THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 007/11

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS' UNION	Appellant
and	
JACQUELINE GARVIS	First Respondent
THURAYA NAIDOO	Second Respondent
CHINATOWN (RSA) INTERNATIONAL TRADING CC	Third Respondent
ANEES SOEKER	Fourth Respondent
ANDREWS NJIOKWUEMEGI	Fifth Respondent
DOLORES ROSANNE REITZ	Sixth Respondent
MAURICE ROBERTSON	Seventh Respondent
HAROLD BURGER	Eighth Respondent
MINISTER OF SAFETY AND SECURITY	Ninth Respondent

Neutral citation: *South African Transport & Allied Workers Union v Garvis & others* (007/11) [2011] ZASCA 152 (27 September 2011)

CORAM: Navsa, Brand, Van Heerden, Mhlantla JJA and Plasket AJA

HEARD: 5 September 2011

DELIVERED: 27 September 2011

SUMMARY: **Constitutional validity of s 11(2)*(b)* of the Regulation of Gatherings Act 205 of 1993 – protest march organised by Trade Union degenerating into riot – damage caused to property – persons affected sued Trade Union in terms of s 11 of the Act – high court called upon to decide the separated question of the constitutional validity of s 11(2)*(b)* – Trade Union contending that right to freedom of assembly and protest entrenched in s 17 of the Constitution infringed by the creation of statutory liability without providing a viable defence – submitted that holding organisations that organised assemblies and marches liable would have a chilling effect – high court correct in concluding that s 17 of the Constitution not implicated – assemblies that were peaceful and in which participants were unarmed were protected – held that s 11(2)*(b)* was not internally contradictory and provided viable defences to organisers – organising a march preceded by many deaths and increasing animosities might in itself lead to liability – Evidence presented in the court below indicated that notwithstanding the existence of s 11 gatherings continuing to be a feature of South African life and that there was no chilling effect – warning by court about being subjected to mob rule.**

ORDER

On appeal from: Western Cape High Court (Cape Town) (Hlophe JP sitting as court of first instance):

The appeal is dismissed and no order is made as to costs.

JUDGMENT

NAVSA JA (Brand, Van Heerden, Mhlantla JJA and Plasket AJA concurring)

[1] On Tuesday morning 16 May 2006 the appellant, the South African Transport and Allied Workers' Union (the Union), arranged and organised a protest march, which constituted a gathering as defined in the Regulation of Gatherings Act 205 of 1993 (the Act). The march in the Cape Town City Bowl arose out of a protracted strike in the security sector by members of the Union. As the march proceeded, in the Union's own words, it 'descended into chaos', with admitted extensive damage caused to vehicles and shops along the route.

[2] The first to eighth respondents are individuals who claimed that they had sustained loss as a result of the riot. At least one of the respondents claims to have been assaulted. They all instituted action in the Western Cape High Court, Cape Town, against the Union in terms of s 11 of the Act, alternatively under the common law, to recover the damages they had allegedly sustained and for which they contended the Union was liable. Section 11(1) of the Act creates a statutory liability on the part of organisations under whose auspices a gathering or demonstration was held that degenerated into a riot causing damage to others.[1]

1 Section 11(1) provides:

[3] Section 11(2) of the Act sets out three factors that a defendant to such an action has to prove in order to escape liability. Section 11(2) reads as follows:

'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.' (My emphasis.)

[4] In defending the action the Union, in addition to denying liability in general terms, also contended that s 11(2)*(b)*, particularly the part highlighted above, places too great a burden on trade unions and other organisations and individuals who intended to assemble to protest publicly. It was submitted that it has a stultifying effect on the rights set out in s 17 of the Constitution:

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

[5] Put differently, it was contended that, faced with the onerous task of proving what is required by s 11(2)*(b)*, unions, other organisations and individuals would be deterred from organising marches, protests and other gatherings for fear of financial ruin. Thus, it was contended that s 11(2)*(b)* was unconstitutional in that it offended against the right entrenched in s 17 of the Constitution in terms of which everyone has the right 'peacefully and unarmed', to assemble, demonstrate, picket and to present petitions.

[6] In the paragraphs that follow, I turn to consider the allegations by the

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'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 organisation or person who is liable therefor in terms of this subsection.'

respondents about the riot as experienced by them and the resultant damage allegedly sustained by them. The allegations in relation to the first, second and sixth respondents that appear in those paragraphs are drawn from affidavits filed by them, after an order by the court below in terms of which the issue of the constitutionality of s 11(2)*(b)* was, in terms of Uniform rule 33(4), to be heard prior to and separately from the other issues in the case,[2] and from their particulars of claim. The assertions by the third, fourth, fifth, seventh and eight respondents are drawn from their particulars of claim.

[7] The first respondent, Ms Jacqueline Garvis, alleged that at the time of the riot she was a street vendor selling items such as travel bags, school bags, wallets, etc at a location just outside Grand Central. She described how, on the morning in question, a group of marchers pushed through a gate to the market where her stall was located. One of the persons in the group used a pole with which he smashed her stall. Parts of the crowd looted her stall and robbed her of all her stock. She was struck on her body with a pole and was traumatised by the events. She alleged that the replacement value of the goods lost by her was R3 805.

[8] The second respondent, Ms Thuraya Naidoo, is a flower seller who does business on the pavement alongside Adderley Street, near the intersection with Darling Street, in the centre of Cape Town. She alleges that she was aware that the Union had organised a march for the 16 May 2006. On that day she was going about her business as usual when, at approximately 11h30, a huge crowd approached and a group of marchers trampled her flowers. She was terrified as she witnessed her business and stock being destroyed. According to Ms Naidoo it took her months to pay off her debt to the person who supplies the flowers she sells in her business. She alleged that the replacement value of the flowers lost by her is R6 687.50.

[9] The sixth respondent, Ms Dolores Reitz, recalls that on that morning she was in her car at a set of traffic lights in Darling Street. At the time, she was a manager of a photographic shop in the Strand Concourse and was on the way back there from a

2 The court below, in ordering the separation, granted leave to any party wishing to adduce evidence in relation to the constitutional point to do so by filing affidavits.

goods supplier. Suddenly, she was surrounded by a group of marchers who smashed her car with sticks and their fists. The car was consequently badly damaged and she was terrified. In her particulars of claim she alleged that she had suffered damages in the amount of R5 584.71.

[10] The fourth respondent, Mr Anees Soeker, is a carpenter who claimed that his motor vehicle was vandalised during the march, causing him to sustain damages in an amount of R17 043.53.

[11] The fifth respondent, Mr Andrew Njiokwuemegi, a customs clearance officer, also alleged that his car was vandalised during the march, causing him to sustain damages in an amount of R11 458.23.

[12] The seventh respondent, Mr Maurice Robertson, a businessman, claimed that he had his motor vehicle vandalised during the march and that he sustained damages in an amount of R5 864.25.

[13] Finally, the eighth respondent, Mr Harold Burger, who is self-employed, stated that his motor vehicle was vandalised by marchers and that he consequently sustained damages in an amount of R18 599.15.

[14] In an affidavit filed in the proceedings in the court below subsequent to the order in terms of Uniform rule 33(4), Mr B J Engelbrecht Botha, who is employed as legal advisor to the Speaker of the City of Cape Town, stated that in the riot following on the march, participants began breaking windows, damaging cars and looting stores, causing damage estimated to be in the region of R1.5 million. Most of the damage was done to motor vehicles. According to him, several people were injured and about 39 people were arrested. In this regard he referred to a newspaper report. This part of his affidavit was uncontested.

[15] In opposing the action the Union also served a third party notice on the Minister

of Safety and Security (the Minister), claiming in the attached annexure, that in the event of it being held liable to any or all of the respondents it was entitled to a contribution from him. The Union alleged that the losses suffered by the respondents were caused, at least in part, by the negligent conduct of members of the South African Police Service. They were said to be negligent in the following respects:

(a) they failed to ensure that adequate numbers of police officers were on hand to man the Cape Town railway station at the time that the Union's members arrived from their various departure points;

(b) they failed to ensure that adequate numbers of police officers were on hand to monitor the gathering and to prevent damage being caused to third parties;

(c) they failed to ensure that the police officers on duty at the gathering were adequately equipped to deal properly with the marchers who participated in the gathering;

(d) they fired rubber bullets at those participating in the gathering, thereby causing the gathering to become disrupted and unmanageable by the Union's marshals;

(e) they failed to disarm persons in unlawful possession of traditional and/or dangerous weapons;

(f) the armoured police vehicle at the head of the march moved unduly slowly, thereby disrupting the progress of Union members towards Parliament, thereby causing frustration; and

(g) they failed to take all steps reasonably necessary to protect the property of third parties.

[16] In addition to denying liability on any basis the Union, in a conditional counterclaim, sought an order declaring that s 11(2)*(b)* is unconstitutional and sought the excision of what it contended were the offending parts.

[17] The Minister entered the litigation fray, denying that he was liable on the basis contended for on behalf of the Union. The Minister pleaded that members of the South African Police Service had taken all reasonable measures to regulate and manage the gathering. Furthermore, it was alleged on behalf of the Minister that the Police Service

had consulted with the Union prior to the gathering and ascertained such facts as were necessary, including the anticipated number of participants. Based on this an operational plan was devised by the police to determine how best to regulate and monitor the gathering. The plan was put into operation and it included an adequate number of police to deal with the gathering. The Minister denied that members fired rubber bullets unreasonably or unnecessarily. He alleged that the armoured vehicles that were deployed were used to regulate and control the gathering.

[18] Although it was initially indicated on behalf of the Minister that he would abide the high court's decision he was represented during the hearing of the matter in the court below and argument was presented on his behalf. The Minister made common cause with the other respondents in contending that s 11(2)*(b)* was not unconstitutional.

[19] The separated issue was heard by Hlophe JP and was decided against the Union with the following order being 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.'

The present appeal is before us with leave to appeal having been granted by the learned Judge President.

[20] In deciding the matter the court below had regard to the volatile environment in which the march was organised. This was information gleaned from the affidavit of the Union's Provincial Secretary. According to him the strike in the security sector of industry leading up to the march in question took place in the context of heightened acrimony arising out of issues between Union members and employers and Government. By the time the march took place, approximately 50 people had already been killed in strike-related violence. It is uncontested, as recorded by the court below, that preceding the march there had been previous instances of damage caused to property belonging to the city and private persons.

[21] The court below noted that the Act had come into operation on 15 November 1996. It recorded that preceding legislation had made no provision for civil liability on the part of organisers or conveners of gatherings.

[22] Before focusing on the specifics of the constitutional challenge by the Union, Hlophe JP embarked on a careful examination of the procedure created by the Act for the organisation and notification of an intended gathering. The Act provides for consultations and negotiations in relation to gatherings. Section 2 states that any organisation or branch of an organisation intending to hold a gathering 'shall appoint . . . a person to be responsible for the arrangements for that gathering and to be present thereat, to give notice in terms of section 3 and to act on its behalf at any consultations or negotiations contemplated in section 4, or in connection with any other procedure contemplated in this Act.' Section 2 also contemplates a deputy to be appointed to the person referred to in the preceding sentence. Section 2(2)*(a)* provides that the Commissioner of police or a person authorised thereto by him shall authorise a suitably qualified and experienced member of the police to represent the police at consultations or negotiations contemplated in section 4. It obliges the Commissioner to notify all local authorities or any local authority concerned of every such authorisation and of the name, rank and address of such authorised member.

[23] Section 2(4)*(a)* of the Act makes provision for a responsible officer to be appointed by the local authority with whom the organisers can liaise and whom they are obliged to notify concerning the identity and particulars of an intended gathering. Section 3 obliges the convener of a gathering to give formal notice thereof to the responsible officer of the local authority. Section 3(3) of the Act sets out the extensive information that has to be provided by the convener, including the anticipated number of participants and where possible the number and names of marshals to be appointed and how these marshals are to be distinguished from the other participants.

[24] Section 4 obliges the responsible officer of the local authority concerned to consult with the authorised member of the police about the necessity for negotiations

concerning any aspect of the conduct of, or any condition with regard to the proposed gathering. Section 4(2)*(b)* envisages a subsequent meeting involving the convener, the responsible officer and the police to reach agreement on the conduct, organisation and control of the gathering. In the event of a failure to reach agreement the Act empowers the responsible officer to impose conditions in relation to the intended gathering. Section 5 of the Act sets out circumstances in which the responsible officer of the local authority may prohibit a meeting. Section 8 of the Act determines the conduct of the convener, marshals and participants in the gathering. It includes the appointment of a number of marshals. It requires steps to be taken to ensure orderly and peaceful conduct.

[25] Section 9 sets out the powers of the police in relation to a gathering, including the power to regulate vehicular and pedestrian flow. It also deals with the use of force by the police to control a gathering.

[26] That background leads us to s 11 which, as set out above, forms the statutory basis for a claim against organisations or individuals who organise a gathering that turns into a riot causing damage to others, whilst at the same time setting out a basis for avoiding liability.

[27] In dealing with the submissions on behalf of the Union, that s 11(2)*(b)* is unconstitutional, Hlophe JP had regard to the evidence presented by the Union and the common cause facts. All the material steps required to be taken in terms of the Act had been met by the Union. The Union had approximately 500 marshals in attendance and appears to have communicated to their members on an ongoing basis that they were to desist from unlawful behaviour. They had requested the local authority to clear the roads of vehicles and to erect barricades.

[28] On the strength of what is set out above it was submitted that the Union had taken all reasonable steps to prevent any harm being caused to the public. It was accepted on behalf of the Union that in the extensive planning contemplated in the Act

that precedes a gathering, the potential for a breakdown of order is discussed and thus inevitably, harm being foreseen enters the equation. Thus it was submitted that it was almost impossible for an organisation such as the Union to avoid liability in terms of the provisions of the Act. Put differently, the Union and like organisations as well as individuals who convened a gathering would be unable to satisfy the requirements for a valid defence in terms of s 11(2) of the Act because the foreseeability of harm in the planning stages potentially lands it with liability at source.

[29] The court below rejected the submission that s 11(2)*(b)* offended against s 17 of the Constitution, which expressly states that one has a right to assemble, demonstrate, picket and to present petitions 'peacefully and unarmed'. This right, the court below held does not extend to unlawful behaviour at gatherings or where persons bear weapons. It was on that basis that the submission was held to be groundless.

[30] The court below went on to consider the submission on behalf of the Union about the chilling effect of s 11(2)*(b)*, namely, that if allowed to stand, it would lead to the end of public assembly and protest. In this regard the court below found it telling that notwithstanding the provisions of the Act, with the spectre of looming liability, the Union nevertheless proceeded with the gathering. The court below also had regard to the affidavit deposed to by the local authority's responsible officer that he frequently warns organisers of gatherings of the dangers of liability as envisaged in the Act but that his experience is that it has no deterrent effect. Hlophe JP also considered against the Union, the affidavit of Colonel Cloete, the Minister's senior legal adviser, to similar effect. Both deponents stated the indications are to the contrary, that the right to public assembly and protest is frequently being exercised and that this is promoted by the overall scheme of the Act and not impeded by s 11(2). Importantly, there was no evidence to the contrary presented by the Union.

[31] The court below dealt with the further submission on behalf of the Union that s 11(2) of the Act was internally self-destructive and therefore incoherent. It was contended that this was so because, in all relevant circumstances where the defendant

discharged its duty of taking all reasonable steps within its power to prevent the act or omission in question, the act or the omission will always be reasonably foreseeable in terms of s 11(2)*(b)*. It was submitted that it was 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. Thus it was submitted that the defence contained in s 11(2) is illusory and inherently doomed to failure. Before us it is this latter argument that became the focal point of the argument on behalf of the Union.

Conclusions

[32] It is necessary to record at the outset that counsel on behalf of the Union accepted that, if it were held that s 11(2)*(b)* was intelligible, could be given content, and afforded a real defence to a statutory claim, then it would not be necessary for this court to proceed, as the court below did, to the limitation exercise provided for in s 36 of the Constitution.[3] This means it was accepted that, whatever the difference between liability in terms of s 11 of the Act and liability at common law, the difference would be constitutionally valid provided that this court found s 11(2)*(b)* of the Act to have the qualities referred to in the preceding sentence. Put differently, counsel for the Union conceded that if s 11(2) provides a viable defence, it constitutes a reasonable and justifiable limitation in terms of s 36 of the Constitution.

[33] At common law the test for negligence leading to liability finds its clearest statement in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F. Liability ensues if:

'(a) a *diligens paterfamilias* in the position of the defendant ─

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

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3 Section 36 recognises that fundamental rights may be limited only in terms of 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.'

(b) the defendant failed to take such steps.'

[34] In Neethling, Potgieter and Visser *Law of Delict* 5ed (2006) p 118 the learned authors correctly state the following:

'Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case. No hard and fast basis can be laid down.'

[35] Apart from being couched in the negative, because it relates to the setting up of a defence, I have some difficulty in understanding why the provisions of s 11(2)*(b)*, set out in para 3 above, differ radically or even significantly from the common law requirements for liability for negligence. In this regard I discount questions of whether or not an unjustifiable reverse onus has been imposed on defendants since this aspect was not pursued before us. As stated above, the appeal was limited to questioning the viability of a defence in terms of s 11(2)*(b)*. This involves considering whether the subsection is intelligible and whether it can be applied to the advantage of potential defendants.

[36] Furthermore, I fail to see why the statutory defence is illusory and why defences ordinarily available at common law are excluded by the provisions in question. A number of examples prove that point. Take the case of the gathering of thousands of trade union members with hundreds of marshals in attendance and where steps were taken to ensure that no-one was armed, there was collaboration with the police about the route of a protest march and all such eventualities as occurred to both the police and the trade union organisers were taken into account in the planning. That notwithstanding, a riot ensued because one of the policemen in attendance had not engaged the safety catch on his weapon, causing it to discharge as he moved alongside the crowd, with the consequence that participants panicked and stampeded. In those circumstances an innocent bystander seeking to hold the trade union liable for damages would probably fail at the first hurdle. That eventuality could hardly have been foreseen by the Union and if any liability attaches it would attach to the police.

[37] Consider the case of a gathering, where exactly the same precautions as set out

in the preceding paragraph were taken, but where the march was suddenly and unexpectedly infiltrated by a gunman unconnected to the trade union, who bore a grudge against society and who started firing indiscriminately, causing panic. Once again this would not have been an action that was reasonably foreseeable and the trade union faced with a claim for damages by a shopkeeper whose shop in the vicinity of the march was damaged would probably be able to mount a successful defence.

[38] Another imagined instance is one where, despite barricades having been agreed and erected by police and despite marshals and the police taking precautions to ensure a free-flow of marchers through the streets and to prevent incursions by vehicular traffic, a motorist nonetheless breaks through those barricades and drives into the marching crowd causing panic and a riot with resultant damage to persons and property. I fail to see how in those circumstances the trade union could be held liable.

[39] In all three instances it would have been clear that the actions following upon the unforeseen events did not form part of the purpose of the gathering and it would have been equally clear that the Union did not permit or connive in the actions that caused the panic that led to loss being sustained by others. Furthermore, the Union would have taken all reasonable steps to ensure that a stampede or unruly behaviour did not occur.

[40] It was submitted that the conjunctive nature of the provisions of s 11(2)*(b)* relating to a defendant was especially pernicious, because at common law all a defendant needed to show to escape liability, when sued in a delictual action based on negligence, was that a reasonable person in his or her position would not have foreseen the reasonable possibility of his or her conduct injuring another in their person or property, causing damage to be sustained. The absence of that factor alone would usually mean that a defendant would escape liability. The plaintiff, on the other hand, would have had to meet the *Kruger v Coetzee* test set out in para 33 above in its entirety.

[41] Even though the conjunctive nature of the defence set out in s 11(2)*(b)* of the

Act, on the face of it, seems burdensome one can only take reasonable steps in respect of conduct that is reasonably foreseeable. It does appear that unless the act complained of ─ leading to the riot ─ was reasonably foreseeable, a defendant would probably in all of the instances set out above escape liability. One can only take steps to guard against an occurrence if one can foresee it.

[42] As stated above, it was submitted on behalf of the Union that when an intended gathering takes place where there is a threat of violence, it is inevitable that the content of the discussions between the police and organisers deals with the potential for injury to persons or damage and that therefore it will always unjustifiably be contended against organisations such as unions that, because they foresaw that eventuality, they should be held liable. It was contended that it was akin to strict liability being imposed on organisations which organise gatherings.

[43] In the present case, according to the testimony of the Union's own representative, events leading up to the march had led to a volatile situation. The strike had been protracted and acrimonious and there had been many deaths. In those circumstances it is arguable that no degree of measures could be taken so as to prevent the march from degenerating into a riot. Even at common law it would appear that a defendant who persisted in organising a march in those circumstances would almost inevitably be landed with liability. Put differently, if one persists in organising an event where it is reasonably foreseeable that no measure or means could be employed to prevent it from degenerating into a riot, then when that eventuality occurs one could hardly be expected to escape liability for the harm caused to persons or property. In short, a reasonable trade union would not persist in organising and proceeding with a march in the circumstances sketched in this paragraph.

[44] Furthermore, it might well be that the separated question in terms of Uniform rule 33(4) was premature in that the reasons for the gathering degenerating into a riot had not yet factually been established. Having the question of the constitutionality of s 11(2)*(b)* tested in a vacuum was undesirable. What, if at a trial in due course, it is

established that some Union marshals were instrumental in the gathering turning into a riot? What if the evidence establishes that some Union officials made inflammatory speeches preceding the march, and that this had the effect of causing a riot? In those circumstances the provisions of the Act or the application of common law principles would almost inevitably mean the Union would be held liable for damages sustained by innocent third parties. Could it rightfully be said that in those circumstances the ensuing statutory liability offended against constitutional values and norms? I think not. It is arguable that, in the circumstances set out above, common law liability would attach to the Union and the exploration of the constitutional point would be unnecessary. What if the factor that caused the riot was wholly unconnected to the march and could not have been foreseen by any one of the actors envisaged by the Act? In those circumstances one can hardly imagine that liability could attach to the Union either statutorily or at common law.

[45] The reasons for the riot ought to be properly explored by the trial court in due course. This court has repeatedly warned that piecemeal litigation is not to be encouraged. Sometimes parties consider issues to be discrete and submit that a decision on a separated issue would lead to an expeditious disposal of the litigation, but that submission and agreement on separation often turns out to be ill-advised. In this regard see *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3 and *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd & another* 2010 (3) SA 382 (SCA) paras 89 and 90. The Constitutional Court has commented on the undesirability of matters being referred to it where facts are in dispute.[4] It has also commented on the difficulties of dealing with complex questions of law, constitutional or otherwise, and being called upon to engage in the limitation exercise, presently provided for in s 36 of the Constitution, as a court of first instance. The Constitutional Court has stated that it should not be called upon to do so in circumstances in which a decision on the constitutional issue might not be decisive for the case.[5] Be that as it may, we are called upon to consider whether the court below,

4 *Van der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening)* 2002 (5) SA 392 (CC).
5 *S v Bequinot* 1997 (2) SA 887 (CC) para 15.

with the material available to it was correct in its ultimate conclusion.

[46] During the pre-constitutional era public protests and demonstrations against a denial of fundamental human rights were often met by brute force with resultant loss of life. The Sharpeville massacre and the 1976 Soweto student uprising are stark examples that are etched into the national psyche. In any event, the legislature, after an extensive consultative process, and following on the brutal experiences of the Apartheid era, promulgated the Act.[6]

[47] Our Constitution saw South Africa making a clean break with the past. The Constitution is focused on ensuring human dignity, the achievement of equality and the advancement of human rights and freedoms. It is calculated to ensure accountability, responsiveness and openness.[7] Public demonstrations and marches are a regular feature of present day South Africa. I accept that assemblies, pickets, marches and demonstrations are an essential feature of a democratic society and that they are essential instruments of dialogue in society. The Constitutional Court has recognised that the rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organisations.[8] The struggle for workers' rights can rightly be expected to continue. Trade unions should ensure that a noble struggle remains unsullied. The Act was designed to ensure that public protests and demonstrations are confined within legally recognised limits with due regard for the rights of others.

[48] I agree with the court below that the rights set out in s 17 of the Constitution, namely, the right to assemble and demonstrate, are not implicated because persons

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6 The history leading up to the promulgation of the Act, dealing in particular with the Goldstone Commission of Inquiry regarding the Prevention of Public Violence and Intimidation are set out in Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop *Constitutional Law of South Africa* (2ed) vol 3, pp 43-4 to 43-7. Save to state that the Goldstone Commission convened a multinational panel of experts to thrash out a new approach to public assembly it is for present purposes not necessary to recount that history. From the report of the Commission it is clear that it conducted hearings with interested persons, including the South African Police, political parties and the Congress of South African Trade Unions ─ para 5.2 of the report.

7 The founding values of our Constitution are set out in ss 1, 2 and 3 of the Constitution.

8 *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) para 74.

engaging in those activities have the right to do so only if they are peaceful and unarmed. It is that kind of demonstration and assembly that is protected. Causing and participating in riots are the antithesis of constitutional values. Liability in terms of s 11 follows on the unlawful behaviour of those participating in a march. The court below rightly had regard to similar wording in the Constitution of the United States, where people are given the right to assemble peacefully. Such provisions in constitutions such as ours are deliberate. They preclude challenges to statutes that restrict unlawful behaviour in relation to gatherings and demonstrations that impinge on the rights of others.[9]

[49] It was submitted on behalf of the Union that damage to public property caused by a gathering that degenerated into a riot was a small price to pay to preserve and protect the precious right to public assembly and protest, which is integral to a democratic state. I agree with the court below that members of the public are entitled to protection against behaviour that militates against the rule of law and the rights of others and that, if liability is to attach to unlawful behaviour at a gathering that causes a riot, it would seem just and in accordance with constitutional values that it should attach to the organisers in the circumstances contemplated in s 11 of the Act. As stated above the Union's legal representatives therefore rightly accepted that if s 11(2)*(b)* could be given content, as described above, it would not be necessary for us to proceed to the limitation exercise contemplated in s 36 of the Constitution. For the reasons set out above I do not find the provisions of s 11(2)*(b)* internally contradictory and self-destructive. It appears to me to be structured in such a manner as to ensure that liability should attach where it rightly belongs.

[50] The chilling effect of s 11(2)*(b)* described on behalf of the Union is not only unsubstantiated but is contradicted by the police and the City of Cape Town, who presented unchallenged evidence that in their extensive experience the provisions of

9 See Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5 ed (2005) p 405-407 and Woolman Roux Klaaren Stein Chaskalson Bishop *Constitutional Law of South Africa* (2ed) vol 3 pp 43-19 to 43-20 where German jurisprudence is discussed. See also *Fourways Mall (Pty) Ltd & another v South African Commercial Catering and Allied Workers Union & another* 1999 (3) SA 752 (W) where it was held that neither s 17 of the Constitution nor the Labour Relations Act 66 of 1995 countenance assaults and other forms of conduct that infringed upon the rights of the general public.

the Act have not deterred people from public assembly and protest. If anything, the regularity of public assembly and protest in the 15 years of the existence of the Act proves the contrary. The chilling effect that the provisions of the Act should rightly have is on unlawful behaviour that threatens the fabric of civilised society and which undermines the rule of law. In the past the majority of the population was subjected to the tyranny of the state. We cannot now be subjected to the tyranny of the mob.

[51] Before us it was submitted on behalf of the Union that the provisions of the Act were too wide and presented the spectre of limitless liability for organisers of gatherings. It was submitted that organisers might be liable even for conduct that strictly speaking was not unlawful. In this regard we were referred to the definition of 'riot damage' in the Act which:

'. . . means any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering.'

It was contended that definition was overly wide and that liability would ensue even in the absence of fault.

[52] The submission referred to in the preceding paragraph is fallacious. The definition cannot be read without considering the ordinary meaning of the word 'riot' which is: 'a violent disturbance of the peace by a crowd'.[10] The entire scheme of the Act, including s 11, is designed to prevent unlawful violent behaviour that impinges on the rights of others and to ensure that persons or organisations which organise assemblies that degenerate into riots should bear liability.

[53] For all the reasons set out above, the appeal must fail. Because of the constitutional issue raised there should, like in the court below, be no order as to costs.

[54] The appeal is dismissed and no order is made as to costs.

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10 Concise Oxford Dictionary 10 ed revised (2002).

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	E Fagan SC S Miller Instructed by Bernadt Vukic Potash & Getz Cape Town Lovius-Block Bloemfontein
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