IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO.:
HIGH COURT CASE NO.
(GAUTENG DIVISION, PRETORIA) 3558/2013

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS' UNION	Applicant
and	
THE MINISTER OF CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS	First Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
THE PREMIER OF THE EASTERN CAPE	Fourth Respondent
THE PREMIER OF THE FREE STATE	Fifth Respondent
THE PREMIER OF GAUTENG	Sixth Respondent
THE PREMIER OF KWAZULU-NATAL	Seventh Respondent
THE PREMIER OF MPUMALANGA	Eighth Respondent
THE PREMIER OF THE NORTHERN CAPE	Ninth Respondent
THE PREMIER OF LIMPOPO	Tenth Respondent
THE PREMIER OF NORTH WEST	Eleventh Respondent
THE PREMIER OF THE WESTERN CAPE	Twelfth Respondent
THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	Thirteenth Respondent

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AFFIDAVIT

I, the undersigned,

GLYN ERIC WILLIAMS

do hereby make oath and say that:

1. I am the applicant's ("SAMWU's") attorney of record in this matter. I am duly authorised to depose to this affidavit on its behalf.

2. The content of this affidavit is within my personal knowledge, except where the contrary is apparent from the context, and it is true and correct.

3. **SAMWU** is a registered trade union whose members are drawn from all levels of municipal employees, including municipal managers and managers directly accountable to municipal managers (I shall refer to these two categories of municipal employees collectively as *"senior municipal managers"*). SAMWU acts both in its own interest and in a representative capacity, in terms of s 38 of the Constitution:

    3.1 in the interest of its members, notably those of its members who are senior municipal managers;

    3.2 in the interests of all municipal workers in South Africa, including those who are not members of SAMWU;

3.3 in the interests of the group or class of persons who have applied, or will be applying, for positions as senior municipal managers; and

3.4 in the public interest.

4. The application has been opposed by the:

4.1 First Respondent, the **MINISTER FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** (*"the Minister*");

4.2 Second Respondent, the **SPEAKER OF THE NATIONAL ASSEMBLY**; and

4.3 Third Respondent, the **CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES**, of the **PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA**, (I shall refer to the Second and Third Respondents collectively as *"the Speaker"*).

INTRODUCTION

5. In January 2013 SAMWU launched these proceedings in the Gauteng Division, Pretoria, of the High Court ("the High Court") and sought the following substantive relief:

5.1 a declaration that the Local Government: Municipal Systems Amendment Act 7 of 2011 ("the Amendment Act") is inconsistent with the Constitution and invalid;

5.2 a declaration that s 56A of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act"), read together with the definition of '*political office*' in s 1 of that Act,[1] is inconsistent with the Constitution and invalid;[2] and

5.3 orders referring the declarations of constitutional invalidity to this Court for confirmation.

6. On 23 February 2016 the High Court (per Jansen J) delivered its judgment, a copy of which is attached marked "GW1", and made the following order:

> "*1. It is declared that the Local Government Municipal Amendment Act 7 of 2011 is invalid in its entirety for want of compliance with the procedures set out in section 76 of the Constitution.*
>
> *2. In terms of the provisions of section 167(5) of the Constitution order number (1) above is referred to the Constitutional Court for confirmation.*

[1] In what follows I shall, unless the context indicates the contrary, refer to these two provisions jointly as *"s 56A"*.
[2] Section 56A was one of the provisions introduced into the Systems Act by the Amendment Act.

3. No order as to costs is made as the arguments advanced by the respondents warranted judicial scrutiny."

7. In this application SAMWU seeks:

7.1 confirmation of the High Court's order declaring the Amendment Act to be invalid;[3] and

7.2 leave to appeal against the High Court's failure to declare s 56A of the Systems Act to be unconstitutional.

8. In addition to the relief sought from this Court, SAMWU will apply simultaneously to the High Court for leave to appeal to the Supreme Court of Appeal ("SCA") against the High Court's failure to declare s 56A of the Systems Act to be invalid. The application for leave to appeal to the SCA will be conditional, that is, it will be subject to this Court refusing SAMWU leave to appeal with regard to the s 56A issue. A copy of SAMWU's notice of application for leave to appeal to the SCA is attached marked "GW2".

9. I turn now to consider the application for confirmation of the High Court's order declaring the Amendment Act to be invalid.

THE CONFIRMATION APPLICATION

[3] In terms of s 167(5), read together with s 172(2)(a), of the Constitution.

10. The Bill that preceded the Amendment Act was published in Government Gazette 33189 of 14 May 2010 and submitted to Parliament as the Local Government: Municipal Systems Amendment Bill ("the Bill"). A copy of the Bill is attached marked "GW3".[4]

11. Parliament's Joint Tagging Mechanism ("JTM") recommended that the Bill be passed in terms of s 75 of the Constitution. The Speaker and the Chairperson of the National Council of the Provinces ("NCOP") approved the JTM's recommendation on 3 and 4 August 2010 respectively. The Bill was passed (in amended form) by: (i) the National Assembly on 12 April 2011; and (ii) the NCOP on 19 April 2011; and signed by the President on 2 July 2011.

The case before the High Court

12. SAMWU contended before the High Court that Parliament erred in classifying (or tagging) the Bill as an ordinary Bill not affecting the provinces in terms of s 75, rather than as a Bill affecting the provinces under s 76, of the Constitution. Section 76(3) states that a Bill must be dealt with in terms of the procedure set out in either ss 76(1) or 76(2) if it falls within a functional area listed in schedule 4[5] or it provides for legislation envisaged in, amongst other things, ss 195(3) and (4) or s 197 of the Constitution. SAMWU argued that the Bill provided for legislation envisaged in ss 195(3), (4) and 197 of the Constitution and

[4] The Amendment Act differs in several respects, none of which are material for present purposes, from the Bill.
[5] Schedule 4 deals with functional areas of concurrent national and provincial legislative competence.

accordingly should have been tagged as an ordinary Bill affecting the provinces in that it:

12.1 constituted national legislation which ensured the promotion of the values and principles in s 195(1) of the Constitution;[6] or

12.2 regulated the appointment of people in public administration on policy considerations;[7] or

12.3 regulated the functions and structure of the public service;[8] or

12.4 regulated terms and conditions of employment in the public service;[9] or

12.5 dealt with whether an employee in the public service may be favoured or prejudiced only because he or she supports a political party or cause.[10]

13. In the alternative, SAMWU contended that the Bill provided for matters reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 and the Bill is accordingly deemed, in terms of s 44(3) of the Constitution, to be *"for all purposes, legislation with regard to a matter listed in Schedule 4"*.

[6] Section 195(3).
[7] Section 195(4).
[8] Section 197(1).
[9] Section 197(2).
[10] Section 197(3).

14. The Speaker argued that the sole (procedural) issue before the High Court was whether the Amendment Act provides for legislation envisaged in ss 195(3) and (4) or 197 of the Constitution and that SAMWU was not entitled to rely on submissions grounded on the provisions of the Amendment Act falling within the concurrent legislative competence of the provinces.

15. In SAMWU's supplementary heads of argument dated 17 November 2014 it was contended that:

    15.1 The Speaker was impermissibly seeking to limit the scope of the procedural challenge, pointing out that in SAMWU's founding affidavit its General Secretary stated:

    "*As the Bill provided for legislation envisaged in section 76(3) of the Constitution (notably sections 197 and 195(3) and (4)) it should have been categorised as an ordinary Bill affecting the provinces . .."* [emphasis added]

    15.2 Although the thrust of the (procedural) attack was that the Amendment Act constituted legislation envisaged in ss 197 and 195(3) and (4) of the Constitution, it also relied on the powers conferred by ss 154 and 155 of the Constitution on both national and the provincial governments to regulate municipalities and municipal executive authority through setting standards and monitoring compliance with those standards; and

15.3 In any event, an applicant in motion proceedings may advance legal arguments in support of the relief claimed even where such arguments are not specifically mentioned in its affidavits, provided that they arise from the facts alleged.

16. Furthermore, SAMWU stated in its November 2014 supplementary heads of argument that although whether the Amendment Act falls within the area of provincial legislative competence is pre-eminently a question of law, to be determined with reference to the provisions of the Amendment Act and the Constitution, if it was contended that there was factual material relevant to the issue, the Speaker was invited to file further affidavits prior to the hearing of the application on 3 February 2015, so as to enable the High Court to consider the facts. The Speaker did not file any affidavits in response to this invitation.[11]

The High Court's findings

17. The High Court judgment is clearly reasoned and it is unnecessary to set out in detail the basis upon which it found the Amendment Act to be invalid. In short, it held that the Amendment Act should have been tagged as a s 76 Bill on two related grounds:

[11] Given that the affidavit filed on behalf of the Speaker stated that *"at its core, the Bill dealt with employees at municipal level and municipal managers and managers directly accountable to municipal managers, to that end it had no bearing on provincial interests. As stated by the Constitutional Court, the "key" consideration in determining whether the section 75 procedure should be followed depends on whether the proposed measures substantially affect the provinces"* it is not surprising that the Speaker chose not to file any further affidavits in response to SAMWU's invitation.

17.1 In *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*[12] this Court held that the s 76 procedure should be followed if a Bill: (i) deals with the legislative matters explicitly listed in ss 76(3)(a) – (f); or (ii) it in substantial measure falls within an area of concurrent provincial legislative competence.[13] The Amendment Act sets standards and minimum requirements for local government.[14] Given the importance of the provinces' monitoring and enforcement roles with regard to municipalities and their concurrent powers to pass legislation in order to support and strengthen local government, the Bill should have followed the s 76 procedure;[15] and

17.2 Given the objects of the Bill, it sought to promote the values and principles of public administration listed in s 195(1) and accordingly constituted legislation envisaged in s 195(3).[16]

18. SAMWU contends that this Court should confirm the declaration of invalidity for the reasons given by the High Court, as well as on the further grounds advanced by it at the High Court hearing (which have been summarised above).

Costs

[12] 2010 (6) SA 214 (CC) [72] ("*Tongoane*").
[13] High Court judgment, [143].
[14] High Court judgment, [140].
[15] High Court judgment, [152].
[16] High Court judgment, [148] - [156].

19. In *Biowatch Trust v Registrar Genetic Resources & Others*[17] this Court re-affirmed the principle that ordinarily in constitutional litigation between a private party and the state *"if the government loses, it should pay the costs of the other side, and if government wins, each party should bear its own costs"*.[18]

20. The High Court chose to make no order for costs on the grounds that *"the arguments advanced by the respondents warranted judicial scrutiny"*.[19] I respectfully submit that it erred in this regard - in terms of the *Biowatch* principles there was no reason to deprive SAMWU of its costs, at least in respect of the procedural challenge to the manner in which the Amendment Act had been passed.

21. This Court has held that in confirmation proceedings it is required to consider not only the order of unconstitutionality, but also all the orders which flow from it.[20] Although the prayer in the notice of motion requesting leave to appeal against the High Court's costs order might not strictly be necessary, it is sought to cater for the possibility that SAMWU has misconstrued this Court's judgment in *Dawood.*

THE APPLICATION FOR LEAVE TO APPEAL

[17] 2009(6) SA 232 (CC) ("*Biowatch*").
[18] *Biowatch,* [21].
[19] High Court judgment, [161].
[20] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) [18] ("*Dawood*").

22. The Amendment Act amended the Systems Act by, amongst other things, enacting the following provisions:

> *"political office", in relation to a political party or structure thereof, means –*
>
> *(a) the position of chairperson, deputy chairperson, secretary, deputy secretary or treasurer of the party nationally or in any province, region, or other area in which the party operates; or*
>
> *(b) any position in the party equivalent to a position referred to in paragraph (a), irrespective of the title designated to the position;"*
>
> and
>
> *"**Limitation of political rights of municipal managers and managers directly accountable to municipal managers***
>
> ***56A.** (1) A municipal manager or manager directly accountable to a municipal manager may not hold political office in a political party, whether in a permanent, temporary or acting capacity.*
>
> *(2) This section does not apply to a person appointed as municipal manager or a manager directly accountable to the municipal manager when subsection (1) takes effect."*

23. In the High Court application SAMWU argued that, in addition to the Amendment Act having been passed in terms of the incorrect procedure, s 56A

of the Systems Act is invalid because it violates, amongst other rights, the right to make free political choices in terms of s 19(1) of the Constitution, as well as s 197(3) of the Constitution (in that it prejudices employees in the public service on the grounds that they support a political party or cause).

24. In terms of s 19(1) of the Constitution, every citizen:

> "*is free to make political choices, which includes the right –*
>
> *(a) to form a political party;*
> *(b) to participate in the activities of, or recruit members for, a political party; and*
> *(c) to campaign for a political party or cause."*

25. SAMWU contends that s 56A of the Amendment Act constitutes a grave and far-reaching limitation of the rights of senior municipal managers appointed since the Amendment Act came into effect, and people who seek appointment as senior municipal managers, to form and to participate in the activities of political parties.[21] Copies of SAMWU's founding affidavit and the Minister's answering affidavit are annexed marked "GW4" and "GW5" respectively. The Minister[22] concedes that:

[21] Founding Affidavit, para 30.
[22] The Speaker opposed only the procedural issue relating to the manner in which the Amendment Act was passed (after initially abiding the outcome of the application).

25.1 the right to participate in the activities of political parties is fundamental to the multi-party system of democratic government upon which our Constitution is based;[23] and

25.2 s 56A infringes *"the rights of a municipal manager to exercise certain of their political rights that are guaranteed to citizens by section 19 of the Constitution"*.[24]

26. There can be little doubt that the latter concession applies to other senior managers. Although SAMWU alleges that s 56A also infringes a number of other rights in the Bill of Rights,[25] the Minister's concession renders it unnecessary to decide those claims. The critical issue, which the High Court chose not to determine, is whether s 56A is a justifiable limitation (in terms of s 36(1) of the Constitution) of the right to make free political choices. It is clear that, for purposes of this application for leave to appeal, this is a constitutional matter.

The High Court decision

[23] This is conceded by the Minister, Answering Affidavit, 97: 29.
[24] Answering Affidavit, 94: 23.
[25] Including the s18 right to freedom of association, the s 15(1) right to freedom of conscience, thought, belief and opinion, the s 16 right to freedom of expression, the s 9 right to equality before the law and to the full and equal enjoyment of all rights and freedoms, and the s 22 right to freedom of trade, occupation and profession.

27. The High Court stated that in *Tongoane* this Court '*held that it would be an exercise in futility should a court hold that an entire statute is unconstitutional, to analyse sections of it in order to ascertain the validity or demise thereof.'*[26]

28. I respectfully submit that this constitutes a misreading of *Tongoane*, where this Court stated:

> *"Once it is concluded that CLARA is unconstitutional in its entirety because it was not enacted in accordance with 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 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."*[27][emphasis added]

29. Later in the judgment, this Court elaborated on its reasons for declining the invitation to determine the substantive issues concerning the constitutionality of the act under consideration in *Tongoane*, stating that it would entail expressing '*an opinion on provisions in a statute which we have declared invalid in its entirety, and which we have been told will, in any event, be repealed in toto.'*[28]

30. There are two reasons why the principle relied upon by the High Court was not applicable. Firstly, the High Court is not the final court of appeal. In *Jordan*[29] it

[26] High Court judgment, [4].
[27] *Tongoane*, [116].
[28] *Tongoane*, [122].
[29] *S v Jordan & Others* 2002(6) SA 642 (CC) [21] ('*Jordan'*).

was stated that where the constitutionality of a provision is challenged on a number of grounds, one of which is upheld, it is desirable that the Court should also express its views on the other challenges, as:

"*This is necessary in the event of this Court declining to confirm on the ground upheld by the High Court. In the absence of the judgment of the High Court on the other grounds, the proper course to follow may be to refer the matter back to the trial Court so that it can deal with the other challenges to the impugned provision. Thus failure by the High Court to consider other challenges could result in unnecessary delay in the disposal of a case.*"

31. It follows that the High Court should have decided the substantive challenge to the constitutionality of s 56A.

32. Secondly, the validity of s 56A is not an academic issue and, I submit, it will be in the interests of justice for this Court to determine it, in that:

32.1 the Minister has conceded that the provision infringes a right in the Bill of Rights;

32.2 the matter has been fully argued before the High Court and extensive evidence has been led with regard to whether s 56A is a justifiable limitation of a constitutional right;

32.3 as Professor Steytler's evidence[30] was relied upon by the High Court for purposes of its decision on the tagging of the Amendment Act, much of the justification evidence will have to be considered by this Court in the confirmation application;

32.4 the s 36(1) proportionality inquiry is of the nature of a value judgment, in respect of which the views of the SCA and the High Court would be of less assistance to this Court than their findings on more technical, legal issues;

32.5 there is a good prospect of it being found to be unconstitutional, particularly given the paucity of the evidence advanced to justify s 56A;[31]

32.6 the constitutionality of s 56A is a live controversy. If this Court does not confirm the High Court's order declaring the Amendment Act invalid, s 56A will remain in force. Even if the declaration of invalidity is confirmed, the Minister has in no way suggested that he will not seek to re-enact s 56A – to the contrary, he has argued throughout that the provision is of great importance, sufficient to justify limiting the rights entrenched in s 19(1) of the Constitution. The rights of senior municipal managers will remain under threat. The constitutionality of s 56A

[30] Professor Steytler gave expert evidence on behalf of the Minister to the effect that s 56A constituted a justifiable limitation of the right to make free political choices.
[31] This evidence is considered below in the section entitled *"Prospects of Success"*.

therefore remains a live issue and there is a compelling public interest in this Court determining whether the infringement of the political rights of senior municipal managers is justified.

33. For all of the above reasons, it is submitted that it is in the interest of justice for this Court to grant leave to appeal against the High Court's failure to determine the s 56A challenge. I turn now to consider SAMWU's prospects of success, in the event of leave to appeal being granted.

PROSPECTS OF SUCCESS

34. Section 36(1) of the Constitution provides that a right 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 facts, 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."*

35. The s 36(1) limitations analysis involves a proportionality inquiry, in essence a balancing of means and ends.[32] The five factors identified in s 36(1)(a) to (e) to be taken into account in determining whether a limitation is *"reasonable and justifiable in an open and democratic society"* do not constitute a checklist which must be mechanically ticked-off,[33] but they are key factors that must be taken into account:

> *'in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.'*[34]

[32] *Minister of Home Affairs v Nicro and Others* 2005 (3) SA 280 (CC) [37] (*"Nicro"*).
[33] *Mail and Guardian Media and Others v Chipu NO and Others* 2013 (6) SA 367 (CC) [47].
[34] *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) ("*Manamela*")[32].

36. SAMWU contends that in this matter it is not necessary to reach the proportionality analysis for two reasons:

36.1 s 56A is not a law of general application; and

36.2 the Minister has failed to discharge the burden he bears of presenting evidence to justify the limitation.

37. Alternatively, it will be submitted that the proportionality analysis should lead to a finding that s 56A does not constitute a justifiable limitation of the right to make free political choices.

LAW OF GENERAL APPLICATION

38. SAMWU submits that s 56A is not a law of general application as: (i) the scope of the prohibition on holding *"political office"* is so vague and uncertain that it is inconsistent with the principle of the rule of law; and (ii) it targets only certain senior municipal managers, it is not of general application.

39. The contentions with regard to the vag ueness of s 56A are developed below under the heading *"The Nature and Extent of the Limitation"*. It is submitted, for the same reasons considered in that section, that s 56A does not constitute a law of general application.

40. In addition, the requirement that a law must be *"of general application"* entails that the law must apply *"generally"* and not to particular individuals or groups.[35] Section 56A does not qualify as a law of general application, as the prohibition on political activity does not apply across the board to all municipal employees, but only to two levels of senior municipal managers, and within this group it affects only those senior municipal managers who have been appointed after the Amendment Act came into effect. A law of general application may not target specific individuals.[36]

THE BURDEN OF JUSTIFICATION

41. The Minister bears the *"onus"* of establishing that section 56A is a justifiable limitation of a fundamental right in the sense that he bears the burden of placing before the Court the facts and/or policy considerations relied upon in order to justify the provision.[37]

42. Where facts are relied upon to justify a limitation, the relevant affidavits should set out the purpose of the limitation and the facts necessary to assess the legitimacy of this purpose and the efficacy of its execution.[38] If policy considerations are relied upon, the Minister should clearly articulate the policy

[35] Currie and de Waal, *The Bill of Rights Handbook* (2013) 157.
[36] See the minority judgments of Mokgoro and Kriegler JJ in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) [102] and [76].
[37] *Minister of Home Affairs v NICRO and Others* 2005 (3) SA 280 (CC) [34].
[38] *NICRO*, [36], read together with *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) ("*Child Law*") [54].

objectives he seeks to achieve, the reasons for the policy and why it is reasonable to limit a constitutional right in order to advance that policy.[39]

43. Where government seeks to infringe the fundamental rights of a group of its citizens and the purpose for this is not self-evident, it needs to place sufficient information before the Court to enable it to determine exactly what purpose the infringement was intended to serve. People should not be left guessing as to why their fundamental rights have been infringed. Demonstrable justification requires that the objective served clearly reveals the harm that government seeks to remedy and '*that this objective remains constant throughout the justification process*.' The objective must be defined '*accurately and precisely'* so as to provide a clear framework within which its importance may be evaluated and to assess the precision with which government have created the means directed at fulfilling that objective.[40]

44. It is important that the Minister clearly motivates the basis on which he submits that the provision is justified, so as to enable SAMWU to rebut his contentions by means of countervailing factual material or expert opinions.[41]

45. If government fails to comply with the burden that it bears in terms of s 36 to place legal argument, facts and policy considerations before the Court, this may

[39] *NICRO*, [36], read together with *Child Law* [54].
[40] *Cf NICRO*, [65].
[41] *NICRO*, [36].

tip the scales against it and result in the invalidation of the provision concerned.[42]

46. The effect of the Amendment Act is to single out a precisely defined group, namely senior municipal managers appointed after the date on which the Amendment Act came into effect, and limit the rights the Constitution specifically affords them. Justifying the limitation of their rights requires information or policies bearing directly on this group. However, the Minister offers no such evidence, nor any such policy objective. In the absence of such evidence, it is difficult to appraise less restrictive means of achieving the governmental objective.[43]

47. In the present matter, the Minister fails to set out a factual basis for the justification and no information or policies are presented bearing directly on the group whose rights are affected. It is accordingly submitted, in the absence of the necessary factual or policy underpinning for the limitation analysis, that the burden the Minister bears of justifying the limitation fails at the first hurdle and it is not necessary to engage in the proportionality analysis.[44]

THE PROPORTIONALITY ANALYSIS

[42] *NICRO,* [36].
[43] *Cf Child Law* [54] – [55], read together with *NICRO*, [67].
[44] *Cf NICRO,* [51].

48. The grounds upon which the Minister contends that s 56A should be justified will be considered in relation to the five factors s 36 requires to be taken into account in the proportionality inquiry.

The nature of the right

49. It is common cause that the rights to make free political choices and participate in the activities of political parties are fundamental to the multi-party system of democratic government upon which our Constitution is based.[45] This is reflected both in the founding values set out in s 1 of the Constitution[46] and in its preamble to which refers to the Constitution as laying '*the foundations for a democratic and open society in which government is based on the will of the people . . .'.*

50. Any limitation to rights of such fundamental importance require clear and compelling grounds of justification.

The importance of the purpose of the limitation

51. The Minister deals with the purpose of the limitation in paragraphs 30 to 32 of his answering affidavit. It is apparent from these paragraphs that:

[45] This is conceded by the Minister, Answering Affidavit, para 29.
[46] These values are of fundamental importance in that they inform and give substance to the entire Constitution. *Minister of Home Affairs v NICRO and Others* 2005 (3) SA 280 (CC) [21].

51.1 the aim of the provision is to: (i) *"depoliticize municipal management and prevent political infighting from getting in the way of service delivery"*; and (ii) *"to transform municipalities into professional work environments";*[47] and

51.2 in more general terms, *"the purpose of the legislation is to improve the quality and capacity of local government to provide services to the public".*[48]

52. SAMWU noted in its replying affidavit that the latter statement of the purpose of the provision is *"in such general terms as to be of little or no assistance".*

53. The end or objective which is relevant for purposes of the s 36A enquiry is government's objective in enacting the legislation.[49]

54. After SAMWU had filed its heads of argument and the application was about to be argued, the Minister sought leave to file an affidavit by Professor Steytler of the Communiy Law Centre at the University of the Western Cape, in which he set out why, in his opinion, s 56A is a reasonable and justifiable limitation of s 19.[50] Professor Steytler stated, in effect, that the purpose of s 56A is to ensure that the democratic and administrative accountability structures and processes are strengthened.

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[47] Answering affidavit, para 31.
[48] Answering affidavit, para 32.
[49] *Child Law*, [22].
[50] Para 5 of Professor Steytler's affidavit.

55. In argument before the High Court the Minister relied heavily on Professor Steytler's affidavit in his attempts to justify s 56A. However, there is no evidence that the purpose attributed to the provision by Professor Steytler[51] was the purpose that government sought to achieve in enacting s 56A or that the factors set out by Professor Steytler in his evidence were considered by government or played any role in the passing of the Amendment Act. His evidence amounted to an *ex post facto* rationalisation for s 56A.[52] It is accordingly submitted that Professor Steytler's evidence is of little or no relevance to the s 36(1) inquiry.

Nature and extent of the limitation

56. The Minister states that the limitation is restricted in that:

56.1 it only applies to holding certain positions in political parties;

56.2 it only applies to senior municipal managers;

56.3 it does not impact on the right to join a political party or to hold positions other than those specified in the definition of *"political office"*;

56.4 it does not affect current municipal managers; and

[51] Which differs from the purpose stated by the Minister in his answering affidavit, as reflected above.
[52] Cf *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs & Tourism: Eastern Cape & Others* [2015] ZA CC 23 (CC) [166] (per Madlanga J, Tshiqi AJ concurring).

56.5 the holder of a political office may apply for a position as a senior municipal manager and is only required to resign from such office before taking up the post.[53]

57. However, the nature and extent of the limitation is not at all clear. In *Richter v Minister of Affairs & Others*[54] this Court stated the principle that a law which regulates a fundamental right '*should be expressed in a manner which will enable citizens to determine with relatively clarity what rights they have and do not have.'*

58. SAMWU points out that the gravity of the impact of s 56A is exacerbated by the breadth of the definition of '*political office'* in the Amendment Act. Neither the Amendment Act nor the Systems Act provides any definition of what constitutes a '*political party'*. The prohibition on political activity contained in it extends to the five positions specified in the definition (chairperson, deputy-chairperson, secretary, deputy secretary and treasurer) and refers to '*a political party or structure thereof'*, in the party '*nationally or in any province, region or other area in which the party operates'* (emphasis added). The prohibition also applies to holding a political office in a temporary or acting capacity and includes any equivalent position *"irrespective of the title designated to the position".*

[53] Answering affidavit, paras 21 and 33.
[54] 2009(3) SA 615 (CC) [64].

59. The rule of law is one of the founding values upon which our Constitution is based. An important requirement of the rule of law is that legal rules must be stated in a clear and accessible manner[55] and impermissibly vague laws are invalid.[56] It is because of the principle of the rule of law that s 36 of the Constitution requires that limitations of rights are only justifiable if they are authorised by a law of general application.[57]

60. The test for vagueness is whether, applying the normal rules of interpretation, including those applicable to constitutional adjudication, *"the regulation indicates with reasonable certainty to those who are bound by it, what is required of them."*[58]

61. In the absence of any definition of the words *"political party"* it is uncertain whether the prohibition on holding political office in s 56A applies only to a party registered in terms of s 15 of the Electoral Commission Act 51 of 1996 ("the Electoral Commission Act"), or whether it also applies to:

    61.1 a party registered for municipal elections in terms of s 15A of the Electoral Commission Act;

[55] *Dawood and Others v Minister of Home Affairs and Others.("Dawood")* 2000 (3) SA 936 (CC) [47].
[56] *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) [27].
[57] *Dawood*, [47].
[58] *Affordable Medicines Trust and Others v Minister of Health and Another 2006* (3) SA 247 (CC) [109].

61.2 organisations or movements of a political nature which support the policies or candidates of a registered political party (such as the South African Communist Party);

61.3 a movement of a political nature which calls for the boycott of elections;

61.4 civic organisations (such as the South African National Civic Organisation), which might or might not endorse the policies or candidates of registered political parties;

61.5 trade unions, which have broadly political objectives and which might or might not endorse political parties or candidates participating in elections; and

61.6 broader social movements such as the Treatment Action Campaign and the Social Justice Coalition, which strive to achieve broadly political objectives, without participating in elections or party-political activities.

62. The vagueness of the provision is compounded by lack of certainty with regard to what constitutes:

62.1 a *"structure"* of a political party;

62.2 an *"area in which the party operates"*; or

62.3 a position equivalent to the five identified.

63. SAMWU points out in its founding affidavit that the definition of *"political office"* is so vague and broad that:

63.1 it 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; and

63.2 it is not possible for senior municipal managers, appointed after the Amendment Act came into effect, to know how to regulate their conduct and activities so as to comply with its provisions.[59]

64. It is accordingly submitted that the provision does not, as required by the principle of the rule of law, indicate *"with reasonable certainty to those who are bound by it, what is required of them"*[60] and cannot constitute a law of general application for purposes of s 36 of the Constitution.

The relation between the limitation and its purpose

65. The Minister in his answering affidavit conceded that it is not the holding of political office in itself that is a problem, but the misuse of such office.[61] As SAMWU pointed out in its reply, it follows that s 56A does not target the issue

[59] Founding affidavit, paras 33 - 34.
[60] *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) [109].
[61] Answering affidavit, paras 21 and 34.

which needs to be addressed. Parliament should have dealt with the misuse of political office, which - it is common cause - is a problem, rather than the holding of political office, which is not. Section 36 does not *"permit a sledgehammer to be used to crack a nut"*.[62]

66. It is submitted that the concession that the holding of political office is not a problem is destructive of the Minister's claim that s 56A is *"reasonable and justifiable in an open and democratic society".* Once it is established that the provision is misdirected, it cannot be saved as a reasonable limitation of a fundamental constitutional right.

67. Even if s 56A was not misdirected, it still would not achieve its purpose.

68. Professor Tapscott, the Director of the School of Government at the University of the Western Cape, pointed out that s 56A will not serve to depoliticise municipal management in the manner intended and Professor Steytler appears to accept that it will be ineffectual in advancing this purpose (and he certainly did not attempt to make out a case that it would be effective in doing so).

69. In relation to the Minister's claim that political infighting in municipalities is obstructing service delivery, Professor Tapscott testified that there is no empirical evidence to suggest that senior municipal managers holding political office obstructs service delivery. There is no register of senior municipal

[62] *S v Manamela & Another (Director-General of Justice Intervening)* 2000(3) SA 1 (CC), [34] ("*Manamela")*.

officials who hold party political office in South Africa. Beyond anecdotal evidence, the scale of the perceived problem is unknown.

70. The third objective of the amendment identified by the Minister is to transform municipalities into professional work environments. Professor Tapscott stated that prohibiting senior municipal mangers from holding political office does not advance this objective. He contrasted s 56A with s 54A of the Amendment Act, which deals with the well founded need to set higher standards (in terms of qualifications and experience) for senior municipal managers. Section 54A, he stated, addresses what has been identified as a major weakness in the operations of many municipalities.

71. After the filing of the affidavits in the High Court, the Minister published regulations in Government Gazette dealing with the conditions of employment of senior municipal managers.[63] Annexure B to these regulations sets out comprehensive requirements, both in terms of qualifications and experience, for the appointment of senior municipal managers. These regulations render the ban on holding political office for certain senior municipal managers redundant insofar as advancing the objective of turning municipalities into professional work environments.

72. Finally, Professor Steytler made little attempt to justify limiting the prohibition on holding political office to senior municipal managers. In his affidavit he

[63] Government Gazette 37245 of 17 January 2014.

referred to the South African Local Government Association ("SALGA") statement that the prohibition on holding political office should apply to all local government employees as:

> *'the problem we are trying to solve would be defeated if it is only limited to municipal managers or managers directly accountable to him/her, as the scenario often painted in local government is one where junior officials (because of their political ranking) holds the municipal manager and the other senior managers to account. This provision would effectively allow staff in the administration or junior staff more particular to still politically 'manage' managers and the municipal manager. The fact that only municipal managers and managers directly accountable to the municipal managers are excluded from being officers of political parties may in addition create a discriminatory practice.'* [emphasis added]

73. Professor Steytler also referred to the position of The Institute of Local Government Managers, a body representing senior municipal office bearers, on limiting the prohibition to senior municipal managers, which was to the same effect as that of SALGA.

74. Finally, the fact that the prohibition does not affect senior municipal managers who held office at the time it came into effect calls into question its entire rationale. It means that for many years, quite possibly several decades, there will be a cohort of senior municipal managers who will not be precluded from holding political office. If s 56A was addressing such a pressing problem that it justified the limitation of fundamental political rights, it would make little sense to allow the existing body of senior municipal managers to hold political office,

while denying this right to those managers appointed after the amendment came into effect. Such a dual-track system of regulation undermines the integrity of the measure and is likely to lead to difficulties in enforcing it.

Less restrictive means

75. Given that it is not the holding of office in a political party that is a problem, but the misuse of such office, Parliament should have addressed the problem directly rather than by unnecessarily infringing the political rights of senior municipal managers. Professor Tapscott stated that the misuse of political office should have been dealt with by amendments to the Code of Conduct for Municipal Staff members,[64] by stipulating that:

75.1 All municipal employees must be required to disclose to their municipal councils any office or position which they hold in a political party and a register of all such disclosures should be available, and easily accessible, to members of the public. Failure to disclose such a political position or office should constitute misconduct;

[64] Which forms part of the Systems Act.

75.2 Municipal employees should be obliged not to discriminate unfairly against any person on account of his or her political persuasion or affiliation;[65]

75.3 Municipal employees should be obliged not to use their positions to promote or prejudice the interests of any political party or interest group;[66]

75.4 It should constitute misconduct for a municipal employee to participate in any decision in which a political party of which she or he is an office bearer, or holds any office, is directly implicated unless he or she has declared his or her political affiliation and all interested parties have consented to such participation;

75.5 Municipal employees should be obliged to refrain from engaging in party political activities in the work place;[67]

75.6 Every municipal employee should be obliged to disclose in writing to his or her council:

75.6.1 Any attempt, other than in the ordinary course of council business, to influence a decision in which he or she

[65] This provision could be adapted from para C.2.6 of the Code of Conduct for the Public Service ("the Public Service Code"), which is the similar effect.
[66] Para C.2.7 of the Public Service Code could serve as a starting point in formulating this provision.
[67] Para C.3.7 of the Public Service Code contains an analogous provision.

participates in his or her capacity as a municipal employee; and

75.6.2 All attempts to influence a decision in which he or she participates in his or her capacity as a municipal employee, by any office bearer of a political party.

75.7 It should constitute misconduct for any municipal employee to attempt to influence any municipal council decision, other than to the extent required in the normal course and scope of his or her employment. Employees should be explicitly prohibited from attending, or participating in, party political caucuses of municipal councilors;

75.8 Every municipal employee who holds office or a position in a political party should be permitted to engage in work for his or her political party during normal office hours only if he or she has taken official leave and the taking of such leave has been disclosed to his or her council.

76. The above proposed amendments to the Code of Conduct should apply simultaneously to all municipal employees. This is far preferable to the anomalous position created by s 56A, in terms of which senior municipal managers appointed after the amendments came into effect are subject to the prohibition on holding political office.

SECTION 197(3)

77. SAMWU contends that, in addition to violating the Bill of Rights, s 56A of the Amendment Act is unconstitutional and invalid because it infringes s 197(3) of the Constitution, which states that:

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

78. The effect of s 56A(2) of the Amendment Act is to create a dualistic regulatory regime in terms of which senior municipal managers appointed prior to the amendment coming into effect are free to hold political office, while managers appointed subsequently are precluded from doing so. Should one of the latter group of senior managers be elected to a political office, s/he would be faced with the unenviable choice of resigning from his or her employment or not taking up the political office to which s/he has been elected. This, it is submitted, is inconsistent with s 197(3) of the Constitution, as the manager concerned will have been prejudiced '*only because that person supports a particular political party or cause.'*

CONCLUSION

79. SAMWU requests an order in terms of the notice of motion to which this affidavit is attached.

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GLYN ERIC WILLIAMS

I certify that the Deponent acknowledged to me that:

1. he knows and understands the contents of this Declaration;

2. has no objection to taking the prescribed oath and considers the prescribed oath to be binding on his conscience.

The Deponent thereafter uttered the words: "I swear that the contents of this Declaration are true, so help me God". The Deponent signed this Declaration in my presence at CAPE TOWN on this the day of **MARCH 2016**.

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COMMISSIONER OF OATHS
ex officio