CONSTITUTIONAL COURT OF SOUTH AFRICA

Mlungwana and Others v State and Another

CCT 32/18

Date of hearing: 21 August 2018
Date of judgment: 19 November 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 19 November 2018 at 10h00, the Constitutional Court handed down judgment in an application for the confirmation of an order of constitutional invalidity made by the High Court of South Africa, Western Cape Division, Cape Town (High Court). The High Court declared section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 (Act) unconstitutional and invalid. This section makes it a criminal offence to convene an assembly of more than 15 people without first notifying the responsible officer of a municipality, even if such a gathering is peaceful and unarmed.

The applicants are members of the Social Justice Coalition, who on 11 September 2015 travelled as a group of 15 members to picket at the Cape Town Civic Centre to voice their dissatisfaction with inadequate sanitation facilities in Khayelitsha. The picket was peaceful and unarmed, but grew in size at the venue as more people joined in. The applicants were then arrested and charged for contravening section 12(1)(a) of the Act. and charged with the offence of failing to give notice of an assembly in terms of section 12(1)(a). In the Magistrate's Court, Cape Town they were convicted as charged, cautioned and discharged. The respondents are the state and the Minister of Police.

The applicants appealed against their conviction to the High Court and challenged the constitutionality of section 12(1)(a). The High Court upheld their appeal and declared section 12(1)(a) to be constitutionally invalid. The applicants approached the Constitutional Court to confirm the High Court's order of constitutional invalidity.

In a unanimous judgment penned by Petse AJ, the Constitutional Court confirmed the High Court's declaration of invalidity. It held that criminalising the failure by the

convener of a gathering to give notice of an assembly of more than 15 people limits the right to assemble peacefully and unarmed, which is entrenched in section 17 of the Constitution. This is because criminalisation deters the exercise of the right to assemble, and deterrence by its very nature limits the exercise of this right.

Further, the Constitutional Court held that this limitation to the right to assemble is unjustifiable. The right to assemble peacefully and unarmed is central to South Africa's constitutional democracy. The respondents submitted that the avowed purpose of criminalising the failure to give notice is to ensure that municipalities and the police can adequately prepare for large assemblies and in so doing reduce violence at protests. While these purposes are important, the state, in responding to regrettable incidents at assemblies, cannot employ heavy-handed countermeasures that unduly limit the right to assemble peacefully and unarmed. In this case, the limitation imposed by section 12(1)(a) has far-reaching consequences and is severe. The definitions of "gatherings" and "conveners" are overly broad, so organisers of and participants in peaceful assemblies of more than 15 people could easily be criminalised for failing to give notice. Further, the resort to criminalisation has a calamitous effect on those caught in its net through the imposition of a criminal record and exposure to the penal system.

In addition, the section does not distinguish between adult and minor conveners. This has the potential effect of indiscriminately criminalising children who are more likely to exercise their right to assemble peacefully and unarmed without giving the required notice. For children, who cannot vote, this right is a vital tool for their political participation. There are also less restrictive means of incentivising conveners to give notice of large assemblies, such as civil liability and criminal prosecution of the participants in a gathering who, in the exercise of their right to assemble, contravene a host of other laws.

Consequently, the Constitutional Court confirmed the High Court's declaration that section 12(1)(a) is unconstitutional in its entirety. The criminalisation of convening gatherings without notice is unconstitutional – regardless of whether the subsequent gathering is violent. The Court did not suspend the declaratory order because such an order does not result in a legal gap; there are multiple ways in which the Legislature could cure the unconstitutionality of the legislation; and the right to assemble will be undermined by suspending the declaration of invalidity. The declaration of invalidity, however, shall not affect finalised criminal trials or those trials in relation to which review or appeal proceedings have been concluded.

The judgment of the Constitutional Court makes plain that the confirmation of the High Court's declaration of constitutional invalidity must in no way be understood to imply that the right to assemble can be exercised otherwise than peacefully and unarmed. People convening and participating in a gathering who intend to act violently forfeit their right. However, so long as they act within the parameters prescribed in section 17 they will be assured of constitutional protection.