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Cover photo: Ashraf Hendricks (Daily Vox). Photos by Ihsaan Haffejee (courtesy of Ground Up), Ashraf Hendricks (courtesy of Ground Up and Daily Vox), Kwazi Dlamini and Nabila Bana (courtesy of Daily Vox), Edward Molopi and Dasantha Pillay.
STUDENT PROTESTS
A legal & practical guide
September 2017
“The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable groups ... This right will, in many cases, be the only mechanism available to them to express their legitimate concerns.”

South African Transport and Allied Workers Union (SATAWU) v Garvas, Constitutional Court (2013)
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ABOUT THIS GUIDE
Section 17 of the Constitution protects everyone’s right to protest, peacefully and unarmed. This includes protests that are disruptive. The right to protest is an important means for people to speak out about the issues that affect them and ensure that government and private institutions listen to their concerns. It is an important tool for political expression in South Africa.

During 2015 and 2016, students on university campuses across South Africa embarked on large-scale, disruptive protests. Through these protests students brought campuses to a standstill, disrupted classes, interrupted exams, and marched to the seats of government in Cape Town and Pretoria to voice their demands. The students called for systemic changes to how universities operate and approach education, as well as how academic curricula are structured.

Government, university administrators and police often responded to these protests with violence and intimidation in an attempt to shut them down. Universities approached the courts to obtain interdicts preventing students from protesting on campuses. The police and private security frequently used tear gas, water cannons and rubber bullets against protesting students. Many students were assaulted, arrested and detained.

*Student Protests: A Legal and Practical Guide* explains students’ right to protest, as well as students’ rights when they are arrested, detained or charged with a crime during a protest. It also explains what laws and policies say about these rights and what legal protections students have.

**Who can use the guide?**

This guide is a resource for students who participate in protests, as well as community-based paralegals and lawyers who deal with student protests. The guide will also be useful to government officials, university administrators, police and security guards.

SERI hopes that through this guide, students, universities and the police will benefit from a better understanding of the laws and policies governing student protests.
STUDENT PROTESTS AND THE LAW
1. WHAT DOES THE CONSTITUTION SAY ABOUT PROTESTS?

In South Africa, the Constitution contains a number of important rights and protections that enable people to protest and voice their political views.

This is a dramatic change from the past. Under apartheid, the South African government put numerous laws in place to strictly regulate, prevent and ban protests, making it extremely difficult to participate in lawful protests.

Today the Constitution is the supreme law in South Africa. This means that all other laws must be consistent with the Constitution and that everyone must respect, promote and fulfil the rights set out in it. The Constitution provides for people to be able to voice their grievances and actively participate in decisions that affect them. It not only contains a right to protest but also contains a set of rights that complement the right to protest. For this reason, the Constitutional Court has said that when we interpret protest rights, we should remain aware of how the apartheid government tried to repress protests and make sure that we do not repeat the same mistakes.

The laws or policies governing protest must give effect to the rights contained in the Constitution. This means that the law is mainly aimed at assisting people to participate in protests, not to discourage, prevent or ban them from doing so.

The right to assemble, demonstrate, picket and present petitions

When people speak about the right to protest, they are most often referring to section 17 of the Constitution. Section 17 says that “everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions”. The Constitution therefore grants legal protection to a wide range of different protest actions.

There are, however, two limitations to the right to protest. The Constitution only protects protests that are peaceful and unarmed.

“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...”

South African Transport and Allied Workers Union (SATAWU) v Garvas, Constitutional Court (2013)
What is a peaceful protest?
Peaceful means that the protest does not involve physical violence against people or property. A protest that causes physical harm to people or includes burning, destroying, vandalising or defacing public or private property will not be legally protected in terms of the Constitution. In some instances, the threat of violence alone will be enough to make a protest lose its constitutional protection.

However, protestors will not lose their rights to protest if there is a degree of violence from some protestors at a protest. The Constitutional Court has said that a protest cannot simply be considered violent because some protestors are involved in sporadic violent acts or criminal activities. In other words, if you take part in a protest during which some of the other protestors commit violent acts, this will not mean that your own actions will be considered violent. As long as a person remains peaceful, his or her right to protest will still be legally protected.

What is an unarmed protest?
The Constitution also says that protests should be unarmed. This means that protestors should not carry or use weapons during a protest. This includes dangerous weapons such as guns or knives and even “defensive weapons” such as shields.

The requirement that protestors be unarmed is closely related to the requirement that a protest must be peaceful because violence includes both actual physical violence and the real threat of physical violence.

This does not mean that every group of protestors that shouts or chants threats would automatically be considered violent. However, depending on the context, police
or security guards might see protestors carrying weapons as a threat that the protestors will use violence or as an attempt to raise the levels of aggression.

Can ceremonial weapons be carried at protests?

People sometimes carry ceremonial weapons for cultural or symbolic reasons rather than to use them to commit a crime or a violent act. However, the law is not clear about whether protestors are allowed to carry ceremonial weapons such as knobkerries during a protest.

Although carrying ceremonial weapons at a protest could be a lawful form of political expression, protestors should be aware that the law is unclear on carrying them.

If a protestors uses, or threatens to use, a ceremonial weapon to commit an act of violence at a protest, his or her conduct will not be legally protected.

WHAT DOES THE LAW SAY ABOUT WEAPONS?

The Dangerous Weapons Act (2013) is a national law that regulates the use of weapons. The Act says that it is illegal to carry almost any type of weapon in cases where carrying the weapon could “raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose”. However, the Act also says that people are allowed to carry ceremonial weapons if they participate in “any religious or cultural activities or lawful sport, recreation or entertainment” or in “any lawful … activity”.

For this reason, it is unclear whether protestors can carry ceremonial weapons if they do not intend to do something unlawful (like commit a crime or violent act). Much depends on the context in which a ceremonial weapon is carried.
DISRUPTIVE PROTESTS

The Constitution does not protect violent protests, but it does protect forms of protest that are disruptive. Protests are disruptive if they disturb or interrupt an event, activity or process. Protests sometimes have to be disruptive to have a meaningful effect. Without causing some disruption to the daily functioning of society, protestors may struggle to communicate their message forcefully and effectively. Disruption is often the only way for people who are ordinarily excluded from the decisions that affect their lives to convey their grievances. Employees may, for example, participate in protected strikes in order to disrupt their employer’s work regimes and draw attention to wage dissatisfaction or unfair working conditions. The Grahamstown High Court has said that disruptive protests are a form of political expression that is protected in terms of the Constitution. Importantly, the court said that disruptive, noisy or loud protests are not an exception to the norm, but rather precisely what the Constitution protects.

The Constitutional Court has also held, in the context of parliamentary debate, that not every interruption of an event or proceeding is necessarily unlawful. The temporary expression of a bona fide grievance will often be a lawful exercise of free expression, even if it causes some disruption of an event or proceeding. It is only interruptions that completely discontinue the event, or hamstring the proceedings that will, generally, be considered unlawful.

The degree, form and length of disruption that is legally protected in terms of the Constitution will depend on the particular circumstances. While not all disruptions will be constitutionally protected, not all forms of disruption will be illegal.

“…crowd action albeit loud, noisy and disruptive is a direct expression of popular opinion ... this is what is protected in section 17 of the Constitution.”

Rhodes University v Student Representative Council of Rhodes University, Grahamstown High Court (2016)
Some examples of disruptive protests are:

**Interrupting lectures or tutorials:** Some forms of interruption will ordinarily be legally protected for example singing outside a lecture hall or silently protesting during a lecture by holding up placards or signs without bringing a stop to the lecture. The law is less clear when it comes to other forms of interruption. For example, interrupting a lecture by entering the venue and shouting or singing may or may not be legally protected depending on how serious the disruption is and how long it lasts. If a lecture is 45 minutes long and the interruption lasts only 5 minutes, this may be short enough to ensure that the interruption is still legally protected in terms of the Constitution.

**Preventing people from entering university campuses:** This form of disruption may be legally protected depending on the seriousness of the disruption and how long it lasts. For example, preventing all university students and staff from entering the university campus for a whole day could be seen as a serious disruption, but preventing people from entering the university campus for a short period of time or redirecting traffic from one entrance to another may be legally allowed in certain circumstances. If any form of violence or destruction of property is required to maintain a blockade which prevents entry to a campus, whether temporary or permanent, the attempt to prevent access will not be legally protected in terms of the Constitution.

**Occupying university buildings:** Some students have also occupied university administration buildings (day and night) in order to express their frustrations with universities and facilitate easier sharing of ideas and planning of protests. If occupations do not prevent the universities’ staff from performing their duties or the university from operating, they may be forms of constitutionally protected disruption. This is even the case if occupations inconvenience other students or upset the usual routines of staff or make them feel intimidated.
OTHER RIGHTS IN THE CONSTITUTION

The right to protest is closely related to a number of other fundamental rights contained in the Constitution. These rights are relevant in all protests, regardless of whether the protest takes place on public or private property or whether there are university rules that apply.

The Constitution protects everyone’s right to freedom of conscience, thought, belief and opinion. This means that strongly held views and beliefs are legally protected even if they are not popular or socially acceptable.

Freedom of expression can be seen as an individual component of the collective rights protected by protest rights. This right protects even unpopular and offensive expression that may be insulting to university staff or management. Academic freedom is a form of expression which is at the heart not only of academics’ ability to teach, but also students’ ability to learn critically and respond to the method and content of teaching they receive. Academic freedom is constitutionally protected.

The right to human dignity protects individual and collective autonomy which includes the free expression of ideas. It also requires that people be treated with “care and concern” particularly when it comes to their interactions with government, the police and private security.
This includes the right to be “free from all forms of violence from either public or private sources”. It is a protection against physical, psychological and other forms of violence from both public (including the police) and private sources (including security guards).

The Constitution protects a range of political rights, including the right to make political choices, form political parties and campaign for a political cause. Campaigning for change on campus or campaigning for or against the membership of a Student Representative Council (SRC) is covered by this right. University administrations have been accused of choosing to selectively deal with SRCs which may not necessarily reflect the views of students. Both those campaigning for a student political party or SRC and those campaigning for a political cause outside of formal representation have the constitutional right to do so.

The Constitution guarantees everyone’s right to freedom of movement. Although universities might, in the appropriate circumstances and manner, be able to regulate entry onto, movement around and exit from campuses or certain areas on campus, they do so in the context of the constitutional right to freedom of movement, which will have to be restricted as little as possible. This is relevant in determining whether or when universities may be entitled to impose curfews or request courts to issue interdicts against protestors.

The Constitution says that “everyone has the right to fair labour practices”, which include the ability to join trade unions and participate in their activities; participate in strikes; and engage in collective bargaining. Although the Labour Relations Act (1995) (LRA) further details these rights and restricts some protections to “employees”, it is important to note that the Constitution itself makes no distinction between outsourced or insourced workers or “employees”, “independent contractors” or workers hired through labour brokers. All workers have a constitutional right to fair labour practices, regardless of whether they are academic or non-academic university staff.
In 1993, Parliament passed a law to govern protests in public places called the Regulation of Gatherings Act (the Gatherings Act). Under apartheid many violent conflicts took place during protests, particularly between police and protestors. Government, and particularly the police, played a significant part in causing or worsening these conflicts, and often used brutal violence against protestors. The Gatherings Act was put in place to prevent these types of conflicts and ensure that police create a space where people can protest peacefully. It also requires police to protect protestors rather than instigate violence or curb protests.

How can protestors ensure that a protest is lawful?

The Gatherings Act applies to gatherings in public places of more than 15 people.

The Act sets out a legal process for protestors to follow to make sure that a protest is lawful. It explains what protestors should do to ensure that a protest is legally recognised by the police or a municipality. It also explains how the police should facilitate and support protests to ensure that protestors can exercise their rights. Finally, it empowers courts to overrule decisions of the police and the municipality if they exceed their legal powers by unlawfully prohibiting a protest.

The legal process set out in the Gatherings Act consists of six steps that must be taken in the context of a planned protest:

1. **STEP 1**
   - Protestors determine whether the Gatherings Act applies

2. **STEP 2**
   - Protestors give notice to the responsible officer

3. **STEP 3**
   - Responsible officer consults with the police

4. **STEP 4**
   - Responsible officer calls a meeting in terms of section 4 of the Gatherings Act

5. **STEP 5**
   - Responsible officer agrees that protest can take place, asks for changes to protest plans or prohibits the protest from taking place on the planned day in the particular public space in which it is planned to proceed

6. **STEP 6**
   - Protestors appeal in court (if the responsible officer is unreasonable or prohibits the protest)
Other rules and regulations (such as university rules and compliance with constitutional standards) may apply to protests such as demonstrations which involve 15 or less people or to protests in private spaces, and are covered in section 3 of the guide.

What are the consequences of an unlawful protest?

The Gatherings Act says that a protest can only be prohibited in exceptional circumstances. If a protest as a whole is prohibited or the process laid out in the Act is not followed, then it is unlawful. Any person, whether organiser or participant in a protest which has been prohibited is committing an offence and can be subjected to criminal prosecution.

A lawful protest is a protest that complies with the law. This means that protestors have followed the legal process set out in the Gatherings Act.

A person participating in unlawful activity – such as harming other people or destroying property – at an otherwise lawful protest will also be personally subject to criminal prosecution. Lawful participants in a lawful protest where some individuals are participating in unlawful activities cannot be subjected to criminal prosecution and have a right to continue participating in protest activity.
LIABILITY FOR DAMAGE TO PROPERTY DURING A PROTEST

Individual protestors cannot be held liable for damage to property - no matter how extensive - caused by other protestors. However, section 11 of the Gatherings Act allows for the organisers or conveners of a gathering to pay for damage to property caused by protestors if the damage was:

- “reasonably foreseeable”; and
- the conveners failed to take “reasonable steps”; that were
- “within their power”; and
- at “every stage in the process” to prevent such damage.

These requirements were set out clearly in the Constitutional Court’s analysis of the relevant sections of the Gatherings Act. Organisers will therefore never be liable for damage to property that was not within their power to prevent or that they took reasonable steps to prevent. Organisers of a protest in a public space, for example, cannot be held responsible for the actions of people who are not involved in the protest and who take advantage of a protest to commit crimes such as looting of shops.

What is reasonable depends on the context but could include:

- Ensuring that sufficient marshals are posted to ensure that the protest will go smoothly
- Directing protestors through routes which may minimise potential damage to property
- Clearly discouraging protestors from damaging property before or during a protest
- Attempting to enlist support from authorities through the notice process.

Where it is clear that the convener will not be able to prevent damage to property during a protest, the convener may also need to show that he or she has considered whether - weighing these considerations against the protestors’ rights to protest - the protest should continue at all or at the particular time in its proposed form.

In the university context where protests may be spontaneous or become violent, this could open up the conveners or organisers to significant financial liability.
Can a spontaneous protest be lawful without giving notice?

In the Tsoaeli case, the High Court found that the Gatherings Act “obviously recognises that some protest gatherings happen spontaneously”. If a protest occurs spontaneously and so no notice can be given, the Gatherings Act provides a defence against the criminal charge of protesting without the appropriate notice being given.

The Gatherings Act does not describe the circumstances under which a protest can be considered spontaneous, but the length of time between planning the protest and the protest is one determining factor.

If the intention is to bypass the steps set out in the Gatherings Act, the spontaneous protest defence will not be considered valid.

It is useful to keep the concept of a “spontaneous protest” in mind during student protests. It will often be a defence to a charge under the Gatherings Act that the protest was spontaneous. Evidence of spontaneity such as emails, minutes of meetings or WhatsApp messages in which decisions are taken to protest may help to show good faith intention to protest spontaneously to ensure effectiveness and responsiveness rather than to avoid the notification process.

Notice in terms of the Gatherings Act should be given wherever possible in order to avoid the risk of the protest being considered unlawful. Demonstrating that the protest was spontaneous may not be straightforward and may only be possible in court after protestors are arrested, charged and in custody for their involvement in an unlawful protest.
What is the legal process set out in the Gatherings Act?

1. **Protestors determine whether the Gatherings Act applies**
   - The Gatherings Act only applies to protests that take place on a public road or in a public place. Protestors should consider whether the protest will take place in a public or non-public place.

2. **Protestors decide to organise a protest to air their grievances or make their demands.**

3. **The responsible officer requests that the protestors make unreasonable changes to their protest plans or prohibits the protest.**
   - The responsible officer can only prohibit a protest:
     - After the officials had a section 4 meeting with the convener or deputy convener (and the parties could not come to an agreement) AND
     - There is credible information (under oath) that the protest will seriously disrupt traffic, cause serious damage to property, or cause physical injury to people AND
     - The police say that they are not able to prevent these problems.

4. **The responsible officer agrees that the protest can take place according to the protest plan.**

5. **Protest goes ahead according to the rules applicable to a protests in a non-public place.**

6. **Protestors appeal to a court (if the responsible officer is unreasonable or prohibits protest).**
   - Protestors can approach a court and ask a judge or magistrate to overturn the prohibition or unreasonable conditions within 24 hours of hearing from the responsible officer.
   - After listening to the arguments in court, the judge or magistrate could order the protest to go ahead as set out in the protest plan, order the protest to go ahead with modified protest plans or dismiss the application and prohibit the protest.

   - The responsible officer requests that the protestors make unreasonable changes to their protest plans or prohibits the protest.
   - The responsible officer can only prohibit a protest:
     - After the officials had a section 4 meeting with the convener or deputy convener (and the parties could not come to an agreement) AND
     - There is credible information (under oath) that the protest will seriously disrupt traffic, cause serious damage to property, or cause physical injury to people AND
     - The police say that they are not able to prevent these problems.

   - Protestors are unsure whether the location of the protest is a public or non-public place. Protestors decide to follow the process in terms of the Gatherings Act in case it applies.

   - (See section 3 of this guide for more information about protests that are not governed by the Gatherings Act.)
The protestors plan to have the protest take place on a public road or in a public place. This means that the Gathering’s Act applies.

The responsible officer requests that the protestors make reasonable changes to their protest plans.

Protest can go ahead according to the reasonable changes agreed to.

The officials do not believe that any changes to the protest plans are necessary or the convener does not hear back from the responsible officer within 24 hours of giving notice of the protest.

The officials do believe that changes have to be made to the protest plans as set out in the notice.

The responsible officer can agree that the protest take place according to the protest plan set out in the notice, can request that the protestors make reasonable changes to their protest plans or can prohibit the protest.

The responsible asks the convener or deputy convener to attend a section 4 meeting to get more information about the protest or to discuss any changes that need to be made to the protest plans.

The officials and the convener or deputy convener negotiate about any changes to the protest plans.
A public place is an indoor or outdoor area which the public have a right to access. There are different ways that the public can have a right to access a public place, including it is a public amenity, through an invitation or through a contract (like buying a ticket to get access to a theme park).

Public places are usually owned by the government, but this is not always the case. Examples of public places are public roads or streets, parks, squares or even the pavement in front of, or the steps to, a building.

The legal notification process in the Gatherings Act only applies if:

1. More than 15 people are participating; and
2. The protest takes place on a public road or other public place.

If a protest does not meet these requirements the Gatherings Act does not define it as a gathering. This means that protestors do not have to follow the notification process set out in the Gatherings Act for protests that do not take place in public places and involve more than 15 people.

Importantly, protesters need to follow other processes when participating in protests that are not in public places and/or involve 15 or fewer people. These processes could include those set out in university policies dealing with protests on campus or in municipal by-laws. In addition, all protests, regardless of the number of participants or location must be peaceful and unarmed.

Public and non-public places

When students protest on or near university campuses, it is sometimes difficult to decide whether the protest falls under the Gatherings Act. This is because it is not always clear whether universities should be considered public or non-public spaces.

Roads, buildings, fields and open spaces on university campuses are sometimes considered to be public spaces in terms of the law. For example, in the Hotz case the Supreme Court of Appeal found that a road on the University of Cape Town’s campus was a public road because ordinary members of the public were allowed to access or use the road.

In addition, it may not be clear where a university’s boundaries start and end or what parts of the university the public has access to. Although access control points, like the entrances or gates of university campuses, may indicate where the university begins, this is not always the case. This means that whether the Gatherings Act applies to a protest depends on the particular circumstances and location of the particular university and may not always be immediately obvious.

If you are unsure about whether the location in which you wish to protest is a public place, it is best to check before assuming that it is not. It may be worth following the process set out in the Gatherings Act if you are not sure.
In terms of the Gatherings Act, the convener of a protest (the organiser) must give notice to the responsible officer or to the deputy responsible officer or to a magistrate if a responsible officer is not identified.

When should notice be given?
The convener should notify the responsible officer as soon as possible in advance of the protest. The Gatherings Act says that notice should be given 7 days before the protest (including weekend days and public holidays).

If this is not possible, the responsible officer should be given notice at least 48 hours (2 days) before the protest and reasons should be provided why notice was not given earlier.

The aim of early notification is to ensure that the protest can be carefully planned and coordinated. It cannot legally be used as a way to frustrate the protest.

Who must give notice?
The convener of the protest gives notice. Others who want to participate in the protest do not need to give individual notice.

How to give notice?
Notice must be given to the responsible officer in writing and the convener must sign the notice. There is no prescribed way to hand in this form, so a convener could take this to the responsible officer’s office or send it in an email or fax.

A convener is the organiser of the protest and is usually appointed by the group or organisation that wants to protest. The convener carries responsibilities in terms of the Gatherings Act, including giving notice of the protest and participating in any meetings or negotiations with the municipality and police. A deputy convener should also be appointed in case the convener becomes unavailable. The convener and deputy convener should have experience and skill in negotiating with government officials and the police, and should ideally understand protest rights and the process in the Gatherings Act.

A responsible officer is the person in the municipality that deals with gatherings or protests. The responsible officer could be a municipal official or someone in the police department.

Giving notice is not the same as asking for permission. Giving notice is about informing the municipality of the intent to protest and to facilitate the smooth running of the protest. Protests may only be prohibited in exceptional circumstances.
Keep and carry copies of the notice and proof that it was given to the municipality or police official. Examples of proof include fax receipts, registered mail receipts from the post office or the signature of the person who received it if it was delivered by hand.

**What should be in the notice?**

The notice to the responsible officer should include as much accurate information about the protest as possible. This will ensure that there are fewer reasons for the responsible officer to delay the protest, make changes to the protest plans or to prohibit the protest.

There is no specific form that is prescribed by the Gatherings Act by which notice must be given. Despite this, in practice, some municipalities will insist that a particular form be completed. As long as the form asks for the prescribed information - or similar, relevant information - the convener should fill it in. Information to be included in the notice is set out in the checklist below. Failure to use a form provided by the municipality does not affect the lawfulness of the protest as long as the information prescribed below is given to the municipality.

The police and the municipality cannot prohibit a protest because they disagree with protestors’ objectives or the reason for the protest. Often the reason for the protest will be to object to the behavior of university or government officials. That the protest may be aimed at authorities is not relevant to whether the protest can lawfully be prohibited in terms of the Gatherings Act.

### CHECKLIST

**What should be in a notice?**

- **Conveners’ details:** The name, address, and contact details of the convener and deputy convener.
- **Organisational details:** If the protest is organised by an organisation, the name of the organisation should be provided.
- **Reason for protest:** The main reason for the protest should be provided.
- **Protest details:** The time, date, and location of the protest. This includes the start and end times of the protest. Information on vehicles that will form part of the protest should be included.
- **Suggested route:** If the protest takes the form of a march, the suggested route that you will take should be provided.
- **Size of the protest:** The number of people that will attend the protest should be provided.
- **Marshals:** How many marshals there will be and how people will know that they are marshals, e.g. arm bands or brightly coloured vests. Although the law does not say how many marshals you are supposed to have at a protest, one marshal for every ten protestors is a good rule of thumb.
- **Memorandum or petition:** If a memorandum or petition will be delivered, the name and location of the official or person to whom you will deliver the memorandum or petition should be provided.
- **Dispersing:** Information on how and when the crowd will disperse should be provided.
After the convener gives notice to the responsible officer, the responsible officer is required to consult with the authorised member in the police about the planned protest.

The aim of this consultation is to ensure that there aren’t any other groups that want to protest on the same day or time or that there aren’t any problems with when and where the protest will take place. The police need to be consulted because they are required to facilitate protest and ensure that the protestors and the general public can exercise their rights as smoothly as possible.

**What happens if the convener gives notice and no-one responds?**

If the convener does not hear anything in response to the notice he or she can assume that the protest is lawful and carry on with it.

The protest should then run according the plan laid out in the notice. If there are any changes to these plans, the convener should inform the responsible officer, or the protest could be deemed unlawful and people could be arrested.

**What happens if the responsible officer does respond?**

If the responsible officer, after the consultation, thinks that the plans for the protest need to be changed he or she will call the convener to a meeting after giving the convener at least 24 hours (1 day) notice. This meeting is called a section 4 meeting.

Marshals maintain order and keep a protest to plan.

An authorised member is the person in the police department in charge of dealing with protests.

Negotiation is a form of dispute resolution that takes place directly between the parties involved in a disagreement. When negotiating the parties speak to each other and try to come to an agreement that serves everybody’s needs. This could mean that the parties might have to compromise on certain issues.
The Gatherings Act says that the responsible officer can ask the convener to attend a section 4 meeting to discuss the planned protest. The responsible officer can decide to call a section 4 meeting if he or she believes that it is necessary for the municipality, police and convener to discuss the plans for the protest, talk about changes that need to be made to the protest, or to get more information about the planned protest.

It is common for the responsible officer to call a section 4 meeting. Sometimes officials will call protestors into section 4 meetings at the last minute to put pressure on them or rush them. This could make negotiations difficult and divert protestors’ attention away from organising the protest. For this reason, the convener or deputy convener should plan ahead to make sure that he or she is ready to attend section 4 meetings at short notice.

Who should attend a section 4 meeting?
A section 4 meeting usually includes the responsible officer, the authorised member and the convener or deputy convener. The convener or deputy convener should always attend this meeting. If neither attends this meeting, the responsible officer and authorised member can go ahead with the meeting and make decisions about the protest that are binding on the convener and other protestors without their inputs.

What is the purpose of a section 4 meeting?
A section 4 meeting is an open discussion about the practical aspects of the protest such as the starting and ending point, the route, the number of marshals that will be needed, and whether any changes need to be made to the protest plans to keep within the law.

Usually officials will ask for more information about the protest and make sure that the logistics of the gathering have been carefully planned. The convener or deputy convener must be prepared to discuss any reasonable changes that the officials suggest and negotiate any proposed changes to the plans.

When participating in the section 4 meeting, the responsible officer, authorised member and convener must negotiate in good faith, and try to reach a mutually satisfactory agreement.

Any attempt to use a section 4 meeting to intimidate protestors, discourage them from protesting or change their political views is neither lawful nor appropriate. The aim is to ensure that the protest can take place in a peaceful, organised way.

If the police do not agree to be at the protest to assist with crowd management, make sure that you appoint enough marshals to assist in ensuring that the protest is peaceful and orderly. This will help to ensure that the protest runs smoothly and that you are not held responsible for any damage caused by protestors.
To make sure that protesters are not intimidated by officials at a section 4 meeting, the convener can take along a group of the people who will take part in the protest. If protestors have a lawyer assisting them, then it may also help for the lawyer to attend the section 4 meeting.

What is the outcome of a section 4 meeting?

After a section 4 meeting, the responsible officer has to either agree to the protest taking place as set out in the notice or request that the convener make reasonable changes to the protest plans.

Any requests for changes that the officials make must be reasonable. If the parties cannot come to an agreement or the officials ask the convener to make unreasonable changes, the convener either has to accept the changes suggested by the officials or can ask a court to decide whether the protest can go ahead.

REMEMBER

The purpose of police presence at a protest is to ensure that the protest goes smoothly and that protestors are protected. The absence of the police can place protestors at risk of harm by security guards or other actors.
**STEP 5**

RESPONSIBLE OFFICER AGREES THAT THE PROTEST CAN TAKE PLACE, ASKS FOR REASONABLE CHANGES TO PROTEST PLANS OR PROHIBITS THE PROTEST

**REMEMBER**

The purpose of police presence at a protest is to ensure that the protest goes smoothly and that protestors are protected. The absence of the police can place protestors at risk of harm by security guards or other actors.

The Gatherings Act also says that a responsible officer can prohibit a protest, but this can only be done in exceptional cases.

A responsible officer can only prohibit a protest for three, narrowly defined, reasons and has to comply with clear legal requirements before he or she can prohibit a protest.

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**Lawful conditions for prohibiting a protest**

<table>
<thead>
<tr>
<th>Condition</th>
<th>Requirement</th>
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<tbody>
<tr>
<td>Section 4 meeting concluded without resolution AND</td>
<td>The responsible officer can only prohibit a protest after he or she, the authorised member and convener (or deputy convener) has had a section 4 meeting and were unable to agree about the plans for the protest.</td>
</tr>
<tr>
<td>There is credible information under oath that proceeding with the protest will cause Serious disruption of traffic; OR Extensive damage to property; OR Any physical injury to people. AND</td>
<td>The responsible officer must have information that is reliable and objective (based on unbiased evidence). Information received from people who are biased against the organisation or people planning to protest is unlikely to be objective. It is not sufficient for the responsible officer to simply suspect that the protest will disrupt traffic, cause injury to people or damage to property or even receive a tip-off from a source he or she trusts, or from the media. The responsible officer is legally required to investigate the information he or she receives and decide whether it is credible. This credible information must also be given under oath, or the responsible officer will not legally be able to act on it.</td>
</tr>
<tr>
<td>Police unable to intervene to prevent disruption to traffic, damage to property or physical injury</td>
<td>The police would not be able to prevent any of these problems (disruption to traffic, damage to property or physical injury) from happening. The authorised member of the police may, for example, try to explain that because of the chosen route or other events or protests on the day insufficient police officers will be available to marshal the protest to ensure that there is no serious traffic disruption. The authorities should be satisfied that the police have made an attempt to consider ways in which they could act to prevent problems (e.g. suggesting alternative routes or times or attempting to request additional officers be designated to assist during the protest action) for this to hold.</td>
</tr>
</tbody>
</table>
A responsible officer can only prohibit a protest if all three of these requirements are met.

If a protest is prohibited, the responsible officer must inform the convener in writing that the protest has been prohibited and must provide reasons for prohibiting the protest in writing.

This information must be given to the convener by hand or by placing an advertisement in a newspaper where the convener is sure to see it.

The grounds of serious disruption of traffic, extensive damage to property and physical injury to people cannot be broadly interpreted and must be understood in the context of the constitutional rights of protestors.

**EXAMPLE**

*When is Disruption of Traffic “Serious”? When Is Damage to Property “Extensive”?*

While completely preventing entry to an entire university campus for a lengthy period of time – or through one particular entrance – may be considered to be “serious” disruption, doing so for a short time or merely redirecting traffic from one entrance to another may not be. Permanent blockades will likely amount to serious disruptions of traffic.

Protests often involve hundreds or thousands of people and can result in significant wear and tear to property (e.g. thousands of people trampling on a grassy area). This form of damage may not be considered extensive. Extensive damage could include either a lot of damage to particular property (e.g. destruction of a statues, defacement of buildings, burning of vehicles) or non-negligible damage to a significant amount of property (e.g. damaging windows, vandalising signboards or tipping over bins).

Since there is no similar qualification of “injury to people” with the words “serious” or extensive” the threat of any injury to any person at all is enough for the prohibition of a protest.
What, if after complying with these requirements, police officers still try to prevent the protest?

Regardless of whether the Gatherings Act requirements have been followed, police officers have been known to arrive at protests and inform protestors that their protest has been prohibited or is unlawful, and threaten to make arrests if the protest continues.

Although protesters have a right to appeal in court later, the immediate purpose of the protest will be defeated. In this instance, the only recourse is to negotiate with police officers, explain that the protest is lawful because it is line with the Constitution and the Gatherings Act, that they are acting unlawfully, and provide any supporting evidence. A lawyer, if available, can also explain this to the police.
If a gathering is prohibited by a responsible officer or the conditions required in the section 4 meeting are unreasonable or unfair, protestors can approach a court and ask a judge or magistrate to overturn the prohibition or unreasonable conditions.

Protestors must go to the Magistrates’ Court or the High Court within 24 hours of the section 4 meeting or within 24 hours of being told in writing that the protest is prohibited. This is because the timelines in the Gatherings Act mean that any court case about the protest will have to take place urgently.

Legal assistance will be helpful to appeal unreasonable conditions or a decision to prohibit a protest. A notice of motion and a founding affidavit will be needed. If protestors cannot afford a private lawyer there are various sources of free legal representation, including university law clinics, pro bono (free) lawyers at private law firms or legal NGOs. See the Useful Resources section at the end of this guide for more information.

In the South African legal system, everyone should be given the opportunity to represent themselves in court if they cannot find a lawyer. If protestors know their rights, they can go to court and request guidance from the registrar or clerk of the court on how to make an urgent application to overturn the prohibition of a protest.

The protestors should attend the court hearing and raise arguments to show the judge or magistrate why the protest should not have been prohibited or why the imposed conditions are unreasonable or unfair.

Judges and magistrates are judicial officers of the High Court and Magistrates’ Court respectively. Judges and magistrates hear and decide cases in the courts by applying the law.

An urgent application is a type of procedure for legal proceedings in matters that are urgent. Urgent applications usually mean that the ordinary timelines for a court case can be ignored, and the case can be heard on days’ or hours’ notice.

A notice of motion is an official notice that sets out what order the applicant (the person or organisation who starts legal proceedings) wants the court to make, and when and where they will approach the court to make the order. In urgent applications, the notice should also explain why the case is urgent and why the ordinary court process cannot be followed.

A founding affidavit is a written statement used in court which sets out someone’s case. In urgent applications, an affidavit should also explain why the case is urgent and why the ordinary court process cannot be followed. An affidavit must be signed by the person who confirms that it is true.

The registrar and the clerk are administrative officers of the High Court and Magistrates’ Court respectively. They maintain the court’s records and files and open new case files. The offices of the registrar and clerk are open to the public and court files are public documents.
After listening to the arguments made by the parties during the court hearing, the judge or magistrate will make an order. The judge or magistrate can make one of three orders:

A declaration that the protest is lawful can be made:
- **Subject to no changes**: A court order that allows the protest to take place as it was set out in the notice. If the judge or magistrate makes this order, the protest will be lawful and can go ahead as originally planned.
- **Subject to conditions or changes**: A court order that allows the protest to take place, with the conditions or changes the officials required. If the judge or magistrate makes this order, the protest will only be lawful if the protestors make the changes or comply with the conditions that the officials required.

A declaration that the protest is unlawful:
- A court may issue an order upholding the responsible officer’s decision to prohibit the protest. If the judge or magistrate make this order and the protestors still protest, the protest will be unlawful.
3. PROTESTS THAT ARE NOT GOVERNED BY THE GATHERINGS ACT

As mentioned earlier in this guide, the Gatherings Act only defines gatherings as protests with more than 15 people that take place on a public road or other public place. This means that protestors do not have to comply with the notice requirements set out in the Gathering Act if a protest takes place in a non-public place or if it involves 15 people or less.

Protests that are not governed by the Gatherings Act still need to take place in a lawful manner and are bound by the rights set out in the Constitution, the rights of the property owner if the protest takes place on private property, and municipal by-laws. Protestors may also be bound by university policies dealing with protests on campus.

Constitutional rights

Even if the Gatherings Act does not apply to a protest and there are no other rules or processes that apply, both the protest itself and the universities’ responses and attempts to regulate the protest must still comply with the rights set out in the Constitution, including the rights to:

- assemble, demonstrate, picket and petition;
- dignity,
- freedom of belief, conscience and opinion;
- freedom of expression;
- freedom of security and person;
- campaign for a party or political cause;
- freedom of movement; and
- right to fair labour practices.

These rights are discussed in more detail earlier in this guide on page 12-13. Understanding the full range of constitutional rights that could be relevant in any situation where the university is responding to protest is important because these rights will have to be balanced against each other if they conflict.
CASE STUDY

Curfews and an “atmosphere not conducive to learning”

Some universities have responded to student protests by adopting very strict security measures. For example, some universities increased the number of security guards and police officers on campuses, set up security check points at the gates of campuses, and imposed curfews restricting students’ movements on campuses. Many of these security measures violate students’ constitutional rights to freedom of movement and higher education.

Curfews are one example of a university response that requires a balancing of different rights. Curfews clearly impact on all students’ rights to freedom of movement. Even if aimed at preventing unlawful protests, curfews make organising lawful protests, and many other aspects of student life, more difficult.

In October 2016, students at the University of Witwatersrand participated in a series of protests on the university’s campus and in the adjacent Braamfontein area. In an effort to control the protests the university increased the number of security guards and asked police officers to come onto campus. The protests included violent clashes between some of the protestors, the police and private security.

The university also put a number of security measures in place, including imposing a curfew on its campuses and residences which led to reduced library hours and freedom of movement for students. During the curfew, students were attacked by police and security guards in their residences, told to go to sleep early at night and harassed by security guards and police officers. Some students said that they had been interrogated and assaulted in their residences for no reason at all.

Complaining that they could not study under these conditions, 25 university students asked the Johannesburg High Court to grant an interdict against the university in terms of which the university’s end of year exams would be delayed to allow students the time to study without these conditions. Over 3 000 students signed a petition supporting the application.

Before the case was heard in court, the university agreed to suspend the curfew and relax the rules for applying for deferred exams. Although the court did not order the university to delay the exams, it recognised that the students had to deal with extremely tough circumstances. The judge said that university’s security measures had created “an atmosphere that was ... not conducive to learning, but particularly not to examination.”
University’s property rights

Universities have a right to control what happens on the property that they own. This right, however, needs to be balanced against other rights including students’ rights to protest. Some universities have argued that university property is a private space, and they can therefore prohibit protests on their property.

The reality is more complicated because:

1. Some university spaces include public spaces and it is seldom immediately obvious which spaces are public and which are non-public.
2. Students may have an implied contractual and constitutional right to protest on university property if they are not explicitly prevented from doing so by university rules or a contract that students have all signed. Even if the contract between the student and the university purports to prohibit protest, this may amount to an unenforceable waiver of the student’s rights under section 17 of the Constitution.

There are other reasons to believe that protest should generally be permitted on at least some university spaces that are non-public. One is that students are commonly allowed to come onto campus for academic, social, extra-mural and political activities. They often do so without even having to show any form of identification. When this is the case, there is no reason to assume that they shouldn’t be able to come onto campus to exercise their constitutional right to protest.

Another is that there is a long-standing practice on most university campuses in South Africa not only permitting but endorsing and encouraging political activities such as protests on campus. Given this context, and without a clear rule or contractual provision preventing protest in non-public university spaces, students have a constitutional right to lawful protest in these spaces.

In addition, if universities make rules that attempt to ban protests on private university property it is arguable that these rules will amount to the type of “blanket ban” which the Constitutional Court has said violates constitutional protest rights.

University policies dealing with protests on campus

Some universities have adopted policies dealing with protests on university campuses which students of that university are usually required to follow because they agreed to follow a university’s policies and procedures when they are studying at a university. Students should therefore see if their university has a policy dealing with protests and familiarise themselves with it.

If a university does not have a university policy dealing with protests, students retain the full breadth of their constitutional right to protest on or off the university campus.

When planning a protest in a space on campus that students believe may be non-public university property, protestors should always check to make sure whether there are university rules or processes that they have to comply with before participating in a protest. These rules may be in terms of university policies or in terms of codes of conduct that students agree to (in terms of a contract) when registering for a particular degree or programme.
4. INTERDICTS PROHIBITING STUDENT PROTESTS

Some universities have responded to student protests by approaching the courts to obtain interdicts preventing students from protesting on their campuses.

If a court grants an interdict prohibiting a person or group of people from doing something, it is unlawful for that person or group of people to do whatever is prohibited in the interdict. For example, if a university gets an interdict that says that particular students are not allowed to occupy a specific university building it will be unlawful for those students to do so.

Universities have a legal right to apply for interdicts prohibiting specific students from taking part in clearly defined unlawful or criminal acts, under certain circumstances. However, in the last few years, universities have abused this process by getting overly-broad interdicts that try to prevent students from taking part in any type of protest.

Universities should think carefully before using interdicts as a way of regulating protests because interdicts are not always the best way to deal with protests on their campuses.

Importantly, universities should not use interdicts to regulate student protests when they could lawfully regulate protests by adopting university policies on protest. This is because university policies apply equally to all of the students at a university (as opposed to interdicts which apply only to the specific students that are mentioned in the court order) and any university policy dealing with protest would be developed and adopted through democratic university processes after meaningful consultation with students.

Although universities are legally allowed to adopt university policies that deal with protests on campus, they are not legally allowed to simply ban protests on campus.
Who can a university interdict?

A university can only obtain an interdict against a specific person or group of people that are expressly named or are easily able to be identified.

Courts are not empowered to grant interdicts against the general public or large groups of people who are not named or clearly identified ordering them to obey the law.

This is because interdicts cannot lawfully be used to simply repeat what rights a person already has or what the law already says.

Ultimately, broad interdicts against student protestors give universities too much power to unlawfully police protests without adopting university policies dealing with protest.

Despite this, in the last few years, universities have obtained interim interdicts that are vague and prohibit students from participating in a wide range of activities. These interdicts often apply to large groups of people who are often difficult, if not impossible, to identify.

These types of interim interdicts are overly broad and unlawful, and can be set aside on appeal (be undone by a court).

“[It is] obvious that a blanket order against all at the protest regardless of their intention and participation in unlawful conduct is unsupportable.”

SATAWU v Garvas,
Constitutional Court (2013)

What actions can an interdict prohibit?

Courts are not empowered to grant interdicts that are vague and prohibit those interdicted from doing more than is necessary to ensure that the university’s rights are protected. This is because interdicts are aimed at preventing a particular harm from taking place and are legally not permitted to go further than what is necessary to prevent that particular harm.

Although this is a general rule in relation to interdicts, it is even more important when an interdict could interfere or limit people’s constitutional rights such as the right to participate in a lawful protest. Students can therefore only be interdicted from taking part in specific, clearly-defined, unlawful acts or criminal activity.
CASE STUDY

Overly broad interdicts

In Hotz v the University of Cape Town, the Western Cape High Court granted an interim interdict against several students which basically meant that they were excluded from entering the university campus at any time without the Vice Chancellor’s permission.

The students appealed to the Supreme Court of Appeal, where the court said that the interdict “plainly infringed their right of freedom of movement” and “restricted their … freedom of association” with other protestors. The court said that the students could only be interdicted from taking part in specific, clearly-defined, unlawful acts or criminal activity. The Supreme Court of Appeal narrowed the interdict to bring it into line with the Constitution.

EXAMPLES

Interdicts against unnamed or unidentified groups

In Rhodes University v Student Representative Council of Rhodes University, the Grahamstown High Court granted an interim interdict against “Those Persons Engaging in Or Associating Themselves with Unlawful Activities on the Applicant’s Campus”.

In Durban University of Technology v Zulu, the KwaZulu-Natal High Court granted an interim interdict against “Other Students of the Durban University of Technology”.

In University Cape Town, the Western Cape High Court granted an interim interdict against “All Those Persons Participating, or Intending to Participate, in Unlawful Conduct at the Applicant’s Properties”.

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The students appealed to the Supreme Court of Appeal, where the court said that the interdict “plainly infringed their right of freedom of movement” and “restricted their ... freedom of association” with other protestors. The court said that the students could only be interdicted from taking part in specific, clearly-defined, unlawful acts or criminal activity. The Supreme Court of Appeal narrowed the interdict to bring it into line with the Constitution.
When can a university get an interim interdict against students?

A court is only empowered to grant an interim interdict to a university against a specific person or group of people for particular conduct if the university proves all four of the following conditions:

1. A *prima facie* right even if it is open to some doubt.
2. There is a *reasonable apprehension of irreparable and imminent harm* which could result if the interdict is not granted.
3. The *balance of convenience* favours the granting of the interdict.
4. There is *no other remedy* which will be effective other than the granting of an interdict.
To obtain an interim interdict, the university has to prove that it has a **prima facie right** that it needs to protect. The Latin term *prima facie* means “at first sight”, so a *prima facie* right is a right which is assumed, in the law, to exist until someone proves that it does not exist. However, to obtain a final interdict, the university has to show that it has a **clear right** that it needs to protect. Universities may argue that the rights they are seeking to protect are the universities’ property rights and its ability to continue the academic programme, other students’ rights to higher education, staff members’ rights to work free from interference or academics rights to academic freedom. All of these rights have to be reconciled with, and may be limited by, students’ rights to protest.

The university has to prove that it is **reasonable** to believe that it will suffer **ongoing, irreparable harm** if the interdict is not granted.

**What does reasonable mean?** It would, for example, not be enough for the university to say it will suffer harm because some of the other student protests have been violent. Instead, the university has to show that the reasonable person would believe that the university will suffer harm as a result of the protest action it seeks to restrain.

**What does irreparable mean?** Even if the possibility of harm is reasonable the entity or person seeking the interdict must also show that this harm is irreparable. This clearly implies that the harm to a *prima facie* right cannot be interdicted if it is temporary or can be reasonably avoided or endured. Temporary or reparable harms, however inconvenient, offensive or disruptive cannot be interdicted.

**What does ongoing mean?** Finally, the harm in question must be anticipated or ongoing – it cannot have taken place and concluded already. Interdicts are not intended to punish those they interdict for past conduct, but rather to protect rights that have not yet been violated from violation. Previous conduct on the part of those protestors who the university seeks to interdict is relevant only in illustrating the reasonableness of fear of future harm.

A university must do more than show that a protestor previously engaged in certain conduct in order to be awarded an interdict against the protestor from doing it again. It will have to show that it is reasonable to suspect that the unlawful conduct will occur again.
When a court determines whether to grant an interim interdict against students for particular protest action, even if it is satisfied that a university has established a *prima facie* right and a reasonable apprehension of irreparable harm, it will still have to consider whether the balance of convenience favours the granting of an interdict.

Because they are not final determinations of rights, interim interdicts inevitably deal with a balancing of different harms and interests. There are always, at very least, three competing interests:

1. **Protestors’ interests**: the interests of those being interdicted
2. **University’s interests**: the interest of the university or official applying for the interdict.
3. **Public interests**: when students are being interdicted from protesting, there is a broader public interest in protest rights which is at stake.

The full range of constitutional rights that we have discussed in this guide should also be at the centre of this determination. Courts must adequately consider the impact an interdict could have on students protest rights and weigh them against other interests and rights.

Because of the drastic nature and consequences of granting an interim interdict, a court will only grant an interdict when there is no other effective legal remedy.

The university has to prove that an interdict is the only effective legal remedy which will protect its rights (in other words, no other legal remedy would be more effective than the interdict).

Even though interim interdicts can be overturned, in the context of interdicts against protest action, they are often final in their effect. This is because the threat of being held in contempt of court is often enough to discourage those who are interdicted from proceeding with the planned protest action.
What can an interdict lawfully say?

To be lawful, interdicts must be narrowly tailored. This is especially important in the context of interim interdicts which are granted urgently without complete information available to the judge.

Assuming that all of the other requirements are fulfilled, courts should still try to frame interdicts in the narrowest possible terms to prevent a ‘chilling effect’ on the right to protest. The following general principles may assist in understanding the ways in which interdicts granted can be narrowly tailored to reduce this risk:

**Identification of particular individuals:** Interdicts must identify particular individuals who are being interdicted. Despite the practical difficulties in identifying individuals amongst large crowds, universities cannot interdict the activities of groups that are incapable of being clearly identified.

**Note:** Interdicts against people using a particular hashtag or against large groups of students protesting under a campaign name like “Fees Must Fall” or “#RhodesMustFall” are not lawful because they do not clearly apply to particular individuals.

**Evidence that particular individuals meet the legal requirements:** Evidence must be presented about the conduct of those particular individuals and why, in the absence of an interdict, they will cause a specific form of irreparable harm to a prima facie right if they are not interdicted.

**Note:** General evidence that suggests that certain groups are generally likely to cause particular harm during protests should be treated with suspicion. The evidence must be about specific conduct of specific students. The fact that a student attended a protest at Parliament in which other students (even their friends) were throwing rocks is not a reason to interdict these students from throwing rocks.

**Identification of specific unlawful activities to be interdicted:** Once individuals have been identified and evidence presented, the interdict granted must only prevent these particular individuals from the specific unlawful activities that are necessary to prevent the irreparable harm from materialising.

**Note:** Interdicts cannot be used to prevent wide ranges of behavior that may be related to particular unlawful acts. For example, in *Hotz* the Supreme Court of Appeal refused to uphold an interdict preventing particular students from coming onto campus without permission at all and instead indicated that the interdict should only restrain the unlawful activities that are necessary to prevent the alleged harm.
How can an interdict be lawfully implemented?

During 2015 and 2016, interdicts preventing or regulating protests on university campuses were enforced both by security guards and police officers.

When enforcing interdicts, police and security guards should take care not to enforce conditions and provisions that go beyond the ambit of interdicts. They should interpret interdicts narrowly to ensure that students’ protest rights are respected and that only unlawful conduct of particular individuals – not protest in general by any students – is prevented.

It will not be lawful for police and security guards to merely follow the universities’ own instructions on how to implement an interdict. Universities should be careful to not give security guards any instructions or make any requests from the police that go beyond the interdict or they will be acting unlawfully.

Individuals and companies enforcing an interdict must apply their own minds to the content of interdicts and be cautious of accepting interpretations made by universities that may have an interest in interpreting interdicts broadly.
THE ROLE OF POLICE AND PRIVATE SECURITY AT PROTESTS
1. WHAT ARE THE POWERS OF THE POLICE AT PROTESTS?

The police are legally required to create a safe space in which protestors can exercise their rights to protest. Even in cases of spontaneous protests, the police should try to make room for protestors to air their grievances. This means that the police are not supposed to disperse protests simply because they are not lawful or because the organisers failed to provide notice to the police and the municipality.

There are strict rules that limit the circumstances in which the police are legally allowed to use violence or force against protestors. These rules are set out in laws, such as the Gatherings Act, and in operational policies, such as the SAPS National Instruction 4 of 2014. The police must follow these rules whether the protest is lawful or unlawful, and whether or not the protestors gave proper notice in terms of the Gatherings Act.

The SAPS National Instruction says that the police must try to build a relationship of trust with the conveners or organisers of the protest (if the protest was organised in terms of the Gatherings Act); with the identified leaders of the protest (if the protest was a spontaneous protest or is not governed by the Gatherings Act), and with the protestors taking part in the protest. They are required to negotiate with protestors on an ongoing basis and try to resolve any issues that arise between the police and protestors in peaceful ways before any violence occurs.

The National Instruction clearly says that “the use of force must be avoided at all costs” and that the police “must display the highest degree of tolerance”.

In terms of the law, the police are only allowed to use force against protestors if there are reasonable grounds for believing that it is necessary to the prevent injury or death of a person or destruction of property. In addition, the police should only use force as a last resort, after other measures have failed. This means that the

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SAPS NATIONAL INSTRUCTION 4 OF 2014

SAPS National Instruction 4 of 2014 is an operational policy that complements the Gatherings Act by fleshing out the processes and procedures that the police should follow when dealing with a protest.

If police officers do not follow the National Instruction when dealing with a protest, disciplinary proceedings could be brought against them. If you want to ensure that a police officer is held accountable for failing to follow the National Instruction, you could lay a complaint against the police with the Independent Police Investigative Directorate (IPID). See the Useful Resources section at the end of this guide for more information on where to lay a complaint.

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**Negotiation** is a form of alternative dispute resolution that takes place directly between the parties involved in the disagreement. When negotiating the parties speak to each other and try to come to an agreement that serves everybody’s needs. This could mean that the parties might have to compromise on certain issues.

When there are reasonable grounds to believe something it means that there are very good reasons to believe it.
police are required to consider and try other (less harmful) ways before using force against protestors.

Where the police use force against protestors, the police’s use of force must be proportional to the threat posed by the protestors. This means that the police are only allowed to use as much force as is necessary to prevent a person from being harmed or property from being destroyed. If the police use any more force than is necessary, they are acting unlawfully.

The law also sets out certain steps that the police have to take before they are legally allowed to use force against protestors. The most important of these steps is that the police must give protestors two warnings before they are allowed to use force. These warnings have to explain that the police are going to use force against the protestors if they do not disperse. The police have to make sure that these warnings are loud enough for the protestors to hear. The warnings must be given in two of South Africa’s official languages and, if possible, must be given in the language that is most commonly spoken in the area. After these warnings, the police have to give protestors enough time to disperse before using force.

In terms of the law, proportionality means that there must be a balance between the objective that a person wants to achieve and the method he or she uses to achieve the objective. An action will not be proportional if the method used to achieve the goal causes more harm than is necessary to achieve the goal. For example, in the case of the use of force by police, the police are only allowed to use force against protestors if there is no other (less harmful) way of restoring peace.

CASE STUDY

Police brutality

In 2016 students embarked on disruptive protests at the University of Witwatersrand. The university asked the police to come onto campus to help the university deal with the protests.

Although the law and operational policies require the police to exercise restraint, to carefully manage volatile situations and avoid the use of force at all costs, the police reacted to the protests with overwhelming force and brutality. Many of these actions were unlawful, as the police rarely followed the correct procedure for using force against protestors, used more force than was necessary to restore order and often acted arbitrarily.

Examples of the unproportional use of force by police:

- Female students were shot at with rubber bullets in their residences (apparently because they did not observe the police-approved bedtime curfew).
- A priest was shot in the face by police in the neighbouring area of Braamfontein. The police shot the priest in spite of the fact that the priest was not involved in any protest.
THE ROLE OF POLICE AND PRIVATE SECURITY AT PROTESTS

Kwazi Dlamini & Nabila Bana (Daily Vox)
STEPS THAT THE POLICE MUST FOLLOW BEFORE THEY ARE ALLOWED TO USE FORCE AGAINST PROTESTORS:

1. **NEGOTIATION**
   If there is a serious safety risk, the police must first attempt to negotiate with protestors. This can be done by speaking to the convener or some of the protestors that will be able to speak to the other protestors or convince them to disperse.

2. **DEFENSIVE MEASURES**
   If negotiations fail, the police are legally allowed to use defensive measures. Defensive measures are measures that are protective or that ensure that the protestors cannot cause harm to people or property. These measures are usually proactive, which means that they are used before any damage can occur, for example erecting barriers around a protest, and negotiating with protestors.

3. **FIRST WARNING**
   The police are then required to tell the protestors to disperse over a loud hailer to make sure that they can hear. They should warn the protestors that if they do not disperse, the police will take stronger measures. The police should warn the protestors in at least two official languages and preferably in a language that most of the protestors understand.

REMEMBER
Metropolitan police departments, like the Johannesburg Metropolitan Police Department (JMPD), deal with criminal investigations, by-law enforcement and traffic policing but do not have the power to deal with protests. Only the South African Police Services (SAPS) has the power to police protests.
If the protestors do not disperse after a reasonable amount of time, the police are legally allowed to set up offensive measures. Offensive measures are measures that are reactive and that are aimed at de-escalating the violence. These include search and seizure, pushing protestors back, dispersing, encircling, and using appropriate force. These measures are supposed to be used as deterrents to violence; they should be used only to ensure that there is no violence or that, if there is violence, the protest again becomes peaceful. The police are required to unload or set up offensive measures visibly. In other words, the protestors should be able to see what the police are doing.

The police are then required to give protestors another warning - in two official languages and in the language that most of the protestors understand. After these warnings, the police must give protestors a reasonable amount of time to disperse.

If the protestors fail to disperse, the commanding officer may authorise the use of minimum force necessary to disperse the protestors. This means that the police may not use more force than is absolutely necessary. Any use of force should be geared towards the de-escalation of violence.

Protesters disperse and regroup to plan protest action elsewhere or at another time.
2. WHAT ARE THE POWERS OF PRIVATE SECURITY AT PROTESTS?

After the student protests in 2015 and 2016, many universities increased the number of private security guards on campuses. Security guards have become part of the everyday process of protesting on and around university campuses even though they have no official role in protests in terms of the Gatherings Act.

Do security guards have the power to arrest students?

Although protestors can be arrested by a security guard, a security guard has no special obligation or power to arrest anyone.

When security guards arrest protestors they do so lawfully only in terms of the same provision of the Criminal Procedure Act (1977) which entitles any ordinary person to arrest on any other person. This is sometimes referred to as a “citizen’s arrest”. The grounds for doing so in the student protest context are:

• If the security guard witnesses a student committing, or reasonably suspects them of having committed a crime;
• If the security guard reasonably believes that a student is trying to escape, after having committed a crime, from a person with the authority to arrest the student (e.g. police officer); and
• If the security guards sees the student “engaged in an affray” (common disturbance).

During protests, security guards are legally required to understand this and other powers they may exercise in the context of protesters’ constitutional rights.

What legal obligations do security guards have?

Whether undertaking general duties or assisting in regulating protest action, security guards are legally required to respect and protect the constitutional rights of everyone they come into contact with.

REMEMBER

1. Although security guards are employed by a university to protect the university’s property and interests, they also have legal obligations towards students.

2. Security guards do not have the same powers as police.

3. If security guards violate your rights, the police must prevent them from doing so.
“A security [guard] may not infringe any right of a person as provided for in the Bill of Rights and... may not ... enter premises, conduct a search, seize property, arrest, detain, restrain, interrogate, delay, threaten, injure or cause the death of any person, demand information or documentation from any person, or infringe the privacy of the communications of any person, unless such conduct is reasonably necessary in the circumstances and is permitted in terms of law.”

*Code of Conduct for Security Service Providers (2003)*

To “maintain a trustworthy and legitimate private security industry which acts in terms of the principles contained in the Constitution”, Parliament passed a law called the Private Security Industry Regulation Act (2016) (PSIRA). In terms of this law a Code of Conduct for Security Service Providers has been developed.

All private security guards and companies are bound by the Constitution, the PSIRA and this Code of Conduct.

**What obligations does the Code of Conduct place on security guards?**

The Code of Conduct, which is binding, details “minimum standards of conduct” for security guards and penalties for violations of these standards. The Code places obligations on security companies in relation to their interactions with the police, the public, and their clients. The following table summarises the important obligations that the Code of Conduct places on security companies and security guards.
### THE OBLIGATIONS OF SECURITY COMPANIES IN TERMS OF THE CODE OF CONDUCT

| Obligations to the police | • Assist and cooperate with the police  
<table>
<thead>
<tr>
<th></th>
<th>• Must not obstruct, delay or hinder the police</th>
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| Obligations to the public| • Promote efficiency and responsibility in rendering of security services  
|                          | • Treat members of the public with respect and courtesy  
|                          | • Conduct themselves in a manner that will not further encourage or incite the commission of a crime or endanger any person  
|                          | • Always consider the safety of the public when performing functions in a public space  
|                          | • Must not threaten or harm the public or national interest  
|                          | • Must not infringe on any right of a person in terms of the Constitution  
|                          | • Must not use force unless its nature and extent are “reasonably necessary”  
|                          | • Must not act in any manner that “threatens or poses an unreasonable risk to the public order or safety” |
| Obligations to clients (e.g. the university) | • Perform its obligations in terms of its contract with its clients “in accordance with the terms of and conditions of the contract, the Act and this Code”  
|                          | • Protect the rights of its clients in a “reasonable manner” with “due regard to the rights and legally recognised interests of all other parties concerned” |

#### Who ensures that security guards or security companies fulfil their obligations?

The PSIRA sets up a regulatory authority called the Private Security Industry Regulatory Authority. Its aim is to “exercise effective control” over private security companies in the public interest. The regulatory authority is required to monitor and investigate security companies to ensure that they comply with their obligations. It must also “protect... the interests of the general public”.

The overall governance of the regulatory authority is by a “council”, whose composition is determined by the PSIRA. The council must report regularly to both Parliament and Cabinet about the performance of its functions. This means that Parliament and government ministers have an indirect responsibility to ensure security guards do not violate protestors’ rights.
To ensure that it can perform these crucial functions the regulatory authority has the power to:

1. Suspend or deregister security companies;
2. Create standards and regulate the practices of security companies; and
3. Approach a court to interdict a security company from providing any security services if it is violating its obligations in terms of the PSIRA or “if the activities or intended activities of the security service provider might seriously harm the national or the public interest or the interests of any category of persons”.

What happens if a security company or security guard violates their obligations?

The Code of Conduct defines any failure to comply with the PSIRA and the Code as “improper conduct”. The penalties that security guards and companies can face for violating the Code depend on the “gravity and nature” of the conduct, the relevant circumstances, the public interest and “the risk posed by improper conduct to the rights or legitimate interests of any person”.

An action which violates the Code in order to prevent students from exercising their protest rights poses a serious risk to the public interest and would therefore constitute improper conduct.

What happens if a security guard violates his or her obligations?

Security guards who commit “improper conduct” in terms of the Code are, in addition to the consequences for the security companies they work for, guilty of a criminal offence which is punishable by up to 2 years in prison or a fine or both.

Security guards are also subject to all ordinary criminal laws such as those prohibiting assault, kidnapping and theft. If the improper conduct is itself criminal (for example, assault) then the security officer can be charged both with assault and this special criminal offence.

If a police officer is present at the time at which a security guard is committing an act of improper conduct, students can report the security guard and request the police to intervene. Security guards are ordinary members of the public and are not police officials.

How do I lay a complaint about improper conduct of a security company or security guard?

In order to lay a complaint against a security company or security guard, a person can approach a police station or get a lawyer to assist in writing an affidavit and submit it to the regulatory authority.
### Checklist

**Laying a complaint against a security company or security guard**

- **Complainant's details**: Your full name, work address and residential address.
- **Security guard's details**: The security guard's full name, work address and residential address (if you can access this information).
- **Security company details**: The name, work address and residential address of a director of the security company that the security guard works for (you may be able to find this information on the internet).
- **Information about the incident**: Details of the incident of improper conduct that you are complaining about, including the date and location and as many details as you can recall.
- **Supporting documents**: Photos, videos or affidavits from people who witnessed the incident could be useful to show the credibility of your complaint.

After a complaint has been submitted to the regulatory authority, a “prosecutor” within the regulatory authority will take over the investigation and may request the complainant to provide additional information or testify at a hearing. An improper conduct complaint can be submitted at the same time as a criminal charge.

### Case Study

**University of Cape Town students clash with private security**

In October 2016, during an extended confrontation between private security guards hired by the University of Cape Town and protestors, a security guard ripped a female protester’s braids from her head. Multiple protesters were pepper-sprayed and others were injured.

According the Code of Conduct, which is binding on all security guards, security guards can only use force if it is “reasonably necessary” both in nature and extent. It is unlikely that pulling someone by their braids hard enough to rip them off could ever be considered reasonably necessary. Security guards may also not randomly pepper-spray crowds of students because some students are behaving violently or aggressively.

It is likely that some of the security guards involved in these incidents could be guilty of improper conduct in terms of the Code and subject both to a special criminal charge and a charge for assault.
THE ROLE OF POLICE AND PRIVATE SECURITY AT PROTESTS

Kwazi Dlamini and Nabila Bana (Daily Vox)
STUDENT PROTESTS AND THE CRIMINAL JUSTICE SYSTEM
1. WHAT DOES THE LAW SAY?

In South Africa, the Constitution and other laws give important rights and protections to people who are arrested, detained or accused of having committed a crime.

Section 35 of the Constitution grants a number of rights to people who are arrested, detained or accused of having committed a crime. These rights are:

- The right to be informed about the reason that a person is being detained as soon as possible.
- The right to remain silent and the right not to be forced to make a confession or a self-incriminating admission.
- The right to appear before a court within 48 hours of being arrested, excluding weekends or public holidays.
- The right to be released on bail if the interests of justice permit.
- The right to choose and speak to a lawyer. If a protestors cannot afford a lawyer, he or she has the right to be represented by a lawyer at the government’s expense.
- The right to adequate food, water, medical treatment and reading material while being detained.
- The right to speak to and be visited by family members, spouses or partners, religious counsellors and private doctors.
- The right to be presumed innocent.

The rights of arrested, detained and accused people are closely related to a number of other fundamental rights contained in the Constitution, including the right to human dignity and the right to freedom and security of the person. This means that any arrest or detention has the potential to negatively affect the rights of arrested, detained and accused people, as well as other human rights.

When protestors are arrested, detained and prosecuted for crimes that they are suspected of having committed, there are particular legal requirements to be followed by the police and prosecutors. These requirements are set out in different laws and guidelines. The most important of these laws are the Gatherings Act and the Criminal Procedure Act. These laws describe how the police should respond to protests and set out the legal rules about how arrests and criminal prosecutions should take place.
2. WHAT ARE THE RIGHTS OF PROTESTORS IF THEY ARE ARRESTED?

At any protest, protestors may have to deal with the police. In cases where protests become disruptive or where there are some protestors who take part in violent acts or criminal activity, the police often arrest and detain protestors. The purpose of an arrest is to make sure that somebody who is suspected of committing a crime is brought before a court for trial. In terms of the Criminal Procedure Act, the police are allowed to arrest protestors with or without a warrant. The police may only arrest a person without a warrant if they see him or her committing a crime or if they have probable cause to believe that he or she was involved in committing a crime. In the case of student protests, this means that a police officer can only arrest a protestor if he or she actually saw the protestor committing a crime or has sufficient reason to believe, based on the available facts, that the protestor committed a crime.

For an arrest to be lawful, the police have to follow the legal requirements laid out in the Criminal Procedure Act. These requirements are:

1. **Informing the protestor of the arrest:** The police must, as soon as possible, tell the protestor that he or she is being arrested.

2. **Reason for the arrest:** The police must, as soon as possible, tell the protestor why he or she is being arrested. Unless the protestor is committing a crime when he or she is arrested, this means that the police are legally required to tell the protestor what crime he or she is suspected of having committed. In practice, the police may wait a long time before doing this or may not do it at all. If they do not tell a protestor why they are being arrested, the arrest may be unlawful.

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**A warrant of arrest or warrant** is a written document issued by a court that allows the police to arrest a person suspected of having committed a crime.

**Probable cause** means that there is sufficient reason to believe, based on the available facts, that a person committed a crime.

**UNLAWFUL ARRESTS**

If the police do not follow the right procedure when arresting you, the arrest may be unlawful.

Examples of unlawful arrests:

- If the police arrest you, but there is no reason to believe that you committed a crime.
- If the police arrest you to scare you, intimidate you or teach you a lesson, but never genuinely wanted to charge you with committing a crime.

An unlawful arrest is illegal. This means that you could lay a complaint against the police with the Independent Police Investigative Directorate (IPID) or could have the arrest set aside in court. See the Useful Resources section at the end of this guide for more information on where to lay a complaint.
3. **Physical control:** The police must have physical control over the protestor when they arrest him or her. This is to make sure that the protestor cannot escape arrest. In most cases, this is achieved by putting handcuffs on a person or by putting them into a squad car or police van.

**CASE STUDY**

**Unlawful arrests during student protests**

Although the law says that the police can only arrest a person if they have seen the person committing a crime or have probable cause to believe the person committed a crime, the police often arrest people unlawfully during protests. The police are well-known for arresting protestors to scare them, intimidate them or try to teach them a lesson. Sometimes the police arrest protestors to charge them with trumped-up charges or simply to detain the protestors without bail for as long as the courts will allow. The police often do this even though they have no real intention of holding protestors responsible for crimes that were committed.

During student protests, the police often target the protestors that they believe are the ring leaders of a protest. This could be the members of the Student Representative Council (SRC), if they are involved in the protest, or anyone else that the police think may seem to be playing a leadership role.

The police have also arrested people who weren’t even involved in student protests. For example, in the aftermath of the student protests at the University of Witwatersrand, a 22 year old student was arrested for standing on the steps of the university’s Great Hall, even though he was not committing a crime or participating in a protest. Police officers asked the student to move away from the steps and when he questioned this order, he was punched in the face, pinned to the floor and arrested. He was later charged with trying to steal a firearm from a police officer who arrested him.

**Are the police allowed to use force to make an arrest?**

The police are, in terms of the law, allowed to use *reasonable force* while arresting a person. The police must make sure that the force that they use is proportional to the amount of resistance that the person being arrested is putting up. This means that the police are not allowed to use more force than is necessary to arrest the person.
The law does not allow for the police to abuse or mishandle anyone while they are arresting them. However, resisting arrest could still be dangerous as the police are allowed to use force.

Resisting an arrest is also a crime. This means that the police could charge anyone who resists an arrest with an additional criminal charge.

The right to remain silent

The Constitution says that anyone who is arrested has the right to remain silent and the right not to be forced to make a confession or make self-incriminating admissions.

If a protestor does not want to answer any of the police’s questions, he or she can simply tell them that he or she is exercising their right to remain silent until they’ve spoken to a lawyer.

But it is important to remember that police officers are experts at interrogation. They may have special techniques to get protestors to reveal more information about their activities, the protest or other students involved in the protest. Some police officers may try to get protestors to reveal information by being friendly and sympathetic or by being threatening or intimidating.

No matter what the police say, protestors who are arrested have the right to remain silent and the right not to make a confession. However, if a person is arrested, the police are allowed to search him or her and search through his or her personal belongings without consent. They can also take fingerprints and/or body prints and compel the protestor to participate in an identity parade.

The right to consult with a lawyer

According to the Constitution, everyone has the right to consult with a lawyer of their choice when they are detained by the police. If a protestor is arrested, they should ask to speak to a lawyer as soon as possible. If they do not have a lawyer to represent them, they should ask to speak to their family and ask them to get in touch with a lawyer. The Constitution also says that a person is entitled to a lawyer even if they cannot afford to pay for a lawyer. If they cannot afford a lawyer, a lawyer can be provided at the government’s expense. This can be done by applying for a lawyer through Legal Aid South Africa. They could also contact a university law clinic or legal NGO to represent them. See the Useful Resources section at the end of this guide for more information about how to contact Legal Aid South Africa or legal NGOs.

A confession is a voluntary statement made by a person in terms of which he or she admits to committing a crime and explains how he or she committed the crime. Confessing to having committed a crime could have serious implications for a person’s trial. You should never make a confession unless you’ve spoken to a lawyer.

An interrogation is a conversation where the police ask you questions to gather more information about the crime that you are suspected of having committed. An interrogation usually takes place after you’ve been arrested and could take place in the police van or in an interrogation room.

Legal Aid South Africa is an independent body which provides lawyers and legal advisors to people who cannot afford lawyers at the government’s expense.
If you cannot afford a lawyer, you can apply for Legal Aid. You can do this by getting your friends or family to go to a Legal Aid branch or to go the closest Magistrates’ Court (all Magistrates’ Courts have a legal aid officer who can assist with applying for legal aid).

Legal Aid represents people in most criminal cases. Unfortunately, Legal Aid does not represent people in bail applications.

Importantly, you can only qualify for Legal Aid if a legal aid officer or lawyer has checked that you cannot afford to pay for your own lawyer. This is done by conducting a “means test”. A means test consists of a legal aid officer or lawyer gathering information about you or your family’s income and assets to decide whether you qualify for free legal representation. You will only qualify if you earn less than a certain amount or have assets that are worth less than a certain amount.

To qualify for legal aid:

• If you are employed and single, you must earn less than R5 500 a month;
• If you are part of a household, the entire household must earn less than R6 000 a month; and
• If you or your family own immovable property (a house, a flat, land or a farm), the immovable property must be worth less than R500 000.

These amounts are net income, which means that they are the amount of money left after income tax, medical aid and pension amounts have been deducted from your income.

See the Useful Resources section at the end of this guide for more information about how to contact Legal Aid South Africa.
WHAT HAPPENS AFTER AN ARREST

1. TRANSPORT TO POLICE STATION

Arrested protestors will be transported to the police station by squad car or police van (depending on how many people are being arrested).

2. VERIFICATION OF IDENTITY

The police will verify the identity of anyone who was arrested by asking them their names and addresses. The police will also take the fingerprints of anyone who has been arrested.

3. NOTICE

The police must give people who are arrested a notice of their rights in terms of section 35 of the Constitution, explaining that they have been arrested and what their rights are.

Protestors should try not to talk to anyone about anything that may incriminate themselves while waiting to be taken to the police station.
Protestors may be put in a holding cell until they are charged. While detained, the police may interrogate protestors by asking them questions about the crime that they are suspected of having committed.

The police may charge protestors with a crime or multiple crimes (e.g. violence, malicious damage to property, assault or trespassing or contravening the Gatherings Act) if they believe that they have enough evidence to show that the protestors have committed a crime.

After a person has been charged, they may be able apply for police or prosecutorial bail, otherwise they will have to wait until their first court appearance to apply for bail.

You can insist of having a lawyer during this questioning process and you do have the right to remain silent.
3. WHAT ARE THE RIGHTS OF PROTESTORS WHILE THEY ARE DETAINED?

The Constitution says that the police are only legally allowed to detain a person for a maximum of 48 hours before they either have to appear in court or be released.

This rule does not apply if the 48 hour-period ends on a weekend or public holiday. This means that if a person is arrested on or after a Thursday evening, he or she may only be released or appear in court on the following Monday. If the police do not bring a person before a court within this timeframe, they are acting unlawfully.

In terms of section 50(6)(d) of the Criminal Procedure Act, a court may postpone any bail proceedings for no more than 7 days at a time to give the police or the prosecutor time to collect more information or evidence to decide the issue of bail. This means that prosecutors may ask for protestors to be detained for another 7 days at a time after the initial 48 hour-period following an arrest, so that the police can collect more information or evidence to decide whether a person should be granted bail. However, prosecutors and police often try to postpone bail for unacceptable reasons such as attempting to punish or teach protestors a lesson, even when they know that there is very little chance of protestors being found guilty of a crime.

The Constitution grants all detained persons certain rights. Detained persons have the right to receive adequate food, water, medical treatment and reading material while being detained. They also have the right to speak to and be visited by their family members, spouses or long-term partners, religious counsellors and their own doctors.
Section 35 of the Constitution says that everyone has the right to be released from police custody if it would be in the interests of justice. This means that a police officer or judge has to decide whether it would be fair under the circumstances for a person to be released from police custody by carefully considering the rights and interests of the accused and the interests of society. The police officer or the judge will balance the rights of the accused person and the community when making this decision.

There are two ways to be released from police custody after an arrest: An accused could be released with a warning to appear in court on a certain day or could be released on bail. Whether an accused is released with a warning or on bail will depend on the crime that he or she is suspected of having committed.

Bail is the term used when an accused is released from police custody after paying a sum of money (determined by a court) as security or providing a guarantee that he or she will pay a sum of money. The accused does not have to go back into police custody until the court delivers its verdict or sentences the accused. The accused is required to appear in court at a specific place, date and time. If the accused appears in court for the trial, the money will be refunded. If the accused doesn’t go to court on the day that they are supposed to or fails to comply with the bail conditions, he or she will lose the bail money (or it will be forfeited).

There are three different types of bail, namely police bail, prosecutorial bail and court bail. Each type of bail can be granted at a different time.

Bail is a sum of money paid by an accused to the police or a court so that he or she may be released from police custody. The purpose of this sum of money is to make sure that the accused attends his or her trial. There are different types of bail, including police bail, prosecutorial bail and court bail.

Bail conditions are terms which an accused who has been released on bail has to comply with.

A charge sheet is a document drafted by the prosecutor that lists all the crimes that a person is charged with. A charge sheet contains all the most important information about the charge.

Police bail

Police bail is a type of bail that is granted before an accused appears in court. This type of bail is usually only available if an accused is charged with a less serious crime. Some less serious crimes that protestors may be charged with include trespassing or injury to property. This type of bail is paid to a police officer at the police station.

To be granted police bail, an accused can ask the police for bail as soon as they’re arrested and taken to the police station. If the police agree that police bail is available for the specific charge, then a police officer will decide how much bail should be paid. This amount will be confirmed during the official bail hearing in court once the accused appears.
Bail must be paid in cash. Once an accused has paid bail, the police officer who received the money is required to give the accused a receipt that says how much money he or she paid and tell the accused when, where and what time he or she should appear in court. If an arrested person pays bail, he or she should make sure that he or she gets the receipt for the full amount signed by the police officer or clerk who takes the money.

If the police do not agree to police bail, the accused may have to wait until his or her first appearance in court to apply for bail.

Prosecutorial bail
Prosecutorial bail is a type of bail that is also available before an accused’s first court appearance but for more serious crimes. In terms of this type of bail, the police are allowed to grant a person bail if the prosecutor agrees that they can do so. To get this type of bail, an accused can ask the police to contact the prosecutor on duty to check if he or she can be released on bail. This type of bail is also available after hours.

Court bail
Bail can also be granted by a judge or magistrate on an accused’s first appearance in court. A trial is usually a long process that will take more than one day, so an accused can ask the court if he or she could be released for the duration of the trial or until the case finishes. An accused can ask for bail at any time on or after the first day in court. An accused has a legal right in terms of section 60(1) to be released on court bail if the court is satisfied that it is in the “interests of justice”.

If a person has been arrested and wants to apply for bail, he or she should tell provide the court with as much information about their personal circumstances as possible. Section 60(9) of the Criminal Procedure Act provides that at least the following factors must be considered in determining whether it is in the interests of justice to grant bail:

- How long the accused has already been in detention already.
- How long the accused is likely to be in detention until the conclusion of the trial if he or she is not granted bail. If there are many complicated charges against the accused, it may take longer to conclude the trial against him or her. This is likely to be a longer period.
- Any reasons why the trial has been delayed and whether the accused is responsible for these delays.
- Any reasons why denying the accused bail will delay the process of obtaining legal representation or preparing his or her defense.
- The health of the accused. For example, if an accused has a serious physical or mental illness which is likely to be worsened by staying in detention.
- Any financial or other loss that the accused will suffer if he or she is not granted bail. For example, whether the accused’s detention will mean that he or she will miss classes or exams. An accused should tell the court as much as he or she can about about their personal circumstances, including their age, whether they are employed or busy studying and whether they have dependents.
- Whether an accused has any previous criminal convictions.
- If an accused has a fixed residential address. If an accused can provide proof of address to the court, it would be helpful. It is important to remember that the court is not allowed to assume that an accused does not have a permanent address simply because he or she lives in an informal settlement.
If an accused has a good character, he or she can get their parents, family members, friends, employers, lecturers or religious officers to write statements of support.

Before a magistrate or a judge can allow or refuse bail, he or she is required to balance the rights of the accused against the interests of justice to determine whether the accused can be released. In doing this, the court takes into account a number of factors.

Section 60(4) of the Criminal Procedure Act specifies circumstances in which it will not be in the interests of justice for court bail to be granted:

• When the accused is likely to be a “flight risk”: To decide whether an accused is a flight risk or may evade his or her trail, a court will consider whether a person has family or assets in the area and what the chances are of the person being found guilty of a serious crime.

• When the accused is likely to be dangerous or could commit other violent crimes if he or she is released on bail: To decide whether an accused is dangerous, the court will consider whether the accused is being charged with a violent crime or has previously been convicted of a violent crime.

• When the accused is likely to intimidate or influence witnesses in the case against him or her: To decide whether an accused is likely to intimidate witnesses, the court will consider whether the accused knows the witnesses, whether the witnesses have already made statements and whether the accused, in the past, had influence over the witnesses.

• When the accused is likely to jeopardise the criminal justice system: To decide whether an accused is likely to jeopardise the criminal justice system, the court may consider whether the accused is likely to comply with set bail conditions.

• When there are “exceptional circumstances” which make it likely that the accused will “disturb the public order or undermine the public peace or security”: To decide whether there are exceptional circumstances a court may consider whether there is a state of emergency in the country or because of the peculiar circumstances and identity of the accused a continuation of the alleged criminal conduct is likely to result in public violence.

It has happened that magistrates or judges refuse bail in protest situations because it is alleged by the prosecution that the “leaders” of protests, if released on bail, will result in more protests. Magistrates or judges often do this by considering the risk of further protest as “exceptional circumstances” that “disturb the public order”.

However, magistrates or judges should be encouraged to consider that this is not what the Criminal Procedure Act intends to cover when it discusses “exceptional circumstances”. The Constitutional Court has specifically said that these will be “those rare cases where it is really justified”.

In addition, if a magistrate or judge seems to be considering this a factor in determining whether bail is granted, an accused can remind the magistrate that involvement in further protest is itself a constitutionally protected right. An accused can also suggest that a bail condition prohibiting the accused from the type of criminal activity alleged would be a way of achieving the intended outcome while more appropriately balancing the interests of justice.

If an accused cannot afford to pay the amount of money asked for as bail, the Criminal Procedure Act says that a court
The court should decide what type of non-financial guarantee would be sufficient in the circumstances. An example of a non-financial guarantee would be that an accused gives up his or her passport until the trial ends.

If a person is released on bail, a court may insist that they comply with certain bail conditions. Bail conditions are terms that an accused who has been released on bail has to comply with. Some examples of bail conditions include that the accused could be required to report to a specific person such as a probation officer at a specific time and place, or that specify that an accused cannot go to certain places or speak to the witnesses that are involved in the case against him or her. Sometimes courts will provide, as a condition of bail, that a person should not participate in any other protests.

could ask for a non-financial guarantee instead. This means that the accused would have to give some other guarantee that he or she will appear for his or her trial.

REMEMBER

Your right to legal representation at state expense does not currently extend to bail proceedings. This means that you will have to either get your own lawyer for bail proceedings or try to ask the court for bail and present the evidence yourself.

Ashraf Hendricks (Ground Up)
CASE STUDY

Student protestors’ experiences with bail

During the 2015 and 2016 student protests, students from a number of universities were arrested by the police on different charges. Some of the experiences of student protestors highlight how prosecutors and the police can manipulate and abuse the criminal justice system and prevent protestors from being released on bail.

Earlier in this guide we mentioned a 22 year old student who was arrested for standing on the steps of the University of Witwatersrand’s Great Hall in the aftermath of the student protests at the university, even though he was not committing a crime or participating in a protest. Police officers asked the student to move away from the steps and when he questioned this order, he was punched in the face, pinned to the floor and arrested. He was later charged with trying to steal a firearm from a police officer who arrested him. The student was arrested on a Saturday which meant that the first opportunity to appear before a magistrate or judge was on Monday - unless the police or the prosecutor on duty were willing to grant bail outside of ordinary court hours. However, when the student’s lawyers asked for the prosecutor to grant the student prosecutorial bail, the prosecutor refused saying that he had been instructed to refuse any out of hours bail requests for student protestors. Even though refusing protestors without considering the circumstances of their case is unlawful, prosecutors have been known to refuse prosecutorial bail for whole groups of protestors when there are frequent protests in a specific area or community. The student finally appeared in court on the Tuesday and was granted bail of R500.

Other student protestors were not as fortunate. The former SRC president of the University of Witwatersrand, Mcebo Dlamini, was arrested during a raid on his university residence in the early hours of Sunday, 16 October 2016. He was charged with a variety of crimes associated with his participation in student protests, including public violence, malicious damage to property and assault. Dlamini was also denied prosecutorial bail. When he appeared in the Johannesburg Magistrates’ Court on Wednesday, 19 October 2016, the magistrate refused to order Dlamini’s release on bail because he believed that Dlamini was a flight risk that might flee to Swaziland where he was born. Dlamini appealed the decision to refuse him bail to the Johannesburg High Court, where a judge eventually order his release on bail on Friday, 14 January 2017. By this time, Dlamini has spent almost three months in detention.
USEFUL RESOURCES
LEGAL ASSISTANCE AND ADVICE

Legal Aid South Africa
National
Tel: 0800 110 110
http://www.legal-aid.co.za
Twitter: @LegalAidSA1
Facebook: https://www.facebook.com/LegalAidSA1/

Centre for Applied Legal Studies (CALS)
University of Witwatersrand, Johannesburg
Tel: 011 717 8600
http://www.wits.ac.za/cals
Twitter: @CALS_ZA

Legal Resources Centre (LRC)
Johannesburg, Cape Town, Durban and Grahamstown
Tel: 011 8369831 (National Office)
http://www.lrc.org.za
Twitter: @LRC_SouthAfrica
Facebook: https://www.facebook.com/LRCSouthAfrica/

Probono.Org
Johannesburg and Durban
Tel: 011 836 9831
http://www.probono.org.za
Twitter: @ProBono_Org
Facebook: https://www.facebook.com/ProBono.Org/

Socio-Economic Rights Institute of South Africa (SERI)
Johannesburg
Tel: 011 356 5860
http://www.seri-sa.org
Twitter: @SERI_RightsSA
Facebook: https://www.facebook.com/SocioEconomicRightsInstitute/
OTHER ORGANISATIONS OR INSTITUTIONS

Independent Police Investigative Directorate (IPID)
Tel: 012 399 0000 (National)
Email: complaints@ipid.gov.za
http://www.ipid.gov.za

Private Security Industry Regulatory Authority
Tel: 086 107 7472 (National)
Email: info@psira.co.za
http://www.psira.co.za/

Freedom of Expression Institute (FXI)
Johannesburg
Tel: 011 482 1913
http://www.fxi.org.za
Twitter: @FXISouthAfrica
Facebook: https://www.facebook.com/FreedomofExpressionInstitute/

Right2Know Campaign
National
Tel: 011 339 1533 / 073 904 1626
http://www.r2k.org.za
Twitter: @R2KCampaign
Facebook: https://www.facebook.com/Right2Know/

Right2Protest Campaign
National
Tel: 0800 212 111
http://www.r2p.org.za
Twitter: @ProtestZA
Facebook: https://www.facebook.com/ProtestZA/

National Alliance for the Development of Community Advice Offices (NADCAO)
National
Tel: 011 339 1258
http://www.nadcao.org.za
Facebook: https://www.facebook.com/nadcao/
South African University Clinics Association (SAULCA)
National
Tel: 018 297 5341
http://www.saulca.co.za

LEGISLATION

Constitution of the Republic of South Africa, 1996 (Constitution)

Criminal Procedure Act 51 of 1977

Dangerous Weapons Act 15 of 2013

Regulation of Gatherings Act 205 of 1993 (Gatherings Act)

POLICIES AND GUIDELINES

South African Police Services (SAPS) National Instruction 4 of 2014

RESOURCE GUIDES


http://paralegaladvice.org.za/chapter-five/
EXAMPLES OF DOCUMENTS

AN EXAMPLE OF A NOTICE IN TERMS OF THE GATHERINGS ACT

NOTICE OF GATHERING TERMS OF SEC 3 OF THE REGULATION OF THE GATHERINGS ACT 205 OF 1983 ("THE ACT")

Date of Notice: ___________________________ Ref No: ___________________________

1. RESPONSIBLE OFFICER

NAME: ________________________________

2. DEPUTY RESPONSIBLE

NAME: ________________________________

Tel No: 011 490 1590 Fax No: 011 490 1864

E-Mail: ________________________________

3. (a) CONVENER (Applicant)

First Name: _____________________________

Surname: _______________________________

Home / Work Address: _______________________________

Cell No: ___________ Tel No: ___________ Fax No: ___________

(b) DEPUTY CONVENER

First Name: _____________________________

Surname: _______________________________

Home / Work Address: _______________________________

Cell No: ___________ Tel No: ___________ Fax No: ___________

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<thead>
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(b) The name of the organization or branch on whose behalf the gathering is convened or if it is not so convened, a statement that is convened by the convener

Name of the Organization / Branch: ________________________________


(c) The purpose of the Gathering/march:

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(J) The number and type of vehicles if any which are to form part of the procession.

Types of vehicles: ________________________________

Number of vehicles: ________________________________

If notice is given later than seven days before the date of on which the Gathering is to be held the reason why it was not given on time.

Not applicable

Reason if late: __________________________________________


iv. If a petition or any other document is to be handed over to any person, the
Place where a petition the person to whom is to be handed:

- Name of the recipient: ________________________________
- Place of the recipient: ________________________________

vi. Copy of a confirmation letter from other party accepting to receive a
Memorandum or the letter from the convener/applicant sent to the recipient
Requesting someone to accept the memorandum.

Available

Not available if not state the reason why? ________________________________

4. OTHER FACTORS

State what arrangements have been made regarding the following?

4.1 Parking of buses and other motor vehicles: ________________________________

4.2 Toilets facilities/ water points: ________________________________

4.3 Resting places along the route: ________________________________
NB In terms of Sec 12 (1) (b) of the Act, any person who after giving notice in terms of Sec 3, fail to attend a meeting called in terms of Sec 4. 2 (b) shall be guilty of an offence and liable to fine or imprisonment.

The under-mentioned forum members agreed on the above details and or amendments.

Signatures:

__________________________  __________________________
Responsible Officer (JMPD)    Authorized Member (SAPS)

__________________________  __________________________
Convener (Applicant)         Deputy Convener (Applicant)

__________________________  __________________________
Public Order Police Member    Area Police Station Commander
INDEMNITY

GIVEN BY __________________________________________
(Full Name - Please Print)

In his/her capacity as ____________________________________________

Of ____________________________________________________________

("the Applicant")

He/She being duly authorised hereof, in favour of the City of Johannesburg Council (hereinafter referred to as "the Council").

WHEREAS the Applicant has requested the approval of the Council to use certain streets, sidewalks or public places under the control of the Council for the purpose of

________________________________________________________________________________________

________________________________________________________________________________________

AND WHEREAS the Council has approved the application subject to the requirements of the:

Regulation of Gatherings Act;
The National Road Traffic Act;
The Safety at Sports and Recreational Events Act and
Other applicable legislation

The Applicant further agrees as follows:

- to indemnify and hold harmless the Council against all or any loss, costs, damage to property or person or injury that may be incurred or sustained by the Council or the Applicant or by any third party (including the Council's employees) and also against any actions, legal proceedings and claims of whatsoever nature which may be instituted or made against the Council, arising out of, or in any way connected with the exercise by the Applicant of the rights granted by the Council;

- to indemnify the Council in respect of all legal and other expenses (including all attorney and client costs) incurred by the Council in examining, settling or defending any such actions, legal proceedings or claims.

THUS done and signed on behalf of the Applicant at JOHANNESBURG

ON THIS ___________ DAY OF __________________________ 20____

77
AN EXAMPLE OF AN INTERDICT

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2015/38222
P/H NO: 0

JOHANNESBURG, 29 October 2015
BEFORE THE HONOURABLE JUDGE VALLY

In the matter between:-

THE UNIVERSITY OF THE WITWATERSRAND,
JOHANNESBURG

Applicant

and

SIMBARASHE FADZI
1st Respondent

MFUNDO ZULU
2nd Respondent

ORDIRETSE MASEBE
3rd Respondent

ALL OTHER PERSONS INTENDING TO
UNLAWFULLY DISRUPT THE ACTIVITIES
OF THE APPLICANT

4th Respondent to
Further Respondents

HAVING read the documents filed of record and having considered the matter :-

THE COURT GRANTS AN ORDER:-

1. Dispensing with the forms and service provided for in the Rules of Court and condoning the non-compliance with the rules due to urgency in terms of Rule 6(12).

2. A Rule Nisi is hereby granted and returnable on Wednesday the 4th day of November 2015 at 10:00 in Court 9E, when the First, Second, Third Respondent and all other persons should show why the following order should not be made final.

2.1. Interdicting and restraining the First, Second, Third Respondent and all other persons from:

2.1.1. Obstructing or preventing any person from entering or leaving the precinct of the Applicant or any of its buildings, facilities, residences, halls, classrooms and the like;
2.1.2. In any way disrupting the normal activities of the Applicant, including classes, tutorial’s and the like;

2.1.3. In any way causing damage to the property of the Applicant, its staff, students or members of the public present on the Applicant’s precinct;

2.1.4. Harassing, intimidating, threatening or assaulting any of the Applicant’s students or staff, or members of the public in any manner whatsoever;

2.1.5. In any way causing damage to the property of the Applicant, its staff or students.

3. The South African Police Service is directed to assist the Applicant in enforcing this order.

4. Any interested party who intends opposing the granting of the relief sought in paragraph 2 above is required to appear at this Court at 10:00 on the 4th day of November 2015 in court 9E or may anticipate the return date by giving the Applicant’s attorneys twenty-four hours notice, and show cause why the interim order should not be made final.

5. The Applicant is directed to serve a copy of this order in the following manner:

5.1. by affixing a copy of this order to all notice boards of all faculty buildings of the Applicant;

5.2. by affixing a copy of this order to all the entrances to the Applicant’s precinct;

5.3. by hand delivering copies of the order to the offices of the Student Representative Council (SRC) and affixing copies of the order to the notice boards at the offices of the SRC;

5.4. by affixing a copy of the order to all notice boards within the Matrix and Senate House;

5.5. by publishing the order on the Applicant’s website;

5.6. by notifying the Applicant’s students of the order through the Applicant’s twitter Handle;

5.7. by notifying all registered students of the Applicant of the order by sending out e-mails to each of them.
6. Pending the hearing for the finalisation of the matter on Wednesday the 4th day of November 2015 at 10:00 or on any anticipated return date, the above mentioned order in paragraph 2 above shall operate as an interim interdict.

7. The order in paragraph 2 above shall not be construed as removing the Respondents’ and any other person’s right to peacefully demonstrate at the precinct of the Applicant.

BY THE COURT

REGISTRAR

AN EXAMPLE OF A BAIL RECEIPT