

Lawyering protest: critique and creativity

Where to from here in the
public interest legal sector?

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Frequent protests, arising from a diversity of motivations, are a feature of the South African landscape. Despite the right to protest being entrenched in section 17 of the Constitution, it is under threat, and communities seeking to protest increasingly risk criminalisation. This article identifies some of the emerging themes in the protest landscape and the way the right to protest is being suppressed. Four dominant themes are highlighted through the lens of the experiences of the public interest legal sector: the conflation of notification and permission; heavy-handed state responses to protests; the abuse of bail procedures; and the use of interdicts. Law has become at least one of the sites of contestation in the protest arena. The political space held open by the existence of the right to protest is thus closing as a result of violations of this right. It is therefore both useful and necessary to interrogate the role of lawyers in such contestation. This article also examines the context and nature of the public interest legal sector's response to these emerging themes.

There should be little need for protest in a functioning participatory democracy.¹ Yet protest is an entrenched part of the South African psyche, and a core tactic of activists pushing for change of all kinds. In South Africa, protest is not just a tactic of

revolution, but a protected human right. Nevertheless, protesters often risk arrest and criminalisation, given that protest is frequently a means of last resort, used when frustrated communities can no longer justify continued fruitless attempts at engagement.² Part one of this article touches briefly on the drivers of protest, while part two sets the scene with an outline of the regulatory system applicable to protest. Part three examines various ways in which the right to protest is being suppressed. Lastly, part four discusses the role of the public interest legal sector in responding to these attempts at suppression.

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Part one: Drivers of protest

South Africa has a rich history of organised civil disobedience and social mobilisation, which were used as a tool against the apartheid regime.³ Today's protesters thus tap into a protest culture that dates back to the struggles against exploitation and oppression under apartheid.⁴ Much has been written about the causes of protests in South Africa. While initially the dominant narrative was that of service delivery protests, fuelled largely by the way in which protests were reported by the mainstream media, our understanding of the drivers of protest activity has now deepened. Today we understand that in addition to dissatisfaction with inadequate provision of services, people in South Africa protest because of discontent with the ineffectiveness of the available channels of participatory democracy⁵ and because of community alienation stemming from a neglect of 'bottom-up' planning and consultative processes.⁶ Protests are also the result of billing issues,⁷ labour matters such as salaries and improvement of working conditions,⁸ community members seeking out alleged criminals, attempts to highlight causes such as environmental injustice or homophobia, or to express solidarity with pro-democracy protests in places like Egypt.⁹ More recently, there have also been controversial protests calling for the removal of the president. The South African picture of frequent protests arising from a diversity of motivations is clear. How then does this reality interact with the legal protection of protest?

Part two: What the law says

Section 17 of the Constitution provides that 'everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions'. The legislative accompaniment to section 17 is the Regulation of Gatherings Act 203 of 1995 (the Gatherings Act), which came into operation at the dawn

of South Africa's democracy following the Goldstone Commission of Inquiry's attempt to bring South Africa's assembly jurisprudence in line with international practice.¹⁰ Reflecting the language of section 17, the preamble to the Gatherings Act recognises that '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'. However, this right is qualified by the duty to protest 'peacefully and with due regard to the rights of others'.¹¹

In one of the leading cases on protest – *South African Transport and Allied Workers Union and Another v Garvas and Others*¹² (*Garvas*) – the Constitutional Court acknowledged that the right to protest is central to South Africa's constitutional democracy, as it exists primarily to give a voice to groups that do not have political or economic power. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. In the minority judgment in *Garvas*, Justice Chris Jafta held that '[i]t is through the exercise of the section 17 rights that civil society and other similar groups in our country are able to influence the political process, labour or business decisions and even matters of governance and service delivery'.¹³

Similarly, in *S v Mamabolo*, the court reaffirmed the position that freedom of expression is now 'an inherent quality' of an open and democratic society, including freedom of assembly as provided for in the Bill of Rights.¹⁴ In *South African National Defence Union v Minister of Defence and Others*, the court captured the value of the right to protest as including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society, and its facilitation of the search for truth by individuals and society generally.¹⁵ The right to protest is thus firmly entrenched in South Africa's democratic dispensation, at least in terms of legal regulation.

Part three: Emerging themes in the protest landscape

Despite this legal protection, communities and the civil society organisations that support them routinely face obstruction from municipalities seeking to deny ‘permission’ for protest – notwithstanding the fact that the Gatherings Act only requires communities to notify the local authorities, not to ask their permission. In addition, when protests do go ahead, police response is often disproportionately violent, and protesters and innocent bystanders alike risk arrest for spurious reasons. As one author has put it, the ‘right to peacefully protest is being swallowed by manipulative bureaucratic practices and violent policing practices’.¹⁶ The political space held open by the existence of the right to protest is thus closing as a result of violations of this right.

In the next section we discuss some of the ways in which the right to protest is being suppressed, so as to identify emerging themes in the protest landscape. While this article does not seek to provide a comprehensive account of the tools of repression used by different state actors to quash protest, four dominant themes are highlighted through the lens of the experiences of the public interest legal sector. These are: the conflation of notification and permission; heavy-handed state responses to protests; the abuse of bail procedures; and the use of interdicts.

Notification versus permission

One of the key challenges facing protesters in South Africa is that the municipal officials tasked with administering the Gatherings Act frequently misunderstand its provisions, or deliberately apply them improperly. Municipal officials routinely operate on the basis that the conveners of a protest are required by the Gatherings Act to ask for *permission* to protest when this is in fact not the case. The

requirement is notification, not consent. The Gatherings Act requires municipalities to be involved in the *administration* of the right to protest but does not require them to provide consent for such protests. Local officials thus substitute an obligation to facilitate protest with a right to veto.¹⁷ As emphasised in the Local Government Briefing Note, ‘[t]he notice of a gathering should not be seen as an “application”. Municipalities may, in principle, not refuse gatherings to take place.’¹⁸ Furthermore, in *Garvas*¹⁹ the Constitutional Court seems also to indicate that the Gatherings Act envisages a process of notification and administration of logistics, rather than permission-seeking.²⁰

The provisions of the Gatherings Act specify that the only grounds on which a protest can lawfully be prevented by the municipality before the protest has commenced is if less than 48 hours’ notice is given,²¹ or if the gathering poses a threat of injury to participants or others, or a threat of extensive damage to property or of serious disruption of traffic, *and* the South African Police Service (SAPS) is not equipped to contain that threat.²² Even then, a reasonable suspicion of violence is not enough. There must be credible information, submitted under oath in an affidavit. Importantly, neither the purpose of the protest nor past indiscretions by the group organising it are relevant considerations. The validity of a prohibition thus stands or falls on the ability of the SAPS to provide security. In addition, if the municipality suspects that a gathering may need to be prohibited, the prescribed meeting between the conveners, the SAPS and the municipality²³ must still occur in good faith in order to explore whether any solutions exist. If, after all that, there is still no way to ensure adequate containment of the credible threat supported by evidence on oath, reasons must be provided for prohibition.²⁴

Notwithstanding this extremely high threshold outlined in the law, the current situation is that a

community seeking to protest lawfully by going through the process set out in the Gatherings Act should steel themselves for the likelihood that they will be rebuffed and obstructed by either the municipality, the SAPS, or both.²⁵ Whether this is due to a lack of training, or a more sinister deliberate ‘misinterpretation’,²⁶ the effect is the same. In fact, this misguided imposition of a permission-seeking process by municipalities has led to many aspirant protesters seeking instead to fall outside the bureaucratic bounds of the Gatherings Act by protesting in groups of fewer than 15 people (which does not require prior notice), a strategy also employed during apartheid.

Heavy-handed state response to protest

Although the right to protest remains protected as long as those who engage in protest do so peacefully and are unarmed, a further challenge facing protesters is the repressive and hostile response from state authorities, primarily the police, once a protest goes ahead. In the previous section we discussed attempts by municipal officials, and sometimes also by the SAPS, to prevent protests from happening. Here we turn to attempts to disperse protests when they occur, and to impose severe penalties for participating in protest activity.

This is well-illustrated by the arrest (and regional court conviction) of a group of 94 community healthcare workers in the Free State for their attendance at a night vigil outside the headquarters of the Department of Health. The workers had gathered at Bophelo House in protest against their dismissal and the generally unsatisfactory conditions in the provincial health care system.²⁷ The community healthcare workers were convicted of contravening section 12(1)(e) of the Gatherings Act, i.e. ‘convening a gathering, or attending a gathering or demonstration prohibited in terms of the Act’.

In November 2016 the appellants were acquitted on appeal, in an important judgment

that makes it clear that it is not a crime to attend a gathering simply because notice was not provided. It expressly states that a gathering in regard to which notice was not provided is not ‘illegal’ or ‘prohibited’ and it also confirms that the Gatherings Act, while requiring notice, does not require ‘consent’.²⁸ Among the several practical consequences of the court’s decision is that police who arrive at an un-notified gathering are now duty-bound to liaise with and protect attendees, as well as the public, and to facilitate the exercise of the right rather than to simply disperse the crowd or make arrests. In recognising that the Gatherings Act ‘replaced a host of statutes promulgated in the apartheid era, (which) were widely regarded as being of a draconian nature’²⁹ the judgment may impact positively on a move away from the criminalisation of protesters and pave the way for an important shift from the past (and current) ‘iron-fist approach toward protest action’.³⁰

Another important protest court case heard in 2017 was the appeal against the conviction of 21 activists who were arrested at a peaceful protest outside the offices of Cape Town Mayor Patricia de Lille in September 2013 while demonstrating against the state of sanitation in the city.³¹ In February 2015, 10 of the activists involved in the protest were convicted of convening and attending an illegal gathering. The activists had decided that 15 people would protest, and accordingly it would not be necessary to issue notification in terms of the Gatherings Act. They chained themselves to the railings on the steps at one entrance to the Civic Centre. There was no intention to block access to the building, and people were able to pass under the chains. The situation was thus described:

There were 15 of us chained when the picket started, but the number grew when people arrived and started singing along

with us. Then there were also members who were carrying placards and some had brought us water. [There were about 20 to 30 police members at the scene at different times,] who came with tools used to cut padlocks and chains and they started cutting aggressively and pushed us in a group towards the police van. Other people were arrested as well who were not part of the chain.³²

The Social Justice Coalition argued that section 12(1)(a) of the Gatherings Act criminalises a gathering of more than 15 people just because no notice was given and therefore unjustifiably limits the right to protest and is unconstitutional.³³ The appeal was heard in the Western Cape High Court in June 2017 and judgment was pending at the time of writing.

These examples are demonstrative of the routine police response of quashing peaceful protests where they may be, at worst, merely disruptive. Research by the University of Johannesburg's Social Change Research Unit distinguishes between peaceful, disruptive and violent protests.³⁴ Jane Duncan's research, published in *Protest nation*, reveals that the vast majority of protests are in fact peaceful and take place without incident.³⁵ The state response to protests – whether peaceful protests or those that may turn violent – is similar, characterised by heavy-handed actions that include violence perpetrated against protesters. In the experience of the Centre for Applied Legal Studies (CALS), police response to protest is often disproportionately violent and protesters and innocent bystanders alike risk arrest on spurious grounds. This kind of excessive force used against protesters in order to repress disruptive protest is also often then misrepresented as public violence.³⁶

Apart from at a protest itself, heavy-handed and violent police responses are also a feature in 'protest hotspot areas'. The Thembelihle

informal settlement, adjacent to Lenasia in Johannesburg, is one such site where there have been unyielding struggles for basic services over the last 15 years, in the face of little meaningful government response.³⁷ This has increasingly led to police quashing protest, and even the imposition of de facto, if unofficial, states of emergency. During February 2015 scores of residents were arrested following spontaneous protests. The SAPS and other security agents placed the township on lock-down, patrolling the streets, breaking up gatherings of more than three people, and harassing individual activists.³⁸

As in many areas, the Thembelihle experience demonstrates that rather than being responsive to the needs and rights of its residents, government is prepared to use repression and police brutality to stamp out protest. The heavy-handed police response included the arrest of community leaders (not during protests but following raids in the settlement after the fact), notwithstanding the important role those leaders played in advocating for and restoring calm to a community desperate to be heard. The SAPS actions in making those arrests amounted to a display of power unconducive to restoring calm and responding to the eminently reasonable needs of the community. It is telling that some of the community leaders of the Thembelihle Crisis Committee who were arrested were the same leaders intervening to organise anti-xenophobia public meetings and stop such attacks just days before. They had even attempted to involve the SAPS in these responses and prevention.³⁹

Defending the constitutionally protected right to protest against heavy-handed state actions aimed at quelling protest is not just about defending the right to protest. It is also about upholding the rule of law and holding government to account in a constitutional democracy. In this context, trends such as those highlighted above must be viewed extremely seriously.

When law is used as an instrument of repression

The third way in which the right to protest is being suppressed is through the law itself – where the law is used as a weapon to stifle and demobilise, and is claimed by conservative powers in order to protect the status quo that protest is challenging. The two systemic examples of this in the protest context are the abuse of bail processes and the use of interdicts.

Abuse of bail processes

State officials routinely abuse the bail process to ‘punish’ protesters or quash ongoing protests, and these tactics are used as an extension of arbitrary arrests of protesters. The state officials implicated here include the police, prosecutors and magistrates. Arrested protesters require assistance in procuring bail to avoid remaining in remand detention awaiting trial – stretches that can last potentially for many months and very often ultimately result in the withdrawal of the protest-related charges on the grounds that these charges could not be sustained. Arrestees require this assistance because the bail process is abused at various stages following arrest. These abuses include the unjustified denial of police or prosecutorial bail before a first appearance (which, if protesters are arrested just before a weekend, means they then spend a few days in custody); unreasonable delays and unjustifiable postponements before bail hearings; stringent conditions attached to bail aimed at quashing further (lawful) protest; and bail set in excessively high and unattainable amounts.

All these tactics have been features of recent student protests, and are also well demonstrated in the case of a group of 17 residents of Marapong, Lephalale, who were charged with public violence and arson. The reasons for delays in the hearing of bail applications included postponements for ‘verification of address’ without proper explanation of why investigating

officers had not yet done so, refusing to accept oral evidence of family members present in court as to the address of the accused, the unavailability of a magistrate, already overcrowded court rolls, and an investigating officer not being present to provide evidence for a prosecutor in opposing bail. CALS’s representation of the Lephalale residents documents systemic abuse of arrestees in places that are considered ‘protest hotspots’.⁴⁰

While section 50(6)(d) of the Criminal Procedure Act 55 of 1977 allows a court to postpone any bail proceedings ‘for a period *not exceeding* seven days at a time’,⁴¹ this provision is routinely used to frustrate bail applications at a first appearance, and even in subsequent weeks, without good grounds. Unless detained protesters are represented, repeated week-long postponements are not always interrogated by the court – perhaps because court rolls are extremely full, or due to a level of cynicism from the bench that may have developed in our criminal courts.⁴² These delays are often an abuse of process by prosecutors and investigating officers who are seeking to punish or remove perceived ‘trouble makers’ from active protests.

Once a bail application is argued, it is a two-part inquiry – firstly into whether or not the interests of justice favour the release of an accused on bail, and secondly, if they do, what amount would be appropriate, taking all the circumstances of the matter into account, including what the individual can afford.⁴³ The attitude of the court in *Lephalale* ran contrary to this legal position: before hearing any evidence or argument on behalf of the arrested people, the court demanded that they come with a serious proposal about the amount of bail they could afford because of the damage caused. Bail was set in the amount of R4 000 per person, which was shockingly inappropriate, given that the people concerned were mostly

unemployed and surviving on meagre child support grants. Ultimately bail was reduced through further application to the court, but this meant a further delay.⁴⁴

Even in 1972, in *S v Budlender*,⁴⁵ which concerned an appeal against both the amount and conditions of bail for two students charged under the draconian Riotous Assemblies Act, the Cape Provincial Division held as follows:

[T]here is the very important thing: The courts do not like ever to deprive a man of his freedom while awaiting trial. He may be innocent, and then it would be very wrong. Also, even if he is guilty, we try not to deprive a man of his freedom until he has been convicted. After all, even if you are sitting in gaol awaiting trial under the most favourable conditions in the gaol you are nevertheless deprived of your freedom. Therefore, when fixing the bail amount, we feel that this amount must be put within reach of the accused.⁴⁶

A recurring theme in hotspots in magisterial districts is also the requests by prosecutors to magistrates to set conditions of bail that preclude accused individuals from taking part in any protests whatsoever upon their release, pending the outcome of their trials. We would argue, as CALS did in *Lephalale*, that such a limitation on the constitutional right to protest is unlawful and cannot stand. However, when arrested protesters do not have access to legal representation, the likelihood of onerous and arguably unlawful bail conditions increases.

One of the most high-profile recent cases that illustrate such practices is that of Bonginkosi Khanyile, a #FeesMustFall activist from the Durban University of Technology (DUT), who was arrested in September 2016 during protest action at his university. He faced eight charges, including inciting violence, participating in an illegal gathering and public violence.⁴⁷ Both the magistrates' court and the high court denied

him bail, at least partly on the basis that he had violated previous bail conditions by participating in protest action. He subsequently spent several months in detention at Durban's Westville Prison. The Supreme Court of Appeal refused to hear his case⁴⁸ and it eventually ended up in the Constitutional Court in March 2017.

Interrogating why he had been in custody for so long, Chief Justice Mogoeng Mogoeng asked: '[P]eople who are accused of rape get bail. People who are accused of murder get bail. What is it about this one?' The chief justice further noted that thousands of people who perhaps should get bail are awaiting trial in remand.⁴⁹ During the Constitutional Court hearing, the state finally agreed to release Khanyile on R250 bail – a welcome result, but one which should not have required legal intervention all the way to the Constitutional Court. This case is another clear illustration of the abuse of bail processes to make an example of a leader who is considered problematic by those in power. It also evidences how justice is so often ultimately only accessible for those with resources.

Use of interdicts

The use of interdicts to quash and prevent protest is a feature of the recent university protests, and is also gaining popularity as a tactic used by multinational corporations operating in South Africa against communities affected by mining. A prohibitory interdict is a court order instructing a party not to do something.⁵⁰ Interdicts ought to prohibit unlawful conduct, and/or protect an established right of the applicant. The use of interdicts to quell lawful protest arguably does neither, and they are accordingly being used inappropriately by conservative forces.

The use of interdicts by mining companies is well illustrated by an *ex parte rule nisi*⁵¹ that Platreef Resources obtained against the Kgobudi Traditional Community in May 2012.

The *rule nisi* was granted against the Kgobudi Community as ‘a clan within the broader Mokopane Community, [who] live on farms in respect of which the applicant [Platreef] holds a prospecting right [...] the applicant alleges that a mob of some 150 angry and violent members of Kgobudi Community marched on the drill-rigs and threatened violence if operations were not stopped.’⁵² In discharging the *rule nisi*, the court considered whether it was permissible for the mine to seek and obtain an interdict against an entire community, which in this case consisted of upwards of 15 000 people.⁵³ Additionally, community members were interdicted in the *rule nisi* from going within 200 m of drilling equipment, despite such drilling sites and equipment being within 200 m of their homes. This ruling had the effect of a back-door eviction order against some residents from their communal land without any court-sanctioned eviction or compensation.

The *rule nisi* was opposed on the return date by a group of affected community members represented by Lawyers for Human Rights. The court ultimately discharged the interim interdict, relying on what arguably ought to be settled law by now, namely that:

A notification to persons in general or to a group of individuals by way of Rule Nisi that the Court is about to pronounce a suit between parties is of course permissible. It is a procedure frequently adopted in order to give interested parties an opportunity of joining litigation. But it does not by itself, make them parties to the litigation and they do not merely, by virtue of being notified of the litigation become liable to be punished for contempt of Court, for failure to comply with any order which is eventually made. A failure to identify defendants, or respondents would seem to me to be destructive of the notion that a Court’s order operates only inter-

parties, not to mention questions of *locus standi in jure iudicio*. An order against respondents, not identified by name or perhaps by individualised description, in the process commencing action or in very urgent cases, brought orally on the record, would have the generalised effect typical of legislation. It would be a decree and not a Court order at all.⁵⁴

Notwithstanding these clear parameters in law, the universities of the Witwatersrand, Cape Town, Pretoria, Port Elizabeth, Rhodes and the Free State all sought and obtained interdicts against broad descriptions of unnamed students to prevent them from protesting during the recent student protests. These interdicts are problematic, for two reasons. Firstly, they often include orders that are so broad that it is not easy to discern conduct that is lawful from conduct that is not. Secondly, these interdicts arguably breach the principle of legality in that they seek to include vague, unnamed respondents who are not sufficiently described. It is difficult to understand how courts are willing to grant interim interdicts with broad descriptions that are unopposed, because it follows that because no one is named, they will be unopposed – for, in order to oppose such interdicts, some individuals would have to ‘volunteer’ themselves as engaged in ‘unlawful’ activity to enter the proceedings as respondents.⁵⁵

One of these interdicts – obtained by ‘the University Currently Known as Rhodes’ on 20 April 2016 – was challenged in the Grahamstown High Court by the Socio-Economic Rights Institute (SERI), representing both students and a group of concerned staff.⁵⁶ The interim interdict initially restrained a wide variety of persons from ‘encouraging, facilitating and/or promoting any unlawful activities’ at Rhodes University. This interim interdict applied to three named students, to the Student Representative Council of Rhodes University, and to a broad and amorphous mass

of people identified as ‘students of Rhodes University engaging in unlawful activities on the applicant’s campus’ or ‘those persons engaging in or associating themselves with unlawful activities on the applicant’s campus’.

The interim interdict was granted after the court heard oral evidence from five members of Rhodes University’s management and administrative staff concerning protest action that was led and organised by women students at the university, against what the students believe is an organisational culture that condones and perpetuates rape and sexual violence against women.⁵⁷ SERI and its clients argued that the requirements for interim or final interdicts were not met; that interdicts may not unjustifiably infringe on constitutional rights (which by their definition protect lawful conduct); and that court orders should be clear and unambiguous as a fundamental principle of the rule of law.

The matter was heard in the Eastern Cape High Court on 3 November 2016. The high court discharged the interim interdict that had been granted in Rhodes University’s favour against all of the unnamed respondents, and was critical of the overbroad relief sought and the citing of unidentifiable groups.⁵⁸ A narrower interdict was granted against three of the original respondents, who the court held acted unlawfully in some respects.⁵⁹ SERI’s application for leave to appeal against that portion of the judgment was dismissed with costs, as was its petition to the Supreme Court of Appeal.⁶⁰

This meant that students who had participated in protests against rape culture stood to be held liable for a considerable sum of legal fees incurred by the university that had sought to prevent them from protesting. The matter was subsequently appealed to the Constitutional Court. In a judgment handed down on 7 November 2017, the Constitutional Court dismissed the appeal on the merits, but upheld

the appeal against the costs order. In dismissing the costs order against the students, the court pointed out that ‘one needs to be careful not to create a perception that the applicants were being admonished for seeking leave to appeal’.⁶¹

The granting of overly broad interdicts seems to be on the rise. However, in at least some of the instances where that overbreadth in interim interdicts is challenged – as in the *Mokopane* and *Rhodes* cases discussed above – the resulting final interdict is more appropriately narrowly fashioned. What is clear is that considerably more scrutiny of the relationship between interdicts and the right to protest is required.

Part four: The role of public interest lawyers

The discussion above has highlighted a number of the challenges facing those seeking to exercise the right to protest in South Africa today, despite the constitutional protection of this right. We have also highlighted how sometimes the law and legal instruments are used as the very tools to suppress protest. Law has therefore become at least one of the sites of contestation in the protest arena. It is consequently both useful and necessary to interrogate the role of lawyers in such contestation. A full discussion of this is beyond the scope of this article, but we offer some reflections on the role played by the public interest legal sector in relation to protest.

In the honeymoon period immediately following the transition to democracy, protest died down significantly and at that time little attention was paid to the Gatherings Act.⁶² But gradually the shine on the rainbow began to dim, and activists began to turn once again to protest as a strategy to challenge power. By the early 2000s there was a widespread perception among civil society that opportunities for participation in structures like policy forums and public participation processes were in decline.⁶³ As the prevalence of protest began to increase, so too did calls

from protesting communities for assistance from lawyers in the public interest legal sector.

In spite of the fact that protests are so central to South Africa's politics, there has not been a coordinated system in place to support protesters. In the struggle against apartheid, human rights lawyers were well versed in criminal law; providing representation for their activist comrades in criminal proceedings was an everyday part of their work. However, after the transition to democracy, criminal justice work ceased to be a focus of many organisations practising public interest law, as the need for this kind of legal work died down in that honeymoon phase. This shift can also be attributed to donor funding that emphasises strategic litigation (where precedent-setting cases are likely to have an impact beyond the parties to the case) rather than direct legal services (the day-to-day business of legal support to those who cannot afford a private sector lawyer, such as conducting a bail application).⁶⁴

However, in the past few years there has been a resurgence of the need for this kind of direct legal service support to communities across South Africa. Law-focused civil society organisations are increasingly requested to assist with negotiations around section 4 meetings,⁶⁵ bail applications for arrested protesters, subsequent criminal trials, and even damages claims pertaining to malicious prosecution and police brutality. While many civil society organisations have recently begun working on protest-related issues again, this work has not always been coordinated, and the capacity of these organisations is often outstripped by the demand. In many cases, requests for help are met with the response that organisations do not do criminal work (both because this expertise has largely been lost and because their funding streams do not support this kind of work). This has led to increasing anger from communities across the country,

perhaps most acutely in communities affected by mining, directed towards their colleagues in human rights-focused organisations. Gradually, there have been shifts in the sector, in part for reasons of strategic value, but also because there is an overwhelming need. More and more non-governmental organisations have resuscitated their expertise in criminal law – for example, Lawyers for Human Rights, the Legal Resources Centre, the Socio-Economic Rights Institute, Section27, Equal Education Law Centre, ProBono.org and CALS have all started engaging in more protest-related and criminal work.⁶⁶

The #FeesMustFall protests in 2015 were also a powerful catalyst for this shift. Within two weeks of #FeesMustFall becoming a national movement, lawyers in the social justice sector had banded together to run a coordinated hotline for arrested students seeking legal assistance. Through the development of relationships with the National Association of Democratic Lawyers (NADEL), Legal Aid and many lawyers in the private sector who were keen to contribute their expertise in support of the movement, legal assistance was deployed to support protesting students across the country. While this started out as a crisis response, it has proved enormously valuable in highlighting gaps. For example, many human rights lawyers had to learn how to conduct bail applications on the trot, with the sector mobilising to ensure skills transfer and training across organisations where necessary. Experienced social justice lawyers conducted training for private attorneys who wanted to assist but who were not well-versed in bail processes or representing large, politicised groups of clients. The effect of this kind of legal mobilisation was that by the time the second wave of #FeesMustFall protests broke out in 2016, the public interest legal sector was far better equipped to provide effective support to protesting students.

In addition, these events gave rise to a coalition called the Right2Protest Project (R2P), by catapulting the collaboration between various civil society organisations into the formal establishment of an organisation aimed at advancing the constitutional right to protest.⁶⁷ R2P has a full-time attorney on hand to provide legal representation to protesters – whether in bail applications, section 4 meetings, reviews of municipal decisions to ‘refuse permission’ to protest, student disciplinary enquiries resulting from protest, or any other relevant legal proceedings. The organisation also runs a national toll-free hotline⁶⁸ through which the project provides legal support to protesting communities.⁶⁹ In addition to the direct legal assistance, R2P provides a platform for collaboration and information-sharing. R2P is one of many welcome developments in the protest space: the coalition’s significance lies in the fact that it is borne out of both the recognition of the right to protest and the growing need to protect that right. The coalition also responds to critical gaps in the work of the public interest law sector.

Conclusion

Protest is embedded in the fabric of South Africa and the contemporary political climate. It is also intricately linked to South Africa’s history of civil disobedience and social mobilisation. Although protest is a constitutionally protected right, its realisation is impeded by the use of law for repressive purposes when protesters are erroneously required to apply for permission to protest, when bail processes are abused, when interdicts are captured, and when the state responds to protests in a heavy-handed manner.

Progressive lawyers therefore have a responsibility to claim back the law. Bad law must be challenged, and cases such as *Tsoaeli*, *Mlungwana* and the *Rhodes* interdict are examples of welcome interventions. It is

critical that we abandon a ‘business as usual’ approach in favour of finding more creative ways of lawyering, including collaboration with partners outside of the legal sector. Furthermore, given that many of the abuses highlighted in cases such as *Lephalale* and *Mokopane* are taking place in magistrates’ courts, the sector needs to work in these spaces rather than always focusing on more glamorous Constitutional Court cases. While the need for strategic litigation remains, these legal interventions must be complemented by a return to the pre-constitutional approaches of being responsive to community requests for direct legal assistance in remote police stations and rural magistrates’ courts.

Organisations such as R2P cannot be the sole solution to the issues raised above. The organisation’s establishment does, however, signal a shift in civil society responses to community needs. R2P is an experimental project, which will require constant reflection, self-critique and guidance from protesters themselves. It will also hopefully aid the project of claiming back the law and putting the law to use in advancing the right to protest.



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Notes

- 1 See the discussion of the nature of South Africa’s democracy in *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 CC.
- 2 Karl von Holdt et al., *The smoke that calls: insurgent citizenship, collective violence and the struggle for a place in the new South Africa*, Cape Town, Johannesburg: Centre for the Study of Violence and Reconciliation and Society, Work and Development Institute, University of the Witwatersrand, 2011, 33.
- 3 See Richard Ballard, Social movements in post-apartheid South Africa: an introduction, in Peris Jones and Kristian Stokke (eds), *Democratising development: the politics of socio-economic rights in South Africa*, Leiden: Martinus Nijhoff, 2005, 77.
- 4 Christopher Mbazira, Service delivery protests, struggle for rights and the failure of local democracy in South Africa and Uganda: parallels and divergences, *South African Journal of Human Rights*, 2013, 251–275, 272. While much has stayed the same, much is also different. In the apartheid era, because the government was illegitimate and unrepresentative, all protests against the state could be rationalised on moral, human rights and democratic grounds. This rationalisation

included violent protest. Today, the moral authority of protest is a lot more complicated and justification of protests that may become violent is controversial. Despite these shades of grey, from a legal perspective, peaceful protest activity is now grounded in a right to do so.

- 5 See Luke Sinwell et al., Service delivery protests: findings from quick response research on four 'hotspots' – Piet Retief, Balfour, Thokoza, Diepsloot, Centre for Sociological Research, University of Johannesburg, September 2009.
- 6 Lilian Chenwi and Kate Tissington, Engaging meaningfully with government on socio-economic rights: a focus on the right to housing, Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, March 2010, 7.
- 7 Bilkis Omar, *SAPS costly restructuring: a review of public order policing capacity*, Institute for Security Studies (ISS), Monograph 138, 2007, 18, as discussed in Shauna Mottiar and Patrick Bond, The politics of discontent and social protest in Durban, *Politikon*, 39, 2012, 309–330, 311.
- 8 Mokoko Piet Sebola, The community policing philosophy and the right to public protest in South Africa: are there positive developments after two decades of democracy?, *Journal of Public Administration*, 49, 2001, 300–313, 307.
- 9 Mottiar and Bond, The politics of discontent and social protest in Durban, 312.
- 10 Mzi Memeza, A critical review of the implementation of the Regulation of Gatherings Act 205 of 1993: a local government and civil society perspective, Freedom of Expression Institute, 2006, 12. Interestingly, there is some suggestion that the Gatherings Act was only ever intended to be used during the difficult transition into democracy around the time of the first democratic elections, and that the drafters of the Act understood that it was flawed but saw it as a stopgap measure compiled in a bit of a rush. See Freedom of Expression Institute, *The right to protest: a handbook for protestors and police*, Johannesburg: Freedom of Expression Institute, 2007, 5.
- 11 See Shannonbrooke Murphy, Unique in international human rights law: Article 20(2) and the right to resist in the African Charter on Human and Peoples' Rights, *African Human Rights Law Journal*, 11, 2011, 475–494, 474 for a discussion of the right to resist in the African Charter, which has a broader formulation. For a critique of the Gatherings Act, see, among others, Qhuba Dlamini, Mass action and the law: can South Africa do without the regulation of the Gatherings Act?, *AFR. J. RHETOR*, 27, 2009, 86–107, 86.
- 12 *South African Transport and Allied Workers Union & Another v Garvas & Others* 2013 (1) SA 83 (CC).
- 13 *Ibid.*, 120. See also Stu Woolman, My tea party, your mob, our social contract: freedom of assembly and the constitutional right to rebellion in *Garvas v SATAWU (Minister for Safety & Security, third party)* 2010 (6) SA 280 (WCC), *South African Journal of Human Rights*, 24:2, 2011, 346–353; Khulekani Khumalo, Developing the crime of public violence as a remedy to the rights of non-protesters during violent protests and strikes: a critical analysis of the South African jurisprudence, *Obiter*, 36:3, 2015, 578–599.
- 14 *S v Mamabolo* 2001 (3) SA 409, para 50.
- 15 *South African National Defence Union v Minister of Defence and Others* 1999 (4) SA 469 (CC), para 6–8. The right to protest is also protected under international law. Article 20 of the Universal Declaration of Human Rights (UDHR), which was unanimously adopted in 1948 by the General Assembly of the United Nations, provides for the right to freedom of peaceful assembly and association. Likewise, Article 11 of the African Charter on Human and Peoples' Rights provides that '[e]very individual shall have the right to assemble freely with others'. See, for example, *Gunme and Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009), in which the African Commission found that Article 11 of the African Charter was violated when demonstrations were suppressed using force against demonstrators, as well as by their detention.
- 16 Stuart Thembisile Lewis, The Marikana aftermath: the right to peaceful protest is dying in South Africa, *RGR*, 33, 2013, 116–117, commenting on the work of Jane Duncan. See also Sebola, The community policing philosophy and the right to public protest in South Africa, 300, 307, where he talks about the 'unsafe conditions in public gatherings', and the discussion of invited and invented spaces of participation in Faranak Miraftab and Shana Wills, Insurgency and spaces of active citizenship: the story of Western Cape anti-eviction campaign in South Africa, *Journal of Planning Education and Research*, 25:2, 2005, 200–217. The threat to the right to protest is also discussed in Mottiar and Bond, The politics of discontent and social protest in Durban, 323; Jane Duncan, *Protest nation: the right to protest in South Africa*, Durban: University of KwaZulu-Natal Press, 2016, 11.
- 17 See Lisa Chamberlain, Assessing enabling rights: striking similarities in troubling implementation of the rights to protest and access to information in South Africa, *AHRLJ*, 16, 2016, 365–384.
- 18 Local Government Briefing Note 2012, 1, 3, A municipality's role in the Regulation of Gatherings Act.
- 19 *South African Transport and Allied Workers Union & Another v Garvas & Others*.
- 20 This reading of the judgment is supported by Johnson and Griffiths. See M Johnson and J Griffiths, The Regulation of Gatherings Act 205 of 1993, *Legal City*, 27 July 2012, <http://www.legalcity.net/Index.cfm?fuseaction=magazine.article&ArticleID=4493411> (accessed 7 June 2016).
- 21 Even then, prohibition is discretionary, not mandatory – see the language of 'may' used in section 3(2) of the Gatherings Act.
- 22 Gatherings Act, section 5(2). Note that there are further sections that allow police officers to disperse a gathering once it is already in progress, but these are beyond the scope of this discussion.
- 23 See Gatherings Act, section 4.
- 24 Local Government Briefing Note, 3.
- 25 See further Mzi Memeza, A critical review of the implementation of the Regulation of Gatherings Act 205 of 1993: a local government and civil society perspective 2006, <http://publicationdesign.co.za/wdb1/wp-content/uploads/RGARReport-Mzi.pdf> (accessed 9 November 2017); M Johnson and J Griffith, Controlling gatherings – great in theory, *Without Prejudice*, 12, 2012, 77–78, 77; R2K Activists Guide, *Protesting your rights: the Regulation of Gatherings Act, arrests and court processes*, Right to Know, 2015, <http://www.r2k.org.za/wp-content/uploads/R2K-Protest-Guide-2015-final-web.pdf> (accessed 9 November 2017); Woolman, My tea party, your mob, our social contract, 349; and various publications by Jane Duncan, who has written extensively on the subject – see for example Jane Duncan, *The rise of the securocrats: the case of South Africa*, Johannesburg: Jacana Media, 2014.
- 26 Or both, as a single motivation cannot be ascribed to all municipal officials en masse.
- 27 Judgment of JP Mollemela, ADJP Moloi and J Lekale in *Patricia Tsoeli and Others v The State* FSHC Appeal No A222/2015

- dated 17 November 2016, para 3. The appellants were represented by Section27.
- 28 Ibid., para 43.
- 29 Ibid.
- 30 Ibid., 26.
- 31 The protesters include members of the Social Justice Coalition and Ndifuna Ukwazi, represented by the Legal Resources Centre during their trial and in their appeal in *Phumeza Mlungwana v the State* A431/15. Equal Education (represented by the Equal Education Law Centre), the Open Society Justice Initiative and the UN Special Rapporteur on the Right to Freedom of Assembly and of Association (represented by the Socio-Economic Rights Institute, or SERI) all intervened as amicus curiae in the case.
- 32 Mary-Anne Gontsana and Lea Bork, SJC members defend civic centre protest, *GroundUp*, 7 October 2014, http://www.groundup.org.za/article/sjc-members-defend-chaining-themselves-civic-centre_2327/ (accessed 6 September 2017).
- 33 See Social Justice Coalition, Joint press statement: the #SJC10 case and protecting the right to protest, 13 June 2017, http://www.sjc.org.za/joint_press_statement (accessed 6 September 2017).
- 34 Social Change Research Unit, University of Johannesburg, Community protests 2004–2013: some research findings, Media Briefing, 12 February 2013, <http://www.uj.ac.za/en/newsroom/news/Pages/UJ-researchers-release-service-delivery-protest-findings.aspx>, discussed in Lizette Lancaster, At the heart of discontent: measuring public violence in South Africa, ISS, Research Paper 292, 2016, 2, <https://www.uj.ac.za/faculties/humanities/Centre%20for%20Sociological%20Research/Documents/Quick%20response%20research%20into%20Service%20Delivery%20Protest%20Hotspots.pdf> (accessed 6 September 2017).
- 35 Duncan, *Protest nation*, 11. We do not deal with it here, but challenging assumptions that disruption is outside the scope of the constitutionally protected right to protest is an area for further research. 'Because they are inherently disruptive, protests can wake society up out of its complacent slumber, make it realise that there are problems that need to be addressed urgently, and so hasten social change', *ibid.*, 1. Given the context of South Africa's history and pervasive ongoing inequality, it is arguably only through disruption to the comfortable lives of the 'haves' that awareness can be awakened as a precursor to change. See Lancaster, At the heart of discontent, 2: '[M]any acts that form part of the South African protest repertoire, such as tyre burning, are disruptive but not violent.' The act of burning tyres, though, frequently leads to the criminal charge of public violence, including with the use of the draconian 'common purpose' doctrine to criminalise protests.
- 36 The crime of public violence is defined by Jonathan M Burchell and J Milton, *Principles of criminal law*, 3rd edition, Cape Town: Juta Academic, 2005, 867, as consisting of 'the unlawful and intentional commission by a number of people acting in concert of acts sufficiently of serious dimensions which are intended forcibly to disturb the public peace or security or to invade the rights of others'. The position taken by R2P is that the law does not prohibit or criminalise disruptive protest.
- 37 The Thembelihle Crisis Committee (TCC) is a community-based organisation in the area that focuses on socio-economic issues such as water, electricity and housing, raising awareness through rights campaigns, petitions, engaging local authorities and, very often, through protest action.
- 38 The majority of the arrested activists and protesters were represented during their bail applications by SERI. The Centre for Applied Legal Studies (CALS) also provided assistance approaching trial and in making representations – some of the protesters accepted diversion programmes under threat of jail terms if convicted on charges of public violence, and eventually the charges were withdrawn against the remaining protesters. The Right2Know Campaign (R2K) was instrumental in ensuring legal representation for everyone, and in raising and posting bail money. The support and on-the-ground involvement of R2K, the legal assistance of SERI and CALS and the ongoing collaboration and support for this community demonstrate the benefit of these partnerships, as well as the need for ongoing responsiveness to affected communities.
- 39 R2K, Gauteng statement on situation in Thembelihle, 26 February 2015, <http://www.r2k.org.za/2015/02/26/thembelihle/> (accessed 6 September 2017).
- 40 The township of Marapong, in Lephalale, near the Medupi power station, is another area like Thembelihle that has seen numerous protests over the last few years. During September 2015 CALS received a request for assistance from the Marapong Community Forum through an established civil society network via the Centre for Environmental Rights and Earthlife Africa.
- 41 Emphasis added. A prosecutor ought to justify the necessity of the length of postponement to the minimum period necessary in favour of liberty, but in practice postponements are routinely granted for the maximum period the section permits.
- 42 While the Criminal Procedure Act provides for some discretion of the court, in the magistrates' court such discretion is always a narrow one, and must be applied with the Criminal Procedure Act, for reasons including if: (i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application; (ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation that a person will be charged with a schedule 5 or 6 offence; (iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to- (aa) procure material evidence that may be lost if bail is granted; or (bb) perform functions such as taking fingerprints or DNA; or (v) it appears to the court that it is necessary in the interests of justice to do so. This would all require a reason being provided by the prosecutor for seeking a postponement of up to seven days, a justification of why seven days is required and not less time for the postponement sought, and a consideration by the court on the merits in granting such a postponement. In practice, however, courts routinely grant seven-day postponements without interrogating the reasons or time, with merely a cursory appearance of the detained person in the stand.
- 43 Criminal Procedure Act 1977 (Act 51 of 1977), section 60, contains numerous factors a court must consider in weighing up whether the interests of justice favour an accused person's release on bail. The prime consideration and which ought to be brought into reckoning is whether an accused will stand trial. If a court determines that the interests of justice favour the granting of bail, the court must then consider appropriate conditions. Fixing the amount of bail serves as one of these conditions.
- 44 CALS represented this group. We had to weigh up bringing an urgent review application in the Polokwane High Court, against bringing an application for variation (and reduction) of the bail amount at the next appearance for those remaining in detention who could not raise the amount. Ultimately it was in

- the clients' interest to opt for the latter, to ensure their quicker release, notwithstanding that the settled law favoured their success on review and could have sent a strong message to that magistrates' court. A successful application for a reduction of bail was brought before the same magistrate during their next appearance. We are still of the view that persisting with these arguments before the same magistrate goes some way to challenging the preconceptions around protests in 'protest hotspots', in particular magistrates' courts where cogent defences are argued.
- 45 *S v Budlender and Another* 1973 (1) SA 264 (C).
- 46 *Ibid.*, para 269 E–F.
- 47 *Mail & Guardian*, Bonginkosi Khanyile determined to carry on with struggle for free education, 2 March 2017, <https://mg.co.za/article/2017-03-02-bonginkosi-khanyile-determined-to-carry-on-with-struggle-for-free-education> (accessed 6 September 2017).
- 48 Constitutional Court of South Africa, Order of the SCA dated 17 January 2017, <http://www.constitutionalcourt.org.za/Archimages/26986.PDF>.<http://collections.concourt.org.za/bitstream/handle/123456789/3887/Answering%20Affidavit-26989.pdf?sequence=8&isAllowed=y> (accessed 6 September 2017).
- 49 Greg Nicolson, Bonginkosi Khanyile: free, in an unfree system, *Daily Maverick*, 1 March 2017, <https://www.dailymaverick.co.za/article/2017-03-01-bonginkosi-khanyile-free-in-an-unfree-system/#.WZ6unYSGPIU> (accessed 6 September 2017).
- 50 The requirements for both interdicts are the same, but there are significant differences between final interdicts and temporary (or interim) interdicts. As its name implies, a final interdict resolves the matter between the parties. A temporary or interim interdict merely preserves or restores the status quo until such time that the dispute between the parties is finally determined. The interim interdict does not entail that the dispute is finally resolved – the final resolution of the matter may still be some way off in the future.
- 51 An *ex parte* application is one brought without service of the papers on the respondent or without giving the respondent the opportunity to argue before the judge. This is often a feature in *rule nisi* applications, which are essentially applications for interim relief, in which respondents are then notified of a return date on which they have an opportunity to argue before the court why the interim order should not be made final.
- 52 Unreported judgment of J Kollapen in *Platreef Resources (Pty) Limited v Kgobudi Traditional Community* SGHA 29218/10 dated 28 January 2013, 3–4.
- 53 *Ibid.*, 9.
- 54 *Ibid.*, quoting J Conradie in *Kayamandi Town Committee v Mkhwaso & Others* 1991 (2) SA 630 C; see also *City of Cape Town v Yawa & Others* 2004 (2) All SA 281 (C); *Illegal Occupiers of Various Erven, Phillip v Monwood Investment Trust Company (Pty) Limited* 2002 (1) All SA 115 (C).
- 55 For example, the Rhodes University interim interdict restrains –
- i. [interfering with] access to, egress from and the free movement on the Applicant's campus of all members of the Rhodes University community and all others who have lawful reason to move on to, off and upon said campus;
 - ii. Kidnapping, assaulting, threatening, intimidating or otherwise interfering in any manner with the free movement, bodily integrity and psychological and mental wellbeing of any members of the Rhodes University on the Applicant's campus;
 - iii. Disrupting, obstructing or in any other manner interfering with the academic process of the Applicant, which shall include but not be limited to lectures, tutorials, practicals, tests and use of the Applicant's library facilities and laboratory;
 - iv. In any manner interfering with the academic and/or administrative staff of the Applicants while on the Applicant's campus;
 - v. Disrupting, obstructing or in any other manner interfering with the ordinary function of the Applicant's residents system;
 - vi. Causing any damage to the Applicant's property.'
- 56 *Rhodes University v Student Representative Council of Rhodes University* [2017] 1 All SA 617 (ECG).
- 57 According to the preparatory notes shared with the authors by SERI, the protesters believe that this culture has been created and perpetuated by the university administration's on-going failure to punish rape and sexual assault against women at the university, and by its failure to put in place policies and procedures that discourage rape and sexual violence, and encourage and support victims of rape and sexual violence to report it when it happens.
- 58 *Rhodes University v Student Representative Council of Rhodes University and Others* [2017] 1 All SA 617 (ECG), para 141, 142, 144, 145, 158(e).
- 59 *Ibid.*, para 146, 147, 158 (a)–(d).
- 60 See SERI, *Rhodes University v Student Representative Council of Rhodes University and Others* ('Rhodes'), <http://www.seri-sa.org/index.php/litigation/participation-protest-and-political-space/19-litigation/case-entries/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes> (accessed 6 September 2017).
- 61 *Ferguson and other v Rhodes University* CCT 187/17, para 28.
- 62 *Ibid.*, 13.
- 63 Susan Booysen, Public participation in democratic South Africa: from popular mobilisation to structure co-operation and protest, *Politeia*, 28, 2009, 1–27, 12.
- 64 In this context, credit must go to the Open Society Foundation – South Africa, which has supported R2P since its inception.
- 65 The section 4 meeting, held in terms of the Regulation of Gatherings Act, is a negotiation between all the parties on the terms of the protest, including dates, times, routes, number of expected participants and required marshals, etc.
- 66 R2K, established in 2010 to challenge the 'Secrecy Bill', has been at the forefront of defending the right to protest. R2K's close relationship with many of the legal organisations working in the social justice sector has been pivotal in driving the resurgence of protest and criminal work in those organisations. For more information see R2K, <http://www.r2k.org.za/>.
- 67 The coalition is staffed by an attorney and a coordinator, both housed at CALS, guided by a steering committee consisting of FXI, R2K, Lawyers for Human Rights and CALS, and propelled by a broader membership base of organisations working on protest. Currently this broader membership base consists of SERI, Section27, Probono.org, Ndifuna Ukwazi, Equal Education Law Centre, the Centre for Environmental Rights, the Centre for Child Law and the Social Justice Coalition, although the coalition is designed as an inclusive one with a view to growing its membership.
- 68 The number for this hotline is 0800 212 111.
- 69 The hotline is also a tool that is used for data collection to track emerging trends. R2P also runs training on a range of protest-related issues.