit the right to freedom of expression in section 16 (2) of the Constitution. The internal modifiers thus define the boundaries beyond which the rights to assemble and demonstrate do not extend. As with freedom of expression, implicit in its provisions is an acknowledgment that certain assemblies and demonstrations do not deserve constitutional protection because, among other things, they have the potential to impinge adversely on the dignity of others and cause harm.¹²

- [24] In amplification of their argument the plaintiffs contended that "this qualification [that demonstrations must be peaceful] is presumably intended to ensure that no constitutional difficulty can be raised regarding laws restricting breaches of peace, or riots, pursuant to an assembly."¹³ Thus if the basic requirement of peacefulness is not met there can be no protection for the assembly. The 'peaceful' criterion, Mr Katz argued, constitutes an internal modifier and failure to comply with these criteria pre-empts the application of the proportionality of state action tests.
- [25] Counsel for the plaintiffs further submitted that the organiser (the defendant) must take responsibility for the gathering as a whole. The organiser is intimately identified with the gathering. It cannot disassociate itself from the actions of those participating in its gathering. If the gathering is violent, for whatever reason, and regardless of the identity of the aggressors, it follows that the organiser and all the participants are not assembling peacefully. It therefore follows that in the circumstances the rights protected by section 17 of

¹² *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002(4) SA 294 (CC) at para 32.

¹³ *South African Constitutional law* (2nd edition) Issue 8. March 2010 pg 12-2.

the Constitution are not violated by section 11 of the Act. Accordingly, Mr Katz argued, it is not even necessary for this Court to engage in the balancing limitations enquiry provided for in section 36 of the Constitution.

[26] Ms Pillay also submitted on behalf of the Minister for Safety and Security, that section 17 of the Constitution does not find application in these proceedings for the following two reasons:

26.1 Firstly, section 17 applies only to demonstrations, assemblies and pickets that are peaceful and unarmed; and

26.2 Secondly, the defendant has not shown any factual basis on which section 17 has been infringed.

[27] In amplification of her argument she stated that according to Woolman, et al in "Assembly, Demonstration, Picket and Petition" The Bill of Rights Handbook (5th edition) at pg 406 "one readily identifiable class of assemblies, demonstrations and pickets excluded from the protection of the right are those that are not peaceful." ¹⁴ "The section [section 17] contains two internal qualifications. The first, the word "peaceful" appears to have been taken from the First Amendment to the Constitution of the United States ("the right of people to assemble peacefully"). This qualification is presumably intended to ensure that no constitutional difficulty can be raised regarding laws restricting breaches of peace, or riots, pursuant to an assembly. Armed assemblies are not constitutionally protected because, once petitioners

¹⁴ Woolman, "Assembly, Demonstration, Picket and Petition" The Bill of Rights Handbook by Currie & De Waal (5th edition) at page 406.

are armed, there is a potential for such forms of assembly to become violent."¹⁵

[28] Furthermore, Ms Pillay submitted that the defendant's contention that it will "in effect" be precluded from convening a gathering in all instances where there is a spectre of the defendant being held liable in terms of section 11 of the Act, cannot constitute a basis for alleging an infringement of section 17 of the Constitution. This, Ms Pillay argued, is particularly so when regard is had to the evidence of two persons in the employ of the State (Mr Botha and Colonel Cloete) who regularly engage with the Act. More of that later in the judgment.

[29] I am of the view that the submissions made in this regard by Mr Katz and Miss Pillay are correct for the following reasons: firstly, section 17 of the Constitution does not find application in this specific case because the gathering in question has led to riot damage. Mr Katz correctly argued that the rights set out in section 17 (and relied upon by the defendant) are conditional on the gathering being "peaceful". And therefore, where the gathering is not peaceful, the organisers or trade unions that have organised the gatherings cannot as a result rely on the protection of section 17.

[30] Secondly, the violation of section 17 as relied upon by the defendant is misconceived for the following reasons:

30.1 Mr Abrahamse who is the provincial secretary for SATAWU asserts that the defendant faces a "spectre of extensive liability. From this assertion he draws the conclusion that the defendant will be precluded from convening gatherings. This conclusion does not follow logically from the premise because in respect of

¹⁵ Davis, "Assembly" in "South African Constitutional Law: The Bill of Rights" by Cheadle, Davis & Haysom at 12-2.

the march it is clear that the defendant was fully aware of the provisions of the Act, yet it proceeded with the march.

30.2 It is also striking that the defendant was unable to point to a single occasion where it, or any other party, called off a gathering on account of the "spectre of extensive liability". The defendant has also failed to present cogent evidence of the gatherings not proceeding because of the provisions of section 11(2) of the Act. The preclusion argument is based on pure conjecture and speculation.

[31] Furthermore, Mr Botha who is the Deputy Responsible Officer of the City of Cape Town stated in his affidavit that section 11 of the Act has not had a "chilling effect" on organisations or persons organising gatherings. He frequently warns organisers of the provisions of section 11 of the Act, but these warnings have not deterred the organisers from proceeding with their envisaged gatherings. He further stated that in his experience the system in terms of the new Act works well in Cape Town. The City sometimes receives up to five notifications a week. Furthermore, Colonel Cloete, who is the Minister's senior legal advisor, is also a person of considerable experience who has frequently engaged with the Act. His evidence corroborated the views expressed by Mr Botha. He stated that the requirements under section 11(2) of the Act have not, in his experience, had the effect of impeding the rights recognised by section 17 of the Constitution. He proceeded to record that on the contrary, in his experience, it is precisely as a result of the overall scheme of the Act that the rights provided for in section 17 have been protected and indeed exercised by a wide range of persons. Persons who seek to exercise their rights to freedom of assembly and demonstration do so in the knowledge that there is an appropriate regulatory framework that is aimed at the protection of all persons.

- [32] Even if I am wrong in coming to the conclusion that section 11(2) of the Act is not inconsistent with section 17 of the Constitution, nevertheless the defendant must fail because as we shall see below, the limitation of the right to strike and assemble peacefully is a justifiable limitation in terms of section 36 of the Constitution.

We shall now discuss section 36 of the Constitution.

Limitation Analysis

- [33] Mr Fagan argued that the infringement of the section 17 rights could not be justified in terms of section 36¹⁶ of the Constitution. He contended that the inclusion of the offending words, read in the context of the scheme of the Act, renders the defence contained in section 11(2) internally self-destructive and therefore incoherent. This was so because in all relevant circumstances where the defendant discharges its duty of taking all reasonable steps within its power to prevent the act or omission in question as required by section 11(2) (c) of the Act, the act or omission will always be reasonably foreseeable in terms of section 11(2)(b). It is therefore not logically possible to take reasonable steps to prevent an act from occurring if one does not foresee the possibility of such an act occurring. As a result, the defence contained in section 11(2) is inherently doomed to failure.

¹⁶ Section 36 of the Constitution provides-

(1) The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[34] Mr Fagan further argued that the Act attempts to achieve a balance between the right to demonstrate and the protection of the interest of various parties who may be affected by the exercise of that right. This includes a provision for strict civil liability to arise in certain circumstances. In so far as civil liability is concerned, the Draft Bill¹⁷ sought to achieve the requisite balance by ameliorating the effects of imposing strict liability through permitting the defence that appears in Clause 10 of the Draft Bill¹⁸. It was never the intention of the legislature in enacting Clause 10 in its current form (section 11 of the Act) to impose strict civil liability without any defence thereto. Thus civil liability is strict in that it seeks to impose liability on the organisers of the gathering for the riot damage that was caused immediately before, during or after the gathering by persons other than the organisers themselves.

[35] The ameliorative defence that was proposed in the Draft Bill required, in addition to the first two components thereof, the organiser to

¹⁷ Note 18 below.

¹⁸ The Goldstone Commission released a report on 15 January 1993 together with a Draft Bill. The Bill was published under Government Notice No 153 of 1993 in Government Gazette No 14590 of 12 February 1993 for general comment and information. It aimed to consolidate legislation pertaining to public gatherings; to provide for general measures setting out procedures, requirements, powers and responsibilities of the police and organisers of the gatherings; and to provide for matters incidental thereto.

The Commission published its final report on 28 April 1993. In paragraph three of the report it was stated: "The Committee does not believe that the Draft Bill contains no errors or that it cannot be materially improved. Indeed, appropriate amendments may be considered necessary by a future legislature ..."

Approximately a year later, after suggestions, comment and feedback had been received; a Regulation of Gatherings Bill (211/93 (GA), ISBN 0 621 15573 X) was published. The Bill made provision for the general conduct of gatherings; the powers of the police in protecting participants and non-participants and in what circumstances force may be used; provision was made for civil liability of the organisers of a gathering when such gathering results in damage to property or injury or death of persons and offences and penalties are laid down. Thereafter, the Joint Committee on Security Service's amendment to Regulation of Gatherings Bill (211A/93(GA), ISBN 0 621 15592 6) was introduced so as to insert the phrase: "in consultation with the transitional Executive Council established by section 2 of the Transitional Executive Council Act 1993 (Act No 151 of 1993)". Thereafter, further amendments were introduced to the Regulations of Gatherings Bill as recommended by the Joint Committee on Security Services. The President assented to the Regulation of Gatherings Act No 205 of 1993 on 14 January 1994 in Government Gazette No 15446, Notice No 132.

A Proclamation was then issued in Notice No 69, Regulation Gazette No 5807 stating that the said Act would come into operation in November 1996.

establish that it had taken all reasonable steps to prevent an act of the kind in question. This would allow that party to escape the strict liability imposed by section 11(1) of the Act.

[36] The inclusion of the offensive words leads to internal incoherence. This is because, contrary to the obvious intention of the legislature in granting a defence to section 11(1) liability, the inclusion of the offending words results in the non-availability of the defence and this results in the automatic imposition of strict liability in all circumstances.

[37] The plaintiffs contended that it is important that due consideration be given to the perspectives of ordinary members in the public who are adversely affected by gatherings. In this regard Mr Katz made reference to three of the plaintiffs' affidavits in which they stated that:

37.1 there was nothing they could do to protect themselves and their property;

37.2 they felt vulnerable and helpless;

37.3 they were traumatised; and

37.4 they were frightened for their physical safety and well being, and felt that their privacy and physical integrity had been completely violated.

[38] Mr Katz further submitted that it is right and proper that the organisers concerned bear the risk of damage arising from the gathering. They stipulated the following as being pertinent *inter alia*:

38.1 It is the responsibility of the organisers of the gathering and not the responsible officer or the authorised member, to control the crowd;

38.2 The organisers are best placed to assess the potential for hostility and to assess the dangers and risks involved in a gathering and their ability to control it.

[39] In this particular case the march was organised within a volatile milieu. The protracted industrial action had been acrimonious and had given rise to the deaths of nearly 50 people pursuant to strike related violence. Furthermore, there had been previous instances of damage to council and private property. In these circumstances the defendant's decision to press ahead with the march posed a grave risk to members of the public. In the circumstances it would be fair that the risk of damage to private persons rest on the shoulders of the organisers of the march, SATAWU.

[40] Furthermore, in performing a balancing role, Mr Katz submitted that this Court should have regard to the following considerations:

40.1 The imposition of liability is reasonable and necessary in order to protect the constitutional rights of members of the public, especially:

40.1.1 The right to dignity;

40.1.2 The right to be free from all forms of violence;

40.1.3 The right not to be arbitrarily deprived of property

[41] The purpose of section 11 is not only to protect rights. It is also to promote order and the rule of law. Furthermore it seeks to deter mob violence.

- [42] It would also be very difficult, if not impossible, for the victims of riot damage to institute delictual action against the responsible individuals. Even if the plaintiffs were able to identify the aggressors, locate them subsequently and obtain a judgment against them, the prospects of actually recovering damages, however, are not strong.
- [43] It is the organisation and its members who benefit from the gathering. They should thus bear the risk inherent in the gathering. If the organisation takes proper steps to avoid the damage foreseen, then the prospect of liability arising will be minimal, if not non-existent.
- [44] Mr Katz submitted that it is important that due consideration be given to the perspectives of ordinary members of the public who are adversely affected by the gatherings and that these considerations all resonate with those germane to the Act. Firstly, the objective of section 11 is clearly to put pressure on the organisers of gatherings to take proper pre-emptive steps to prevent harm to the public. Secondly, it would be disproportionately onerous for the victims to be obliged to discharge the normal burden of showing a delictual cause of action. Thirdly, it is evident from the three affidavits deposed to by the plaintiffs that there is no way in which they could prove which individual caused damage to their properties. Such individuals, the plaintiffs contended, were all members of SATAWU.
- [45] It was further contended on behalf of the plaintiffs that the cancellation of a few prospective gatherings is small price to pay for the protection of the constitutional rights which would be infringed by a riot such as that which occurred in Cape Town on 16 May 2006. I am inclined to agree with Mr Katz in this regard.
- [46] Section 36 of the Constitution provides that any limitation on fundamental rights must be reasonable and justifiable in an open

democratic society based on human dignity, equality and freedom.¹⁹ In this case, two sets of constitutional rights are implicated and which will require careful balancing. On the one hand the right by organisations and/ or Trade Unions to demonstrate, picket and to present petitions as provided for in section 17²⁰ and on the other hand, the constitutional rights of members of the public to: human dignity²¹; the right to be free from all forms of violence²² as well as the right not to be arbitrarily deprived of property²³.

[47] The enquiry now turns on whether in terms of section 36 of the Constitution the limitation of section 17 can be seen as reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

[48] The nature of the right

The right implicated is section 17 of the Constitution. This right is afforded to organisations and/or Trade Unions to assemble, demonstrate, picket and petition.

¹⁹ Section 36 of the Constitution.

²⁰ Above note 11.

²¹ Section 10 of Act 108 of 1996.

²² Section 12 (1) (c) of Act 108 of 1996.

²³ Section 25 of Act 108 of 1996.

The importance of the purpose of the limitation

The impugned words serve an important purpose in so far as they place the risk of riot damage on an organiser who foresees such damage. It therefore places an obligation on the organiser to ensure that no damage occurs. Furthermore, the imposition of liability is reasonable and necessary in order to protect the constitutional rights of the public (as mentioned in paragraph 47 above), which too are worthy of constitutional protection.

The nature and extent of the limitation

There is no evidence that gatherings have been precluded as a result of the provisions of the Act. In fact, and as stated above, the evidence by Mr Botha and Colonel Cloete is to the contrary. Furthermore, any risk that is placed on the organiser of the gathering can be met by the implementation of proper safety procedures and/or insurance. The harm is thus not disproportionately severe when compared with the benefits achieved by section 11 of the Act.

The relation between the limitation and its purpose

There is a clear link between the limitation and its purpose, and that relationship is not disproportionate.

Less restrictive means to achieve the purpose

The defendant has not suggested in its papers that there are less restrictive means by which the purpose of the legislature could be achieved. It appears, therefore that they accept that the purpose of the legislature is legitimate.

Remedy

[49] Mr Fagan submitted that the inclusion of the words "*and was not reasonably foreseeable*" in section 11(2) of the Act is unconstitutional on the basis that it results in an unjustifiable limitation of the right to assemble and to demonstrate as contained in section 17 of the Constitution. Accordingly, he argued a declarator to that effect should be granted by this Court.

[50] On the other hand, Mr Katz submitted that this Court should find that the inclusion of the words "*and was not reasonably foreseeable*" is not inconsistent with section 17 of the Constitution. However, should the Court find that section 11(2) of the Act is inconsistent with the Constitution, it must be declared invalid to the extent of its inconsistency. In terms of section 172(1) (b) of the Constitution, this Court may make an order which, inter alia, limits the retrospective effect of the declaration of invalidity.

Findings

[51] After careful consideration of the arguments and evidence presented by the parties to this application, my findings are as follows:

51.1) I am in agreement with the plaintiffs and the Minister that section 17 of the Constitution does not arise in this matter. The rights set out in section 17 of the Constitution, and relied upon by the defendant, are conditional on the gathering being "peaceful". Where riot damage is caused, the gathering is obviously not peaceful. Therefore section 17 of the Constitution does not encompass gatherings which are violent or riotous in nature. Section 17 protects only peaceful and unarmed assemblies, demonstrations and pickets. Although the use of arms and non-peaceful actions could readily have been dealt with in terms of the general limitations clause for the protection of the public

interest or of the rights of others, restricting the protection of this right to peaceful and unarmed activities is a formula used in most other human rights instruments. Gatherings that are not peaceful and unarmed are not protected by the Bill of Rights.

- 51.2) Even if I am wrong in coming to the conclusion that section 11(2) of the Act is not inconsistent with section 17 of the Constitution, I am of the view that such limitation of section 17 is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. It is common cause that this specific gathering was organised within a volatile milieu. As has already been pointed out before, the protracted industrial action had been acrimonious and had already given rise to the deaths of nearly 50 people pursuant to strike related violence. Furthermore, there had been previous instances of damage to council and private property. In these circumstances the defendant's decision to proceed with the march posed a grave risk to members of the public. In undertaking a balancing exercise, courts will have regard to the following considerations: whether the imposition of liability is reasonable and necessary in order to protect the constitutional rights of members of the public, especially, the right to dignity (section 10 of the Constitution), the right to be free from all forms of violence (section 12(1)(c) of the Constitution) and the right not to be arbitrarily deprived of property (section 25 of the Constitution) in comparison with the defendant's right to assemble, demonstrate, picket and petition in terms of section 17 of the Constitution. The impugned words serve an important purpose insofar as they place the risk of riot damage on an organiser who foresees such damage. The State is obliged to take actions and implement measures which protect the lives, dignity and property of its citizens. This is one such measure. Lastly, there is no evidence that gatherings have been precluded as a result

of the provisions of the Act. In fact, the evidence of Mr Botha and Colonel Cloete is to the contrary.

51.3) Courts are enjoined to read down legislation where it is possible to do so. In this regard the Constitutional Court held that:

"... where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved"²⁴

Therefore, the courts will strive to construe the defence that the riot damage was not reasonably foreseeable, in a way which does not violate the defendant's constitutional rights. Furthermore, the reasonable foreseeability contemplated by section 11(2) of the Act is already narrower than the common law test. The organiser must show that the specific "act or omission which caused the damage in question" was not reasonably foreseeable. The common law test only required that the general nature of the harm suffered by the plaintiff and the general manner of the harm occurring must have been reasonably foreseeable.

Costs

[52] Mr Fagan requested that in the event of the defendant being successful in this application, that this court should grant a costs order in their favour against the Minister for Safety and Security. However, in the event of them not being successful the court should make no order as to costs.

²⁴ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para 26.

[53] Mr Katz contended that in the event of the plaintiffs being successful in this application, that this court should grant a costs order in their favour against the defendant (SATAWU). In the event of them not being successful, the court should also make no order as to costs.

[54] Ms Pillay for the Minister argued that no order as to costs be made, irrespective of the outcome of this matter.

[55] I have come to the decision to make no order as to costs in this matter. I am not persuaded that this matter warrants any cost order to be made. In *Affordable Medicines*, Ngcobo J (as he then was) held the following.

*"The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule."*²⁵

[56] I am of the view that this matter has brought important constitutional principles before this court. The issues that had to be decided are not only important for the defendant (SATAWU) but for any other organization or trade union(s) that would want to embark on a strike/demonstration or picket. The defendant should therefore not be penalised for raising the constitutional point that is in the public interest. Another reason for not making a costs order is because the parties had agreed to have the constitutional point heard before the main action. Therefore, the plaintiffs (even if they were successful in this application) consented and agreed to the matter being heard.


²⁵ *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2005 (3) SA 247 (CC) at para 138.

Order

[57] In all circumstances the following order is made:

a) It is declared that the inclusion of the words "*and was not reasonably foreseeable*" in section 11(2) (b) of the Regulation of Gatherings Act 205 of 1993 is not inconsistent with section 17 of the Constitution of the Republic of South Africa.

b) No order as to costs.



Judge President J Hlophe
Western Cape High Court
CAPE TOWN

9/9/2010 ,

Counsel details:

- On behalf of the Plaintiffs:** Advocate Anton Katz SC and Darryl Cooke instructed by Fairbridges Attorneys.
- On behalf of the Defendant:** Advocate Eduard Fagan SC and Saul Miller instructed by Bernadt Vukic Potash & Getz Attorneys.
- On behalf of the Third Party:** Advocate Karrisha Pillay instructed by The Office of the State Attorney, Cape Town.