IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

(BRAAMFONTEIN)

CCT 54/2016

NGHC Case No: 2013/3888

In the matter between:-

SOUTH AFRICAN MUNICIPAL WORKER'S UNION	**Appellant**
and	
THE MINISTER OF CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS	**1st Respondent**
THE SPEAKER OF THE NATIONAL ASSEMBLY	**2nd Respondent**
THE CHAIRPERSON OF THE NCOP	**3rd Respondent**
THE PREMIER OF THE EASTERN CAPE	**4th Respondent**
THE PREMIER OF THE FREE STATE	**5th Respondent**
THE PREMIER OF GAUTENG	**6th Respondent**
THE PREMIER OF KWA – ZULU –NATAL	**7th Respondent**
THE PREMIER OF MPUMALANGA	**8th Respondent**
THE PREMIER OF THE NORTHERN CAPE	**9th Respondent**
THE PREMIER OF LIMPOPO	**10th Respondent**
THE PREMIER OF NORTH WEST	**11th Respondent**
THE PREMIER OF THE WESTERN CAPE	**12th Respondent**
THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	**13th Respondent**

FIRST RESPONDENTS' SUBMISSIONS

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INTRODUCTION

1. This application arises from the amendment to the Local Government: Municipal Systems Act No. 7 of 2011 ("the Amendment Act"), which amended the Systems Act by essentially limiting the political rights of municipal managers and managers directly accountable to them.

2. The Applicant approached the court seeking an order declaring section 56A ("the impugned provisions") of the Local Government Municipal Systems Act No. 32 of 2000 ("the Systems Act"), read together with the definition of "*political office*" in section 1 of the Amendment Act, to be inconsistent with the Constitution and invalid.[1] The court *a quo* did not pronounce on this prayer in the light of the invalidation of the Amendment Act.

3. After hearing the challenge launched by the applicant, the court *a quo* issued an order declaring that the Amendment Act is invalid in its entirety for want of compliance with the procedures set out in section 76 of the Constitution of the Republic of South Africa Act, 1996.

4. The court *a quo* ordered that in terms of the provisions of section 167(5) of the Constitution the order of invalidity is referred to the above honourable court for confirmation.

[1] Volume 1; p.1 Notice of Motion prayer 2

THE APPROACH OF THE COURT *A QUO*

5. The court a quo separated the matter into two issues, one being the declaration of invalidity sought in relation to the entire Amendment Act due to the alleged incorrect procedure followed in enacting it.[2] The second issue is whether section 56A of the Amendment Act is a justifiable limitation in terms of section 36 of the Constitution on the right to make free political choices in terms of section 19(1) of the Constitution.

6. The court *a quo* found that the Amendment Act is unconstitutional and thus upheld the procedural point. In the result the court found it unnecessary to deal with the substantive issue of whether section 56A is a justifiable limitation on the right to make free political choices in terms of section 19(1) of the Constitution.

7. In this application the Applicant seeks the following:

   7.1. Confirmation of the order made by the court *a quo*;

   7.2. Leave to appeal against the court a quo's failure to determine whether section 56A of the Amendment Act read together with the definition of "political office" in section 1 of the Amendment Act, is inconsistent with the Constitution and accordingly invalid;

[2] Vol 6 p449 par 1.1

7.3. Failure to award costs of suit to the Applicant. In this regard, the Applicant seeks costs in the High Court and this Court, in respect of the procedure followed in the passing of the Amendment Act and the challenge to the substance of section 56A of the Amendment Act.

THE SCHEME OF THESE SUBMISSIONS

8. These submissions will be structured as follows:

8.1. First, we set out the background to the impugned provisions in order to demonstrate why they are in accordance with the obligations to create effective and efficient local government;

8.2. Second, as argued in the court *a quo* by the First Respondent, we will argue that if the entire impugned legislation is declared unconstitutional, it is unnecessary to determine whether or not section 56A offends against section 36. In this regard, the First Respondent agrees with the approach adopted by the Court a quo in not determining the substantive issue in the light of the finding of invalidity of the entire legislation;

8.3. Third, we will argue that the appeal in respect of the substance of the impugned provisions is premature in that the court a quo has not delivered a judgment on that issue;

8.4. Fourth, and in the event that this Court takes the view that it must, in the interest of time and costs, determine the substance of the impugned provisions, it will be argued that section 56A does not offend against section 36 of the Constitution in that it constitutes permissible limitation of rights;

RELEVANT BACKGROUND TO THE IMPUGNED PROVISIONS

9. The objectives which the government seeks to achieve with the Amendment Act were articulated by the relevant Cabinet Minister when the Amendment Act was piloted through the National Assembly.[3]

10. The impugned provisions are part of amendments which deal with the local government sphere of government in general and *inter alia* the following subject matters:

10.1. Appointment of a municipal manager;

10.2. Appointment of managers directly accountable to the municipal manager;

10.3. Limitation of political rights of municipal managers and managers directly accountable to the municipal manager;

[3] Volume 1, pages 33 – 41; Annexure WT2

11. The legislation which the Applicant challenges is but one of the measures which are aimed at improving, and contributing to a functioning, better and effective local government, and these measures are critical for the delivery of quality services to the citizens of South Africa.[4]

12. Local government in South Africa has contributed to the achievement of significant social and economic development advances, since the new municipal dispensation in December 2000[5]. The majority of the people of South Africa have increased access to a wide range of basic services and more opportunities have been created for their participation in the economy.[6]The Government of the Republic of South Africa identified that there is a risk that the overall positive progress in success of the new local government system in South Africa is increasingly being overwhelmed by *inter alia* negative practices both internally and externally to municipalities.[7]

13. Good or even satisfactory practices are not institutionally sound but depend on few leaders and personalities.[8]

14. The government further identified that a deliberate subversion of policy intent can happen due to the capture of systems by local elites (bureaucrats or politicians, and business people), interest groups and

[4] Volume 3; page170, para 9 Steytler's Affidavit
[5] Volume 3; page 170 para 3
[6] Volume 3 p170 para 3
[7] Volume.1 p49 para 4
[8] Volume. 1 p49 para 4

individuals utilizing corrupt and criminal means to advance personal interest rather than the community and public interest.[9]

15. The poor state of local government was widely acknowledged from both inside and outside government.[10] By 2009 many, but if not all, local governments were showing clear signs of distress and some of dysfunctionality resulting *inter alia* in increasing civil society protests against poor service delivery[11].

16. The government investigated the state of local government in the country and convened a National Indaba on Local Government on 21 to 22 October 2009 which brought together senior government officials from all the three spheres, traditional leaders, representatives from labour, civil society, academia and the business sector.[12]

17. The government came to the conclusion that one of the major negatives in local government sphere of local government is corruption, nepotism and lack of accountability and improper influence by political elites.[13]

18. The Indaba adopted certain declarations *inter alia* that there is a need for a national turnaround strategy for local government.[14]

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[9] Volume 50 para 6
[10] Volume 3, page 172 para12 first line
[11] Volume 3, page 172 para 11
[12] Volume 1 p50 para 8
[13] Volume 1 p50 par 7
[14] Volume 1 p50 par 9.3

19. In response to this state of affairs, the Department of Cooperative Governance and Traditional Affairs ("Cogta") developed a Local Government Turnaround Strategy which was adopted by the Cabinet of the Government of the Republic of South Africa on 25 November 2009.[15]

20. In the Turnaround Strategy document some of the causes of the distress of municipalities were identified, *inter alia,* as being political parties that are undermining the integrity and functioning of municipal councils through *intra* and interparty conflicts and inappropriate interference in councils and administration.[16]

21. One of the objectives identified in the Turnaround Strategy was to improve and strengthen performance and professionalism in municipalities.[17] These objectives translated in numerous intervention measures, one of which was legislative and the main thrust of the Amendment Act was to strengthen the professionalisation of local government as an important strategy to improve service delivery.[18]

22. The measures in the Amendment Act included securing a greater separation between the administration and political parties. In order to achieve this, senior municipal managers are prohibited from occupying

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[15] Volume 3, page 174 para 15
[16] Volume 3, page 175 para 15.1.3
[17] Volume 3, page176 paras 16 and 16.3
[18] Volume 3, page 177, Steytler Affidavit, para 17

key elected positions in political party structures.[19] This seeks to ensure that there is no blurring of party and state. It also assists in ensuring that there is a clear line between the administration and political office in the manner in which municipalities are administered.

23. The Amendment was a well targeted, evidence based, legislative measure to provide a necessary regulatory framework in terms of which some of the problems relating to the lack of professionalisation and the politicisation of the administration could be addressed.[20]

24. The Amendment Act, which is attacked by the Applicant, was based on an assessment of the challenges of local government in South Africa, and therefore was not arbitrary or irrational.[21]

25. The purpose of the impugned provisions is to improve the quality and capacity of local government to provide services to the public, and this is of extreme importance and consistent with the Constitution.[22]

26. The government also identified that it is important to prohibit the holding of joint political and managerial offices because of the conflicting pressures that this places on individuals and because of its impact on public perception of local government administration.

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[19] Volume 3, page 177, Steytler Affidavit, para 17.3
[20] Volume 3, page 178, Steytler Affidavit, para 18
[21] Volume 3, page 179, Steytler Affidavit, para 20
[22] Volume 1 p58 par 19

27. The government also identified that the issue that section 56A addresses is not confined to the problems that arise from municipal managers holding office in the same areas that they are employed as public officials, and that the holding of political office is susceptible to misuse.[23]

28. When the Amendment Act was introduced in the national assembly the then acting Minister of Cogta stated that the date on which the amendments were introduced was an important milestone in our ongoing efforts to realize the vision of a developmental local government in South Africa.[24]

29. The then Acting Minister stated that this vision is fundamentally about people centered local government and the need to make municipalities administratively and professionally sound so that they can improve the lives of the people.[25]

30. The purpose of section 56A is thus to affirm and strengthen the democratic and administrative accountability relationships, as prescribed by the Constitution and legislation.[26]

31. A high standard of professional ethics as demanded by section 195 (1) of the Constitution can hardly be promoted and maintained where ranking party political office holders are able, as senior managers, to

[23] Volume 1 p59 par 21
[24] Volume 1 p33 Annexure W12, para 1
[25] Volume 1 pp34-41 para 2 Annexure W12
[26] Volume 3 p. 189 para 35

give preference to party interest at the expense of professional ethics.[27] Moreover, their appointment is also unlikely to result in services being provided impartially, fairly, equitably and without bias.[28] Moreover, even if they act impartially, the perception of partiality may be a dangerous as the reality thereof.

32. Where the presence of political office holders turns the accountability processes on their head, public administration cannot become accountable.[29]

33. The key matters which the Amendment Act seeks to address were identified by the Acting Minister as follows:

33.1. First that the bill sent a clear message that municipalities must and will be more professional in a manner in which they do their business;

33.2. Second the amendment sought to ensure that competent and well qualified officials are appointed to provide the best possible service to the people;

33.3. Third they also regulate various matters on human resource management in a manner that promotes great uniformity and predictability across municipalities;

[27] Volume 3, page 191, Steytler Affidavit, para 37
[28] Volume 3, page 191, Steytler Affidait, para 37
[29] Volume 3, page 191, Steytler Affidavit, para 37

33.4. They deepen accountability of senior municipal officials to the council and by the same token place certain obligations on politically elected officials.

THE PURPOSE OF SECTION 56A

34. It is widely accepted that political interference in municipal administrations is one of the factors that has hampered the effective and efficient functioning of municipalities and their compliance with the mandate of delivering basic services.[30]

35. It is undesirable for the two roles of political office bearers and administrative functionaries to be blurred and conflated. One of the functions of a municipal manager is to manage communications between the municipality's administration and its political structures and political office bearer.

36. In order for a municipal manager to carry out the functions prescribed in section 55 of the Systems Act, it is imperative that he or she should be above party political constraints.

37. The political structures of a municipality are established pursuant to elections and on the basis of proportional representation.[31] Councilors

[30] Vol 3 p.179 par 22
[31] Section 173 of the Constitution

are therefore party political functionaries. It is the reality of politics that councilors are often forced or pressured to relinquish their seats as councilors by either being expelled or their membership suspended from their political parties.[32]

38. The legislation which prohibits senior municipal managers from holding political office is therefore reasonable and meant to prevent destabilisation of municipalities which would inevitably happen if the senior municipal managers are subject to the whims of internal party political strife.

39. In a case where a municipal manager occupies the position of chairman of a political party and he/she loses the position through an internal party electoral process, there is likelihood, as it so often happens, that such a municipal manager may be recalled by his party, thus destabalising the municipality.

40. Parliament has deliberately sought to draw a clear distinction between party political functionaries and administrators within a municipal council for a good reason.

[32] See Marais v Democratic Alliance [2002] JOL 9241 (C) where the mayor of the City of Cape Town was told by his party that they had lost confidence in his ability to function as a mayor and calling upon him to resign.

GOVERNANCE STRUCTURES OF LOCAL GOVERNMENT

41. According to the Systems Act a municipality consists of the political structures, administration and community of the municipality.[33]

42. There are three critical organs of municipal governance,[34] namely:

    42.1. the municipal council;

    42.2. the mayor;

    42.3. the municipal manager.

43. The interplay in relations amongst these organs are critical to good governance, which in turn, is an essential ingredient for effective service delivery.[35]

MUNICIPAL ADMINISTRATION

The Municipal Manager and Section 56 Managers

44. The Systems Act and Structures Act create a deliberate distinction between the political and administrative functionaries. Political administration lies with elected political functionaries whilst the administration rests with full time employed managers and employees.

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[33] Section 2(b) Systems Act
[34] Volume 3 p170 para 7 p. 151; section 1"*political structure"* in the Systems Act
[35] Volume 3, page 170, Steytler Affidavit, para 8

45. The Systems and Structures Acts create a legal framework for the appointment and functioning of staff at the two most senior levels of municipal administration, namely the municipal manager and those managers that are directly accountable to him or her.

46. Section 54A of the Systems Act provides for the appointment of municipal managers and acting municipal managers. A municipal manager is the head of the administration of a municipal council.[36]

47. The pivotal role of the municipal manager in the function of a municipality was highlighted by the Constitutional Court which termed the manager "*a key structure of a municipality and not merely a personnel appointment as contemplated in section 161 (d) of the Constitution*.[37]

48. The municipal manager is the primary interface between, on the one hand, the political structures and office bearers and the municipal administration on the other.[38] It is thus essential that the person appointed as municipal manager has the relevant skills and expertise to perform the duties associated with that post.

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[36] Section 54A (1) (a)
[37] Steytler et al supra at p.8-22(1); Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development Executive Council of KwaZulu Natal vs President of the Republic of South Africa 1999 (12) BCLR 1360 CC at para 109
[38] Steytler supra at p.8-22(1) para 3.2

49. It is therefore clear that the law governing local government draws a clear distinction between political and administrative functionaries. Political functionaries are councilors and the head of administration is the municipal manager.

STUDY INTO FUNCTIONING OF LOCAL GOVERNMENT

50. Research has been conducted into the function of local government and in particular the impact of the appointment of political office bearers to the senior managent of municipalities. The findings of the study shows that the views of government that senior municipal managers should not hold political office.

51. Steytler, together with Professor Jaap de Visser and Ms Anette May, conducted research as a team for the Community Law Centre in 2009, and the study was entitled. "***The Quality of Local Democracy; a study into the functionality of municipal governance arrangement***" (referred to as "the study).[39]

52. More than 30 interviews were conducted with municipal office bearers, councilors and officials in 5 municipalities in 4 provinces (North West, Gauteng, Eastern Cape and Western Cape), which differed according to size, location and levels of functionality.[40] Although the interviews were a small sample, the in depth interviews revealed behavioural

[39] Volume 3 p.180 par24
[40] Volume 3 p.181 para 25

dynamics that were uncontested, if not confirmed, by the wide readership of local government stakeholders the report enjoyed.[41]

53. The study found that the widely held perception of the widespread incidence of political appointments to senior management positions was confirmed.[42]

54. The study found that the municipal manager and the section 56 managers were often political appointees who did not have the necessary skills for their positions.[43] It also found that the consequences of such political appointments were as follows:

54.1. Once a political appointment has been made, the incumbent is beholden to the party;

54.2. There is also a deep understanding amongst most stakeholders that political appointments are not in the best interest of a municipality.[44]

55. Although Tapscott, the Applicant's expert, criticizes the study on the basis that methodologically it is problematic in that it was conducted with a very small base,[45] the Applicant offers no empirical evidence for

[41] Volume 3 p.181 para 25
[42] Volume 3p.182 para 28
[43] Volume 3 p.182 para 28
[44] Volume 3 p.182 para 29
[45] Volume p.11 para 12 of Tapscott Affidavit

the attack on the impugned provisions except for the opinion of Tapscott and Walter Theledi, the General Secretary of the Applicant.

56. In contrast the First Respondent offers the views of Steytler, who carried out research and interviews, as well as comments by the South African Local Government Association ("SALGA"), the Thirteenth Respondent, on the Bill before it was passed into law,[46] as well as a memorandum of the Institute for Local Government (ILGM), which is a body representing "*senior managerial positions in local government*".[47]

57. Both the study and the comments of SALGA and the ILGM confirmed that political appointment of municipal managers and section 56 managers is not in the best interest of local government. SALGA represents the views of all municipal councils[48] and its members are best placed to appreciate the enormity of the problem.[49]

58. In fact, SALGA's only criticism was that the prohibition did not go far enough and should cover all municipal employees.[50] This is in line with the objectives of government in passing the impugned provisions, which *inter alia* is to depoliticise the administration of municipalities.

[46] Volume 3 pp 280- 285 Annexure NCS3
[47] Volume 3 pp 286-293 Annexure NCS4
[48] Volume 3 p.199 par 56
[49] Volume 3 p.199 par 56
[50] Volume 3 p.199 par 57

59. The ILGM is a body representing "*senior managerial positions in local government*".[51] ILGM supported the Systems Amendment Bill of 2010, but with the same reservation as SALGA about the limited field of application.[52]

60. It is important to note that ILGM did not reject or protest against the inclusion of section 56A although it would directly affect its very membership i.e. senior management of municipalities.[53]

SUBMISSIONS ON THE INVALIDITY FINDING

61. The court *a quo* found that the Amendment Act is invalid in its entirety. It did this on the basis that the manner in which it was passed was not in accordance with section 76 of the Constitution. Having found this way, the court held that it was not necessary to determine the issue of the substance of section 56A.

62. It is submitted that the court a quo was correct in adopting the approach that it did on the strength of the authority of ***Tongoane and Others v National Minister for Agriculture and Land Affairs and Others***[54]. In this matter the Constitutional Court held that:

> **"Once it is concluded that the CLARA is unconstitutional in its entirety because it was not enacted in accordance with**

[51] Volume 3 p.181 par 58
[52] Volume 3 p 200 par 58
[53] Volume 3 p201 par 60
[54] 2010 (6) SA 214

the provisions of s 76, it seems to me that is the end of the matter. Although the anxiety of the applicants to finalise the matter in the light of the energy and time they invested in it is understandable, there is nothing left for this court, as a court of final appeal, to consider."[55]

63. The above position had also been held by this Court in the case of ***Mabaso v Law Society, Northern Provinces and Another***[56].

64. The court *a quo* correctly found that should the court hold that an entire statute is unconstitutional, to analyse sections in it to ascertain the validity or demise thereof would be an exercise in futility.[57]

JUDGEMENT A QUO IS NOT APPEALABLE

65. Section 16 (1) of the Superior Courts Act 10 of 2013 regulates appeals in general.[58] Only a decision of a court is appealable.[59]

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[55] Para 116
[56] 2005 (2) SA 117 (CC)
[57] p.46 par 4
[58] **16 Appeals generally**
(1) Subject to section 15(1), the Constitution and any other law—
(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted—
(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6); or
(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;
(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal; and
(c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.
(2) *(a)* (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

[59] Section 16.

66. In accordance with the general rule laid down in ***Zweni v Minister of Law and Order of the Republic of South Africa***[60] a 'decision' contemplated in s 16(1) of the Superior Courts Act has three attributes:[61]

(i) it must be final in effect and not susceptible to alteration by the court of first instance;

(ii) it must be definitive of the right of the parties, i e it must grant definite and distinct relief; and

(iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

67. This litmus test only finds application when the court concerned has pronounced conclusively on the issue submitted to it for determination.[62]

68. In this matter the court *a quo* has not pronounced conclusively on the second issue regarding the constitutionality of section 56A. The court *a quo* did not make a decision on section 56A.

69. Accordingly the judgment or order of the court is not appealable. At the very least, if the above Honourable Court concludes that the court *a quo* should have pronounced on the constitutionality of section 56A,

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[60] 1993 (1) SA 523 (A) at 532I–533B.
[61] Erasmus et al Superior Court Practice Vol 1 A2-43 ; Carter v Haworth 2009 (5) SA 446 at par 10; Ndlovu v Santam Limited 1993 (1) SA 523 A at 532 I-533B; 2006 (2) SA 239 SCA par 9
[62] Carter supar at 450 B par 11

then the matter must be remitted to the court a quo for a ruling on the matter.

70. In terms of Rule 19 of the rules of the above Honourble Court leave to appeal to the above honourable court can only be done where a decision on a constitutional matter, other than an order of constitutionality and validity under section 172(2)(a) of the Constitution, has been given by any court including the Supreme Court of Appeal.

71. No decision has been made by the court *a quo* on section 56A.

72. In its notice of application in terms of rules 6 and 19 the Applicant seeks leave to appeal to the court against the High Court judgment in respect of its failure to determine whether section 56A read together with the definition of political office in section 1 of the Amendment Act is inconsistent with the Constitution and valid.[63]

73. It will therefore be submitted that the Appellants' application for leave to appeal be dimissed with costs. A failure to determine whether section 56A is unconstitutional is not a judgement, order or decision which is appealable.

IMPUGNED PROVISION DOES NOT OFFEND AGAINST SECTION 36

74. It is trite that when an applicant challenges the constitutionality of a provision or of conduct,

[63] Vol 7 p.515

74.1. the applicant bears the onus to prove, on a balance of probabilities, the facts on which it relies for its submission that its constitutional right(s) is / are being infringed by the challenged provision / conduct; and if the applicant succeeds therein; and

74.2. it is for the respondent to prove that the said limitation is reasonable and justifiable.

75. Once the Court finds or it is common cause that a constitutional right has been infringed, the enquiry then turns to the question whether the limitation / infringement is reasonable and justifiable in an open and democratic society.

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

(a) the nature of the right

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

(c) the nature and extent of the limitation;

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

(e) less restrictive means to achieve the purpose.” (Own emphasis)

77. In order to determine whether section 56A offends against section 36 we will analyse the section against the elements of section 36. The elements of section 36 can be summarised as follows: **that the law limiting the rights must be of general application, the limitation must be reasonable and justifiable, the purpose of limitation must be important and the measures must be proportionate**.

LAW OF GENERAL APPLICATION

78. Only a law of general application can validly limit a right in the Bill of Rights. According to the rule of law, the law must be sufficiently clear, accessible and precise so that those who are affected by it can ascertain the extent of their rights and obligations.

79. The Amendment Act applies to all and sundry who desire to apply for the post of senior municipal manager. Those who are already in this position may not hold political office regardless of political party or the attributes thereof. This is clearly a law of general application and meets the requirements of section 36.

80. The requirement that the law must be of general application means that any limitation must be authorized by law that is formally valid in the sense that it is properly enacted and promulgated.[64] The impugned

[64] August vs Electoral Commission 1999 4 BCLR 363 (CC)

provisions will meet this element only if the court holds that the Amendment Act was properly tagged.

81. The impugned provisions were properly promulgated and are a law of general application. If the court agrees with the court a quo about the invalidity of the Amendment Act then this point becomes irrelevant.

82. If no formally valid law can be identified that authorizes a particular limitation, the limitation is unjustifiable and there is no need to investigate whether the limitation is "*reasonable and justifiable in an open democratic society based on human dignity, equality and freedom*."[65]

83. On a substantive level, it means that the law must apply equally to all and it must not be arbitrary in its application. The court in ***Dawood v Minister of Home Affairs,***[66] held that it is an important principle of the rule of law that the rules must be stated in a clear and accessible manner.[67] The court further held that it is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorized by a law of general application.[68]

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[65] LAWSA par 27
[66] 2000 (3) SA 936 CC at para 47
[67] Par 47
[68] Dawood supra

84. In ***President of the Republic of South Africa v Hugo***[69] the court held that a Presidential Act did not violate the right to equality and non – discrimination and therefore did not consider the issue of limitation.

85. It will be argued that the limitation of the political rights of the senior municipal managers is reasonable and justifiable in terms of section 36 of the Constitution.

[69] 1997 (4) SA 1 (CC)

LIMITATION IS REASONABLE AND JUSTIFIABLE

86. The limitations inquiry is whether or not the limitations placed on political rights by section 56A are justified depends on an analysis of the provisions in accordance with section 36 of the Constitution.

87. The manner in which this general test of reasonableness and justifiability should be applied was considered by the Constitutional court on a number of occasions and the court has explained that a court must not simply take the factors listed in section 36(1) in account in a mechanical way, but it must also engage in a balancing exercise and arrive at a global judgment based on proportionality.[70]

88. The Constitutional court has also explained that *"as a general rule, the more serious the impact of the measure on the right, the more compelling or persuasive the justification must be and ultimately the question is one of degree to be assessed in the concrete legislative and social setting of the impugned measure, paying due regard to the means which are realistically available in the country at the date, but without losing sight of the values to be protected*.[71]"

[70] See State v Manamela (Director – General of Justice Intervening) 2000 5BCLR 491 (CC) at 32, Minister of Home Affairs v National Institute for Crime Prevention and Integration of Offenders (NICRO) 2004 5BCLR 445 CC at 36

[71] See State v Manamela supra at 32

89. The limitation clause requires a law that restricts a fundamental right to do so for reasons that are acceptable in an open and democratic society based on human dignity, equality and freedom. In addition, the law must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose.

90. To satisfy the limitation test, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the infringement of the Applicant's rights and the benefits the Respondent seeks to achieve.

THE GOVERNMENT'S OBJECTIVES ARE RATIONAL AND LEGITIMATE

91. As long as the purpose to be achieved by the exercise of public power is within the authority of the functionary and as long as the functionary's decision viewed objectively, is rational, a court cannot interfere with the decisions simply because it disagrees with it or considers that the power was exercised inappropriately.[72]

92. The standard for reviewing legislation for constitutionality is the rational connection which is more appropriate than reasonableness.[73] Decisions as to reasonableness of statutory provisions are ordinarily matters within the exclusive competence of parliament and this is

[72] Pharmaceutical Manufacturers Association of SA and Others in re Ex parte President of the Republic of South Africa and Others 2000 vol 2 SA 674 CC
[73] Affordable Medicines Trust and others v Minister of Health and Others (2006) 3 SA 247 (CC) p.280 para 82 and New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC)

fundamental to the doctrine of separation of powers and to the role of courts in a democratic society.[74]

93. Courts do not review provisions of Acts of parliament on the grounds that they are unreasonable and do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose and in such circumstances, review is competent because the legislation is arbitrary.[75]

94. If the legislation is rational, the Act of parliament cannot be challenged on the grounds of unreasonableness.[76] Reasonableness will only become relevant if it is established that the Act, though rational, has the effect of infringing the right of citizens.

95. The question would then arise whether the limitation is justifiable under the provisions of section 36 of the Constitution and it is only as part of this section 36 enquiry that reasonableness becomes relevant. It follows that it is only at that stage of enquiry that the question of reasonableness has to be considered.[77]

96. It is submitted that given the history of the impugned provisions, the stated objectives of government of improving the function of local government, the thorough assessment of the state of local government

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[74] New National Party supra
[75] New National Party p.489 ad para 19
[76] New National Party supra
[77] New National Party para 24

undertaken by government prior to promulgation and the research of Steytler and his colleagues the limitation of the political rights of senior municipal managers is justifiable in that it is in furtherance of a rational and legitimate objective.

97. It is legitimate for the government to limit the political rights of senior municipal managers.

PROPORTIONALITY

98. In ***S v Makwanyane*** the Constitutional Court adopted the approach that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality and that this is implicit in the provision of section 33 (1)[78].

99. In the process regard must be had to the provisions of section 33 (1), and the underlying values of the Constitution, bearing in mind that, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators."[79]

100. It is in this light that the legislature sought to amend section 56 of the Systems Act. The dire position in local government is well

[78] 1995 (3) SA 391 CC para 102
[79] Makwanyane supra

documented. The prevalent service delivery protests, which at times lead to damage to property and loss of life across the country cannot be ignored, neither can it be allowed to prevail. It will be submitted that the court can take judicial notice of the situation described in this paragraph.

101. Although the ***Makwanyane*** case refers to the interim Constitution, it will be submitted that it applies with equal force to section 36 of the current Constitution[80]. Section 36 contains a set of "relevant factors" to be taken into consideration by a court when considering the reasonableness and justifiability of a limitation.

102. A government policy choice is at stake in this matter. On this basis, the court will be implored to defer to the legislature.

103. Looked at objectively, the court will see that any harm done (the infringement) to the senior municipal managers is outweighed by the rights and interests sought to be achieved by the Amendment.

104. It is submitted that section 56A limitation is not disproportionate in that :

104.1. It does not prohibit senior municipal employees from doing the following:

[80] The National Coalition of Gay and Lesbian 1999 (1) SA 6 (CC) at paragraph 33 onwards in which the CC held that the principles enunciated in Makwanyane case is applicable under the 1996 Constitution.

(a) To form a political party. Senior municipal employees are free to form a political party.

(b) To participate in the activities of or recruit members for a political party.

(c) To campaign for a political party or cause.

105. The Applicant misconstrues section 56A by suggesting that the section restricts the rights of senior employees to form and participate in the activities of political parties.[81] Section 56A does no such. Senior municipal employees are free to campaign for a political party or cause of their choice without any restriction.

106. All that section 54 (a) does is to restrict in a very limited manner the right to participate in the activities of a political party only in the sense of holding the specified offices in the political party.[82]

IMPORTANCE OF THE PURPOSE OF THE LIMITATION

107. It will be submitted that, at minimum, reasonableness requires the limitation of the rights to serve some purpose. The purpose which is sought to be achieved by government is clear from the answering affidavit and the affidavit of Steytler.

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[81] Volume 1 p.18 para 30
[82] Volume 3 p.203 para 64

108. Justifiability requires the purpose to be one that is worthwhile and important in a constitutional state. Nothing could be more important than the rights of the community enshrined in the Constitution.

109. Section 152 (1) of the Constitution provides:-

"*OBJECTS OF LOCAL GOVERNMENT"*

S152. (1) The objects of local government are :–

(a) *to provide democratic and accountable government for local communities;*

(b) *to ensure the provision of service to communities in a sustainable manner;*

(c) *to promote social and economic development;*

(d) *to promote a safe and healthy environment; and*

(e) *to encourage the involvement of communities and community organizations in the matters of local government.*

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).”

110. The limitation attended in section 56A clearly serves a purpose that will contribute to human dignity and equality, and the infringement is therefore justifiable.

111. It will be submitted that this is a limitation society considers worthwhile, a limiting measure which will serve a purpose that all reasonable citizens would agree to be completely compelling.

112. For this reason, the purpose of protecting the rights of society against political instability, corruption and power - mongering within municipalities, definitely qualifies as a justification for the limitation of the rights of senior municipal managers.

113. Previously, the Constitutional Court has condoned as legitimate purposes for the limitation of rights, the prevention of the following situations:-

113.1. The dispensing of medicines by doctors without regulation in order to keep the public safe and lower the price of medicines[83]; and

[83] Affordable Medicines Trust supra 2002(4) SA 294 CC

113.2. Protection of the rights of others.[84]

GENERAL APPLICATION

114. It is conceded that only a law of general application can validly limit a right in the Bill of Rights, that a limitation must be authorized by law, and the law must be of general application.

115. However, that the law must be general in its application means that the law must be **sufficiently clear**, **accessible** and **precise so that those who** are affected by it can ascertain the extent of their rights and obligations.[85]

116. On a substantive level, it means that the law must, apply equally to all and it must not be arbitrary in its application.

117. It will be submitted that equal application does not mean that a law must apply to everyone, but that it applies to everyone that it regulates in the same way. As an example, the fact that the Code of Good Conduct for Broadcasting Services under consideration in ***Islamic Unity Convention v Independent Broadcasting Authority***[86] applied only to broadcasters and not to the public at large did not matter. It

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[84] Beinash v Ernest & Young 1999 (2) SA 116 CC, in which the Constitutional Court upheld the provisions of the Vexatious Proceedings Act 3 of 1956 which allow a court to declare someone a vexatious litigant, thereby preventing them from instituting proceedings in any court without the leave of that court.
[85] Dawood v Minister of Home Affairs 2000 (3) at 936 CC at par 47
[86] 2002 (4) SA 294 CC

applied to all broadcasters and therefore qualified as a law of general application.

118. The First Respondent will rely on this[87] case for the proposition that, whereas section 56A applies to municipal managers and senior managers, it qualifies as a law of general application in that it applies to all senior municipal employees.

LESS RESTRICTIVE MEANS

119. The Applicants contends that there are lesser restrictive means of dealing with the problem which the government seeks to curb. The Applicant suggests that the Code of Conduct of municipal employees can be amended in certain ways to ameliorate the problem.[88]

120. It is submitted that the means suggested by the Applicant are not sufficient and only a complete limitation of the right to hold political office is appropriate.

[87] Islamic Unity Convention
[88] Volume 3 p.206 para 71

ALLEGED VAGUENESS OF DEFINITION OF POLITICAL OFFICE AND POLITICAL PARTY

121. The contention of the Applicant is that the Amendment Act and the Systems Act do not provide for any definition of what constitutes a political party. It is contended that the definition of political office is hopelessly vague and inconsistent with the rule of law and could apply to virtually any position in a street committee, area committee or other civic organization.[89]

122. It is contended that the breath of the definition will have a far reaching "*freezing effect*" on all people who seek to hold senior positions in municipalities or who have careers as managers in municipal government.

123. It is submitted that political party should be understood in its general and ordinary sense. Political office is defined in clear and unambiguous terms in that it refers to chairperson, deputy chairperson, secretary, deputy secretary and treasurer and includes any equivalent position irrespective of the title designated to the position. The impugned provision is clear and specific as regards what political office refers to.

[89] Volume 1 p13 para 33

124. The doctrine of vagueness is founded on the rule of law, which is the foundational value of our constitutional democracy[90] The doctrine requires that laws must be written in a clear and an accessible manner.[91]

125. What is required is reasonable certainty not perfect lucidity nor absolute certainty of laws[92]. The doctrine of vagueness must recognize the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives.[93]

126. The impugned provisions are clear and readily understandable to anyone who reads them. They are not vague at all.

127. The words "*political office*" and "*political party*" are encountered in many statutes[94].

128. Section 236 of the Constitution provides as follows:

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[90] Affordable Medicines Trust at pp. 288-289 para 108
[91] Affordable Medicines Trust
[92] Affordable Medicines Trust
[93] For instance section 26 (3) of the Labour Relations Act, 1995 which regulates a close shop agreement provides that a close shop agreement is binding inter alia only if it provides that no membership subscription or levy deducted may be paid to a "*political party*" as an affiliate fee, contributed in cash or kind to a "*political party*" or a person standing for election to any "*political office*"; the Electoral Commission Act 51 of 1996 provides that a political party includes "*any organization or movement of a political nature which publicly supports or opposes the policy, candidates or course of any registered party, or which propagates non-participation in an election*."
[93] Affordable Medicines Trust at p. 289 para 108

"*To enhance multiparty democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis*."

129. There is no definition of political party in the Constitution but the ordinary meaning is clear. The principal purpose of a political party must be to influence government.[95]

130. Black's Law Dictionary defines political party "*as an association of voters formed to influence the government's conduct and policies by nominating and electing candidates to public office*."[96]

131. The purpose should not be qualified by the requirement to nominate and elect candidates as a political party may exist outside the formal structures of government by organised persons in order to influence the government by extra-legislative, though lawful, means.[97]

132. It is submitted that the impugned provisions are clear and not vague.

THE CHALLENGE BASED ON AN INFRINGEMNT OF OTHER CONSTITUTIONAL RIGHTS

133. The Applicant contends that the impugned provisions infringe a number of other related rights in the Bill of Rights, including the section 18 right

[95] Cheadle et al par 14-4
[96] Black's Law Dictionary 7th Edition West Group
[97] Cheadle supra p.14-4

to freedom of association, the section 15(1) right to freedom of conscience, faith, belief and opinion, the section 16 right to freedom of expression, the right to equality before the law and to the full and equal enjoyment of all rights and freedoms, and the section 22 right to freedom of trade, occupation and profession.[98]

134. The impugned provisions do not take away any existing rights in that it does not affect senior municipal managers who at the time of promulgation of the impugned provisions held political office in political parties.

135. Section 56A demands of a prospective senior manager to make a selection between being employed in the capacity of manager and holding a political office. It is in this sense, not a denial or an infringement of the Applicant's sections 9, 15, 16, 18, 19 or 22 rights.

136. The impugned provision only applies to future applicants to positions of senior municipal managers. The provisions do not take away the right to freedom of association and any of the rights alluded to by the Applicant.

137. What the provisions do is to merely require that if anyone wants to apply for a position of a senior municipal manager and if they should be

[98] Volume 1 para 31

holding political office as contemplated, then they would be disqualified from occupying that position, unless they relinquish the political office.

138. It is hard to conceive of anything that would harm anyone who wishes to apply for a position of a senior municipal manager, if they were required to relinquish or not take up a political office.

139. It would certainly enhance the image of a municipal administration if senior staff members in the administration are seem to be politically neutral and not partisan to any specific political party. This would promote the good image in the eyes of the members of the public within the municipality who would perceive the senior managers as serving the public without any bias or prejudice.

140. It is therefore submitted that the constitutional challenges based on the alleged infringement of other constitutional rights must fail.

ALLEGED DISCRIMINATION

141. The other ground of attack on the impugned provisions is that they discriminate against senior municipal managers in relation to other municipal employees.

142. The Constitution provides in section 9(1) that everyone is equal before the law and has a right to equal protection and benefit of a law. The

Constitution proscribes direct or indirect unfair discrimination on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[99]

143. Discrimination on one or more of the listed grounds is unfair unless it is established that the discrimination is fair. Discrimination may be fair if it is aimed at achieving a worthy and important societal goal.[100]

144. If the impugned provisions discriminate against municipal managers, then it is submitted that this is for a worthwhile societal goal in the light of the objectives which the impugned provisions seek to achieve.

VIOLATION OF SECTION 197(3) OF THE CONSTITUTION

145. Section 56A does not violate section 197(3) of the Constitution, which provides that:-

"*No employee of the public service may be favoured or prejudiced only because that person supports a particular political party".*

146. There can be no dispute that section 197 applies to the public service. The Constitution itself does not define the term "public *service".* It is

[99] section 9(3)
[100] National Coalition for Gay and Lesbian on Equality and Another v Minister of Justice and Others 1999 1 SA 6 CC at pp.24-25 par 19

however defined on the Public Service Act, 114 (Proclamation 103 of 1994) ("*the PSA*) to consist of persons who are employed in the national and provincial departments.[101]

147. It is accordingly submitted that employees at local government level do not form part of the public service. However section 56A still does not undermine section 197(3).

COMPARATIVE JURISPRUDENCE

148. The proscription of government employee from holding party political office is not unique to South Africa. In Zimbabwe and Nigeria similar provisions are to be found.[102]

149. In the United States of America, the US Supreme Court has on several occasions held that a governmental interest in fair and effective operation of the federal government justified regulation of parties and political activities of government employees.[103]

150. The statute in question in the United States is the Hatch Act which forbids government employees from taking "*an active part in political management or political campaigns. All such persons shall retain the*

[101] Section 1 of PSA :" *a national department , a national government component , the Office of a Premier , a provincial department or a provincial government component*"
[102] Volume 3 pp.210-211 paras 77-80 Steytler's affidavit
[103] *Ronald Rotunda and John E Nowak* Treatise on Constitutional Law Substance and Procedure 2ed vol 4 chapter 20 at p. 379

right to vote as they may choose and to express their opinions on all political subjects."

151. In ***United States Civil Service Commission v National Association of Letter Carriers***[104] the court reaffirmed its 26 year old holding in ***United Public Workers vs Mitchel***[105] that such restrictions upon public employees were valid, since they served an overriding state interest which only restricts certain methods of political legal expression, and does not deny governmental employees the right to hold political views or express those views outside the context of a political campaign.[106]

152. In the ***United State Civil Service Commission*** case the US Supreme Court held that federal employees can be prevented from engaging in "plainly identifiable acts of political management and political campaign" such as holding a party office.[107]

153. In ***United Public Workers v Mitchell*** the prohibition was attacked by a labour union and various federal employees as being violative of the First, Ninth, and Tenth Amendments and as contrary to the Fifth Amendment as being vague and indefinite, arbitrarily discriminatory,

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[104] 413 US 548, 93 S. Ct. 2880,37 L.ED.2d 796(1973)
[105] 330U.S.75, 67S.Ct 556,91 L.ED 754 (1947)
[106] Rotunda et al
[107] Rotunda at p.380

and a deprivation of liberty. The Supreme Court dismissed the application and found that the prohibition was constitutional.[108]

CONCLUSION

154. The court *a quo* correctly did not decide the constitutionality of section 56A in the light of its finding that the entire Amendment Act is constitutionaly invalid.

155. The court a quo correctly did not award costs. This is a matter of public interest litigation.

156. There is no decision, order or judgement of the court in respect of section 56A which is appealable.

157. If the court decides that the constitutionality of section 56A should be considered then the impugned provisions are constitutional and should be maintained as such. The impugned provisions are rational and have been put in place to achieve a legitimate governmental and public interest goal of professionalizing and depoliticizing municipal administration.

[108] Rotunda at al at p.382

158. Accordingly, the application should be dismissed with costs, including the costs of two counsel.

M SIKHAKHANE SC
FJ NALANE
Sandton Chambers
Sandton

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32. Van Dyk vs Mathufi N.O. and Another 2004 (4) SA 857 (T)

33. Zweni v Minister of Law and Order of the Republic of South Africa 1993 (1) SA 523 (A) at 532I–533B.