

THE MUNICIPALITY'S ROLE

IN IMPLEMENTING

The Gatherings Act

Community protests have become prevalent in South Africa in recent times, with the incidence of violence in these protests rising (see page 10). The ongoing strike by the South African Municipal Workers' Union (SAMWU) provides a classic example of gatherings with a high level of violence.

Strike action, especially violent strike action, has multiplier effects that municipalities must consider. For example, public safety, the destruction of property and environmental pollution in the aftermath of protest action all weigh heavily on municipalities. This gives rise to the questions: What is the regulatory framework governing such gatherings, and what is the municipality's role in terms of this framework?

Constitutional guarantee

Section 17 of the Constitution protects everyone's right to make themselves heard. It provides for the right to assemble, demonstrate, picket and present petitions peacefully and unarmed. This right is not contingent on approval by the state. In theory, protesters are entitled to assert their fundamental rights and freedoms. They can demand that state agents, such as police officers, respect these rights and freedoms.

However, section 17 excludes certain forms of assembly, demonstrations, pickets and petitions from constitutional protection, namely those not conducted 'peacefully and unarmed'. Assemblies, demonstrations and pickets that are not peaceful include those that involve assaults on members of the public, employ tactics of intimidation or are accompanied by physical violence to property. The term 'armed' may include the carrying of defensive devices and, possibly, the use of masks. Protesters who obscure their facial features and prevent their identification may have criminal motives or be prone to criminality.

Regulation of Gatherings Act

The Regulation of Gatherings Act (Act 205 of 1993) gives expression to the right guaranteed in section 17 of the

Constitution. The Act took effect in November 1996 and marks a significant departure from the way in which marches and gatherings had been policed before, when the emphasis had been on police control. Under the Regulation of Gatherings Act, the emphasis is on the joint management of marches by the organisers, municipalities and police.

The Act significantly qualifies the right to gather in public. It limits and defines how, where, when and why individuals may gather, and it defines the shape, size and location of gatherings. It is arguable that such rigid definition could be vulnerable to constitutional challenge. However, until the Constitutional Court rules on the constitutionality of the Act, the current position remains. The Act only applies to 'gatherings', defined as 'any assembly, concourse or procession of more than 15 persons in or on any public road ... or any other public place or premises wholly or partly open to the air'. The Act does not make a distinction between labour and political gatherings, and applies to both equally. In fact, any gathering of more than 15 persons in any public place in the Republic falls within the ambit of the Act.

The role of municipalities

Municipalities have a duty to facilitate all gatherings within their area of jurisdiction. Notice of the intention to gather must be given to the municipality concerned, whether or not the gathering is directed against it; even in the case of gatherings against private bodies, notice must be given to the municipality. The municipality must appoint a responsible officer to perform functions relating to gatherings. The Act requires the group intending to protest to appoint a convener, whose role is to organise the gathering. The convener must

give the responsible officer notice of the gathering seven days in advance, unless it is not reasonably possible to do so. In that case, notice must be given 48 hours before the intended gathering. If no responsible officer has been appointed, the municipal manager or his or her immediate junior performs the functions relating to gatherings. The municipality must respond to the notice of gathering within 24 hours of receipt. If it sees a need to discuss any amendment to the contents of the notice and to impose conditions regarding the conduct of the gathering, it must respond by convening a meeting between the municipality, the convener and the South African Police Service (SAPS) (known as a 'golden triangle' meeting).

Municipalities have a statutory and constitutional obligation to facilitate the right to assembly, but they may not thwart it. They should respond timeously to properly filed notices and must engage the convener in good faith. This means that in the golden triangle meeting, the views of the convener must be taken seriously. If the municipality sees no need for such a meeting, it must facilitate the gathering's proceedings as specified in the notice.

Prohibition of gatherings

Municipalities may only prevent or prohibit a gathering when 'credible information on oath' is presented that it poses a threat of serious traffic disruption, of injury to participants and others or of extensive damage to property, and that the police and traffic officers cannot contain the threat. Even then, the golden triangle meeting or consultation should first take place and reasons for the prohibition must be furnished. Past indiscretions by people associated with the convening group cannot be a ground for prohibition, nor can the reasonable suspicion of violence. There must be credible information on oath. The reason, topic or content of the protest does not matter. In essence, the prohibition may only be based on the inability of SAPS to ensure security. This rules out blanket prohibitions by municipalities in response to notices of peaceful demonstrations.

Even when credible information on oath concerning threats is brought to the attention of the municipality, the municipality may not summarily prohibit the gathering. The golden triangle meeting between the municipality, the police and the organiser of the gathering is then supposed to explore ways of conducting the gathering with less disruption, such as trying to ensure that vehicular traffic is less impeded.

Conduct of gatherings

The organiser must appoint clearly distinguishable marshals to control participants in the gathering, and to take the necessary steps to ensure that it proceeds peacefully at all times. The notice of gathering, which may be amended after the golden triangle meeting, includes binding conditions. The convener and marshals must take all reasonable steps to ensure compliance with them. Moreover, if there is riot damage as a result of the gathering, the organisation on behalf of which the gathering was held and each demonstrator are jointly and severally liable.

The police also have a duty to enforce the conditions of the notice. They may take such steps, including negotiations with the protesters, as are reasonable in the circumstances and appropriate to protect property and persons, whether participants in the gathering or not. Moreover, the Act permits the use of 'firearms and other weapons' for crowd control and the use of force where there is a 'manifest intention' to kill or to seriously injure persons, or to destroy or seriously damage property. However, use of firearms or force must be necessary, moderate and proportionate to the circumstances.

With these safeguards, it becomes senseless for municipalities to be hell-bent on responding to notices for gatherings with blanket prohibitions.

Comment

Protests, assemblies and mass demonstrations played a central role in the struggle against apartheid. Now that the battle for liberation has been won, and all possess the franchise, there might be an assumption that there is no place for demonstrations in the current dispensation. Still, mass protests continue to be an important form of political engagement.

Organised labour, landless people, anti-privatisation movements, students, squatters and even the police have all used demonstrations to press their demands. After all, dialogue, not the franchise, is the condition without which democracy cannot thrive.

Most importantly, the poor and the marginalised majority in South Africa cannot afford to litigate to get their voices heard. Neither are they in a position to press their demands through political channels. For them, the freedom to assemble counters feelings of helplessness and isolation.



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