**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CCT CASE NO.: CCT54/16**

GP Case No.: **3558/2013**

In the matter between:

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| **SOUTH AFRICAN MUNICIPAL WORKERS' UNION** | Applicant |
| and | |
| **THE MINISTER OF COOPERATIVE 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 |

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| **THE PREMIER OF THE WESTERN CAPE** | Twelfth Respondent |
| **THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION** | Thirteenth Respondent |

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**SECOND AND THIRD RESPONDENTS' SUBMISSIONS**

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## INTRODUCTION

1. The Applicant ("**SAMWU**") instituted these proceedings in the Gauteng Division, Pretoria ("High Court") on 23 January 2013.

2. SAMWU sought the following substantive relief:

   2.1 Declaring the entire Local Government: Municipal Systems Amendment Act, No. 7 of 2011 ("**the Amendment Act**") to be inconsistent with the Constitution and invalid. This relief was premised on a contention that the Amendment Act was passed in terms of section 75 of the Constitution (which deals with ordinary Bills not affecting the provinces) whereas it ought to have adopted the procedure in terms of section 76 of the Constitution (ordinary Bills affecting provinces). We shall refer to this leg of the challenge as "the procedural challenge".[1]

   2.2 An order declaring section 56A of the Amendment Act read together with the definition of "political office" in the Act to be inconsistent with the Constitution and invalid. The basis for this relief is that section 56A violates, amongst other rights, the right to make free political choices in terms of section 19 of the Constitution as well as

[1] Vol 1; NM; page 1; par 1; FA; page 14; par 19.1.

section 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). We refer to this leg of the challenge as "the substantive challenge".[2]

3. The Second and Third Respondents ("**Parliament**") are only implicated in the procedural challenge. To date, Parliament has adopted the following approach:

3.1 It filed a notice of intention to abide, together with an explanatory affidavit, the purpose of which was to explain to the Court the reasoning and justification for the classification of the Amendment Bill as a section 75 Bill.[3] Notwithstanding its initial intention to abide the proceedings and in light of the Applicant's refusal to accept the explanation tendered, Parliament filed Heads of Argument in the Court a quo in respect of the procedural challenge and addressed oral argument at the hearing of the application.

[2] Vol 1; NM; page 1; par 1; FA; page 14; par 19.2.
[3] Vol 2; Parliament's EA; page 69; par 7.

3.2 Parliament did not challenge the substantive relief but pointed out in its explanatory affidavit that it had considered the Amendment Act to be constitutionally valid. [4]

4. On 23 February 2016, the High Court delivered judgment in the matter.[5] The High Court determined only the procedural challenge in terms whereof it declared that the Amendment Act is invalid in its entirety for want of compliance with the procedures set out in section 76 of the Constitution and referred its order for confirmation to this Court.[6]

5. In its Notice of Application in terms of Rules 16 and 19 SAMWU seeks: (a) an Order confirming the Order of the High Court; and (b) leave to appeal against the High Court judgment in respect of its failure to determine whether section 56A of the Amendment Act read together with the definition of "political office" in section 1 of the Act is inconsistent with the Constitution and invalid and further seeks the upholding of its appeal.[7]

[4] Vol 2; Parliament's EA; page 69; par 7.
[5] Vol. 6; Judgment; page 448.
[6] Vol. 6; Judgment; page 501.
[7] Vol. 7; page 515.

## PARLIAMENT'S POSITION BEFORE THIS COURT

6. Notwithstanding its active opposition to the procedural relief sought in the High Court, Parliament abides the outcome of the proceedings before this Court.

7. The legal principles in respect of tagging are well established.[8] This Court summarised the position in **Tongoane** as follows:

> "[72] To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in s 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in s 76(3)(a) - (f), over which the provinces have no legislative competence, as well as Bills, the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in s 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. Whether a Bill is a s 76 Bill is determined in two ways. First, by the explicit list of legislative matters in s 76(3)(a) - (f); and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence."

[8] See: **Tongoane v Minister of Agriculture & Land Affairs** 2010 (6) SA 214 (CC) and **Democratic Alliance v President of South Africa and Others** 2014 (4) SA 402 (WCC).

8. In its Heads of Argument SAMWU advances the following submissions as to why the process contemplated by section 76 of the Constitution ought to have found application in the present instance:

8.1 First, it contends that section 76(3) of the Constitution refers to a "functional area listed in schedule 4". That, according to SAMWU includes a matter "that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 [and] is, for all purposes, legislation with regard to a matter listed in Schedule 4."[9] According to SAMWU, in enacting the Amendment Act, national government was exercising its regulatory powers under section 155(7) of the Constitution to see to the effective performance of municipalities of their functions in respect of matters listed in Schedules 4 and 5[10].

8.2 Second, that the Bill constitutes legislation envisaged in section 76(3) of the Constitution (notably sections 195(3) and (4) and 197) and therefore should have been tagged in terms of section 76.[11]

[9] Section 44(3) of the Constitution.
[10] SAMWU HOA; par 47.
[11] SAMWU HOA; par 47.

9. Parliament has explained in its Explanatory Affidavit the process that is followed for the tagging of a Bill.[12] In essence, Parliament obtained a legal opinion which expressed the following view[13]:

9.1 The Bill does not contain any provisions pertaining to customary law or customs of traditional communities and did not need to be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act No 41 of 2003.

9.2 The Bill contained no provision to which the procedure set out in section 76 of the Constitution applies.

9.3 The Bill was constitutionally and procedurally in order within the meaning of Joint Rule 161 of Parliament's Joint Rules.

10. Parliament adopted the following approach with regard to the tagging of the Bill:

10.1 It did not approach the tagging on the basis of section 44(3) of the Constitution. It did not do so because section 76(3) of the

[12] Vol 2; Parliament's EA; page 72; par 16 and following.
[13] Vol 2; Parliament's EA; page 77; par 25 read with NA 4; page 125.

Constitution states in terms that it applies to matters which "falls within a functional area listed in Schedule 4". It makes no reference to section 44(3) or reasonably necessary or incidental matters.

10.2 It did not consider the Amendment Act to fall within the purview of "legislation envisaged" by sections 195(3) and (4) or 197 of the Constitution for three reasons as addressed in its Explanatory Affidavit[14]:

10.2.1 First, the national legislation contemplated by section 195(3) is primarily the Public Service Act. For instance, the Public Service Amendment Bill [B31-2006] was classified as a section 76(1) Bill, precisely because it constituted legislation which fell within the purview of section 76(3) of the Constitution. By contrast, the Amendment Bill deals with a particular category of employees at municipal level as opposed to "*the public administration*" or "*the public service*";

10.2.2 Second, the Local Government: Municipal Systems Bill [B27 - 2000] had been classified as a section 75 Bill.

[14] Vol 2; Parliament's EA; page 79; par 31.

Parliament accordingly reasoned that there was no basis for a different classification of an Amendment Bill.

10.2.3 Third, 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 whatsoever on provincial interests.

**AN APPROPRIATE ORDER**

11. A declaration of constitutional invalidity is not axiomatic as the cases refer to below.[15]

12. Although this Court confirmed the declaration of constitutional invalidity in **Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others**[16], it held as follows:

> "[8] Section 172(2) confirmation proceedings are not routine, for it is does not follow that High Court findings of constitutional invalidity will be confirmed as a matter of course.

[15] See by way of example **Khosa & Ohers v Minister of Social Development & Others**; **Mahlaule & Others v Minister of Social Development & Others** 2004 (6) SA 505 CC where the remedy is addressed in paras 87–89; **City of Cape Town & Another v Robertson & Another** 2006 (2) SA 323 (CC) at para 77; **National Credit Regulator v Ackerman & Others** 2013 (2) SA 1 CC at para 106; **Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)** 2007 (5) SA 30 CC at para 70 and **S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)** 2002 (6) SA 642 CC at para 32.
[16] 2003 (3) SA 345 CC.

This Court is empowered to confirm the High Court order of constitutional invalidity only if it is satisfied that the provision is inconsistent with the Constitution. If not, there is no alternative but to decline to confirm the order. It follows that a finding of constitutional invalidity by a High Court does not relieve this Court of the duty to evaluate the provision of the provincial Act or Act of Parliament in the light of the Constitution. A thorough investigation of the constitutional status of a legislative provision is obligatory in confirmation proceedings. This is so even if the proceedings are not opposed, or even if there is an outright concession that the section under attack is invalid. As the judgments in this case show, the issues in this case are not straight forward. Issues that come before this Court seldom are."

13. A similar case to SAMWU's challenge to section 56A can be found in **National Director of Public Prosecutions & Another v Mohammed NO & Others**[17] in which the Constitutional Court held that the validity of Chapter 6 was not before it and would have to refer the matter back to the High Court for consideration of the substantive challenge to Chapter 6. Paragraphs 31 to 37 are of particular relevance. This Court held in paragraph 37:

"The only course for this Court to adopt, given the way in which the matter was dealt with the High Court, and in view of the clear urgency of the matter, is to set aside that Court's order and to refer the matter back to it to decide on the relief sought by the respondents, namely the constitutional invalidity of Chapter 6. The Court is firmly of the view that, given the

[17] 2002 (9) BCLR 970; 2002 (4) SA 843.

> nature of the Act and the way its procedural provisions are interwoven with the substantive, it is undesirable to deal with them separately or piecemeal."

SAMWU is clearly cognisant of this undesirability of the application for direct access on the Section 56A challenge. This matter was fully ventilated in the court of first instance, together with the procedural challenge.

14. Parliament accepts that in the event that this Court finds that it incorrectly tagged the Amendment Bill, then it must follow that:

14.1 The resultant legislation is invalid. Indeed, Parliament is mindful of the *dictum* of this Court in **Tongoane** where it held as follows[18]:

> "[109] I have already described in detail the purpose of the s 76 procedure and the importance of the constitutional role that the provinces must play in considering legislation which affects them. Apart from this, the provisions of s 76(3) are couched in peremptory terms. Having regard to this, and the purpose of s 76(3), I consider that enacting legislation that affects the provinces in accordance with the procedure prescribed in s 76 is a material part of the law-making process relating to legislation that substantially affects the provinces. Failure to comply with the requirements of s 76(3) renders the resulting legislation invalid."

14.2 It is submitted that it in the event that this Court is inclined to refer the Amendment Act back to Parliament to be tagged in terms of

[18] See too: paragraphs 110 to 112.

section 76 of the Constitution, Parliament ought to be afforded a period of twenty-four months within which to follow the correct processes for the adoption of the Amendment Act. Indeed, this is the timeframe that the National Minister has sought.[19] SAMWU has indicated in its replying affidavit that it has no objection to any order of constitutional invalidity being suspended for a period of 12 months.[20]

14.3 As regards the final issue of the retrospective effect of any Order that this Court may make, it is trite that a confirmation of constitutional invalidity will have retrospective effect unless the court making the declaration orders otherwise for reasons pertaining to justice and equity.[21] The High Court's declaration of invalidity applies retrospectively. We respectfully submit that the High Court ought to have limited the retrospective effect of the declaration of invalidity so that it has no bearing on any actions taken in terms of the Amendment Act. We have carefully considered the affidavit filed before this Court on behalf of the Twelfth Respondent and in particular paragraph 50 thereof which identifies "several key concerns" if there is no limit

[19] Vol. 1; AA; page 57; par 16.5.2.
[20] Vol. 2; RA; page 154; par 9.
[21] See **Minister of Police & Others v Kunjana** [2016] ZACC 21 at para [33]; see also **S v Bhulwana; S v Gwandiso** 1996 (1) SA 388 (CC) at para [32].

placed on retrospectivity. Parliament recognises that these are indeed legitimate concerns.

14.4 We respectfully submit that limiting the retrospective effect of its Order would accord with the *dictum* of this Court in **Kunjana**,[22] where it reiterated its well-established principles that the ability to limit the retrospective effect of orders of invalidity can be used "to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the invalidated] statute"; and recognised that "the interests of individuals must be weighed against the interests of avoiding dislocation to the administration of justice and the desirability of a smooth transition from the old to the new".

15. Subject to what is stated in these Submissions, we abide the decision of this Court.

**RT WILLIAMS SC**
**KARRISHA PILLAY**
**LIZIWE DZAI**

Chambers
29 August 2016

[22] **Kunjana** at para [35].

## LIST OF AUTHORITIES

1. **City of Cape Town & Another v Robertson & Another** 2006 (2) SA 323 (CC).
2. **Democratic Alliance v President of South Africa and Others** 2014 (4) SA 402 (WCC).
3. **Khosa & Ohers v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others** 2004 (6) SA 505 (CC).
4. **Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)** 2007 (5) SA 30 (CC).
5. **Minister of Police & Others v Kunjana** [2016] ZACC 21.
6. **National Credit Regulator v Ackerman & Others** 2013 (2) SA 1 (CC).
7. **National Director of Public Prosecutions & Another v Mohammed NO & Others** (CCT13/02) [2002] ZACC 9; 2002 (9) BCLR 970; 2002 (4) SA 843 (12 June 2002).
8. **S v Bhulwana; S v Gwandiso** 1996 (1) SA 388 (CC).
9. **S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)** 2002 (6) SA 642 (CC); 2003 (3) SA 345 CC.
10. **Tongoane v Minister of Agriculture & Land Affairs** 2010 (6) SA 214 (CC).