

" B "

Extract from Opinion on the
Regulation of Gatherings Act, 205 of 1993
by Adv. RG LaGrange, 12 July 2004.

11. The purpose of the Act is to regulate the holding of public gatherings and demonstrations at certain places; and to provide for matters connected therewith." (Emphasis added.)

12. The intention of the legislature in passing the RGA is further spelled out in the preamble which recognises that *"every persons has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy State protection while doing so."* (Emphasis added) Counter-balanced against this, the preamble also states that the exercise of such rights shall "take place peacefully and with due regard to the rights of others".

¹ N Jarman, D Bryan, N Caleyron and C de Rosa, Politics in Public, Freedom of Assembly and the Right to Protest, A Comparative Analysis, Democratic Dialogue, 1998, ISBN 1 900281 07 4.

13. The Act is divided into three chapters dealing respectively with the procedures for convening a gathering; specific limitations on demonstrations and gatherings in the vicinity of courts, Parliament and the Union buildings; the regulation of conduct of gatherings and demonstrations and, the legal consequences of damage arising from a demonstration or gathering and criminal provisions of the Act.
14. Although the Act distinguishes between demonstrations and gatherings, and does not require any procedure to be followed in respect of the convening or holding of a demonstration, the basis for this distinction is principally based on the size of the assembly rather than on any other qualitative ground. Thus, a demonstration includes a demonstration by one or more persons but not more than fifteen persons "for or against any person, cause, action or failure to take action". By contrast a gathering means "an assembly, concourse or procession of more than fifteen persons in or on any public road or any other public place or premises which are outdoors." The purposes of a gathering include "a demonstration of support for or opposition to the views, principles, policies, actions or omissions of any person or body of persons or institution".
15. In practical terms, there seems little to distinguish between the demonstration of support for a particular view or principle, policy or action and a demonstration against any person, cause, act or omission. Hence there is nothing about the "purpose" of administration that materially distinguish it from a gathering. Because the scale of a demonstration as defined in the Act does not cover public demonstrations of

any significant size, the statutory treatment of small demonstrations is of little consequence for the purposes of the opinion. Accordingly, the opinion addresses the problems relating to the convening and holding of gatherings as defined in the Act the key characteristics of which are that they are in a public place and consist of more than fifteen persons.

The Convening of Gatherings

16. The Act requires the body proposing to hold a gathering to appoint a “responsible member” to attend to the necessary arrangements for convening the gathering, including liaison with a so-called “responsible officer” appointed by the relevant local authority and with authorised police officer.²

17. As far as possible, the convenor of a gathering must give written notice to the responsible officer appointed by the local authority. The notice must contain certain details, among other things: the contact details of the convenor; the purpose of the gathering; the time duration and venue of the gathering; the anticipated number of participants; the number, identity (where possible) and designation of marshals, and details of the planned progress of a gathering which takes the form of procession.³ The notice ought to be given as far as possible seven days in advance of a gathering. If less than seven days notice of the gathering is

² Section 2 of the RGA.

³ Section 3 of the RGA.

given, the notice must also provide reasons why the notice was issued later. Similar provisions apply to the convening

of marches in New York which also require police permission and not merely notification⁴.

18. If notice is given less than 48 hours before the proposed gathering, the convenor runs the risk of the gathering being prohibited by the responsible officer under section 3(2) of the RGA. This provision is one of three that provides for an outright prohibition of the gathering.
19. Failure to convene a gathering in accordance with the provisions governing notice of a gathering can render the convenor liable to a fine of up to R20,000.00 or term of imprisonment of one year in terms of section 12(1)(e).
20. Following the notice to the responsible officer the responsible officer must consult with the authorised officer specifically appointed by the Commissioner of Police to represent the police in the performance of their functions under the Act (in terms of section 2(2) of the RGA). The consultation the responsible officer must have with the authorised member of the SAPS concerns the need for negotiating the conduct and any conditions that ought to apply to the proposed gathering.

⁴ Jarman, et al, "In New York organisers are required apply to the appropriate department of the NYPD at least 36 hours in advance, but often longer notice is given to facilitate the police. Normally obtaining a permit is a formality, but the police check to see if there are any potential problems, such as other events around the same time, before one is issued. If there are any concerns, then they will negotiate with the organisers to try to reach an agreement before they issue a permit. In Boston organisers must give at least 48 hours notice to the City Transportation Department in the Mayor's office. Requests for a permit are considered by representatives of the police, as well as those of the park and transport authorities.

21. Should the responsible officer be of the opinion that negotiations are not necessary or subject to such amendments to the notice as are agreed between him and the convenor of the gathering he must notify the convenor.⁵
22. On the other hand, if the responsible officer after consulting with the authorised SAPS member believes that negotiations are necessary the responsible officer must convene a meeting between himself, the authorised members, the convenor and other representatives of public bodies which in his opinion ought to be present. The purpose of the negotiation is "in order to discuss any amendment to the contents of the notice and any such conditions regarding the conduct of the gathering" as the responsible officer deems necessary.⁶ Furthermore, the discussion to be held at the meeting concerning amendments, additions or conditions to which the gathering is to be subject are those "to be imposed in respect of the holding of the gathering so as to meet the objects of this Act".⁷ (Emphasis added.)
23. It is clear from the provisions of section 4(4)(a) of the RGA that the intention of holding such meeting is to try and obtain agreement on any amendments that need to be made to the proposed arrangements for the march. If such an agreement cannot be reached on the practical arrangements or conduct of the gathering, then the responsible officer has a discretion

⁵ Section 4(2)(a) of the RGA.

⁶ Section 4(2)(b) of the RGA.

⁷ Section 4(2)(c) of the RGA.

“if there are reasonable grounds therefore” to impose conditions with regard to the holding of the gathering to ensure:

“... ”

- (i) *That vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded; or*
- (ii) *An appropriate distance between participants in the gathering and rival gatherings; or*
- (iii) *Access to property and workplaces; or*
- (iv) *The prevention of injury to persons or damage to property.”*

The responsible officer is required to provide reasons for the conditions imposed and there must be an objective basis for him to form the view that such measures are necessary.

24. The tenor of the above provisions relating to the duties of the responsible officer are clearly aimed at achieving a mutually acceptable balance of interests between the concerns of the convenors of the gathering, the local authorities and the police. The overarching purpose of the provisions appears to be to facilitate the *holding* of the gathering in a manner that is mutually acceptable to all interested parties and to make all parties assume responsibility for the peaceful conduct of the event, in keeping with the concept of the ‘safety triangle’ envisaged in the Goldstone Commission proposals.
25. The issues which the responsible officer may take into account in imposing conditions unilaterally are also noteworthy. All the conditions take as a starting point that the gathering will in fact proceed but seek to ensure some

minimum degree of freedom of movement to third parties and prevention of damage to property or injury to persons. Such concerns are not uncommon features of regulating marches in other jurisdictions. Thus, for example, in Canada which also guarantees the freedom of peaceful assembly in its constitution, the police are able to impose a variety of constraints on parades. As Jarman, et al, state:

“These usually relate to the proposed route or to the time of the event. Most restrictions aim at maintaining a free flow of traffic and avoiding disruption to business activities - there is an underlying fear that businesses might sue if a parade could be seen as causing loss of trade. Parades are therefore kept to one side of the road and away from streetcar routes. Right turns are preferred in order to avoid crossing the flow of traffic but parades are not permitted to complete a square on their route because this could block off areas and 'freeze' commercial access”⁸.

26. If the type of conditions mentioned are imposed they are capable of being set aside by an appropriate magistrate in terms of section 6(1)(a) of the RGA.
27. The *second* instance in which a gathering can be prohibited *before* it has started is when “credible information on oath is brought to the attention of the responsible officer that there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to

⁸ Jarman, et al: Chapter on Canada.

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".⁹

28. Even if such convincing information on oath is forthcoming, the first step to be taken by the responsible officer is to meet, or if time does not permit a meeting, to consult with the convenor and the authorised member if possible. Only if the responsible officer is convinced, on reasonable grounds, that none of the terms of the notice can be varied in a way that would prevent the threat identified may he prohibit the gathering.¹⁰ Once again, provisions requiring consultation between the convenors and municipal and police authorities are also common to other jurisdictions such as the USA.
29. Thus, not only must plausible information under oath attest to the existence of the threat, but only after attempting consultation and if no restriction could be imposed that would avert the threat, having failed to reach agreement on changes, is the responsible officer empowered to prohibit the gathering altogether.
30. As in the case of a condition imposed on the gathering (see above), the convenor may apply to a Magistrate's Court to set aside such a prohibition.

⁹ Section 5(1) of the RGA.

¹⁰ Section 5(2) of the RGA.

31. It is also possible for the authorised member of the SAPS on the instruction of the District Commissioner for the area where the gathering is to take place to apply to the Magistrate's Court to set aside any refusal by the responsible officer to prohibit the gathering after receiving the information of the threat on oath.
32. Any of the orders that may be granted by a Magistrate may be also be taken on appeal to a division of the High Court by way of an urgent application.¹¹
33. The convenor, authorised SAPS member, or anyone whose rights are affected by the holding of the gathering, or its prohibition, may, in any event, approach the High Court on an urgent basis for an appropriate order.¹² Consequently, the convenor of a protest march is not limited to the pursuit of remedies in the Magistrate's Court if an unjustifiable limitation has been imposed on the gathering or if it has been prohibited altogether.
34. The *third* set of circumstances in which the gathering can effectively be prohibited under the RGA arises if a member of the police (of the rank of warrant officer or above) has "reasonable grounds to believe that a danger to persons and property" as a result of the gathering or demonstration cannot be averted by adopting various precautionary measures set out in section 9(1) of the RGA. In such

¹¹ Section 6(4) of the RGA.

¹² Section 6(5) of the RGA.

circumstances, the SAPS member may disperse the gathering peacefully. However, if necessary he may have recourse to non-lethal force only to the extent that it is necessary to achieve the object of dispersing the gathering.¹³

35. The precautionary provisions of section 9(1) that the SAPS member should attempt before dispersing a gathering, also illustrate the philosophy underlying the Act. This section deals with the powers of the police in managing a gathering or demonstration even if the gathering or demonstration does not comply with the provisions of the Act. Thus, if a notice of the gathering is given 48 hours or less before it takes place, the gathering may be restricted to a place, or along a certain route, for the purpose of ensuring the least impediment to traffic, an appropriate distance between participants in the gathering and a rival gathering, access to property and workplaces, and the prevention of injury to persons or damage to property.¹⁴ Similarly, section 9(1)(f) obliges the police to take reasonable and appropriate steps to protect persons and property, including negotiation with the relevant persons.
36. What is noticeable about section 9(1) is that even though the notice provisions of the Act might not have been complied with, the emphasis is on *managing* the demonstration rather than prohibiting it. I would suggest that this has implications for interpreting the circumstances when it would be

¹³ Section 9(2)(a) and (b) of the RGA.

¹⁴ Section 9(1)(c) of the RGA.

appropriate to rely on section 3(2) of the RGA to prohibit a march.

37. It is only when these and other measures under section 9(1) prove inadequate that the police may invoke powers to disperse the gathering as such.
38. The following principles appear self-evident from the above even when applying the statute in accordance with its provisions, irrespective of their constitutional validity or otherwise:
 - 38.1. The prohibition of a public gathering *before* the event takes place ought only to occur when independent evidence on oath provides convincing grounds for believing that serious traffic disruption, injury to persons or extensive property damage is probably and such risks cannot be averted by the imposition of any restrictive condition on the gathering.
 - 38.2. The fact that the requisite minimum 48 hours notice has not been given, does not provide sufficient justification for prohibiting the gathering in advance.
 - 38.3. Gatherings that are in progress may only be dispersed if damage to property and persons cannot be avoided by other less coercive means of regulating the gathering.
39. It is noteworthy in this regard that in relation to the dispersal of a gathering that is in progress, the mere disruption of

traffic itself is not a consideration: it is only the existence of reasonable grounds for believing that there is a danger to persons and property, which cannot be averted by alternative measures, that can justify the police invoking the power to disperse the gathering. This requirement is objective in nature and not dependent on the subjective judgement of the SAPS member concerned.