

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO.:3558/13

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

APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE that the abovenamed applicant hereby notes its application for leave to appeal to the Supreme Court of Appeal (“the SCA”) against the judgment and order of the above Honourable Court delivered (per Jansen J) on 23 February 2016, in respect of its failure to:

- 1.1 determine whether 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 the Act, is inconsistent with the Constitution and invalid;
- 1.2 find that s 56A of the Systems Act is inconsistent with the Constitution and invalid; and
- 1.3 award costs in the applicant’s favour.

BE PLEASED TO TAKE NOTICE FURTHER that the applicant has applied to the Constitutional Court, in terms of s 167(5) of the Constitution, for an order confirming the declaration of constitutional invalidity made by this Court in respect of the Local Government: Municipal Systems Amendment Act 7 of 2011 (“the Amendment Act”) and simultaneously applied for leave to appeal directly to the Constitutional Court on the same grounds upon which leave to appeal is sought in this application. This application for leave to appeal to the SCA is accordingly conditional upon leave to appeal directly to the Constitutional Court being refused.

BE PLEASED TO TAKE NOTICE FURTHER that the detailed grounds upon which leave to appeal is applied for are the following:

The failure to determine the challenge to s 56A

1.4 It is respectfully submitted that this Court overlooked:

1.4.1 the principle that where the constitutionality of a provision is challenged on a number of grounds and it upholds one such ground, it is desirable that it should also express its opinion on the other challenges;

1.4.2 the principles applicable to whether the final court of appeal should determine the issue do not necessarily apply;

1.4.3 the constitutional validity of s 56A is an important question, which should be determined, not just in the interests of the parties, but also in the public interest, having regard *inter alia* to the factors listed below.

The public interest

2. It is in the interest of the parties and the public interest that the constitutional validity of s 56A should be determined, having regard to:

- 2.1.1 the First Respondent's ("the Minister's") concession that the provision infringes a right in the Bill of Rights;
- 2.1.2 the parties invested considerable time and energy in ensuring that the matter was fully argued and extensive evidence has been led with regard to whether s 56A is a justifiable limitation of a right in the Bill of Rights;
- 2.1.3 the constitutionality of s 56A is a live controversy, not an academic dispute which will have no practical effect. If the Constitutional Court does not confirm the 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 constitutional rights infringed by s 56A will remain under threat. The constitutionality of s 56A therefore remains a live issue and there is a compelling public interest in determining whether the infringement of the political rights of senior municipal managers is justified.

The merits of the challenge to s 56A

3. It is respectfully submitted that this Court erred in failing to decide the challenge to the constitutionality of s 56A in the applicant's favour, in that:

3.1 s 56A does not constitute a law of general application in terms of s 36(1) of the Constitution as, amongst other things: (i) the definition of '*political office*' in s 1 of the Amendment Act 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 a law of general application;

Onus

3.2 The Minister failed to discharge the '*onus*' he bore of establishing that s 56A is a justifiable limitation of a fundamental right by placing before this Court the facts and policy considerations needed to assess the legitimacy and efficacy of the provision;

3.3 The Minister's evidence concerning the objectives of s 56A was contradictory and he failed to place any, or any sufficient, information before the Court concerning facts or policy

considerations pertaining to the senior municipal managers directly affected by the prohibition on holding political office.

The proportionality analysis

4. It is respectfully submitted that this Court erred in failing to determine the proportionality analysis required by s 36(1) of the Constitution in the applicant's favour in that:

The nature of the right

- 4.1 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. Any limitation to these rights requires clear and compelling grounds of justification;

The importance of the purpose of the limitation

- 4.2 The Minister sought to justify s 56A on the basis of objectives stated in the evidence of Professor Steytler, which were not the objectives that government sought to achieve at the time it enacted the provision, and amounted to *ex post facto* rationalisations concerning government's purpose;

- 4.3 The limitation evidence advanced by the Minister did not amount to demonstrable justification as required by s 36(1) and government's purpose did not satisfy the requirement that it was clear and consistent throughout the process;

The nature and extent of the limitation

- 4.4 The provisions of s 56A and the definition of '*political office*' are so vague that they fail to comply with the principle that a law which regulates a fundamental right must be expressed with sufficient clarity to enable those affected to comply with the provision or to indicate with reasonable certainty to those who are bound by it, what is required of them.

The relation between the limitation and its purpose

- 4.5 The Minister has conceded that it is not the holding of political office in itself that is a problem, but the misuse of such office. It follows that s 56A does not target the issue which needs to be addressed, namely the misuse of political office. The provision is accordingly misdirected;

4.6 Section 56A will not be effective in achieving its objectives;

4.7 The fact that the provision does not affect senior municipal managers in office when s 56A came into effect means that for many years there will be a cohort of senior municipal managers who will not be precluded from holding political office. This brings into question the rationale for s 56A and is likely to lead to difficulties enforcing it;

Less restrictive means

4.8 In any event, the objects of s 56A could have been achieved by less restrictive means, such as embodied in s 36 of the Public Service Act 103 of 1994 or the amendments to the Code of Conduct for Municipal Staff members proposed by Professor Tapscott in his evidence.

Section 197(3)

5. It is respectfully submitted that this Court erred in failing to decide the challenge to the constitutionality of s 56A in the applicant's favour in that, in addition to infringing rights in the Bill of Rights, s 56A also is invalid

in that it is inconsistent with s 197(3) of the Constitution as it establishes a dualistic regulatory regime in terms of which senior municipal managers appointed prior to the coming into effect of s 56A are free to hold political office, while managers appointed subsequently are precluded from doing so. This is inconsistent with s 197(3) of the Constitution as the latter group of managers will have been prejudiced only because they support a particular political party or cause.

Costs

6. It is respectfully submitted that this Court erred in failing to award the applicant costs, given (amongst other things) the principles stated in *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) SA 232 (CC).

DATED AT CAPE TOWN ON THIS THE DAY OF MARCH 2016.

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