IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 21/49197

In the matter between:

THE RIGHT2KNOW CAMPAIGN	First Applicant
GAUTENG HOUSING CRISIS COMMITTEE	Second Applicant
KEITH DUARTE	Third Applicant

and

CITY MANAGER: CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	First Respondent
CHIEF OF THE JOHANNESBURG METROPOLITAN POLICE DEPARTMENT	Second Respondent

---

APPLICANTS' HEADS OF ARGUMENT

A. INTRODUCTION AND OVERVIEW

1. This is an application to declare invalid and unlawful the practice, law, regulation or resolution of requesting a fee from convenors of protests by the City of Johannesburg.[1] To that end, the applicants seek a declarator to the effect that the charging of fees to those who seek to exercise their constitutional right to assembly, demonstration, picket and petition is unconstitutional and unlawful.[2]

2. For the purpose of these submissions, the term "protest" and or the phrase "the right to protest" will be used as a placeholder for the right in section 17, that is, assembly, demonstration, picket and petition.

3. The essence of the argument is as follows: since neither the Constitution nor the Regulation of Gatherings Act 205 of 1993 (Gatherings Act) prescribe a fee to be paid by convenors of protests, the requirement by the respondents that convenors of protests must pay a prescribed fee before embarking on a protest is unconstitutional and therefore unlawful.[3]

4. Members of the applicants, who engage with the respondents regularly, have stated under oath, in these proceedings, that the respondents treat the fee as an absolute necessity – a pre-condition – that allows one to exercise their right to protest. The respondents inform people and organisations that want to protest that if the fee is not paid, then their planned protest, if it continues, will be deemed unlawful and that there will be no deployment of officers from the respondents.[4]

[1] Founding Affidavit (FA) Caselines page 2-3 para 10.
[2] Reply Affidavit (RA) Caselines page 6-2 para 5.
[3] Founding Affidavit (FA) Caselines page 2-4 para 11 and 12.
[4] FA Caselines page 2-13 para 50 and 62.

5. As a result, those who cannot afford to pay the fee are unable to exercise their right to protest. The reason for this is simple, many individuals, formations and organisations that rely on the right to protest, are indigent, and they use the right to protest to demand basic services.[5]

B. BRIEF HISTORICAL BACKGROUND

6. On 23 October 2020, members of the applicant held a peaceful protest in the Johannesburg Central Business District.[6]

7. However, before the protest, and in line with the provisions of the Gatherings Act, the applicants attended a meeting with the respondents in order to discuss logistical issues pertaining to the march.[7]

8. After the meeting, as is the procedure of the Johannesburg Metropolitan Police Department (JMPD), the convenor of the protest was directed to another office, where the convenor was requested to make a payment of R297.00 to the second respondent.[8]

9. The request for a fee was presented as though it was a pre-condition for approval of the protest. The officials of the respondents specifically informed the convenor that if he refused to pay the intended protest, if it continued, they would be

[5] RA Caselines page 6.3 para 8 – 9.
[6] FA Caselines page 2-14 at para 55.
[7] FA Caselines page 2-14 at para 56.
[8] FA Caselines page 2-15 at para 57.

deemed unlawful and that there would be no law enforcement agents present on the day of the protest.[9]

10. It must be understood that the absence of law enforcement agents has chilling consequences.[10]

    10.1. The first of these consequences is that it gives the impression that the protest is illegal and, therefore, the protesters are committing a crime.

    10.2. The second is that the person to whom the demands of the protesters are to be submitted, will in all likelihood, not come to receive those demands for fear of their lives.

    10.3. The third is that the protesters themselves are at risk of being harmed by motorists who the protest has inconvenienced.[11]

11. Out of fear of any of the above, on 19 October 2020, the third respondent paid the prescribed fee of R297.00 to the offices of the second respondent and the gathering proceeded as planned on 23 October 2020.[12]

12. The applicants are placed in a precarious position by the required fee and how officers treat that fee of the respondents – either you pay the fee and your protest is legitimate, or you refuse to pay and you risk breaking the law and not having

[9] FA Caselines page 2-15 at para 58.
[10] FA Caselines page 2-15 at para 59.
[11] FA Caselines page 2-15 at para 59.
[12] FA Caselines page 2-15 – 2-16 paras 60 – 62.

your demands accepted by the person or institution against which you are protesting.[13]

13. On this basis, the paying of the prescribed fee is on compulsion. The members of the applicants and others that are indigent have to borrow money and go into debt in order to afford these fees. Sometimes the applicants and their members are unable to pay the fee and the consequence is that no protest takes place.[14]

14. The applicants are also aware that if a particular convenor is unable to pay the fee and threatens litigation on the basis that the convenor believes that the fee is unlawful, the officials of the respondents give in and allow the protest. However, this often requires consultations with lawyers, and sometimes counsel to prepare the papers.[15]

15. The applicants have come before this Court in their own interest but also in the interest of many more community members and social justice activists who, as a result of their level of poverty and deprivation, would be unable to pay the fee and will be unable to bring this form of an application.[16]

16. It was after the protest action of 23 October 2020 that the applicants sought a legal team to represent them so that they could launch these proceedings.

[13] FA Caselines page 2-15 para 59.
[14] FA Caselines page 2-16 para 62.
[15] FA Caselines page 2-16 para 63.
[16] FA Caselines page 2-16 para 64 – 65.

17. To their fortune, the Centre for Applied Legal Studies, an institution that takes up cases on behalf of indigent people, was available to take up their case.

18. Even before the incident described above, which led to the applicants paying the fee on 19 October 2020, the applicants are aware that at the very least, since 2011, the respondents have charged certain fees for protest action.[17] These fees have ranged from R172 for a picket organised by another civil society organisation, Sonke Gender Justice, to R15000 for a workers' march convened by NUMSA, and on 31 March 2021, an amount of R778 was charged for a picket organised by Sonke Gender Justice.[18]

C. STANDING

19. The applicants have approached this Court both in their interest and in the public interest. In this regard, section 38 of the Constitution states:

> "Enforcement of rights
> 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[17] FA Caselines page 2-13 para 48.
[18] FA Caselines page 2-13 para 48.

20. In *Van Rooyen & Others v The State & Others*[19] , the Court stated that section 38 provides for unlimited *locus standi in judicio*.

> "The courts are *par excellence* the bodies which must protect the rights in the Bill of Rights. That appears clearly from the provisions of s 38 of the Constitution. The object of this section is clear and unambiguous, and it is striking that provision is made for practically unlimited *locus standi in judicio,* that no limit is placed on the manner in which persons may approach the Court, the nature of the enquiry which must take place and the relief which the Court may grant."

21. Furthermore, in *Kruger v President of the Republic of South Africa and Others,*[20] the Constitutional Court also endorsed this generous approach to standing when it stated that:

> "Section 38, however, is not of direct application in this case as it does not concern a challenge based on a right in chapter 2 of the Constitution. Nevertheless, in my view, we should adopt a generous approach to standing in this case. In so doing, I am mindful of the fact that constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights. Such an approach to standing will facilitate the protection of the Constitution."

22. Unlike in *Kruger,* in the present case, the litigation involves chapter 2 of the Constitution, the Bill of Rights. Most specifically, this litigation involves the violation of section 17 of the Constitution by the City of Johannesburg Tariff Determination Policy.

23. The applicants consequently can, without impediment, invoke the standing provisions of the Constitution in bringing this litigation in the public interest.

---

[19] *Van Rooyen & Others v The State & Others* 2001 (4) SA 396 (T), 232G–I, 2001 (9) BCLR 995 (T) ('Van Rooyen') p 423 G-H.

[20] *Kruger v President of the Republic of South Africa and Others* [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC).

D. THE PRESCRIBED FEE IS UNLAWFUL AS IT IS NOT SANCTIONED BY THE GATHERINGS ACT

24. As has been described above, the prescribed fee is paid by the convenor of the gathering at a meeting with the relevant officials of the respondents. This is a meeting in terms of section 4 of the Gatherings Act in terms of which the convenor and the relevant officials must meet in order to discuss certain prescribed issues such as the route of the protests, destination and number of protestors, among other issues. At the end of this meeting, the convenor is sent to another office of the City of Johannesburg, where they are told to pay the fee.[21]

25. The preamble to the Gatherings Act states that:

> "Preamble
> WHEREAS every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so;
> AND WHEREAS the exercise of such right shall take place peacefully and with due regard to the rights of others."

26. It is instructive that the preamble already envisages the exercise of the right to assemble as needing protection by the State and that such protection by the State for those exercising this right must be provided.

27. Section 2 of the Gatherings Act provides for the appointment of convenors by those who seek to organise a protest, and section 2(3) of the Gatherings Act provides for meetings/consultations that must take place in order for convenors and officials of the City to discuss the pending gathering.

[21] FA Caselines page 2-9 para 38.

28. Section 2 provides in essence that:

> "2 Appointment of conveners, authorised members and responsible officers
>
> (1) *(a)* An organisation or any branch of an organisation intending to hold a gathering shall appoint-
>
> (i) 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 at which his presence is required; and
> (ii) a deputy to a person appointed in terms of subparagraph (i).
> *(b)* Such organisation or branch, as the case may be, shall forthwith notify the responsible officer concerned of the names and addresses of the persons so appointed and the responsible officer shall notify the authorised member concerned accordingly.
> *(c)* If a person appointed in terms of paragraph *(a)* is or becomes unable to perform or to continue to perform his functions in terms of this Act, the organisation or branch, as the case may be, shall forthwith appoint another person in his stead, and a person so appointed shall be deemed to have been appointed in terms of paragraph *(a)*: Provided that after the appointment of a person in terms of this paragraph, no further such appointment shall be made, except with the approval of the responsible officer concerned.
> (2) *(a)* The Commissioner or a person authorised thereto by him shall authorise a suitably qualified and experienced member of the Police, either in general or in a particular case, to represent the Police at consultations or negotiations contemplated in section 4 and to perform such other functions as are conferred or imposed upon an authorised member by this Act, and shall notify all local authorities or any local authority concerned of every such authorisation, and of the name, rank and address of any authorised member concerned."

29. Section 3 of the Gatherings Act lists certain requirements that must be met before a gathering can take place.

30. Under s 3(1) of the Gatherings Act, convenors of a gathering must give notice to the responsible officer of the intended gathering. In Johannesburg, convenors are obliged to give such notice to the JMPD.

31. Section 3 (3) lists various issues that must be contained in the gathering notice, including:

> "(a) The name, address and telephone and facsimile numbers, if any, of the convener and his deputy;
> (b) 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;
> (c) the purpose of the gathering;
> (d) the time, duration and date of the gathering;
> (e) the place where the gathering is to be held;
> (f) the anticipated number of participants;
> (g) the proposed number and, where possible, the names of the marshals who will be appointed by the convener, and how the marshals will be distinguished from the other participants in the gathering;
> (h) in the case of a gathering in the form of a procession-
> (i) the exact and complete route of the procession;
> (ii) the time when and the place at which participants in the procession are to assemble, and the time when and the place from which the procession is to commence;
> (iii) the time when and the place where the procession is to end and the participants are to disperse;
> (iv) the manner in which the participants will be transported to the place of assembly and from the point of dispersal;
> (v) the number and types of vehicles, if any, which are to form part of the procession;
> (i) if notice is given later than seven days before the date on which the gathering is to be held, the reason why it was not given timeously;
> (j) if a petition or any other document is to be handed over to any person, the place where and the person to whom it is to be handed over."

32. Under section 4 of the Gatherings Act, when the responsible officer receives notice of a gathering, s/he must consult with the authorised member of the SAPS regarding the necessity for negotiations on any aspect of the conduct of or any

condition for the proposed gathering. Section 4 most notably also provides for the imposition of conditions aimed at, amongst others, the prevention of injury to persons or damage to property.

33. When convenors attend at the JMPD's offices to give notice of an intended gathering, they are furnished with a pro forma letter inviting the convenor to attend a section 4 meeting with the responsible officer.

34. In addition to specifying the date and venue of the section 4 meeting, the invitation letter lists the supporting documents to be submitted to the JMPD "so that it can properly consider the Notice". The "Check List for Gathering/ Marches" is as follows:

> "1. Confirmation letter from the Recipient for any petition;
> 2. Permission letter from the Ward Councillor commenting on the gatherings;
> 3. Permission letter from the owner/ controller of the place of gathering commenting on the gathering;
> 4. Copies of the identity documents of the convenors;
> 5. Copies of the residential/ work addresses for convenors; and
> 6. Name list of the marshals (e.g. for every 10 people 1 marshal) only their names
> 7. Planning cost _____".

35. The invitation letter, which contains the items listed above, is not provided for in the Gatherings Act. It is an administrative form that the respondents give to a convenor of a protest.

36. Section 5 provides for the prevention and prohibition of gathering. Briefly stated, it states that:

> "5 Prevention and prohibition of gathering

(1) When credible information on oath is brought to the attention of a responsible officer that there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat, he shall forthwith meet or, if time does not allow it, consult with the convener and the authorised member, if possible, and any other person with whom, he believes, he should meet or consult, including the representatives of any police community consultative forum in order to consider the prohibition of the gathering.
(2) If, after the meeting or consultation referred to in subsection (1), the responsible officer is on reasonable grounds convinced that no amendment contemplated in section 4 (2) and no condition contemplated in section 4 (4) (b) would prevent the occurrence of any of the circumstances contemplated in subsection (1), he may prohibit the proposed gathering."

37. Section 6 provides for reviews and appeals of a decision to impose a condition on a gathering in terms of section 4 (4) (b) or when a gathering is prohibited in terms of section 5 (2).

38. According to this section, there are two types of decisions that one is allowed to review and appeal: a decision placing a condition on the gathering <u>in terms of section 4 (4) (b)</u> and a decision prohibiting a gathering <u>in terms of section 5 (2)</u>. Since both of these sections do not provide for a fee, it follows that the decision to impose a protest fee is not one of the decisions that one is allowed to review or appeal in terms of section 6.

"6 Reviews and appeals
(1) (a) Whenever a condition is imposed in regard to a gathering in terms of section 4 (4) (b) or when a gathering is prohibited in terms of section 5 (2), the convener of such gathering may apply to an appropriate magistrate for the setting aside of such prohibition or the setting aside or amendment of such condition, and the magistrate may refuse or grant the application."

39. Section 9 provides for the powers of the police. It is quite clear from a reading of section 9 that the spirit and purport of section 9 is that of protection which must be rendered by the police, and if the police, for one reason or another, are unable to provide such protection, must inform the convenor.

40. The protection which must be offered by the police is not only protection of those who will be impacted by the march, such as those who are driving through but is also for the protesters themselves.

41. The interpretation clause in the Gatherings Act – section 13 – contains the following subsection:

> "(2) The provisions of section 111 of the Road Traffic Act, 1989 (Act 29 of 1989), shall not apply in respect of a gathering or demonstration held in accordance with the provisions of this Act."

42. Section 111 of the Road Traffic Act (which has since been repealed) regulated "racing and sport on public roads" through a 'prior authorisation' model for any such events. In addition to requiring prior written consent from the provincial or local authority, section 111 provided for a fee to be levied "to defray the expenses incurred by the Provincial Administration or local authority concerned in connection with the race or sport" (s 111(3)(c)).

43. The fact that section 13(2) of the Gatherings Act expressly stipulates that these provisions "shall not apply in respect of a gathering or demonstration held in accordance with the provisions of this Act" indicates that the legislature was concerned to ensure that the local authorities did not require prior authorisation and did not levy fees to defray their expenses for gatherings or demonstrations.

44. In finality, section 14 provides for instances where the provisions of the Gatherings Act conflict with provisions of other legislation.

> "14 conflict and repeal of laws (1) In the case of a conflict between the provisions of this Act and any other law applicable in the area of jurisdiction of any local authority the provisions of this Act shall prevail."

45. As can be discerned from this textual analysis of the Gatherings Act, the Act does not require the levying of fees from those who seek to exercise their right to protest. The Act, also most notably, does not empower the respondents to create their own legal frameworks in terms of which they can levy fees.

46. Since the Gatherings Act is the only act that regulates the processes leading up to a gathering, the imposition of the prescribed fee to be paid by the convenor of a gathering is therefore unlawful as it is not prescribed by the Gatherings Act.

E. THE PRESCRIBED FEE VIOLATES SECTION 17 OF THE CONSTITUTION

47. Section 17 of the Constitution provides for everyone's right to assemble, demonstrate, picket and present petitions in a peaceful and unarmed manner.

> "17. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

48. The effect of the imposition of a prescribed fee is that everyone has to pay a sum of money in order to exercise a constitutionally protected right. This is in circumstances where neither the Constitution nor the relevant legislation provides for the imposition of a fee.

49. The right to assemble and demonstrate is an important means to hold states and other entities accountable to the public. If this right can only be exercised after convenors pay a prescribed fee, this has the risk of having a chilling effect on the exercise of the right. This runs counter to the values underpinning our constitutional democracy and it cannot be left unchallenged.

50. All human rights are indivisible and interdependent. This means that one set of rights cannot be enjoyed fully without the other. In the particular facts with which this Court is seized, the right to assemble intersects with a myriad of other rights such as human dignity, equality, freedom of speech, religion, belief, opinion and freedom of association.

51. The prescribed fee imposed by the respondents, therefore, violates not only the right to assembly, demonstration, picket and petition but also infringes the plethora of other rights mentioned above. This is because the right to assembly, demonstration and picket is geared at the protection of rights and other legally recognised interests.

52. The Constitutional Court in *Mlungwana and Others v S and Another* stated the following in respect of section 17.

> "Everyone" in section 17 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 section 17 to express their frustrations, aspirations, or demands. Anything that would prevent unarmed persons from assembling peacefully would thus limit the right in section 17."[22]

[22] *Mlungwana and Others v S and Another* [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) (Mlungwana) at para 43.

53. In *South African Transport and Allied Workers Union and Another v Garvas and Others,*[23] the Constitutional Court remarked on the fees charged to convenors when the protesters have caused damage to property.

54. In essence, the Court stated that those fees limited the right in section 17. This is because those who are indigent would be deterred from organising protests as they would fear that if anything went wrong, they would be liable for the costs.

> "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. Section 11(2), read with section 11(1), goes further than simply to regulate the exercise of the right in order to facilitate its full and appropriate enjoyment by those who organise and those who participate.[24]
>
> Section 11(1) holds organisers of a gathering liable for riot damage subject to section 11(2), which provides a limited defence to a claim of this kind. The effect of these specific provisions, in the context of the Act as a whole, is to render holders of a gathering organised with peaceful intent liable for riot damage on a wider basis than is provided for under the law of delict. This is all the more so given the extremely wide definition of riot damage in the Act.26 This means that proof of liability will, as indicated earlier, be easier in a large number of cases.[25]
>
> Compliance with the requirements of section 11(2) significantly increases the costs of organising protest action. And it may well be that poorly resourced organisations that wish to organise protest action about controversial causes that are nonetheless vital to society could be inhibited from doing so. Both these factors amount to a limitation of the right to gather and protest.[26]
>
> <u>It must be emphasised that it is not the right of organisations alone that is affected. It is quite plausible that the organiser of a gathering who anticipates the involvement of, say, ten thousand people may be forced to cancel it because a few hundred of the participants would</u>

[23] *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (Garvas Judgment).
[24] *Garvas* at para 55.
[25] *Garvas* at para 56.
[26] *Garvas* at para 57.

> cause mayhem. In these circumstances, the right of thousands of people to protest peacefully and unarmed is affected.[27]
>
> It is true that the increase in costs and the wider basis on which there is civil liability will render organisations more reluctant to organise marches."[28]

55. Similarly so, the protest fee levied by the respondents has the same consequence. People who form part of shack dwellers movements, those who are unemployed, and the various unemployed people's movements, street vendors and the many street vendors associations will all be deterred from exercising their right to protest because of the fees charged.

56. It must be understood that these categories of people do not use the right to protest from time to time when things are tough. For them, their existence is consistently tough – they have to fight for basic services, jobs, houses, lands and the vast corruption in local government.

57. These people cannot opt out of public services and hire private services; they are literally at the mercy of local government and therefore have to resort to protest action quite regularly.

58. As a result, the fee charged is unconstitutional and therefore unlawful.

F. THE RESPONDENTS' ANSWER

59. In essence, the response answer is as follows:

[27] *Garvas* at para 58.
[28] *Garvas* at para 59.

59.1. First, that the applicants should have challenged the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act) and consequently should have joined the relevant minister.

59.2. Secondly, that it is incorrect for the applicants to say that the Gatherings Act is the only act that is intended to regulate the processes leading up to a protest.

59.3. Thirdly, it is incorrect to assert that the Gatherings Act was enacted for the purpose of the section 17 right.

59.4. Fourthly, that the right to protest is also regulated by the common law.

59.5. Fifthly, that there is no conflict between the provisions of the Gatherings Act and the requirement for the protest fee.

59.6. Lastly, that the right in section 17 is not absolute. It can be limited in terms of section 36 of the Constitution.

60. These arguments are all unmeritorious for the following reasons.

61. The mischief sought to be cured by this application is not in the Municipal Systems Act; it is in the City of Johannesburg Tariff Determination Policy which was adopted by the City of Johannesburg's Municipal Council by means of a resolution.

62. The provisions of the Municipal Systems Act do not provide that a municipality can levy fees from those who seek to exercise their constitutional right to protest.

63. Section 4(1)(c)(i) of the Municipal Systems Act provides that: “The council of a municipality has the right to finance the affairs of the municipality by charging fees for services.

64. Section 74(1) of the Municipal Systems Act provides that:

> “A municipal council must adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself or by way of service delivery agreements, and which complies with the provisions of this Act, the Municipal Finance Management Act and any other applicable legislation.”

65. Section 75A of the Municipal Systems Act states as follows: (1) A municipality may- (a) levy and recover fees, charges or tariffs in respect of any function or service of the municipality; and (b) recover collection charges and interest on any outstanding amount. (2) The fees, charges or tariffs referred to in subsection (1) are levied by a municipality by a resolution passed by the municipal council with a supporting vote of a majority of its members. (3) After a resolution contemplated in subsection (2) has been passed, the municipal manager must, without delay (a) conspicuously display a copy of the resolution for a period of at least 30 days at the main administrative office of the municipality and at such other places within the municipality to which the public has access as the municipal manager may determine.

66. The Municipal Systems Act provides a broad general power to levy fees. It is not this power that the applicants are challenging. For emphasis, “a municipal council must adopt and implement a tariff policy on the levying of fees. The fees, charges or tariffs referred to in subsection (1) are levied by a municipality by resolution

passed by the municipal council with a supporting vote of a majority of its members."

67. As categorically stated by the respondents in their answering affidavit, in paragraph 9.20, a policy as envisaged by the Municipal Systems Act was adopted by the council by means of a Resolution. The policy is The City of Johannesburg Tariff Determination Paragraphs 9.20 to 9.25 of the answering affidavit, evidence that it is in terms of this policy that fees are charged for protest action.

68. Moreover, In paragraph 9.23 of the answering affidavit, the respondents state:

> "I wish to refer this Honourable Court specifically to the currently applicable tariffs. in particular, I refer to the submission made to the Mayoral Committee and Council for approval of the amendment of the tariffs for traffic related services for the current financial year which is entitled "Amendment of Tariff Charges in Respect of Miscellaneous Traffic Related Services: 2020/201."

69. In a later part of paragraph 9.24 of the answering affidavit, the respondents quote directly from the tariff policy as follows:

> "All NGO's (Non-Governmental Organisation), NPO's (Non-Profitable Organisation) will be given 80% discount for service rendered."

70. At paragraph 9.25, the respondents, again quoting from the tariff policy, state the following:

> "All legal marches and gatherings happening in the City of Johannesburg and approved by JMPD will be given 80% discount."

71. As can be seen from these portions of the answering affidavit, the fees for protests are prescribed by the City of Johannesburg Tariff Determination Policy which was passed by the City of Johannesburg's Municipal Council. The fees are not prescribed by the Municipal Systems Act. That Act merely provides for a broad and general power to municipalities to raise fees for their operations.

72. Consequently, the applicants do not need to challenge the Municipal Systems Act or any other act. The mischief sought to be corrected is found in the Municipal Council Resolution of the first respondent.

73. Since the issue in this litigation involves a municipal council resolution, which is only applicable to Johannesburg residents, the respondents cannot invoke the limitation clause of the Constitution because the council resolution is not a law of general application.

74. And even if it were a law of general application, which it is not, it would not satisfy the test in section 36.

75. Section 36 of the Constitution provides that:

> "Limitation of rights
> 36. (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 relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

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

76. In *S v Makwanyane and Another,*[29] the Constitutional Court stated the following in respect of the test in section 36.

> "The criteria prescribed by section 33(1) for any limitation of the rights… are that the limitation must be justifiable in an open and democratic society based on freedom and equality, it must be both reasonable and necessary and it must not negate the essential content of the right.
>
> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators."[30]

77. The respondents have not seriously engaged this test. They have not shown why a municipal council resolution is a law of general application; they have not explained why the purpose of the limitation cannot be achieved by other means

[29] S v Makwanyane and Another [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (Makwanyane).
[30] Makwanyane at para 103 – 104.

– higher municipal rates for affluent areas, a complete exemption from the protest fee for those who are poor and vulnerable but slightly higher fees for those who can afford (cross-subsidisation), or funding from national government, as a few examples.

Section 36 1 (a): the nature of the right

78. In *South African Transport and Allied Workers Union and Another v Garvas and Others,* the Constitutional Court stated the following about the importance of the right to assemble.

> "The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights.
>
> Under apartheid, the State took numerous legislative steps to regulate strictly and ban public assembly and protest. Despite these measures, total repression of freedom of expression through protest and demonstration was not achieved. Spontaneous and organised protest and demonstration were important ways in which the excluded and marginalised majority of this country expressed themselves against the apartheid system, and was part and parcel of the fabric of the participatory democracy to which they aspired and for which they fought.
>
> So the lessons of our history, which inform the right to peaceful assembly and demonstration in the Constitution, are at least twofold. First, they remind us that ours is a "never again" Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away. Second, they tell us something about the

> inherent power and value of freedom of assembly and demonstration, as a tool of democracy often used by people who do not necessarily have other means of making their democratic rights count. Both these historical considerations emphasise the importance of the right.
>
> That freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by ss 15-19 of the Bill of Rights. It is the right – idealists would say the duty – of every member of civil society to be interested in and concerned about public affairs.
>
> Freedom of assembly is no doubt a very important right in any democratic society. Its exercise may not, therefore, be limited without good reason. The purpose sought to be achieved through the limitation must be sufficiently important to warrant the limitation."

Section 36 1 (b): the importance of the purpose of the limitation

79. As already stated, it seems as though the purpose of the limitation is for the deployment of officers. The Gatherings Act, however, envisages the deployment of officers at the State's expense and not at the expense of those who are protesting.

Section 36 1 (c) the nature and extent of the limitation

80. The point has already been made in these heads that the limitation imposed is extreme. It muzzles a vulnerable and indigent sector of our community which is the majority of the people in the country. This will have devastating consequences for democracy, openness and transparency as the people who are supposed to hold the government accountable will not be able to do so. Or will do so in a severely limited capacity.

Section 36(d): the relationship between the limitation and the purpose

81. The purpose of the limitation appears to be a costing of resources that the JMPD will have to allocate to the gathering held under the Gatherings Act. As already stated above, the Gatherings Act states that the respondents must provide protection to those who are exercising their section 17 right. The Gatherings Act also states that protection must be given for the purpose of protecting those who will be impacted by the gathering.

82. We submit that, in terms of the Gatherings Act, it is unlawful for the respondents to seek to levy fees from convenors for this purpose.

83. The Preamble to the Gatherings Act provides that: “whereas every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so”.

84. In essence, the Gatherings Act guarantees the right to assembly with the protection of the State. It, therefore, cannot be that the respondents can lawfully charge for the exercise of the right.

Section 36 (e): less restrictive means to achieve the purpose

85. Less restrictive means have been provided above at paragraph 72. And even if those measures are insufficient, it is not for the applicants to come up with less

restrictive measures. The respondents must satisfy the limitation clause in its entirety.

86. The respondents must find other ways of funding their constitutional mandate that does not infringe upon Constitutional rights.

Conclusion on section 36 limitations analysis

87. Viewed cumulatively and balancing the section 36(1) factors, the applicants submit that the limitation imposed by the JMPD policy is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

G. DOES THE COMMON LAW REGULATE THE RIGHT TO PROTEST?

88. In respect of the argument by the respondents that the Gatherings Act is not the only act that regulates the right to protest and that the common law also regulates the common law, the answer is a simple and straightforward one.

89. The Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*[31] said the following:

> "What section 35(3) and section 33(3) of the interim Constitution make clear is that the Constitution was not intended to be an exhaustive code of all rights that exist under our law. The reference in section

[31] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (Pharmaceutical Manufacturers).

> 33(3) of the interim Constitution and section 39(3) of the 1996 Constitution is to "other rights", and not to rights enshrined in the respective Constitutions themselves. That there are rights beyond those expressly mentioned in the Constitution does not mean that there are two systems of law. Nor would this follow from the reference in section 35(3) of the interim Constitution and section 39(2) of the 1996 Constitution to the development of the common law. The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply."[32]

90. Consequently, even if the common law regulates the right to protest, it must do so within the framework of the Constitution. Since the Constitution does not require a fee to be paid by convenors, we submit that this Court should bring the common law to be in line with section 17 of the Constitution.

91. There is consequently a conflict between, on the one hand, the provisions of section 17 and the Gatherings Act, and on the other hand, The City of Johannesburg Tariff Determination Policy.

92. The City of Johannesburg Tariff Determination Policy must be struck down to the extent that it authorises the respondents to levy fees from those who seek to exercise their constitutional right to, peacefully and unarmed, assemble, demonstrate, picket and present petitions.

[32] Pharmaceutical Manufacturers at para 49.

H. COSTS

93. It is a trite principle in our constitutional democracy, especially within the realm of constitutional litigation, that in constitutional litigation between individuals and the government, an unsuccessful person should not be ordered to pay costs as this would have a ripple effect on many others who may be frightened to assert or to vindicate their rights through litigation.

94. This is how the Constitutional Court framed the principle in *Affordable Medicines Trust and Others v Minister of Health and Another*[33]

> "the award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case. In Motsepe v Commissioner for Inland Revenue, this Court articulated the rule as follows:
>
> "[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or 'chilling' effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interests of the

[33] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

administration of justice nor fair to those who are forced to oppose such attacks."

95. The applicants' case, as per the notice of motion, is one that seeks to assert a right in the Constitution, which is the right to section 17. The applicants have not been reprehensible in pursuing litigation in any way whatsoever.

96. Consequently, if this Court does not grant an order in favour of the applicants, it ought not to mulct the applicants with an adverse cost order. However, if the applicants are successful, this Court ought to award costs in favour of the applicants, and such costs should include the costs of counsel where so employed.

I. CONCLUSION

97. In conclusion, we submit that:

97.1. The fee violates section 17 of the Constitution and is at odds with the provisions of the Gatherings Act.

97.2. There is no law of general application applicable in this case, and therefore the respondents have failed to satisfy the limitation clause.

97.3. Consequently, the City of Johannesburg Tariff Determination Policy, which was adopted by the City of Johannesburg's Municipal Council by means of a resolution, is unconstitutional to the extent that it authorises the respondents to levy fees from those who seek to exercise their

constitutional right to peacefully, and unarmed, to assemble, to demonstrate, to picket and to present petitions.

97.4. The respondents are to pay the costs of the applicants, including the costs of counsel, jointly and severally, the one paying the other to be absolved.

MLULEKI MARONGO

Counsel for the Applicants

26 January 2022

LIST OF AUTHORITIES

1. Affordable Medicines Trust and Others v Minister of Health and Another [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).
2. *Kruger v President of the Republic of South Africa and Others* [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC).
3. *Mlungwana and Others v S and Another* [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC).
4. Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (Pharmaceutical Manufacturers).
5. S v Makwanyane and Another [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.
6. *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC)
7. *Van Rooyen & Others v The State & Others* 2001 (4) SA 396 (T), 232G–I, 2001 (9) BCLR 995 (T) ('Van Rooyen').