



Basic Education
Justice and Constitutional Development



NATIONAL SCHOOLS
Moot Court Competition



10TH NATIONAL SCHOOLS MOOT COURT COMPETITION 2020

RESOURCE PACK

NOTE: The following should provide teams with a solid basis from which to build arguments for both the applicant (the six learners) and the respondent (the School Governing Body of Mjondolo Combined School). Learners are permitted to do further research and to utilise other sources, but may not add either facts or evidence to that which is provided.

1. The Constitution of the Republic of South Africa Act 108 of 1996

Sections 9, 10, 14, 16, 17, 28(1), 29(1), 36(1) and 39(1) (b)

Note: In South African law, the Constitution is the supreme law of the land. Any other law that is inconsistent with the Constitution must be declared invalid and may, amongst other remedies, be amended.

Section 9: Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

Section 10: Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 14: Privacy

Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

Section 16: Freedom of expression

(1) Everyone has the right to freedom of expression, which includes—

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

Section 17: Assembly, demonstration, picket and petition

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

Section 18: Freedom of association

Everyone has the right to freedom of association.

Section 28(2): Children

A child's best interests are of paramount importance in every matter concerning the child.

Section 29(1): Education

29. (1) Everyone has the right—

(a) to a basic education, including adult basic education;

Section 36(1): Limitation of Rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

Section 39(1) (b): Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—

(b) must consider international law;

2. United Nations International Covenant on Civil and Political Rights (ICCPR)

NOTE: This is considered part of international law, and was developed by the United Nations (UN). South Africa ratified the treaty and has agreed to be bound by its provisions.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

3. United Nations Convention on the Rights of the Child (CRC)

NOTE: This is also considered part of international law, and was developed by the United Nations (UN). South Africa ratified the treaty and has agreed to be bound by its provisions.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

4. South African Schools Act No. 84 of 1996 (Schools Act)

Note: Schools in South Africa are regulated in accordance with the Schools Act.

Section 8: Code of Conduct

(1) Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school.

(2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.

....

(4) Nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the schools attended by such learner.

5. The Regulation of Gatherings Act No. 205 of 1993 (Gatherings Act)

Section 1: Definitions

“convener” means—

(a) any person who, of his own accord, convenes a gathering; and

“**demonstration**” includes any demonstration by one or more persons, but not more than 15 persons...

“**gathering**” means any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act No. 29 of 1989), or any other public place or premises...

Section 3: Notice of gatherings

(1) The convener of a gathering shall give notice in writing signed by him of the intended gathering in accordance with the provisions of this section:...

Section 12: Offences and penalties

(1) Any person who—

(a) convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3; or

.....

shall be guilty of an offence and on conviction liable—

(i) in the case of a contravention referred to in paragraphs (a) to (j), to a fine or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment; and

(2) It shall be a defence to a charge of convening a gathering in contravention of subsection (1) (a) that the gathering concerned took place spontaneously.

6. Case Law (Judgments handed down by courts)

Note: The following extracts are drawn from landmark judgments by South African courts. The underlying principles can be applied to the facts of the Moot.

6.1 South African Transport and Allied Workers Union (SATAWU) and Another v Garvas & Others (2013) 1 SA 83 (CC) (Garvas Case)

- **Paragraph 52:**

“...everyone who is unarmed has the right to go out and assemble with others to demonstrate, picket and present petitions to others for any lawful purpose. The wording is generous. It would need some particularly compelling context to interpret this provision as actually meaning less than its wording promises. There

is, however, nothing, in our own history or internationally, that justifies taking away that promise.”

- **Paragraph 53:**

“Nothing said thus far detracts from the requirement that the right in section 17 must be exercised peacefully. And it is important to emphasise that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection. This proposition has support internationally. As the European Court of Human Rights noted:

“[A]n individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour”.

- **Paragraph 61:**

“The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights.”

- **Paragraph 62:**

“Under apartheid, the state took numerous legislative steps to regulate strictly and ban public assembly and protest. Despite these measures, total repression of freedom of expression through protest and demonstration was not achieved. Spontaneous and organised protest and demonstration were important ways in which the excluded and marginalised majority of this country expressed themselves against the apartheid system, and was part and parcel of the fabric of the participatory democracy to which they aspired and for which they fought.”

- **Paragraph 63:**

“So the lessons of our history, which inform the right to peaceful assembly and demonstration in the Constitution, are at least twofold. First, they remind us that ours is a “never again” Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away. Second, they tell us something about the inherent power and value of freedom of assembly and demonstration, as a tool of democracy often used by people who do not necessarily have other means of making their democratic rights count. Both these historical considerations emphasise the importance of the right.”

- **Paragraph 64:**

“There is also international support for this. The Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns stated:

“Supporting freedom of assembly implies a realisation that, as expressed so eloquently by the Spanish Constitutional Court, ‘in a democratic society, the urban space is not only an area for circulation, but also for participation’.”

- **See also paragraphs 22; 66; 69 and 120.**

6.2 *Mlungwana and Others v S and Another 2019 (1) SACR 429 (CC) (Mlungwana case)*

- **Paragraph 2:**

“...section 12(1) (a) constitutes an unjustifiable limitation of the right in section 17.”

- **Paragraph 8:**

“Central to the Act and to this case are the definitions of a “gathering”, “demonstration”, and “convener” in section 1 of the Act.”

- **Paragraph 16:**

“If a gathering proceeds without a formal notice, then section 12(1) (a) provides that it is a criminal offence to convene a gathering without giving the requisite notice as prescribed in the Act. It is only a convener who is criminally liable for failure to give notice of a gathering under section 12(1) (a). It is open to a convener to invoke a defence that the gathering concerned took place spontaneously.”

- **Paragraph 43:**

“Section 17 guarantees the right to assemble peacefully and unarmed. The content and scope of this right must be interpreted generously. But its meaning

is clear and unambiguous. Everyone has the right to assemble, demonstrate, picket, and present petitions. The only internal qualifier is that anyone exercising this right must do so peacefully and unarmed. “Everyone” in section 17 must be interpreted to include every person or group of persons—young or old, poor or rich, educated or illiterate, powerful or voiceless. Whatever their station in life, everyone is entitled to exercise the right in section 17 to express their frustrations, aspirations, or demands. Anything that would prevent unarmed persons from assembling peacefully would thus limit the right in section 17.”

- **Paragraph 47:**

“In this matter, the criminal sanction in section 12(1) (a) deters the exercise of the right in section 17. The respondents not only admit this, but invoke the self-same deterrent effect to explain section 12(1) (a)’s purpose and justify its provisions. The possibility of a criminal sanction prevents, discourages, and inhibits freedom of assembly, even if only temporarily. In this case, an assembly of 16 like-minded people cannot just be convened in a public space. The convener is obliged to give prior notice to avoid criminal liability. This constitutes a limitation of the right to assemble freely, peacefully, and unarmed. And this limitation not only applies to conveners, but also to all those wanting to participate in an assembly. If a convener is deterred from organising a gathering, then in the ordinary course (save for the rare spontaneous gathering) a gathering will not occur.”

- **See also paragraphs 48; 51; 55; 57; and 72.**

6.3 Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2014 (2) SA 228 (CC)

- **Paragraph 58:**

“...a code “must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.”

- **See also Paragraph 231.**

6.4 MEC for Education: Kwazulu-Natal and Others v Pillay 2008 (1) SA 474 (CC) (Pillay case)

- **Paragraph 98:**
“Both discipline and education are legitimate goals. However, care must be taken not to state the School’s interest too broadly.”
- **Paragraph 175:**
“The Code of Conduct once adopted did not contain any express provision for exemptions, either to regulate in what circumstances they would be granted or to establish a procedure whereby an exemption could be obtained. In my view, it is this absence which was a significant factor in giving rise to the unfairness in this case.”
- **See also Paragraphs 184-185:**

6.5 *Antonie v Governing Body, Settlers High School 2002 (4) SA 738 (C) (Antonie case)*

- **Paragraph 17:**
“The question should be asked, in this regard, whether or not the prohibition is aimed at promoting positive discipline and whether or not noncompliance therewith justifies punishment or some other form of sanction. This requires a spirit of mutual respect, reconciliation and tolerance.”

7. Other

7.1 United Nations Human Rights Committee: Draft General Comment on the right of peaceful assembly, setting out the general legal principles on demonstrations.

- <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx>

7.2 African Commission on Human and Peoples’ Rights: Guidelines on freedom of association and assembly in Africa

- <https://www.achpr.org/legalinstruments/detail?id=5>

7.3 In the media:

- <https://www.iol.co.za/capeargus/news/cellphones-have-a-place-in-classroom-19496518>

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