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## Recent case law

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### Rethinking the regulation of university students' protests in light of *Mlungwana v The State* 2018 ZACC 45

#### SUMMARY

On 19 November 2018, the Constitutional Court handed down an important judgment in *Mlungwana v The State* 2018 ZACC 45 that declared section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 unconstitutional because it unjustifiably limited the right of everyone to, peacefully and unarmed, assemble, demonstrate, picket and present petitions in section 17 of the Constitution of the Republic of South Africa, 1996. Section 12(1)(a) of the Act was found constitutionally invalid to the extent that it makes the failure to give notice or the giving of inadequate notice by any person who convenes a gathering a criminal offence. In arriving to its decision, the Court held that the limitation imposed by section 12(1)(a) of the Act on the right to freedom of assembly did not meet the requirements in section 36 of the Constitution. The Constitutional Court's judgment in the *Mlungwana* case has caught the interests of legal scholars and has already generated a journal article and a case note. The existing scholarship on this case has focused on analysing the correctness of the Court's reasoning and on what South African municipalities can learn from it. This article departs from this emerging body of scholarship by critically analysing the implications of the Court's jurisprudence in the *Mlungwana* case for the regulation of university students' protests in South Africa. Drawing examples from policies and regulations of some universities outlining the process for students' protests and the consequences for non-compliance with notice and authorisation procedures, this article argues that universities generally have to rethink how they regulate students' protests in order to comply with the Court's jurisprudence emanating from the *Mlungwana* case. It is argued that in their current form, the policy positions of some universities are inconsistent with the rights of students in section 17 of the Constitution and the concomitant duties of universities emanating from the Bill of Rights.

## 1 Introduction

The history of the struggle against apartheid and the brutal suppression of peaceful and legitimate protests of the black majority for liberation and equality is well documented.<sup>1</sup> Despite police brutality, protest action remained a defiant hallmark of the struggle for a democratic South Africa because it was the only means through which black people, including students, could express their views in relation to government decisions that affected their lives.<sup>2</sup> Informed by this historic struggle, a core aspect of the new vision of democratic South Africa, as expressed in the Preamble to the Constitution of the Republic of South Africa, 1996 is the commitment to create “the foundations for a democratic and open society in which government is based on the will of the people”. While the political rights guaranteed in the Bill of Rights<sup>3</sup> are generally in line with this vision, the right of everyone to assemble, demonstrate and picket in section 17 of the Constitution ensures that “the will of the people is not always mediated by political parties and the elites that run them”.<sup>4</sup> Section 17 of the Constitution enables everyone in South Africa, including civil society organisations to directly influence government policy decisions. The #FeesMustFall Movement of 2015-2016 demonstrates how students were able to use this right to influence government’s policy position regarding the high cost associated with access to higher education in South Africa for students from poor and middle-income households. The #FeesMustFall Movement was a student-led protest movement that started in October 2015 with the primary objectives of stopping universities from increasing study fees and to force government to increase funding to all universities.<sup>5</sup> The Movement was started and led by the Student Representative Council at the University of Witwatersrand throughout 2015.<sup>6</sup> The protest that started at the Witwatersrand spread to the University of Cape Town and Rhodes University before quickly spreading to other universities across the country. The central message of the Movement across the country was

1 See, Woolman in Woolman and Bishop *Constitutional Law of South Africa* (2014) 43-4 to 43-6; *University of Cape Town v Davids* 2016 3 All SA 333 (WCC) par 60; *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) paras 112.

2 *SATAWU v Garvas* 2012 8 BCLR 840 (CC) par 121; *University of Cape Town v Davids supra* para 40.

3 Political rights guaranteed in Ch 2 of the Constitution (Bill of Rights) include: the right to freedom of expression in section 16; the right to assemble, demonstrate, picket and present petitions in section 17; the right to freedom of association in section 18; and the rights to vote, form and participate in the activities of political parties, regular free and fair elections, and to stand and be elected into public office in section 19.

4 See, Woolman 43-4.

5 See, Langa in Langa *#Hashtag: An analysis of the #FeesMustFall Movement at South African Universities* (unknown) 5. The economic, ideological and political dimensions of the students’ protests of 2015-2016 have been analysed in detail by Badat. See Badat “Deciphering the Meanings and Explaining the South African Higher Education Students Protests 2015-2016” 2015 African Journal of Academic Freedom 74-89.

6 For details, see: Malebela in Langa 133-139.

that “the cost of higher education were too high and unaffordable for the majority of poor black students” and that there was therefore need for free university education in South Africa.<sup>7</sup> The protests were initially very peaceful and gained a lot of support from academics and other stakeholders. The protests temporally came to an end in 2015 when the government announced on 23 October that there was not going to be any tuition fee increment for the 2016 academic year. At the start of the 2016 academic year, there were student protests over a diverse range of issues.<sup>8</sup> Although calm was eventually restored, the protest was reignited again in September 2016 when the Minister of Higher Education announced that there would be fee increment for the 2017 academic year capped at 8 percent with universities given the discretion to decide on how much to increase their tuition.

However, towards the end of 2016, the protests lost momentum due to internal divisions. In addition, support from the public dwindled following the intensification of violence by some student protesters. This notwithstanding, on 16 December 2017, President Jacob Zuma took the nation by surprise when he announced that from the 2018 academic year, university education will be free for all deserving students.<sup>9</sup> Although student protests post 1994 was a culture in especially historically black universities and institutions that were merged as part of the restructuring of the higher education landscape after 2000, the 2015-2016 protests were distinctive because, unlike previous protests, the centre of these protests was at historically-white universities. In addition, the mobilisation of students was nation-wide.<sup>10</sup> Although the #FeesMustFall Movement received much attention for their wanton destruction of property, it will also be remembered for putting the torchlight on a very germane issue.<sup>11</sup> It raised tremendous public awareness about the shortage of funding for higher education in South Africa and solicited the type of political response that few anticipated: achieving free higher education for all deserving students in South Africa through increased government funding. As Langa correctly argues,

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7 Langa 6 and 8

8 Report of the Commission of Enquiry into Higher Education and Training to the President of the Republic of South Africa (2017) 15-16.

9 This was a surprise because it was contrary to the recommendations of the Commission of Inquiry into Higher Education and Training. For details on the Commission’s recommendations, see: Report of the Commission of Enquiry into Higher Education and Training (2017) 540-561.

10 Report of the Commission of Enquiry into Higher Education and Training (2017) 9; Badat 2015 *African Journal of Academic Freedom* 71-72; Langa 7.

11 The student protests of 2015-2016 also received significant academic attention from diverse disciplines. See: Leuscher, Loader and Mugume “#FeesMustFall: An Internet-Aged Student Movement in South Africa and the Case of the University of the Free State” 2016 *Politikon* 231; Badat 2015 *African Journal of Academic Freedom* 71; Keet, Nel and Sattarzadeh “Retreating Rights: Human Rights, Pre-Theoretical Praxes and Student Activism in South African Universities” 2017 *SAJHE* 79.

“some of these changes would not have happened if the students did not organise(d) protests”.<sup>12</sup>

The achievement of the #FeesMustFall Movement demonstrates how ordinary people can use the right to protest to bring about fundamental change that advances the realisation of constitutional ideals such as the right to further education.<sup>13</sup> Generally, the historical and political significance of the right of everyone to assemble, demonstrate, picket and present petitions has been acknowledged by courts in a number of cases.<sup>14</sup> Recently, in *Mlungwana v The State* 2018 ZACC 45, the Constitutional Court was asked to determine the constitutional validity of section 12(1)(a) of the Regulations of Gatherings Act 205 of 1993 which creates criminal liability for a convenor of any gathering who fails to give notice or adequate notice to a local municipality and the police prior to the gathering. The Court declared this provision unconstitutional because it unjustifiably limited the right in section 17 of the Constitution. The Constitutional Court’s judgment in the *Mlungwana* case has caught the interests of legal scholars and has already generated a journal article and a case note.<sup>15</sup> The existing scholarship on this case has respectively focused on analysing the correctness of the Court’s reasoning<sup>16</sup> and on what South African municipalities can learn from it.<sup>17</sup> This article departs from this emerging body of scholarship by critically analysing the implications of the Court’s jurisprudence in the *Mlungwana* case for the regulation of students’ protests by universities in South Africa. Drawing examples from policies and regulations of some universities outlining the process for students’ protests and the consequences for non-compliance with notice and authorisation procedures, this article argues that universities generally have to rethink how they regulate students’ protests in order to comply with the Court’s jurisprudence emanating

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12 Langa 8.

13 According to section 29(1)(b) of the Constitution, everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.

14 *University of Cape Town v Davids supra* para 60; *Mlungwana v The State* 2018 ZACC 45 pars 64-69; *SATAWU v Garvas supra* paras 61-63.

15 See Barrie GN “Section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 Declared Unconstitutional – Criminal Sanction an Unjustifiable Limitation on the Exercise of the Right to Assemble” 2019 2 *TSAR* 405-418. Stoffels M “The failure to provide notice of an intended gathering: *Mlungwana v The State* (CCT 32/18) 2018 ZACC 45 (CC) 2019 *Obiter* 408-416.

16 See, Barrie 2019 *TSAR* 405-418. Barrie generally agrees with the Court’s reasoning but adds that the consideration of the constitutional jurisprudence of the Federal Republic of Germany could have enhanced the Court’s judgment. For a commentary on the Western Cape High Court ruling that led to the case before the Constitutional Court see: Khumalo K “The constitutionality of criminalising peaceful protests” 2018 *Without Prejudice* (October 2018) 18-19.

17 See, Stoffels M 2019 *Obiter* 408-416. Stoffels accepts the Constitutional Court’s clarification of the legal position and argues that “there is a need for municipalities to be educated on the effect of the judgment as well as to revisit the current practices in relation to gatherings”. See, Stoffels 2019 *Obiter* 415-416.

from the *Mlungwana* case. It is argued that in their current form, the policy positions of some universities are inconsistent with the rights of students in section 17 of the Constitution and the concomitant human right duties emanating from the Bill of Rights.

In order to achieve the above objective, the discussion that follows is structured into three parts. The first provides a brief historical context and a discussion of the legislation regulating the right to protest in South Africa, with specific attention on the provisions that led to litigation in the *Mlungwana* case. The second part provides a summary of the *Mlungwana* case, focusing on the facts, the decision of the Court, and the reasons advanced for the decision. The third part analyses the relevance of the Court's findings in the *Mlungwana* case for the regulation of university students' protests in South Africa. This part draws examples from three university policies that regulate students' protests in order to support the arguments made and to offer suggestions on the way forward.<sup>18</sup>

## 2 Legal framework on the right to protest in South Africa

### 2.1 Background to the Regulation of Gatherings Act

Although protests were vociferously used as a tool for the political liberation of the majority in South Africa, they were hardly sanctioned by law. The government enacted a series of repressive laws from 1920 up to the 1980s that prohibited and criminalised assemblies in order to stifle dissent.<sup>19</sup> The extremely restrictive civil and criminal measures that formed part of these legislation failed to suppress political assemblies and violent protests. In early 1990, most political parties and the government agreed on the need to find solutions to ongoing violence and to reconcile the rights of assemblers with the state's interest in public order. In 1991, former President, FW de Klerk appointed the Goldstone Commission (Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation) to investigate a new approach to regulate assembly and prevent violent protests in the country.<sup>20</sup> The Commission convened a multi-national panel of experts to assist in this task. Although the Commission held the conviction that the right to assemble, demonstrate, protest and petition was fundamental to the functioning of any democratic society committed to universal political participation, it was convinced that the right should be subject to reasonable restrictions. In view of this, the Commission recommended that the police, local authorities and conveners should take part in pre-demonstration negotiations. As Barrie points out, this meant in practical terms that "organisers of demonstrations should be obliged to give notice to local

18 The researcher was able to obtain the relevant policies of only three universities (University of Johannesburg, North-West University and Stellenbosch University) through the internet. They are merely used in this article as examples and do not represent a definitive generalization of the position in all South African universities.

19 For details, see Woolman 43-4 to 45-6; Stoffels 2019 *Obiter* 411.

20 See, Stoffels 2019 *Obiter* 411; Barrie 2019 2 *TSAR* 405-418 at 405.

authorities and police of the nature, size and route of their demonstration".<sup>21</sup> At the end, the Commission and the panel of experts drafted the Regulations of Gatherings Act No 205 of 1993 (RGA) as new legislation to give effect to principles that were laid down in the panel's testimony. Although the Act was meant to repeal a series of repressive legislation and to allow for the meaningful exercise of the right to assemble in the run-up to the 1994 elections, it was only enacted into law in 1996. Commenting on the RGA, Woolman observes that:

"To Parliament's credit, the legislation retains the most interesting aspect of the panel's report: namely, the notion of 'demonstration as of right'. Demonstration as of right means that the ability to hold a public gathering, assembly or demonstration is not contingent upon approval by the state. Unfortunately, the RGA qualifies this 'right' in a manner that largely vitiates its significance. Several provisions blunt, in a similar fashion, the potentially revolutionary vision of mass action envisaged by the RGA, and reflect the difficulty that present political actors have had in making a complete break with the past."<sup>22</sup>

In line with the above observations, the discussion below shows that despite the transformational aspirations of the RGA, there are practical difficulties posed by the notice requirements for gatherings.<sup>23</sup>

## **2 2 Legislative framework on the right to protest in South Africa**

As indicated above, public gatherings and demonstrations in South Africa are regulated by legislation that predates the Constitution, the RGA. According to the Act, "demonstration" includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.<sup>24</sup> On the other hand, a gathering means any assembly, concourse or procession of more than 15 persons in or on any public road or any other public place or premises wholly or partly open to the air – (a) at which the principles, policy, actions or failure to act of any government, political party or political organisation, whether or not that party or organisation is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or (b) held to form pressure groups, to hand over petitions to any person, or to mobilise or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.<sup>25</sup> A close look at these definitions suggests that the main difference between a gathering and a demonstration lies in the

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21 Barrie 2019 *TSAR* 406.

22 See, Woolman 43-7 to 43-8.

23 For a detailed analysis, see, Woolman 43-8 to 43-16.

24 S 1 of the Regulation of Gatherings Act 205 of 1993.

25 S 1 of the Regulation of Gatherings Act.

number of persons involved. While 15 people or less make up a demonstration, more than 15 constitutes a public gathering.<sup>26</sup>

In terms of section 2 of the RGA, an organisation intending to hold a gathering must appoint a person to be responsible for the arrangements for the gathering and to represent the organisation for purposes of the Act. Such a person is expected to play an important role in terms of giving notice of the gathering or entering into negotiations on behalf of the organisation as respectively contemplated in sections 3 and 4 of the Act. In terms of section 3 of the RGA, a convener of a gathering shall give notice in writing to the municipality and police within whose area of jurisdiction the intended gathering is supposed to take place, about the intended gathering, not less than 7 days before the date on which the gathering is to be held.<sup>27</sup> Where it is reasonably not possible to give notice seven days before the date of the gathering, the convener is required to give such notice at the earliest opportunity. If the notice is provided less than 48 hours to the commencement of the gathering, the responsible municipal officer may by notice to the convener prohibit the gathering.<sup>28</sup>

According to the RGA, the notice by the convener to the municipality should contain at least the following information: the name, address, telephone number and facsimile numbers, if any, of the convener and his deputy; the name of the organisation or branch on whose behalf the gathering is convened or, if it is not so convened, a statement that it is convened by the convener; the purpose of the gathering; the time, duration and date of the gathering; the place where the gathering is to be held; the anticipated number of participants; the proposed number and where possible, the names of the marshals who will be appointed by the convener, and how the marshals will be distinguished from other participants in the gathering.<sup>29</sup> In the case of a gathering in the form of a procession, the notice by the convener to the municipality should contain: the exact and complete route of the procession; the time when and the place at which participants in the procession are to assemble, and the time when and place from which the procession is to commence; the time when and the place where the procession is to end and the participants are to disperse; the manner in which the participants are to be transported to the place of assembly and from the point of dispersal; and the number and types of vehicles, if any, which are to form part of the procession.<sup>30</sup> In case where 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. In addition, if a petition or any other document

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26 In the *Mlungwana* case, the court raised questions as to the rational of using the number 15 to distinguish between a gathering and a demonstration. See *Mlungwana* case paras 84 and 93.

27 See, ss 3(1) and (2) of the Regulation of Gatherings Act.

28 See, s 3(2) of the Regulation of Gatherings Act.

29 See, ss 3(3)(a)-(g) of the Regulation of Gatherings Act.

30 See, ss 3(3)(h)(i)-(v) of the Regulation of Gatherings Act.

is to be handed over to any person, the convener should specify the place where and the person to whom it is to be handed over.<sup>31</sup>

The requirements that must be met, and the responsibilities placed on the convener of a gathering in terms of giving adequate notice are onerous and largely reflects the time when the Regulation of Gatherings Act was drafted. Some of the provisions are clearly outdated. For example, section 4(4) which requires the convener to give notice to a district magistrate if a local authority does not exist in the area where the gathering is to be held is not attuned to the current system of wall-to-wall municipalities in South Africa where all geographical space falls within the jurisdiction of a municipality.<sup>32</sup> The system of wall-to-wall municipalities shows that there is no town or village that does not fall within the jurisdiction of a municipality.

The above notwithstanding, the RGA provides that where a municipal officer receives information about a proposed gathering other than through the notice procedure prescribed in section 3(1) and (2) of the Act, he/she shall take such steps as he/she deems necessary, including obtaining assistance from the police, to establish the identity of the convener of such gathering, and may request the convener to comply with the notice requirements of the Act.<sup>33</sup>

Upon receiving notice in terms of section 3(2) of the Act, or through any other means, the responsible municipal officer shall consult with the convener of the gathering or their authorised member regarding the necessity for negotiations on any aspect of the conduct of, or any condition with regard to, the proposed gathering.<sup>34</sup> The processes for negotiations, amendment of notices and the powers of municipal officers to impose conditions for gatherings are outlined in section 4 of the Act. In terms of section 4(4) of the Act, if a meeting between the convener, their authorised member and municipal officer cannot reach agreement on the contents of the notice or the conditions regarding the conduct of the gathering, and where there are reasonable grounds, the responsible municipal officer may on his own accord or on the request of an authorised member impose conditions with regard to the holding of the gathering to ensure: that vehicular or pedestrian traffic is not impeded; or an appropriate distance between participants in the gathering and rival gatherings; or access to property and workplaces; or the prevention of injury to persons or damage to property. In addition, a municipal officer can prohibit a gathering when there is credible information on oath that there is a threat that a proposed gathering will result in serious

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31 See, ss 3(3) (i)-(j) of the Regulation of Gatherings Act.

32 See, Fuo "Intrusion into the Autonomy of South African Local Government: Advancing the Minority Judgment in the Merafong Case" 2017 De Jure 325; De Visser *Developmental Local Government: A Case Study* (2005) 87; Du Plessis and Nel in Du Plessis *Environmental Law and Local Government Law in South Africa* (2015) 24-25.

33 See, ss 3(4) and (5) of the Regulation of Gatherings Act.

34 See, s 4(1) of the Regulation of Gatherings Act.

disruption of vehicular or pedestrian traffic, injury to the participants in the gathering or other persons, or extensive damage to property and that the police and traffic officers in question will not be able to contain this threat.<sup>35</sup>

The role of the convener, as well as the conduct of participants, during gatherings and demonstrations are outlined in section 8 of the Act. It is generally expected that the gathering shall proceed and take place at the locality or on the route and in the manner and during the times specified in the notice. No participant at a gathering or demonstration should be in possession of a firearm or any dangerous weapon. In addition, no person present at or participating in a gathering or demonstration shall by way of a banner, placard, speech or singing or in any other manner incite hatred of other persons or any groups of other persons on account of differences in culture, race, sex, language or religion.<sup>36</sup> The Act also prohibits persons present at or participating in any gathering or demonstration from performing any act or uttering any words which are calculated or likely to cause or encourage violence against any person or groups of persons.<sup>37</sup> In addition, participants are prohibited from wearing a disguise or mask or any other apparel or item that obscures their facial features and prevents their identification; and any form of apparel that resembles any of the uniforms worn by members of the security forces.<sup>38</sup> The Act prohibits anyone from compelling or attempting to compel another person to attend, join or participate in a gathering or demonstration.<sup>39</sup>

Chapter 4 of the Act deals with liability for damages arising from gatherings and demonstrations as well as offences and penalties.<sup>40</sup> Anyone found guilty and convicted on any one of the following grounds shall be liable to a fine or to imprisonment for a period not exceeding one year or to both such fine and imprisonment: convenes a gathering in respect of which no notice or no adequate notice was given in terms of section 3 of the Act; after giving required notice, fails to attend a negotiation meeting convened in terms of section 4(2)(b) of the Act; contravenes or fails to comply with any of the provision in section 8 regulating conduct during demonstrations and gatherings; knowingly contravenes or fails to comply with the contents of a notice or a condition imposed for the holding of a gathering or demonstration in terms of the Act; convenes a gathering or convenes or attends a gathering or demonstration prohibited in terms of the Act; fails to comply with orders

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35 For details, see ss 5(1)-(3) of the Regulation of Gatherings Act.

36 See ss 8(4)-(5) of the Regulation of Gatherings Act. In *Duncanmec (Pty) Ltd v Gaylard* 2018 11 BCLR 1334 (CC), the Court held that the use of racially offensive words in a song by employees during a strike was inappropriate but was not a ground for automatic dismissal. This reasoning also applies to protests generally.

37 See s 8(6) of the Regulation of Gatherings Act.

38 See ss 8(7)-(8) of the Regulation of Gatherings Act.

39 See s 8(10) of the Regulation of Gatherings Act.

40 For details, see ss 11 and 12 of the Regulations of Gatherings Act.

issued by a police officer or interferes with the execution of his functions during a gathering or demonstration; supplies or furnishes false information for purposes of the Act; and anyone who hinders, interferes with or obstructs or resists a member of the police, responsible officer, convener, marshal or any other person in exercising his powers or the performance of his duties under the Act.<sup>41</sup> Anyone carrying a firearm or dangerous weapon during a gathering or demonstration upon conviction shall be liable to a fine or to imprisonment for a period not exceeding three years.<sup>42</sup> However, a person who convenes a gathering without submitting a notice or adequate notice as required by section 3 of the Act can plead as a defence that the gathering concerned took place spontaneously.<sup>43</sup> It should be noted that the powers of the police in gatherings and demonstrations are outlined in detail in section 9 of the Act but not discussed in this article. These powers are not of vital importance in this context.

Even before the recent court rulings that have helped improve understanding of the constitutionality of some provisions of the Regulation of Gatherings Act, Woolman had pointed out several problematic areas that appear to stifle the noble objectives of section 17 of the Constitution.<sup>44</sup> For example, he earlier pointed out the problematic nature of the requirements for notice and approvals before a public gathering could take place,<sup>45</sup> and the fact that the seven-day notice period envisaged in the Act makes it possible for government to suppress dissent since it gives government a grace period that could be used to turn intention into action before the public registers its collective anger.<sup>46</sup> In addition, he indicates that: the requirements of the Act for gatherings scheduled with less than 48 hours' notice are onerous; local authorities often take more than a week to reply to a properly filed notice; and that, requests to demonstrate peacefully are often met with blanket prohibitions.<sup>47</sup>

### 3 The *Mlungwana* case: facts, decision and reasons for the decision

#### 3 1 Facts

The applicants in this case were members of the Social Justice Coalition (SJC), a lobby group that was established to fast-track the pace of provision of municipal services to disadvantaged communities within the City of Cape Town and its environs. In September 2013, 15 members of

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41 See ss 12(1)(i)-(j) and (k)(i) of the Regulation of Gatherings Act.

42 See s 12(1)(k)(ii) of the Regulation of Gatherings Act.

43 See s 12(2) of the Regulation of Gatherings Act.

44 See Woolman 43-7 to 43-16.

45 Woolman 43-7.

46 See Woolman 43-8 to 43-9.

47 See Woolman 43-11 to 43-14.

the SJC travelled from Khayelitsha to the Civic Centre in Cape Town in order to take part in a protest they had decided to organise.<sup>48</sup> The SJC decided to limit the number of participants to 15 in order to avoid rendering the gathering notifiable in terms of the Regulation of Gatherings Act. However, they were aware of the risk of other members of the SJC joining them during the planned protest. Even though they were joined by other people, the gathering was peaceful and members of the public were not denied entry to or exit from the Civic Centre. The protesters refused to obey the police's order for dispersal and were arrested without confrontation.<sup>49</sup> Eventually, 21 of the protesters were charged before the Magistrates' Court for contravening section 12(1)(a) of the Regulation of Gatherings Act and alternatively of attending a prohibited gathering contrary to section 12(1)(e) of the Act.<sup>50</sup> In their defence, the applicants argued that section 12(1)(e) does not make it an offence to attend a gathering merely because no prior written notice was not given. In addition, they challenged the constitutional validity of section 12(1)(a) of the Act. The Magistrates' Court acquitted all accused persons of the alternative count but found the ten conveners of the protest guilty of contravening section 12(1)(a) of the Act. However, taking into consideration the reason for the protest action, the attempts made to engage the City of Cape Town over the issues, the peaceful conduct of the protesters and the fact that no property was damaged, the Magistrate cautioned and discharged the applicants. In addition, the Magistrate granted the applicants leave to appeal to the High Court in order to enable them to pursue their challenge of the constitutionality of section 12(1)(a) of the Act.<sup>51</sup>

In the High Court, the applicants argued that section 12(1)(a) of the Act constitutes an unjustifiable limitation to the right of freedom of assembly in section 17 of the Constitution in that it discourages people from convening gatherings to voice their views and frustrations, mindful of the repercussions that may follow if adequate notice is not given.<sup>52</sup> The respondents, the State and Minister of Police, resisted the constitutional challenge. The respondents argued that section 12(1)(a) of the Act does not constitute a limitation of the right guaranteed in section 17 of the Constitution and that even if it does, this was in line with the general limitation clause in section 36.<sup>53</sup> The respondents further argued that: the requirement to give notice serves a legitimate purpose by ensuring that there is proper planning to facilitate the exercise of the right to assemble; the giving of notice does not impose an onerous duty on the convener of a gathering; section 12(2) of the Act provides the defence of spontaneity against a section 12(1)(a) charge; and that the criminalisation of the failure to give prior written notice or adequate

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48 *Mlungwana* case para 29.

49 *Mlungwana* case para 30.

50 *Mlungwana* case para 31.

51 *Mlungwana* case paras 32-33.

52 *Mlungwana* case para 34.

53 *Mlungwana* case para 35.

notice effectively deters the convening of gatherings without notice, which are more likely to be violent.<sup>54</sup> The High Court held that section 12(1)(a) constitutes a limitation on the right in section 17 of the Constitution because of the frightening and deterring effect criminalisation had on the exercise of the right to assembly.<sup>55</sup> The High Court concluded that the limitation could not be justified under section 36 of the Constitution.<sup>56</sup> As required by the Constitution, the Constitutional Court therefore had to confirm the finding of constitutional invalidity of section 12(1)(a) of the Act.<sup>57</sup> This was the heart of the applicant's argument before the Constitutional Court as they refused to plead spontaneity under section 12(2) of the Act.

### 3 2 Decision and reasons for the decision

The Constitutional Court confirmed the finding of constitutional invalidity of the High Court on the ground that section 12(1)(a) of the Regulations of Gatherings Act constitute a limitation on the right to freedom of assembly and that the limitation could not be justified under section 36 of the Constitution.<sup>58</sup> In order to arrive this decision, the Court had to determine whether the right in section 17 of the Constitution was limited, and if so, whether the limitation was justified. This required an examination of (a) the content and scope of the relevant protected right; and (b) the meaning and effect of the disputed enactment to see whether there is any limitation of (a) by (b).<sup>59</sup>

The Court indicated that although the meaning of the right to assemble peacefully and unarmed under section 17 of the Constitution is clear and unambiguous, the scope and content of the right must be interpreted generously.<sup>60</sup> The Court indicated that the only internal qualifier to the right is that its exercise must be peaceful and unarmed. The Court held that the term "Everyone" contained in section 17 of the Constitution "must be interpreted to include every person or group of persons – young or old, poor or rich, educated or illiterate, powerful or voiceless. Whatever their station in life, everyone is entitled to exercise the right in

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54 *Mlungwana* case para 35.

55 *Mlungwana* case para 36.

56 *Mlungwana* case para 36. S 36 of the Constitution provides that: "(1)The rights in the Bill of 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 relationship 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."

57 This power is conferred on the Constitutional Court by s 167(5) of the Constitution.

58 *Mlungwana* case para 101.

59 *Mlungwana* case para 42.

60 *Mlungwana* case para 43.

section 17 to express their frustrations, aspirations or demands”.<sup>61</sup> Based on this interpretation, the Court indicated that anything that would prevent unarmed persons from assembling peacefully would therefore limit the right in section 17 of the Constitution.<sup>62</sup> The Court ruled that although mere regulation of gatherings for the purpose of ensuring the enjoyment of the right to assemble peacefully and unarmed was acceptable, the deterring effect of criminal sanction in section 12(1)(a) of the Act amounted to a limitation of the right in section 17 of the Constitution.<sup>63</sup> The Court reasoned that:

“The possibility of criminal sanction prevents, discourages and inhibits freedom of assembly, even if only temporarily. In this case, an assembly of 16 like-minded people cannot just be convened in a public space. The convener is obliged to give prior notice to avoid criminal liability. This constitutes a limitation of the right to assemble freely, peacefully, and unarmed. And this limitation not only applies to conveners but also to those wanting to participate in an assembly. If a convener is deterred from organising a gathering, then in the ordinary course (save for the rare spontaneous gathering) a gathering will not occur.”<sup>64</sup>

The Court indicated that the above conclusion was consistent with the position adopted by specialised international and regional legal bodies at the level of the United Nations and the European Union which have held that criminalising the failure to give notice of an intended assembly limits the right to freedom of assembly.<sup>65</sup> The Court quoted with approval article 21 of the International Covenant on Civil and Political Rights of 1966 (ICCPR) which asserts that no restrictions may be placed on the exercise of the right of peaceful assembly other than those imposed “in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order... the protection of public health or morals or the protection of the rights and freedoms of others”.<sup>66</sup> In view of this provision, the Court emphasised that any requirement for a notice must be in line with one of the purposes in article 21 of the ICCPR otherwise the restriction will be unjustified. Drawing from the work of the United Nations (UN) Human Rights Committee, the Court noted that it is a restriction of the right to freedom of assembly to require conveners to conclude contracts with city services for the maintenance of security and cleaning for gatherings before authorisation is granted or for administrative fines to be imposed for failure to secure authorisation for a gathering.<sup>67</sup> The Court observed that at the international level, the approach adopted for the scope of the right to assemble peacefully is broad, focusing primarily on the justification of the restriction on the right.<sup>68</sup> In this regard, the Court

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61 *Mlungwana* case para 43.

62 *Mlungwana* case para 43.

63 *Mlungwana* case paras 46-47.

64 *Mlungwana* case para 47.

65 For details, see *Mlungwana* case paras 48-55.

66 *Mlungwana* case para 48.

67 *Mlungwana* case para 50.

68 *Mlungwana* case para 50.

noted that restrictions include measures taken before, during and after a gathering, such as punitive measures.<sup>69</sup> Despite the broad approach adopted by the Court to the right in section 17 of the Constitution, it observed that: “what has been said on this topic must in no way be understood to imply that the right in section 17 must be exercised otherwise than peacefully and unarmed”.<sup>70</sup> The Court emphasised that individuals who convene and participate in a gathering while harbouring intentions of acting violently, forfeit their constitutional protection.<sup>71</sup>

Having set out the scope of the right and the grounds for restriction under international law, the Court proceeded to examine whether the limitation of the constitutional right to freedom of assembly by section 12(1)(a) of the Act was justifiable under section 36 of the Constitution.<sup>72</sup> The Court pointed out that this justification analysis calls for the “weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment”.<sup>73</sup> According to the Court, this balancing act must give way to a global judgment on the proportionality of the limitation and that the onus rests on the respondents to demonstrate that the limitation is justified.<sup>74</sup> The Court proceeded to use the following factors outlined in section 36 of the Constitution to determine the proportionality of the restriction imposed by section 12(1)(a) of the Act: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.<sup>75</sup>

In relation to the first factor, the nature of the right, the Court indicated that the right in section 17 of the Constitution was at the heart of South Africa’s constitutional democracy for several reasons.<sup>76</sup> Firstly, it gives voice to vulnerable people without economic or political power and creates a mechanism through which they can voice their legitimate concerns and frustrations.<sup>77</sup> Secondly, the right to freedom of assembly enables people to exercise or realise other human rights and freedoms.<sup>78</sup> Based on this link, the Court reasoned that limiting the right to freedom

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69 *Mlungwana* case para 51.

70 *Mlungwana* case para 55.

71 *Mlungwana* case para 55.

72 For an outline of s 36 of the Constitution, see fn 38 above.

73 *Mlungwana* case para 57.

74 *Mlungwana* case para 57.

75 For details, see *Mlungwana* case paras 58-110.

76 *Mlungwana* case paras 61-73.

77 The Court observed that: “People who lack political and economic power only have protests as a tool to communicate their legitimate concerns. To take away that tool would undermine the promise in the Constitution’s preamble that South Africa belongs to *all* who live in it, and not only a powerful elite. It would also frustrate a stanchion of our democracy: public participation. This all the more pertinent given the increasing rates of protests in constitutional South Africa lately.” *Mlungwana* case para 69.

78 *Mlungwana* case paras 71-72.

of assembly carries the risk of indirectly limiting other rights.<sup>79</sup> Thirdly, the Court noted that the constitutional right gives civil society organisations the space needed to use their members to collectively hold government to account and to influence political processes and business decisions.<sup>80</sup> In addition, the Court observed that the historical context of the country, viewed through the brutal denial of basic political rights to the majority during apartheid, and the failure of draconian historical legislation to suppress the majority, highlight the importance of the constitutional protection of the right to freedom of assembly.<sup>81</sup> According to the Court, section 17 of the Constitution represents a solemn commitment to citizens and non-citizens alike to move away from South Africa's dark past when peaceful gatherings of blacks were brutally crushed without any regard for the legitimacy of the grievances underlying their protests.<sup>82</sup> Based on these reasons, the Court indicated that just like under international law, South Africa places a very high premium on the right to freedom of assembly as it is a cornerstone to any democratic society.

In relation to the second factor, the importance of the purpose of the limitation, the Court dismissed the argument of the respondents that the requirement for notice allows proper planning for the deployment of police and that this reduces the risk of disruptive protests on four grounds.<sup>83</sup> Firstly, the Court reasoned that the respondents' use of lack of resources by the police to justify the need for section 12(1)(a) of the Act is unacceptable because ordinarily a lack of resources or an increase in cost on its own cannot justify a limitation of a constitutional (civil and political) right. According to the Court, the obligation to respect, promote and fulfil human rights come at a cost and that cost is the price the Constitution commands the state to bear.<sup>84</sup> The Court indicated that the respondents had not presented evidence to show the extent to which policing costs would increase if it were to declare section 12(1)(a) of the Act unconstitutional and that it was also in the dark as to what would happen if the incentive (criminalization and punishment) for giving notice were removed entirely, or if parliament was to adopt other ways of incentivising notice. The Court established that there was lack of information on the "relation between the incentive to give notice, the actual giving of notice, the frequency of the violence at the unnotified protests, and the attendant costs incurred by SAPS should the incentivising mechanism of section 12(1)(a) with its penal condemnation be removed from the Act".<sup>85</sup> According to the Court, this significantly deflated the importance of the purpose behind section 12(1)(a) of the Act.<sup>86</sup> Secondly, the Court reasoned that there was a weak link between

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79 *Mlungwana* case paras 71-72.

80 *Mlungwana* case paras 61-63.

81 *Mlungwana* case paras 64-67.

82 *Mlungwana* case para 67.

83 *Mlungwana* case paras 74-81.

84 *Mlungwana* case para 76.

85 *Mlungwana* case para 77.

86 *Mlungwana* case para 77.

the criminalisation and the achievement of section 12(1)(a)'s ultimate purpose of preventing violent protests.<sup>87</sup> Thirdly, the Court was of the view that although the need to reduce crime levels during protests was a legitimate aim, the measure contained in section 12(1)(a) of the Act had the potential of extensively and inappropriately invading the right of individuals to freedom of assembly.<sup>88</sup> The Court remarked that it was not acceptable for the state, in responding to the regrettable phenomenon of violent protests, to employ heavy-handed countermeasures that disproportionately limit the right in section 17 of the Constitution.<sup>89</sup> The Court indicated that the critical question will always be how best to strike a balance between the exercise of the right in section 17 of the Constitution and ensuring a safe and secure environment.<sup>90</sup> Lastly, the Court pointed out that the respondents did not argue that the failure to give notice is hard to defend in a constitutional democracy thereby meriting punishment.<sup>91</sup> According to the Court, crime and punishment were resorted to solely for their deterrent effect.

In relation to the third factor, the nature and extent of the limitation, the Court underscored that the more severe a limitation is, the more powerful the justification for the limitation needs to be. According to the Court, the "severity of a limitation is established by considering the impact the limitation has on the right in question, the social position of those affected by the limitation, and whether the limitation is mitigated at all".<sup>92</sup> Based on these considerations, the Court reasoned that the limitation in this context was too severe for four reasons:

The Court found that the reach of criminal liability under section 12(1)(a) of the Act was exceedingly broad in two ways. Firstly, that the definitions of gatherings and conveners are broad and expand the scope of criminal liability for contravening section 12(1)(a) in two respects: Convening peaceful assemblies of more than 15 people in a public space to discuss "principles, policies, actions or failure to act by any government, political party, or political organisation" without notice is a crime. The Court found that: "This breadth and, by all accounts, legislative overreach, point to how section 12(1)(a) results in criminalisation without regard to the effect of the protest on public order. This exacerbates the severity of the limitation."<sup>93</sup> The Court indicated that the categorical criminalisation of the failure to give notice was contrary to the position in international law which emphasises that every infringement of the right to freedom of assembly must be on the facts to a legitimate purpose. Based on this, the Court indicated that the blanket nature of the restriction in the Act that criminalises gatherings as an end in itself invariably falls short of being legitimate. According to the Court,

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87 *Mlungwana* case paras 78 and 93.

88 *Mlungwana* case paras 79-80.

89 *Mlungwana* case para 80.

90 *Mlungwana* case para 80.

91 *Mlungwana* case para 81.

92 *Mlungwana* case para 82.

93 *Mlungwana* case para 84.

this restriction encroached on the right to freedom of assembly without linking the restriction to a legitimate purpose in every instance of encroachment. The Court therefore ruled that section 12(1)(a) of the Act was unconstitutional because its restriction was not context and fact sensitive.<sup>94</sup> Secondly, the Court indicated that where a convener is not appointed in terms of section 2 of the Act, anyone who “has taken any part in planning or organising or making preparations for the gathering” might be criminally liable irrespective of how marginal their role was. This also applies to anyone who by themselves “or through any other person, either verbally or in writing, invited the public or any section of the public to attend that gathering”.<sup>95</sup> This broad reach of criminal liability aggravates the extent of the limitation of section 17 of the Constitution.

The second reason the Court advanced for finding the limitation of section 12(1)(a) of the Act to be too severe was that catastrophic effect that criminalisation had on those caught within its wide net.<sup>96</sup> The Court highlighted the fact that the possibility of arrest and its consequences, even without a conviction, was enough to discourage those seeking to exercise their right in section 17 of the Constitution. In addition, if convicted, those involved faced punishment, stigma and a criminal record for a minimum of ten years. These consequences of criminalisation have the potential of severely discouraging people from exercising their right to freedom of assembly.<sup>97</sup> Thirdly, the Court reasoned that the chilling effect of criminalisation went beyond those who convened assemblies without notice. The Court indicated that some people may be deterred from convening a gathering and prospective attendees might be dissuaded from attending because they too may be deemed to have convened the gathering without notice.<sup>98</sup> Lastly, the Court held that because the Act does not distinguish between adult and minor conveners, children who may not have the resources or know the requirements for an adequate notice and they may be indiscriminately held criminally liable if they fail to give notice before convening a gathering. The Court reasoned that exposing children to the criminal justice system is a traumatic experience and that, as section 12(1)(a) of the Act does through criminal liability, this severely exacerbates the extent of the limitation. The Court held that subjecting children to the full rigour of penal sanctions like adults without taking into account their vulnerability and lack of self-restraint cannot be justified on any rational basis.<sup>99</sup>

The Court rejected the argument that the severity of the limitation in section 12(1)(a) of the Act is mitigated by the defence of spontaneity on the basis that its viability is exaggerated. The Court pointed out that the

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94 *Mlungwana* case para 85.

95 *Mlungwana* case para 86.

96 *Mlungwana* case para 87.

97 *Mlungwana* case para 87.

98 *Mlungwana* case para 88.

99 *Mlungwana* case para 89.

defence will not be available to most conveners because convening includes an element of planning. The defence can only benefit a limited class of conveners who arranged a demonstration and it turned into a gathering without reasonable foresight on their part. The defence of spontaneity will not be available to people who planned a peaceful, unarmed gathering without prior notice and this severely limits their section 17 constitutional right.<sup>100</sup> In addition, the Court reasoned that, taking into account the requirements of section 3(2) and (3) of the Act, the giving of adequate notice required considerable effort on the part of the convener, first to acquaint himself with the requirements and to satisfy them.<sup>101</sup>

In relation to the fourth factor, the relation between the limitation and the purpose, the Court found that the limiting means employed in section 12(1)(a) of the Act are not rationally related to or reasonably capable of achieving the professed purpose of the limitation.<sup>102</sup> The Court reasoned that there was lack of a “tight fit” in relation to the link between the criminalisation of not giving notice and preventing violent protests through police presence. According to the Court, someone could be criminalised for failing to give notice, and yet police presence to prevent violence at the gathering was not necessary. On the other hand, sometimes notice may not be required but police presence to prevent violence will be required. The Court justified this reasoning on the fact that although the requirement to give notice pivots on there being more than 15 people, a disruptive protest does not depend on the number 15. The Court held that the limitation in terms of criminal liability for failure to give notice is neither sufficient nor necessary for achieving the ultimate purpose of that limitation – peaceful protest through the presence of the police.<sup>103</sup>

In terms of the fifth factor, less restrictive means, the Court held that the respondents failed to prove that the less restrictive incentives identified by the applicants in foreign jurisprudence will not work just as well as criminalisation, without the grave consequences that flow from a conviction in terms of section 12(1)(a) of the Act.<sup>104</sup>

After the above proportionality analysis in terms of section 36 of the Constitution, the Court concluded that:

“In balancing the above factors, it becomes clear that section 12(1)(a) is not ‘appropriately tailored’ to facilitate peaceful protest and prevent disruptive assemblies. The right entrenched in section 17 is simply too important to countenance the sort of limitation introduced by section 12(1)(a). Moreover, the nature of the limitation is too severe and the nexus between the means adopted in section 12(1)(a) and any other conceivable legitimate purpose is too tenuous to render section 12(1)(a) constitutional. This is even more so

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100 *Mlungwana* case para 90.

101 *Mlungwana* case para 91.

102 *Mlungwana* case paras 92-94.

103 *Mlungwana* case para 93.

104 *Mlungwana* case paras 95-100.

when regard is had to the existence of a less restrictive means to achieve section 12(1)(a)'s purpose. Consequently, this Court can only conclude that section 12(1)(a) is unconstitutional. In these circumstances, the underlying reasoning in the judgment of the High Court is correct. It therefore follows that the High Court's declaration of constitutional invalidity must be confirmed subject to some semantic and yet consequential variations to be reflected in the order below."<sup>105</sup>

After arriving at the above conclusion, the Court tailored its order to include, *inter alia*, that: the declaration by the High Court regarding the constitutional invalidity of section 12(1)(a) of the Act was confirmed to the extent that it makes the failure to give notice or the giving of inadequate notice by any person who convened a gathering a criminal offence; the declaration of constitutional invalidity should not apply retrospectively and should not affect finalised criminal trials or those trials in relation to which review or appeal proceedings have been concluded; and the appeals of the applicants against their convictions in the Magistrates Court for contravening section 12(1)(a) of the Act are upheld and the resultant convictions and sentences set aside.<sup>106</sup>

It is important to note that, after an in-depth analysis of the jurisprudence of the Constitutional Court on the right to protest in South Africa, Barrie concludes that the decision in the *Mlungwana* case neatly fits into the general approach adopted by the Court in previous cases.<sup>107</sup> Therefore, the decision did not come as a surprise and resonates with the position adopted by Woolman above. Barrie however argues that, the Court could have enriched its jurisprudence by taking into consideration the constitutional jurisprudence of the Federal Republic of Germany.<sup>108</sup>

## 4 Implications for the regulation of university students' protests and the way forward

### 4.1 Current regulation of students' protests by South African universities

All universities in South Africa are organs of state discharging the function of national government to provide tertiary education in terms of the Higher Education Act 101 of 1997.<sup>109</sup> Although universities have

105 *Mlungwana* case para 101.

106 *Mlungwana* case para 112.

107 Barrie 2019 *TSAR* 417.

108 Barrie 2019 *TSAR* 416.

109 See, *Nutesa v Central University of Technology, Free State* 2009 30 ILJ 1620 (LC) paras 31-41. Universities in South Africa are public higher education institutions established in terms of ss 20 and 23 of the Higher Education Act 101 of 1997. In addition, universities are organs of state in terms of the definition of an organ of state in s 239 of the Constitution. Schedule 4A of the Constitution makes it clear that national and provincial governments share concurrent legislative competence regarding education at all levels excluding tertiary education. There are many private higher education colleges in South Africa but not universities.

powers to establish structures to make and implement policies and rules for their effective governance in terms of the Higher Education Act,<sup>110</sup> as organs of state, they are obliged to comply with human rights duties emanating from the Constitution.<sup>111</sup>

In light of their constitutional human rights duties, some universities in South Africa have adopted policies, rules and regulations to guide the exercise of the section 17 constitutional right by their students. For example, the “UJ Student Regulations” adopted by the University of Johannesburg in 2007<sup>112</sup> regulates, *inter alia*, organised student activity. The UJ Student Regulations (2007) recognise the right of students to organise demonstrations.<sup>113</sup> However, it provides that if students want to organise a march, demonstration, protests action or similar event, they must apply for such action in writing to the Director: Student Life and Governance at least five working days before the date of the action.<sup>114</sup> According to the Regulations, in considering the application, the Director takes into account whether or not the action might: cause damage or injury to other people, or violate their rights;<sup>115</sup> and whether the action will disrupt or otherwise represent a seriously detrimental interference with the academic work of other students or staff, or the orderly functioning of the University.<sup>116</sup> The Regulations further provides that: “No mass or protest actions in the form of unlawful processions, meetings, boycotts, occupation of venues or any other area will be permitted”.<sup>117</sup> In addition, the Regulations provide that “No protest in any form against an individual will be permitted”.<sup>118</sup>

On 18 March 2019, the Council of the North-West University (NWU) adopted “Policy and Rules on Gatherings, Demonstrations and Picketing”. The NWU Policy recognises the constitutional right of its students to assemble, demonstrate and picket on or in close proximity to any property of the University, “subject to the limitations of the law”.<sup>119</sup> The NWU Policy prescribes that: “A convenor must, at least seven days prior to the intended protest, give written notice with intention to seek written permission to the registrar, of the intention to convene a protest

110 See, generally ss 26-32, 35-37 of the Higher Education Act.

111 See, ss 7(2) and 8(1) of the Constitution.

112 University of Johannesburg Student Regulations (14G/14.4, Recommended by Senate on 14 May 2007. Approved by Council on 20 September 2007). Although this Regulation is supposed to be reviewed every five years in terms of pars 21.1 and 21.2, this researcher is not aware of any subsequently revised version.

113 University of Johannesburg Student Regulations (2007) para 6.1.1.

114 University of Johannesburg Student Regulations (2007) para 6.1.1.

115 University of Johannesburg Student Regulations (2007) para 6.1.1.1.

116 University of Johannesburg Student Regulations (2007) para 6.1.1.2.

117 University of Johannesburg Student Regulations (2007) para 6.1.2.

118 University of Johannesburg Student Regulations (2007) para 6.1.3. This provision is problematic because the Regulation of Gatherings Act makes it possible for demonstrations and gatherings to be directed against an individual in terms of their definition in s 1 of the Act.

119 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 4.1.

on or in close proximity to any property of the university”.<sup>120</sup> Although it may be argued that a notice with intention to seek written permission from the Registrar is not an application to protest, it can be read as such because a protest will be unlawful without approval from the University. In terms of the NWU Policy, the Registrar must consider an application in consultation with the relevant Deputy Vice Chancellor (DVC) Campus operations, and he/she may grant or refuse such request within a reasonable time.<sup>121</sup> The NWU Policy further provides that an application for a protest may be refused and the protest may be prohibited “for good reason, including where the possibility exists of injury to persons, damage to private or university property, disruption of academic activities, disruption of the discipline or good order within the university or where disruptive involvement of persons or organisations external to the university may be reasonably expected”.<sup>122</sup>

When an application is not approved, the Registrar is required to inform the convenor in writing and to provide written reasons for the refusal.<sup>123</sup> On the other hand, where an application is approved, prior to the protest, “a written agreement in the form prescribed by the registrar must be entered into between the convenor and the university”.<sup>124</sup> Paragraph 5.2 of the NWU Policy regulates the nature of, and conduct during a protest. According to paragraph 5.2.1, the convenor must in the prior protest agreement contemplated in paragraph 5.1.5, and before the start of the protest: confirm the nature of the intended protest i.e. a gathering, picket, march or demonstration; give notice of the time and place of the commencement; give reasons for the protest; indicate the number of marshals to be appointed; and request access to the facilities of the NWU required for purposes other than but related to the protests such as toilets. In terms of conduct during protest, paragraph 5.2.2 provides that the convenor must: at all times have a copy of the agreement entered into with the university and the list of appointed and present marshals, at hand; ensure that marshals are identified with full particulars; ensure that marshals monitoring the protest are wearing an identifiable uniform; and require marshals to ensure that the rights of others are not infringed by the protest. A convenor or participant in an unauthorised protest can be subjected to disciplinary measures by the University (see paragraph 5.3).<sup>125</sup> Disciplinary processes can also be

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120 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.1.1.

121 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.1.2.

122 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.1.3.

123 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.1.4.

124 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.1.5.

125 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.3.

instituted against a convenor or protester that deviates from the pre-protest agreement contemplated in 5.1.5.<sup>126</sup>

In Stellenbosch University, students need to apply for authorisation for student gatherings, petitions and protests marches on campus. In terms of the Disciplinary Code for Students of Stellenbosch University (2017), approved by Council on 26 September 2016, “No student may organize or participate in an event or gathering for which the required permission has not been granted, or which takes place in contravention of any condition or permission having been granted”.<sup>127</sup>

## 4 2 Implications of the *Mlungwana* judgment for the regulation of students’ protests

A juxtaposition of the university policies and rules above with the jurisprudence of the Constitutional Court in the *Mlungwana* case show that the position adopted by some universities in relation to pre-authorisation for university students’ protests is aligned with the provisions of the Regulation of Gatherings Act but inconsistent with the demands of the Constitution. In other words, the position adopted in the policies and rules of the University of Johannesburg, the North-West University and Stellenbosch University, for example, are mostly aligned to the legal position before the *Mlungwana* judgment. The main lesson universities should take home in light of the *Mlungwana* judgment is that, although they have powers to regulate student protests in order to facilitate the enjoyment of the right in section 17 of the Constitution,<sup>128</sup> policies and rules adopted to this effect should not oblige students to obtain approval from university management in order to engage in a peaceful and unarmed protest.<sup>129</sup> As the Court indicated in the *Mlungwana* case, pre-authorisation notice for demonstrations unjustifiably limits the right to assemble in peace and unarmed and that this is not in line with internationally accepted best practice. The need for authorisation and the consequences that may befall students that convene and participate in protests without prior authorisation has a chilling effect on their right guaranteed in section 17 of the Constitution. Many students will avoid violating these policies and rules for fear of being dragged through intimidating disciplinary proceedings. The number of days required for the giving of notice and the powers of university officials to approve or disapprove an application for demonstrations and gatherings can be used to stifle students’ protests.

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126 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.3.

127 Disciplinary Code for Students of Stellenbosch University (2017) par 15.1, p 20.

128 The mere regulation of the right in s 17 of the Constitution is not unacceptable. See the *Mlungwana* case paras 45-46.

129 In the context of municipalities, Stoffels concludes that there is the need to educate municipalities about the effect of the *Mlungwana* judgment and the need to revisit their current practices in relation to gatherings. See Stoffels 2019 *Obiter* 416.

The decision of the Court in the *Mlungwana* case is a positive one and should be embraced for its potential to enhance the enjoyment of the right to protests. The position adopted by the Court is in line with what Woolman had argued several years ago.<sup>130</sup>

While universities cannot impose pre-authorisation notice as a requirement that must be complied with before students' protests or demonstrations, it is submitted that they retain the powers to regulate how the right to protests can be exercised on their campuses. In line with this view, the Constitutional Court held in the *Garvas* case that "the mere legislative regulation of gatherings to facilitate the enjoyment of the right to assemble peacefully and unarmed, demonstrate, picket and petition may not in itself be a limitation" of the right in section 17 of the Constitution.<sup>131</sup> Despite this assertion, the scope of the powers of universities to regulate students protests is uncertain. What their regulatory powers entails in this context is not clear. It is suggested that this could be understood as the power to develop guidelines that will enable students to appropriately enjoy and exercise the right to assemble, demonstrate, picket and present petitions in a peaceful and unarmed manner.<sup>132</sup> This power should not be used to put in place onerous requirements that must be complied with before, during and after students protests. Doing otherwise will effectively limit the right of students to protest in section 17 of the Constitution. Guidelines developed by universities could include: information on appropriate persons to receive petitions during students protests; safety measures and procedures to be followed where a peaceful protests becomes violent; list of words which are likely to cause or encourage violence against any person or groups of persons during protests; discouraging protesting students from forcing others to participate in protests; guidance on how students who are compelled to join protests action can deal with such pressure; and clear explanation of the consequences that will flow from any breach of existing laws, including consequences for destruction of property. This list is not exhaustive.

The generous approach adopted by the Court to the interpretation of the right in section 17 of the Constitution should not leave universities too worried about students abusing the right to protest without authorisation to damage university property. A clear communication of the Court's firm position against violent protests that infringe on the rights of others and often lead to the destruction of property may be

130 Woolman 43-7 to 43-9. See also Barrie 2019 TSAR 417.

131 *SATAWU v Garvas supra* para 55.

132 This thinking is borrowed from the Court's jurisprudence on the powers of national and provincial government to regulate municipalities. See *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Councils*; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town* 2014 5 BCLR 591 (CC) para 22.

sufficient to dissuade protesting students from violent conduct. In *Hotz v University of Cape Town*,<sup>133</sup> Justice Nkabinde (ACJ) reiterated the position of the Court that the right in section 17 of the Constitution must be exercised peacefully and that where students have no intention of acting peacefully, they lose their constitutional protection.<sup>134</sup> To this effect, in the context of students protests in the University of Cape Town, the Court remarked that:

“Their right to assemble and to demonstrate ceased when their demonstration or protest become violent, thus violating the rights not only of the University but also of others at the campus.... Self-help, as this Court has pointed out, is inimical to a society in which the rule of law prevails. Destruction of property, particularly in our learning institutions, cannot be tolerated. The High Court is correct that it could not have been within the contemplation of the drafters of the Constitution that section 17 be used to justify hooliganism, vandalism or any other unlawful and illegitimate misconduct. There can be no doubt that the protestors’ conduct went beyond the boundary of peaceful and non-violent protest.”<sup>135</sup>

In addition to the above strong condemnation of violent students’ protests, the Court indicated clearly that universities have the right to punish students who engage in violent protests that lead to the destruction of property. According to the Court, “students responsible for these transgressions must be held accountable through appropriate legal means”.<sup>136</sup> Appropriate legal means in this context is broad. It is not limited to internal university disciplinary processes and procedures but includes resorting to courts to seek appropriate relief either under common law or statutory law. The imprisonment of some #FeesMustFall activists for violent conduct and the destruction of property during the 2015-2016 nation-wide university students’ protests is significant deterrence to such conduct for other students in future.

Although the “#FeesMustFall” movement has come and gone, it is myopic to believe that this signalled an end to students’ protests in universities across South Africa. The higher education environment is dynamic and one can certainly expect students to resort to their rights in section 17 of the Constitution to address grievances whenever they deem this appropriate. Although the regulation of student protests by universities is not new in South Africa, it is necessary to ensure that future regulation is in line with the obligations emanating from the Bill of Rights. The *Mlungwana* case provides valuable guidance in this regard.

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133 *Hotz v University of Cape Town* 2017 ZACC 10

134 *Hotz v University of Cape Town supra* paras 30-32 and 39. See *SATAWU v Garvas supra* paras 52-55.

135 *Hotz v University of Cape Town supra* paras 31-32.

136 *Hotz v University of Cape Town supra* para 39.