THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 27 September 2011

Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

On 27 September 2011 the Supreme Court of Appeal handed down judgment in *South African Transport & Allied Workers Union v Garvis & others*, dismissing an appeal against an order of the Western Cape High Court, Cape Town, in terms of which it declared that s 11(2)*(b)* of the Regulation of Gatherings Act 205 of 1993 was not inconsistent with s 17 of the Constitution of the Republic of South Africa. Section 17 provides that everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

Section 11 of the Regulation of Gatherings Act provides that if any riot damage occurs as a result of a gathering, every organisation on behalf of or under the auspices of which that gathering was held, shall be jointly and severally liable for that riot damage, as a joint wrongdoer together with any other person who unlawfully caused or contributed to such riot damage. Section 11(2) of the Act contains the provision challenged by the appellant, the South African Transport and Allied Workers' Union. This section provides that it shall be a defence to a claim if an organisation organising a gathering proves that it did not commit or connive at the act or omission which caused the damage, *and* that the act or omission did not fall within the scope of the objectives of the gathering and was not reasonably

foreseeable; *and* that it took all reasonable steps within its power to prevent the act or omission.

In defending an action brought by, amongst others, a hawker and a flower seller, eking out a living in the Cape Town city centre, for loss they sustained during a protest march by the Union as a result of violent behaviour by participants, the Union submitted that too great a burden was placed on trade unions and other organisations by s 11(2)*(b)* of the Act and that, faced with extensive statutory liability for riot damage, they would be deterred from organising marches, protests and other gatherings for fear of financial ruin. Put simply, it was submitted that the statutory liability, coupled with the onerous task of establishing a defence in terms of s 11(2) of the Act, would have a chilling effect on public demonstrations and that the latter subsection was consequently unconstitutional.

That submission was rejected by Hlophe JP in the court below. He had regard to the evidence presented by the Union and the common cause facts and held that the right to public protest and demonstration entrenched in s 17 of the Constitution was not implicated because the right to assemble, demonstrate and picket did not protect unlawful behaviour at gatherings. The court below had regard to evidence presented on behalf of the police and the local authority that notwithstanding the provisions of s 11(2)*(b)*, gatherings were frequently held. In short, the Act had no deterrent effect.

The court below also rejected the submission that s 11(2) of the Act, and particularly s 11(2)*(b)*, was internally self-destructive and incoherent. It had been submitted on behalf of the Union that, where a trade union or like organisation took reasonable steps to prevent acts leading to riot damage, the resultant behaviour complained of would always be reasonably foreseeable and organisations would inevitably be landed with liability. It was submitted that the defence provided for in s 11(2)*(b)* was illusory.

The SCA agreed that the rights set out in s 17 of the Constitution were not implicated and that only peaceful demonstrations were protected. It held that causing and participating in riots are the antithesis of constitutional values. The wording of s 17 is deliberate. It precludes challenges to statutes that restrict unlawful

behaviour in relation to gatherings and demonstrations that impinge on the rights of others.

It was submitted on behalf of the Union that damage caused by participants in a gathering was a small price to pay to protect the precious right to public assembly and protest.

The SCA accepted that assemblies, pickets, marches and demonstrations are essential instruments of dialogue in society. It held, however, that the struggle for workers' rights should take place within legal limits and with due regard to the rights of others. This court agreed with the court below that the chilling effect of s 11(2)*(b)* described on behalf of the Union, was not only unsubstantiated but was contradicted by the City of Cape Town and the police. The SCA stated that in the past the majority of the population was subjected to the tyranny of the State and that historical events such as the Sharpeville massacre and the Soweto student uprising were imprinted on the national psyche. We should not now be subjected to the tyranny of the mob.

This court rejected the notion that the relevant provisions of the Act raised a spectre of limitless liability for organisers of gatherings. It rejected the argument that the defence provided for in s 11(2)*(b)* was illusory and set out a number of examples that proved the opposite. It held that s 11(2)*(b)* was not inherently contradictory and self-destructive and consequently dismissed the appeal. Because of the constitutional challenge no order was made as to costs.