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Protesting Is Not a Right Reserved for the Rich: A Commentary on *The Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality and Another* (49197/2021) [2022] ZAGPJHC 388 (10 June 2022)

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Abstract

The recent decision of the High Court delivered by Victor J in The Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality¹ deals with the local government attempting to charge fees for protests. The case is significant, as it concerns the core history of the Republic of South Africa by involving the right to protest, which is a constitutionally protected right. This right is often the only means that enables marginalised people to voice their issues and dissatisfaction about the government and the State. In this note, the judgment of the High Court concerning the court's discussion of the principle of legality and rationality will be examined, especially in light of South Africa's history predating its current constitutional democracy. The author attempts to go a step further than the High Court by examining the policy of the local government's discrimination

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¹ (49197/2021) [2022] ZAGPJHC 388 (10 June 2022).

against those who cannot afford it.

Keywords: protest; equality; discrimination; race; class; Gatherings Act; legality; rationality

1 INTRODUCTION

Section 17 of the Constitution of the Republic of South Africa, 1996 gives life to the right to protest, as it states: “Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.”² Contrary to this clear right, in *The Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality*³ case, those who wished to exercise their right as provided by section 17, faced the unfortunate reality imposed on them by the Johannesburg Metropolitan Municipality in the form of the Johannesburg’s Tariff Determination Policy (the Policy). In terms of this policy protestors could only be allowed to conduct their protest, after they have paid a fee to the Municipality ranging from R170 to R1 500.⁴ The applicant approached the High Court to have the imposition of such fees declared unconstitutional and unlawful. The applicant’s primary issue was that the Policy was not only contrary to, but it also went beyond the authority that governs protests, such primary statute being the Regulation of Gatherings Act⁵ (the Gatherings Act).

1.1 Framework of the Gatherings Act

The Gatherings Act 205 of 1993 outlines the procedure to continue with a protest.⁶ First, those who wish to stage a protest must appoint a convenor in terms of section 2. Secondly, in terms of section 2(3), the convenor appointed in terms of section 2 must proceed to hold meetings and consultations with the Municipality to facilitate the protest in question. Thirdly, a written notice of the protest must then be sent by the convenor to the Municipality, in terms of section 3. Lastly, in terms of section 4, once the respondents have received the written notice issued in terms of section 3, they can meet with the convenor to discuss issues such as the venue and the number of protestors etcetera. It is crucial that the official who received the written notice from the convenor must then consult with the SAPS as well.⁷

2 FACTS OF THE RIGHT TO KNOW CAMPAIGN

The first applicant in the matter was an activist organisation, the Right2Know whose primary focus is access to information and advocating freedom of expression.⁸ This organisation engages in strategic advocacy which ensures the free flow of information — an essential element of our young democracy. In addition, Right2Know supports protestors who have issues with the State and private security companies when they attempt to violate the protestors’ rights, which are protected by section 17 of the Constitution. The second applicant was the Gauteng Housing Crisis Committee, an organisation created by protesting communities that sought to unite the black working class in their protest against land issues, unemployment and the violation of their housing rights. Keith Duarte was the third applicant as he was the convenor of the protest

2 Paragraph 1.

3 (49197/2021) [2022] ZAGPJHC 388 (10 June 2022.)

4 Paragraph 2.

5 Act 205 of 1993.

6 Paragraph 10.

7 *Ibid.*

8 Paragraph 5.

who was asked by the Municipality to pay the protest fee of R297 in terms of the Policy.⁹ The *locus standi* of the applicants, collectively, is through public interest as the matter is of public importance.¹⁰

The City of Johannesburg was the first respondent in the matter.¹¹ The Chief of the Johannesburg Metropolitan Police Department (JMPD) was the second respondent in the matter, the JMPD being established by section 64 of the South African Police Service Act¹² as a municipal police service. The South African Human Rights Commission acted as a friend of the court.¹³ On 23 October 2020, the applicants had a peaceful protest in the central business district (CBD) of Johannesburg and in compliance with section 4 of the Gatherings Act, the applicants had attended a meeting to discuss the logistics of the protest.¹⁴ After the meeting, the convenor of the protest was referred to the second respondent, in line with the procedure of the JMPD, whereafter he was asked to pay the fee of R297. The fee was indeed paid, and the protest proceeded.

The legality and constitutionality of the levied fees are questioned, as they were presented as a prerequisite for the protest.¹⁵ This precondition was set by the officials of the respondents as they had informed the convenor that if the fee was not paid then the protest would not be lawful and police would be deployed during the protest. The applicants were of the view that such a fee was a violation of their right to protest and the respondents on the other hand were of the view that the fee was not a prerequisite for the protest, but rather served to facilitate the protest.¹⁶

2 2 Applicants Submissions before the High Court

According to the applicants, the right to protest should not be made subject to a fee as this is a way in which the public can hold the State and private institutions to account.¹⁷ However, the Policy does require everyone to pay the levied fees. This fee is in contravention of the Gatherings Act which is the only act that regulates gatherings and this statute does not require any fees to be paid before a protest can be facilitated.¹⁸ No provision of the Act permits the respondents to demand fees for protests and the Policy thus contravenes the Gatherings Act in that it authorises the levying of fees not allowed by the Gatherings Act.¹⁹ Furthermore, section 14 of the Gatherings Act stipulates that this Act takes precedence over any other statute applicable to gatherings and as a result, the Policy must be set aside as it contravenes the Gatherings Act.²⁰

The unconstitutionality of the Policy stems from its contravention of section 17 of the Constitution. The applicants argued that when the respondents use the fee as a prerequisite for the protest, it violates the section 17 rights of those who cannot afford to pay such a fee. The applicants are vulnerable, poor individuals who cannot afford the levied fees, which could cause

9 *Ibid.*

10 Paragraph 6.

11 Paragraph 7.

12 Act 68 of 1995.

13 Paragraph 8.

14 Paragraph 11.

15 Paragraph 12.

16 *Ibid.*

17 Paragraph 13.

18 Paragraph 14.

19 *Ibid.*

20 *Ibid.*

them to become too disheartened to exercise their constitutionally protected right to protest.²¹

The Policy further sidelines the already marginalised members of society especially when one considers that if the fee is not paid then the respondents ensure that inadequate resources will be deployed to police the protest.²² Further, the perception will be created that if the fees are not paid, the protest will be illegal and this puts the protestors' safety at risk and "[a]gain, this means that the most impoverished are rendered most vulnerable."²³ The applicants argued that human rights depend on each other, the violation of section 17 means indirectly violating freedom of association, dignity, equality and other rights.²⁴ The raising of a fee is against the letter and spirit of the Republic's constitutional aspirations. Since the Policy is not a law of general application, the respondents cannot hide behind section 36 through arguing for the limitation clause and in essence, the Policy does not meet the constitutional standards.²⁵

2.3 Respondents' Submissions before the High Court

The position of the respondents was that the Policy does not contravene the Gatherings Act as the City was permitted to charge fees for providing traffic control services during protests and gatherings.²⁶ According to the respondents, the Municipality obtained its authority to levy fees from the Systems Act. Section 4 of this Act allows the local Councils to finance the Municipality through fees levied for specific services and this is further supported by section 74(2) which puts restrictions on such fees and using these provisions along with section 75A. The Municipality argues that it did indeed have the authority to charge such fees.²⁷ Another argument of the respondents was that the applicants were addressing the wrong statute. The applicant should have challenged the fees as being in contravention of section 75A of the Systems Act and not the Gatherings Act as it is the former that gives power to the Municipality to charge fees for traffic control services during protests.²⁸ In addition to this, they are of the view that the Gatherings Act, being silent on the issue of fees, does not mean that charging fees under the Policy constitutes an act that is prohibited by the Gatherings Act.²⁹ In essence the Gatherings Act and the Policy deal with different issues.

The respondents argued further that the fee is not a prerequisite for the protest as it would still proceed, irrespective of whether the fee was paid or not, the only difference being that if the fee is not paid, the JMPD only deploys minimal instead of full service.³⁰ On the issue of section 17, the respondents alleged that the fee was for traffic control and not the protest, which means there was no constitutional violation. The fee allows the JMPD to ensure that protests and gatherings are safe. It also ensures that the Municipality provides for the State obligations regarding safety and security in line with section 7(2) of the Constitution.³¹ In addition, the respondents argued that should the court view the Policy as limiting section 17, they must do so in light of section 36 of the Constitution. In essence, they must view the Policy as being a law of general application and thus passes Constitutional muster and it also provides a discount to

21 Paragraph 15.

22 *Ibid.*

23 *Ibid.*

24 Paragraph 17.

25 Paragraph 18.

26 Paragraph 19.

27 Paragraph 21.

28 Paragraph 22.

29 Paragraph 23.

30 Paragraph 24.

31 Paragraph 25.

NGO's and NPO's.

2 4 SAHRC's Submissions Before the High Court

The SAHRC submitted that the Policy, if viewed through the lens of section 39(1)(b) of the Constitution, goes against international law standards.³² The court should have regard to Article 21 of the International Covenant on Civil and Political Rights ("the ICCPR") which provides protection to the right to assemble peacefully in that it does not allow any restrictions to be placed on this right unless it is for a legally sound reason.³³ The Policy limits Article 21 in question.

2 5 Issues Before the High Court

The court was of the view that the parties would have been misguided in challenging section 75A of the Systems Act as previously submitted by the respondents.³⁴ According to the court, this section is too broad to be challenged on this matter. Using section 229 of the Constitution, this court interpreted the intention of the drafter of the Constitution as intending to accommodate the levying of fees by Municipalities for the services that they render. As such, readily challenging this provision would result in chaos and it is fortunate that in their oral presentations, the parties concurred that this would not have been a desired course of action.³⁵

Further to this, the Policy is not in conflict with the Systems Act, as Municipalities are indeed entitled to charge fees for services rendered and, as a result, the Policy is in fact *intra vires* the said statute.³⁶ The Policy attempts to regulate conduct that is within the jurisdiction of the Gatherings Act. The statute that regulates protests is the Gatherings Act and not the Systems Act, but that being said, the Systems Act must still be read in line with the Gatherings Act.³⁷ Section 14 of the Gatherings Act gives it precedence over any other applicable legislation, should there be a conflict between these statutes. Since the implementation of the Policy goes against the Gatherings Act, the court took no issue with the applicants challenging the Policy using the Gatherings Act.³⁸

The issue of whether there was rationality on the part of the Municipality to charge the convenors fees deserves judicial review and it is worth noting that this application was not brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).³⁹ As such, this court declined to engage with it. However, the court also noted that the exercise of public power involves the principle of legality even if such action does not concern the PAJA. Legality is derived from the rule of law, which is given life by section 1(c) of the Constitution. As a result, the court found it important that it also decides on the issue of the legality of the Policy.⁴⁰

32 Paragraph 27.

33 Paragraph 28.

34 Paragraph 32.

35 *Ibid.*

36 Paragraph 33.

37 Paragraph 34.

38 *Ibid.*

39 Paragraph 35.

40 *Ibid.*

3 THE HIGH COURT'S DECISION ON THE LEGALITY OF THE POLICY

The court, citing *President of the Republic of South Africa and Others v South African Rugby Football Union*⁴¹ opened with the following quote:

In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.⁴²

The exercise of public power must be rational and those who implement such power cannot act beyond their authority. As a result, Municipalities can only act if they are permitted to perform and in the absence of such authority, their conduct must be set aside as it violates legality.⁴³ This court noted that there is no provision in the Gatherings Act that permits the Municipality to charge fees in respect of protests and in addition, there is no provision in the Systems Act that allows for such and thus, in essence, these statutes are silent on the issue.⁴⁴ The silence of both statutes on the issue, cannot be interpreted to mean the statutes allow for the levying of protest fees.⁴⁵

In the case of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council*⁴⁶ the Constitutional Court provided that Municipalities can only act within the scope of their lawful authority. Since there is no statute governing the charging of fees for protests, it follows that doing so goes beyond the powers a municipality is given and this amounts to unconstitutionality.⁴⁷ The High Court in this matter found that the charging of fees for a protest by the Municipality is against the principle of legality. Since legality involves rationality, the court proceeded to deal with the latter.

3.1 The High Court's Decision on the Rationality of the Policy

The question this court attempted to answer was whether the levying of fees by the Municipality was rational. Simply because the Systems Act allows Municipalities to charge fees for their services does not mean such power is unlimited, but is also subject to the principle of rationality.⁴⁸ Citing *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa*,⁴⁹ the court noted that rationality is about whether there is "a logical connection between a decision or action and the purpose for which the power was conferred."⁵⁰ This court also noted that

[m]ost recently reaffirmed by the Constitutional Court in *Minister of Water and Sanitation*, the question is always 'whether there was a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power'. The 'purpose of the enquiry is to determine not whether there are other means that could have been used,

41 2000 1 SA 1 para 133.

42 Paragraph 37.

43 Paragraph 39; see also *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another* 2021 (10) BCLR 1152 (CC) para 83.

44 Paragraph 41.

45 *Ibid.*

46 1999 1 SA 374 para 54.

47 *Right2Know* para 43.

48 Paragraph 44.

49 2000 2 SA 674.

50 Paragraph 45.

but whether the means selected are rationally related to the objective sought to be achieved'.⁵¹ Likewise, the enquiry is not concerned with the strength or reasonableness of the connection. If, objectively speaking there is not a rational relationship between the scheme adopted and the achievement of a legitimate purpose, the exercise of the power would be arbitrary and would fall short of the standard demanded by the Constitution. 'If there is [a rational] connection, the review challenge based on this ground must fail, regardless of the cogency of reasons furnished for the decision in question. This is because rationality is the lowest threshold required for the exercise of public power.'⁵²

This court proceeded to find that there was no rational connection.⁵³ The Municipality was constitutionally obliged to provide services of safety and security, and this was not dependent on a fee.⁵⁴ As a result, this court rejected the argument by the respondents that the fees were for facilitating the logistics of the protest. The right to protest is not subject to the availability of funds, the applicants are in fact entitled to the enjoyment of this right without having to pay any fees.⁵⁵ The State is obliged to provide a safe space for such protests, because if it does not, the constitutional provisions become a mere promise.⁵⁶

In stating that NGO's and NPO's are given a discount, the Municipality expressed its own irrationality as "how can such a negligible sum possibly account for the thousands of rand that it must cost the Municipality to deploy the necessary services? These token sums are not fit for purpose. As I see it, they are opportunistically levied merely because they can be, which demonstrates that the Policy is patently irrational. There is simply no rational connection between the levying of fees of a negligible amount and the purpose of providing traffic control services."⁵⁷

3 2 Was There a Limitation of the Right to Protest?

Another issue before the court was whether the protest limited the right to protest, unconstitutionally.⁵⁸ This requires the court to assess whether the Policy in question was inconsistent with the Constitution — if the answer was negative, then the test would end there. However, if positive, the court would go a step further to determine whether such a limitation meets the constitutional muster of section 36.⁵⁹ As previously stated, the right to protest is governed by section 17 and such a right must be exercised when protesters are unarmed and peaceful.⁶⁰ This right is crucial in enforcing constitutional aspirations due to the history of apartheid and it is equally protected by international mechanisms and courts of other countries.⁶¹ This right is a means of holding the State accountable by citizens who voice their concerns and as such, it is crucial to the functioning of a democracy.⁶² It is equally important to understand that such a right should not and cannot be limited without adequate reasons for doing so.⁶³

The right to protest must however, be regulated as the Gatherings Act does, which serves the

51 *Ibid.*

52 *Ibid.*

53 Paragraph 46.

54 Paragraph 47.

55 *Ibid.*

56 Paragraph 48–49.

57 Paragraph 50.

58 Paragraph 52.

59 Paragraph 53.

60 Paragraph 54; see also *Mlungwana and Others v S and Another* 2019 1 SACR 429 (CC) para 43 and 62.

61 Paragraph 57.

62 Paragraph 60.

63 Paragraph 61.

purpose of ensuring the public enjoys it lawfully.⁶⁴ Using the Constitutional Court's decision in *SATAWU v Garvas*,⁶⁵ the High Court reasoned that any provision which attempts to prevent protestors from exercising their rights goes beyond simple regulation of such right. Indeed, the section 17 right to protest can be regulated, but such regulation must be made in a way that does not prevent peaceful and unarmed people from exercising the right, will lead to a limitation of section 17.⁶⁶

The High Court in this case also noted that the respondents attempted to cover up their demand for fees in exchange for the right to protest. They did this by arguing that when the fees were paid, they would allow the JMPD to provide the necessary traffic control services.⁶⁷ At this point, the court found that the fees do not regulate the protest, but rather, they go beyond regulation and simply deter people from exercising the right.⁶⁸ According to the High Court, the fees levied increased the costs of exercising the right. The court also noted that even if it were to accept the previously stated explanation of the respondents that the protest could still go on, irrespective of whether the fees were paid, the view of the court was that the fees still created an impression that the protest would become illegitimate and would receive reduced safety and security attention.⁶⁹ Simply put, the Policy limits the section 17 right to protest even if the fees are not compulsory and such a limitation sidelines those who are already marginalised.⁷⁰

The disfranchised in society are those who rely on this right to ensure that their concerns are heard, and the Policy affects the exercise of this right by those who are so marginalised and further excluded from the benefits of a constitutional democracy.⁷¹ The High Court highlighted that even though this matter was not brought before the Equality Court, inequality is still a good point to be raised in relation to the discriminatory nature of this Policy, especially since it is only applicable in one province.⁷²

S 7(3) of the Constitution provides that rights are not absolute. One of the rights subject to the limitation clause is section 17. Section 36 is a limitation provision in that rights can be limited by law of general application and if that limitation is reasonable and can be justified.⁷³ One must balance the importance of the right itself and the importance of limiting the right.⁷⁴ The right in question is limited by a Municipal Policy, however, a section 36 analyses is irrelevant in this matter due to the fact that the Policy is not a law of general application.⁷⁵

Due to the Policy not being consistent with South Africa's constitutional aspirations, it is invalid and using section 172 of the Constitution, the Policy was declared to have no effect from the date of the High Court's judgment.⁷⁶ The court did not however, require the Municipality to pay back the fees they collected previously as this would cause chaos to the respondent's budget.⁷⁷

64 Paragraph 62; see also Duncan "South Africa's Doctrinal Decline on the Right to Protest: Notification Requirements and the Shift from Fundamental Right to National Security Threat" 2020 *Constitutional Court Review* 232–233.

65 2013 1 SA 83 (CC) para 55.

66 *Right2Know* para 62.

67 Paragraph 70.

68 *Ibid.*

69 Paragraph 71.

70 Paragraph 71 and 74.

71 Paragraph 77.

72 Paragraph 79.

73 Paragraph 85.

74 *Ibid.*; see also *Mlungwana* para 57.

75 Paragraph 86; see also *Dladla and Another v City of Johannesburg and Others* 2018 2 SA 327 (CC) para 52.

76 Paragraph 89 and 90.

77 Paragraph 91.

4 DISCUSSION

Administrative action in South Africa dates back to the apartheid regime's use of public power to infringe upon the rights of black individuals, black communities and those who sympathised with the struggle of black people.⁷⁸ Activist lawyers at the time came to the realisation that they could not address statutes directly, however, there was a loophole for them to use administrative law as a means of challenging the decisions made by government administrators and/or officials using public power.⁷⁹ After the advent of democracy there was a gradual adoption of the principle of the rule of law, which in turn provided the principle of legality.⁸⁰ The rule of law requires that any action must be carried out in accordance with the law of the land, and in the case of officials exercising public power, such action must not be arbitrary.⁸¹ The author does not suggest that the rule of law did not exist pre-democracy, however, rather that apartheid was "lawless" in the sense that the law was applied in a discriminatory manner and with the sole intention of oppressing black people.⁸²

This author concurs with the High Court in this case in that legality requires that a Municipality when exercising public powers, must ensure that when it performs an action, it does so within its authority and the moment it exceeds its authority, its action moves from being lawful to being unlawful.⁸³ In addition, the author agrees with the High Court's view that if the conduct of a public official who exercises public power goes against the principle of legality, then such action must be set aside.⁸⁴ It is also agreed with the High Court's view that the Gatherings Act does not authorise any Municipality nor the state itself to charge fees to the convenor of a protest. Accordingly, when the Municipality did this, it went beyond the law that regulates protests, that being the Gatherings Act, as stated above. The author submits that this made the charging of fees as per the Policy unlawful and violate the principle of legality.

Another principle that stems from the rule of law is that of rationality and with which the author agrees with the High Court. This principle requires that the action of an official exercising public power must not be arbitrary, but rationally connected to the specific issue.⁸⁵ This rational connection must be viewed objectively as it requires a link between the means used and the end sought to be achieved.⁸⁶ It is again concurred with the High Court that since the Municipality is required to provide safety and security without any requirements for fees, it is therefore submitted that it follows that logically, the decision to charge fees is simply arbitrary and does not meet the rationality standard.

The author concurs with the High Court that section 36 of the Constitution provides for the limitation of rights, as rights are not absolute. However, this provision is not meant to open the gates for the State to arbitrarily limit the rights of the people, but rather, it too must be seen as a way to protect rights.⁸⁷ Under this provision, a right may be limited if it is reasonable and such

78 Hoexter "The Principle of Legality in South African Administrative Law" 2004 *Macquarie Law Journal* 167.

79 *Ibid.*

80 *Ibid* 181; see also *Fedsure* para 59.

81 Ojedokun "The Rule of Law TRC Process in South Africa" 2015 *Journal of Law, Policy and Globalization* 58.

82 Ellman "The Struggle for the Rule of Law in South Africa" 2015 *New York Law School Law Review* 58.

83 Hoexter 2004 *Macquarie Law Journal* 167.

84 *Minister of Water and Sanitation* para 83.

85 *Ibid*; see also *Pharmaceutical Manufacturers* para 85.

86 Okpaluba "Judicial Review of Executive Power: Legality, Rationality and Reasonableness (Part 1)" 2015 *Southern African Public Law Journal* 130.

87 Van Staden "Constitutional Rights and their Limitations: A Critical Appraisal of the COVID-19 Lockdown in South Africa" 2020 *PELJ* 491.

limitation can be justified in a democratic society.⁸⁸ Accordingly,

To determine whether the state has satisfied this standard, the courts must conduct an analysis of the nature, extent and purpose of the right and its limitation, and ascertain the limitation's rationality and proportionality. The courts must also consider whether there were less restrictive means to achieve the purpose of the limitation. The courts must test every alleged infringement of a constitutional right against this formula.⁸⁹

It is concurred with the High Court in that the limitation of the right to protest is indeed present in that this right, under the Policy, is strictly reserved for those who can afford to pay the fees. Considering South Africa's reality where the majority live in poverty, it is submitted that this limitation is not rational and has no basis as it simply discriminates against the poor. In addition to this, the author also concurs with the High Court in that the Policy was decreed by the local government as opposed by an Act of Parliament, as a result, it is not a law of general application and due to this, fails to meet the limitation standard.

It is submitted that protests in South Africa have a deep and meaningful history that is being threatened by the limitation of this right. Protest actions occurred in the pre-apartheid era when Gandhi protested against the poll tax imposed by the British on Indian people, limiting their movements. The protesters numbered around six thousand people.⁹⁰ In 1939, due to the rise in segregation policies, the Non-European United Front held a protest attended by as many as 20 000 people, and on 20 to 21 May 1944, a protest against the carrying of the *dompas* (an identity document that Africans were forced to have on them at all times) was held in Johannesburg.⁹¹ Another protest against the carrying of passes by African women happened in August 1956 when women under the leadership of Lilian Ngoyi marched to the Union Buildings to seek an end to this unjust treatment by the then State.⁹² Robert Mangaliso Sobukwe of the Pan African Congress (PAC) organised a protest in Sharpeville on 21 March 1960 against the carrying of passbooks by African people when the apartheid police turned it into the bloodiest massacre of unarmed people in the history of South Africa.⁹³

In 2015, students from across the country protested against university fees which had become unreasonably expensive, thus discriminating against students from poor and working class backgrounds, in essence, the majority of black students.⁹⁴ In line with these student protests against fee increases, an anti-colonialist, anti-Rhodes protest took place.⁹⁵ This list is not meant to be exhaustive, it is merely a brief description of the history of protest actions in South Africa which all have a significant impact on South African society and the way discrimination of people based on race and class was carried out. It is submitted that, against the background of this history, the Municipality should have reconsidered before levying fees for protest actions.

While the matter was not brought before the Equality Court, the author is of the view that it would have been worthwhile for the High Court to briefly highlight the issue of discrimination. The equality provision of the Constitution accordingly provides that "Everyone is equal before

88 *Ibid.*

89 *Ibid.*

90 Du Pisani, Broodryk and Coetzer "Protest Marches in South Africa" 1990 *The Journal of Modern African Studies* 577.

91 *Ibid* 579.

92 *Ibid.*

93 *Ibid* 582.

94 Kusa "The Born Frees as Assertive Citizens? Student Protests and Democratic Prospects in South Africa" 2018 *Polish Political Science Yearbook* 722.

95 *Ibid.*

the law and has the right to equal protection and benefit of the law.”⁹⁶ The provision goes further to state “Equality includes the full and equal enjoyment of all rights and freedoms.”⁹⁷ The author is of the view that at face value, this provision means all people are equal before the law, all people should equally enjoy the benefits of such law and the moment people do not enjoy full and equal enjoyment of the rights provided by the Bill of Rights, then there is discrimination. Simply put, there is no person or group of people that should be either below the law or above the law and if there is a tip on either scale, then, there is some form of discrimination.⁹⁸ This is especially relevant in the South African context considering the country’s history of racial, gender and class discrimination.⁹⁹

This provision goes further to provide that: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”¹⁰⁰ The author is of the view that this provision, at face value, does not limit the grounds upon which the State may not discriminate against and that would include class. The fact that those who can afford to pay the fee get to enjoy safety and security that the State is obliged to provide to its citizens and those who cannot afford to pay the fee levied are given the bare minimum-security measures constitutes direct discrimination.

5 CONCLUSION

This note is an attempt to initiate an awareness of the decision of the High Court, delivered by Victor J, whether the decision of the Municipality to levy fees for protests, has met the standard of legality and rationality and whether there was a limitation on the right to protest. The author concurs with the High Court in so far as that, when the Municipality instituted such a Policy, it was not authorised by the statute that regulates protests and as such, acted beyond its powers. Such an exercise of power should not be allowed as it is not legal. The author is also in agreement with the High Court in that the Policy stipulating the charging of fees for protests is not rational as the State is obliged to provide for safety and security, irrespective of fees. Of particular importance, is that the fees create unfair discrimination against those who cannot afford them and therefore are not able to enjoy the same benefits as those who can.

96 Section 9(1) of the Constitution; see also Dlamini “Equality or Justice? Section 9 of the Constitution Revisited — Part II” 2002 *Journal for Juridical Science* 16.

97 Section 9(2) of the Constitution.

98 Dlamini 2002 *Journal for Juridical Science* 16; see also *Prinsloo v Van der Linde and Another* 1997 3 SA 1012 (CC).

99 *Ibid.*

100 Section 9(3) of the Constitution.