IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: **CCT 54/2016**
NGHC Case No: **3558/2013**

In the matter between: -

SOUTH AFRICAN MUNICIPAL WORKER'S UNION	Applicant

And

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

TWELFTH RESPONDENT'S AFFIDAVIT

I, the undersigned,

ANTON WILHELM BREDELL

do hereby make oath and say that:

(1) INTRODUCTION

1. I am an adult male and currently hold office as inter alia the Western Cape Provincial Government's Minister of Local Government. I am the Member of the Executive Council responsible for local government in the Western Cape including, *inter alia*, the monitoring, support and evaluation of municipalities in terms of the Constitution and applicable legislation. I am duly authorised to make this affidavit on behalf of the twelfth respondent.

2. The facts in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct. Where I make averments not directly within my knowledge, I do so on the basis of information made available to me by officials in my office and/or officials in the office of the twelfth respondent. I verily believe such

information to be true and correct. Legal submissions are made on the advice of my legal representatives.

(1.1) Structure

3. The remainder of this affidavit is structured under the following headings:

3.1. Introduction and relevant background facts;

3.2. application to file this affidavit in order to place further evidence before this Court;

3.3. the implications of the confirmation of the order invalidity without limiting the retrospectivity thereof; and

3.4. the appropriate remedy.

(2) INTRODUCTION AND RELEVANT BACKGROUND FACTS

4. The Applicant, the South African Municipal Workers Union ('SAMWU') instituted proceedings in the North Gauteng High Court, Pretoria ('the High Court') for, *inter alia*, the following relief:

4.1. An order declaring the entire Local Government Municipal Systems Amendment Act 7 of 2011 ('the Amendment Act') to be inconsistent with the Constitution of the Republic of South Africa, 1996 ('the Constitution') and invalid, on the basis that the incorrect procedure had been followed in enacting it;

4.2. An order declaring section 56A of the Local Government Municipal Systems Act 32 of 2000 ('the Systems Act'), read together with the definition of the term *"political office"* in section 1 of the Systems Act to be inconsistent with the Constitution and invalid, on the basis that it amounts to an unjustifiable 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; and

4.3. An order referring the declarations of invalidity so sought, to this Court for confirmation, if granted.

5. The application was opposed and after hearing argument the High Court declared the Amendment Act to be invalid in its entirety for want of compliance with the procedures set out in section 76 of the Constitution and referred that order of invalidity to this Court for confirmation, in terms of section 167(5) of the Constitution. The High Court, having found that the entire Amendment Act was unconstitutional, declined to make any finding in regard to the constitutional validity of Section 56A as was being sought by the applicant.[1]

6. SAMWU has applied to this Court for :

6.1. An order confirming the order of the High Court declaring the Amendment Act to be invalid for want of compliance with the procedures set out in section 76 of the Constitution ('the confirmation proceedings'); and

6.2. Direct leave to appeal against the High Court's judgment in respect of its failure to determine whether section 56A of the Systems Act read together with the definition of *"political office"* in section 1 of

[1] Section 56A was inserted into the Systems Act by section 5 of the Amendment Act.

that Act is inconsistent with the Constitution; and its failure to award SAMWU costs ('the direct appeal application'); and

6.3. An order upholding SAMWU's appeal to this Court; and

6.4. Directing that the First to Third Respondents pay SAMWU's costs in respect of both the confirmation proceedings and the direct appeal application.

7. The direct appeal application and the confirmation proceedings are set down for hearing together on 10 November 2016.

8. Whilst the Premiers of all nine provinces were cited as Respondents before the High Court, it appears that only the First to Third Respondents, the National Minister of Co-Operative Governance and Traditional Affairs ('the National Minister'), the Speaker of the National Assembly and the Chairperson of the National Council of Provinces, respectively opposed the application and participated in the proceedings before the High Court.

9. I deal with the reasons why the twelfth respondent did not participate in the proceedings before the High Court in detail below in support of this

application for leave to file this affidavit for the purposes of placing further evidence before this Court and participating in the hearing of this matter.

(3) APPLICATION FOR LEAVE TO ADDUCE FURTHER EVIDENCE

10. At the hearing of this matter, application will be made for leave to have this affidavit admitted as a further affidavit in these proceedings in order to place further evidence before this Court and to participate in the hearing and these proceedings.

11. I am advised that in terms of section 19(b) of the Superior Courts Act 10 of 2013 ('the Superior Courts Act'), the Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law, receive further evidence.

12. In terms of Rule 30 of the Rules of this Court certain sections, including section 22, of the (now repealed) Supreme Court Act 59 of 1959 *"apply, with such modifications as may be necessary, to proceedings of and before the Court as if they were rules of their court"*. Section 19 of the Superior Courts Act is the equivalent of the former section 22 and accordingly, finds application in proceedings of and before this Court.

13. Further, section 173 of the Constitution confers on this Court the power to, *inter alia*, protect and regulate its own proceedings, taking into account the interests of justice. As such, this Court may receive further evidence, in the interests of justice.

14. This Court (as well as the Supreme Court of Appeal) has in a series of decisions laid down certain basic requirements for the admission of further evidence, which requirements may be summarized as follows:

14.1. There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the hearing of the application before the court below;

14.2. There should be a *prima facie* likelihood of the truth of the evidence;

14.3. The evidence should be materially relevant to the outcome of the application;

14.4. Every case must be decided on its particular merits, and there may be rare instances where, for some special reasons, the Court will be more disposed to grant relief;

14.5. It is incumbent upon an applicant who seeks leave to adduce further evidence to satisfy the court of appeal that it was not owing to any remissness or negligence on the applicant's part that the evidence in question was not adduced at the hearing before the court below; and

14.6. In order to satisfy these requirements, an applicant may file affidavits in support of the application to lead further evidence. The generally accepted practice is that such affidavits may properly be filed.

15. For the reasons that follow, I submit that exercising its discretion to admit this affidavit would assist this Court in making a determination as to what would constitute a just and equitable order in this matter, as contemplated by section 172(1)(b) of the Constitution.

16. In support of the application to adduce further evidence, I draw the following points to the Court’s attention.

17. The High Court deemed the fact that none of the Provinces opposed the application to be of sufficient import to remark upon that fact at paragraph 128 of its judgment.

18. When the judgment of the High Court was brought to my attention and that of my officials during or about April 2016, it became apparent to us that the judgment will have far reaching and potentially devastating consequences for all municipalities, with respect to the myriad of administrative decisions that have been taken, in terms of the provisions introduced by the Amendment Act, and given effect to by municipalities across the country over the past 5 years, i.e. during the time in which the provisions of the Amendment Act have been in effect.

19. My office was at pains to ascertain why there had been no involvement of either the Western Cape Provincial Department of Local Government nor the office of the twelfth respondent in this matter, given the far-reaching impact that the Amendment Act has had (and continues to have) on the day-to-day administrative functions of all municipalities since coming into force in 2011.

20. We raised these queries with our legal services department in order to ascertain how a matter of this importance appeared to have been overlooked, and in order to ascertain when and how the founding papers in the application had been delivered to the twelfth respondent's offices by the Office of the State Attorney, Pretoria ('the Pretoria State Attorney'), upon whom the papers had been served.

21. Those investigations have led us to conclude that the founding papers in the matter were not brought to the attention of either my office or the office of the twelfth respondent, subsequent to service thereof on the Pretoria State Attorney by the applicant.

22. As such neither I, nor the twelfth respondent had knowledge of the matter until the judgment, and its effect, was brought to the attention of various officials in the Western Cape Department of Local Government during or about late April 2016.

23. Having now read and considered the judgment, I am of the view that the consequences of a confirmation of the High Court's declaration of invalidity, will have disastrous effects for municipalities in the Western Cape over which I have a monitoring and support role (as well as all municipalities in

other provinces), if due regard is not had to how the issue of retrospectivity will be applied in this matter. In particular as concerns the effect that such an order will have on the legality of the thousands of decisions already taken at municipal level to date pursuant to the Amendment Act, all of which will be rendered susceptible to review and/or setting aside for want of legality, if this aspect is not addressed by this Court in any order which it may grant.

24. Indeed it appears from the affidavits filed in the High Court that one aspect of the retrospectivity issue which will arise from any order of constitutional invalidity made by that Court was in fact considered and canvassed by the parties prior to the hearing of the matter before the High Court, and that it was not in dispute, as between SAMWU and the National Minister, that in the circumstances of this matter a type of limitation on the potential damaging effect of any confirmation of constitutional invalidity order, without more, would be appropriate. However, the issue was, for some reason, not addressed by the High Court in its judgment:

24.1. The National Minister at paragraph 16.5.2 of his answering affidavit, dated 2 September 2013[2], states that *"in the unlikely event the court were to declare the Act unconstitutional, and invalid,*

[2] Record Vol. 1 p. 57: 16.5.2.

that would be a proper case for the Court to suspend its declaration of constitutional invalidity for a period of not less than 24 (twenty four) months to enable Parliament to rectify its "mistake" and follow proper procedure."

24.2. SAMWU in its replying affidavit dated 19 December 2013[3], at paragraph 9, states that it *"... has no objection to any order of constitutional invalidity that might be made being suspended for a period of 12 months."*

25. I submit that I have provided a full and proper explanation for why the evidence set out in this affidavit was not led at the hearing before the High Court and further that such failure was not due to any negligence or remissness on my part or that of the twelfth respondent.

26. Furthermore, I submit that having regard to what is set out below, it is apparent that the evidence which I seek to place before this Court is true and is unlikely to give rise to substantial disputes of fact.

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[3] Record Vol. 2 p. 154: 9.

27. In addition while it is apparent from the affidavits which served before the High Court that the issue of the retrospective effect of an order of constitutional invalidity was canvassed by the parties, it is equally clear that none of the parties placed any specific evidence before the High Court as to the far-reaching and potentially dire consequences that a failure to limit the retrospectivity of such an order will trigger.

28. As such I submit that the evidence which I seek to place before this Court is of such a nature that it would probably have caused the High Court to come to a different conclusion, insofar as the remedy is concerned, and as such is materially relevant to the determination which this Court is now being called upon to make.

29. I submit further that the evidence which I seek to place before this Court will facilitate a full and proper hearing on a crucial aspect of the matter which this Court is tasked with adjudicating and as such it is in the interests of justice and will not prejudice any party to the proceedings, for this affidavit to be admitted.

30. On 25 April 2016 I instructed the State Attorney to write to all the parties who had participated in the proceedings before the High Court to request

their consent to the filing of this affidavit. A copy of that letter is annexed hereto marked ('**AB1**').

31. On 10 May 2016 SAMWU's attorneys indicated that they had requested instructions from their client in regard to the request to file this affidavit, however, to date no further response has been received from SAMWU. A copy of that letter is annexed hereto marked ('**AB2**').

32. On 13 May 2016 the State Attorney once again wrote to all the parties and advised them that in light of the fact that no response had been received to our letter of 25 April 2016 that we would proceed to prepare this affidavit. A copy of that letter is annexed hereto marked ('**AB3**').

33. Section 172 of the Constitution enjoins a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of such inconsistency; and further provides that such court may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

34. As such, given that the appropriateness or otherwise of a limitation the retrospectivity of the declaration of invalidity was not dealt with by the High Court, I submit that it would be in the interest of justice for me to make submissions to this Court regarding the potential consequences of a declaration of invalidity and further to make submissions on what would be a just and equitable remedy, taking into account all the circumstances of this matter.

35. I point out that I do not propose to take issue with the merits of the order granted by the High Court in this respect, nor to deal with or address the arguments put up by SAMWU in respect of the direct appeal application. These are both aspects on which I may have wished to make submissions had the founding papers been brought to our attention timeously, but which I now regard as "water under the bridge" given the order handed down by the High Court in this matter.

(4) THE IMPLICATIONS OF THE CONFIRMATION OF THE ORDER OF INVALIDITY WITHOUT A LIMITATION ON RETROSPECTIVITY OF THE ORDER

36. The Systems Act was amended in 2011 in order to address what was perceived to be an alarming increase in the instances of maladministration within municipalities, by enacting legislative measures to ensure that professional qualifications, experience and competence became the overarching criteria governing the appointment of senior managers in local government, as opposed to political party affiliation.

37. The National Treasury in its 2011 Local Government Budgets and Expenditure Review ('the National Treasury Review') states as follows:

> *"The success or failure of a municipality depends on the quality of its political leadership, sound governance of its finances, the strength of its institutions and the calibre of staff working for the municipality. Although sound financial governance is perceived to be most important, without proper personnel management, municipalities are likely to experience difficulty. This has become increasingly evident in a number of large municipalities that have recently found themselves in precarious financial situations, and is certainly true of many smaller municipalities."*

38. The National Treasury Review further states that its analysis of municipal finances suggested that personnel issues lay at the heart of many of the financial problems experienced by municipalities. The National Treasury Review found that personnel management in local government had been marred in many instances by poor recruitment practices, political interference in the appointment and dismissal of employees, the inability to

attract and retain suitably qualified staff, high vacancy rates and the lack of performance management systems and other related symptoms.

39. The National Treasury Review further estimated that at an aggregate level, about 30% of the total municipal operating budgets at the time were spent on the remuneration of personnel and as such more emphasis needed to be placed on whether this expenditure yielded value for money for municipalities and the communities they serve.

40. It is for this reason that the National Treasury Review concluded that measuring and managing the performance of municipalities, and by implication, the performance of municipal employees, was critical and that proper management of personnel was crucial to the effective and efficient functioning of municipalities and ought to be prioritised across all municipal functions, instead of merely being left to corporate services or human resources departments within municipalities

41. It was precisely the concerns articulated above, which motivated the legislature to seek to introduce the amendments brought into force by the Amendment Act in 2011.

42. The nature and extent of the amendments brought into operation by the Amendment Act (which came into force on 5 July 2011) are evident from the long title to the Amendment Act.[4]

43. In essence the Amendment Act sought to:

43.1. address the appointment and competencies of municipal managers and managers directly accountable to municipal managers ('senior managers');

[4] *"To amend the Local Government: Municipal Systems Act, 2000, so as to insert and amend certain definitions; to make further provision for the appointment of municipal managers and managers directly accountable to municipal managers; to provide for procedures and competency criteria for such appointments, and for the consequences of appointments made otherwise than in accordance with such procedures and criteria; to determine timeframes within which performance agreements of municipal managers and managers directly accountable to municipal managers must be concluded; to make further provision for the evaluation of the performance of municipal managers and managers directly accountable to municipal managers; to require employment contracts and performance agreements of municipal managers and managers directly accountable to municipal managers to be consistent with the Act and any regulations made by the Minister; to require all staff systems and procedures of a municipality to be consistent with uniform standards determined by the Minister by regulation; to bar municipal managers and managers directly accountable to municipal managers from holding political office in political parties; to regulate the employment of municipal employees who have been dismissed; to provide for the Minister to make regulations relating to the duties, remuneration, benefits and other terms and conditions of employment of municipal managers and managers directly accountable to municipal managers; to provide for the approval of staff establishments of municipalities by the respective municipal councils; to prohibit the employment of a person in a municipality if the post to which he or she is appointed is not provided for in the staff establishment of that municipality; to enable the Minister to prescribe frameworks to regulate human resource management systems for local government and mandates for organised local government; to extend the Minister's powers to make regulations relating to municipal staff matters; to make a consequential amendment to the Local Government; Municipal Structures Act, 1998, by deleting the provision dealing with the appointment of municipal managers; and to provide for matters connected therewith."*

43.2. regulate the employment of municipal employees who had been dismissed or were subject to disciplinary processes by other municipalities; and

43.3. regulate the duties, remuneration, benefits and other terms and conditions of employment for municipal managers and senior managers.

44. In addition, the Amendment Act introduced the requirement that municipal managers and senior managers may not simultaneously hold political office in a political party.

45. These amendments were immediately implemented at municipal level (at least in the Western Cape Province) and have, since 2011 been integral guiding legislation that has been applied by both municipalities and my office *vis-à-vis* the regulation of the employment of municipal managers and senior managers in municipalities.

(4.1) Appointment and remuneration of senior managers

46. Prior to the enactment of the Amendment Act, municipal managers were appointed in terms of section 82 of the Local Government Municipal Structures Act 117 of 1998 ('the Structures Act'), which provided as follows

> *"**82. Appointment**.—*
> *(1) A municipal council must appoint—*
> *(a) a municipal manager who is the head of administration and also the accounting officer for the municipality, and*
> *(b) when necessary, an acting municipal manager.*
> *(2) A person appointed as municipal manager must have the relevant skills and expertise to perform the duties associated with that post."*

47. The Structures Act did not define what constituted the *"relevant skills and expertise to perform the duties"* required in order to hold the post of municipal manager.

48. This lacuna in the legislative framework unfortunately created the potential for the appointment of persons who lacked the requisite skills to carry out the critical tasks which municipal managers, being both the head of the administration of the municipality and its accounting officer, are charged with performing. Weak recruitment procedures and disputes about the appointments to key posts within municipalities, resulted in many municipal managers being appointed in acting roles for extended periods, as section 82

of the Structures Act provided no limitations on the periods for which such acting appointments could be made.

49. The legislature, in order to address this lacuna, enacted Section 54A of the Systems Act.

49.1. The section prescribes that a municipal manager (or an acting municipal manager) is required to have skills, expertise, competences and qualifications as prescribed by the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers (GN 21 of 17 January 2014: *Government Gazette* No. 37245) ('the Appointment Regulations'), which specify the minimum educational requirements as well as the nature and extent of prior relevant experience and knowledge requirements to hold such positions.

49.2. In addition the section provides for the appointment of acting municipal managers, and that such persons may not be appointed for a period of more than three months, save where the municipal council, in special circumstances and on good cause shown applies in writing to the relevant MEC for Local Government ('the MEC')

to extend the period of appointment for a further period which may not exceed three months.

49.3. Further, the section specifies the procedures for the advertisement and filling of the post of a municipal manager and where a suitable candidate cannot be found the section provides a mechanism for the MEC to be requested to second a suitable person to fill the post until an appointment can be made.

49.4. The section also provides a monitoring and oversight role to the MEC in respect of the appointment process and the outcome thereof.

49.5. In addition the section empowers the MEC to enforce compliance by a municipality with regard to the appointment of municipal managers.

49.6. Where an appointment is made in contravention of the requirements of section 54A and the Systems Act, such appointment is null and void, unless the municipal council, in special circumstances and on good cause shown applies in writing to the National Minister to

waive any of the peremptory requirements, if it is unable to attract a suitable candidate.

50. If the entire Amendment Act is declared unconstitutional, without any limitation on the retrospectivity thereof, several key concerns arise.

50.1. The Appointment Regulations enacted in terms of the provisions of section 72(1)(gB) of the Systems Act, which was inserted into the Systems Act by the Amendment Act, and which empowers the National Minister to make regulations regarding, *inter alia*, the level of skills, expertise and competency that municipal managers and senior managers are required to possess, fall away entirely from 2011 onwards.

50.2. If the retrospective effect of the declaration of invalidity is not addressed and at the very least suspended for a period of time to enable the legislature to remedy the unconstitutionality, the Appointment Regulations will, in effect be *ultra vires* the Systems Act.

50.3. That being so, the recruitment and appointment procedures adopted by municipalities across the country in order to comply with the provisions of Section 54A and the Appointment Regulations will similarly be rendered *ultra vires* and will in effect be *pro non scripto*.

50.4. As such, municipal councils will once again be required to rely on the inadequate provisions of section 82 of the Structures Act in order to appoint municipal managers and acting municipal managers.

50.5. Any candidate who had applied for a position as a municipal manager in the past five years and who was not considered for such appointment because she or he did not meet the requirements prescribed by the Appointment Regulations could potentially challenge their exclusion from such consideration. So too, would any decision in terms of which the appointment of a person as municipal manager was declared null and void for want of

compliance with the provisions Section 54A read with the Appointment Regulations, be open to challenge.[5]

50.6. The potentially disruptive consequences for municipalities of such challenges -arising up to five years after appointments have been made -are patent.

51. Prior to the coming into force of the Amendment Act, senior managers, (i.e. managers directly accountable to the municipal manager), were appointed in terms of Section 56 of the Systems Act which provides as follows:

*"**56. Appointment of managers directly accountable to municipal managers.**—*

(a) A municipal council, after consultation with the municipal manager, appoints a manager directly accountable to the municipal manager.

(b) A person appointed as a manager in terms of paragraph (a), must have the relevant skills and expertise to perform the duties associated with the post in question, taking into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination."

[5] By way of example, in the matter of in the matter of *Allen Paulse v Oudtshoorn Local Municipality and Others* (WCHC unreported Case No 25790/2011). Mr Paulse ('Paulse') had applied for the positions of Municipal Manager and Director of Corporate services of Oudtshoorn Local Municipality. He was unsuccessful in his application and approached the Western Cape High Court ('WCHC') to review and set aside the Municipal Council's appointment of the municipal manager, alternatively the director of corporate services. Paulse argued that the appointed Municipal Manager ('Mnyimba') did not have the management experienced required for the post. The WCHC concluded that Mnyimba did not possess the five years' experience at senior management level within the meaning of Regulation 38, and found that his appointment as Municipal Manager and any contract concluded, between the Council and Mnyimba, in consequence of such decision, were null and void and set his appointment aside.

52. The Amendment Act substituted the provisions of section 56 in their entirety. Section 56 now contains identical provisions to those in section 54A in regard to appointment procedures and processes as well as the systems for the enforcement, monitoring and oversight of compliance by municipalities with the provisions of the Systems Act by the MEC and the National Minister as contained in section 54A. In addition the Appointment Regulations prescribe the qualifications and experience required for appointment as a senior manager.

53. As such, the same concerns outlined above in regarding to the consequences of a failure to limit the retrospectivity of any order of unconstitutionality in respect of the recruitment and appointment of municipal managers since the coming into force of the Amendment Act in July 2011, apply equally to the recruitment and appointment of senior managers during the same period.

54. Further, the Amendment Act inserted section 72(2A) into the Systems Act which provides that the National Minister may, subject to applicable labour legislation and after consultation with the Minister for Public Service and Administration, make regulations relating to the duties, remuneration, benefits and other terms and conditions of employment of municipal managers and senior managers.

55. The National Minister has, in terms of section 72(2A) enacted Regulations –

55.1. determining the upper limit of the total remuneration package payable to municipal managers and senior managers with effect from 1 July 2014; and

55.2. determining the total remuneration packages payable to municipal managers and senior managers with effect from 1 July 2015.

56. Any municipal manager or senior manager whose remuneration package has been determined in accordance with the aforementioned Regulations could dispute the validity of the determination of their remuneration packages on the basis that the Regulations, in terms of which those determinations were made, are *ultra vires* the Systems Act, for the reasons articulated above.

57. In the Western Cape Province alone there are 95 senior managers who have been appointed to their respective posts since the coming into force of the Amendment Act. The potential disruption to the municipalities in the province as a consequence of a failure to limit the retrospective effect of any order of unconstitutionality could have far reaching effects on the ability of

order granted by this court in this matter, many of which are already facing serious capacity constraints, is clear and in my view will only serve to hamper their ability to deliver services to the communities which they serve.

(4.2) Performance agreements for municipal and senior managers

58. Municipal Managers and senior managers may only be appointed to such positions in terms of a written employment contract with the municipality, which complies with the provisions of section 57 of the Systems Act and subject to a separate performance agreement concluded annually as provided for in section 57(2).

59. Prior to the coming into force of the Amendment Act performance agreements were required to be concluded within a reasonable period. As noted in the National Treasury Review, by June 2009 only 78% of municipal managers had signed performance agreements and the National Treasury had no data as to what percentage of senior managers had in fact concluded performance agreements.

60. Section 57(2)(a)(i) of the Amendment Act now provides that such agreements must be concluded within 60 days after a person has been

appointed as the municipal manager or as a senior manager, failing which the appointment lapses.

61. In the absence of similar provisions stipulating the period within which performance agreements are to be concluded, and setting out consequences for the failure to do so, a declaration of invalidity, without more would mean that there would once again be no legislative mechanism for a municipality to enforce compliance with section 57(1). In the absence of performance agreements, municipal managers and senior managers cannot be held accountable for not meeting their key deliverables, which will again ultimately impact on service delivery.

(4.3) Limitations on the employment of dismissed municipal staff

62. The Amendment Act introduced Section 57A in terms of which, *inter alia*:

62.1. Any staff member dismissed for misconduct may only be re-employed in any municipality after the expiry of a prescribed period;

62.2. The National Minister must prescribe different periods of expiry for different categories of misconduct;

62.3. Staff members dismissed for financial misconduct contemplated in section 171 of the Local Government: Municipal Finance Management Act 56 of 2003, corruption or fraud, may not be re-employed in any municipality for a period of ten years;

62.4. A municipality must maintain a record that contains the prescribed information regarding the disciplinary proceedings of staff members dismissed for misconduct; and

62.5. In addition copies of these disciplinary records must be submitted to the MEC and the National Minister and records must be kept of all staff members that have been dismissed for misconduct or who have resigned prior to the finalisation of disciplinary proceedings. This section was crucial in attempting to stem the "revolving door" effect of municipal officials who had been implicated in misconduct, simply resigning to take up municipal posts elsewhere in the country.

63. Further, the National Minister has, in Regulation 18 and Schedule 2 of the Appointment Regulations, prescribed the categories of misconduct

contemplated by Section 57A and the time periods which must expire before a person dismissed for such misconduct may be re-employed by any municipality.

64. Clearly, if a limitation on the retrospective nature of any order of unconstitutionality of the Amendment Act is not made, municipalities will be free to appoint persons who have been found guilty of misconduct at another municipality without any limitations as to time periods; and those who have been charged will once again be free to resign and hence avoid the effect of the outcome of any disciplinary process in limiting their municipal career.

65. Further, persons who were not considered for appointment because of the proscriptions contained in Section 57A and Regulation 18 read with Schedule 2 of the Appointment Regulations could potentially challenge their exclusion from consideration. In addition, persons who were employed contrary to the aforementioned positions and subsequently dismissed on the basis of non-compliance with the aforementioned statutory and regulatory requirements could challenge their dismissals as being substantively unfair.

(4.4) Staff establishment

66. Prior to the coming into force of the Amendment Act, the municipal manager was solely responsible for the determination of the staff establishment of the municipality. However, subsequent to the amendments to section 66 of the Systems Act, the staff establishment determined by the municipal manager, must be approved by the municipal council in order to be valid. The reasoning behind this inclusion in the Amendment Act is also clear. It is to place a check on what is otherwise an unfettered discretion given to municipal managers with respect to staff numbers. Unfortunately experience has shown that this power left unchecked can result in bloated, unaffordable staff levels and allegations of cronyism.

67. In addition, section 66(3) now provides that no person may be employed in a municipality unless the post is provided for in the staff establishment of that municipality and section 66(4) provides that any decision to employ a person in a municipality, and any contract concluded between the municipality and that person in consequence of the decision, is null and void if the appointment is made in contravention of section 66(3). Furthermore, any person who knowingly makes an appointment which contravenes section 66(3) may be held personally liable for any irregular or fruitless and wasteful expenditure that a municipality has incurred as a result of such invalid appointment.

68. In addition, Regulations 3, 4 and 5 of the Appointment Regulations have been promulgated in order to give effect to the amendments to the staff establishment provisions contained in section 66 of the Systems Act, brought about by the Amendment Act.

69. Regulation 4(1) of the Appointment Regulations provides that a municipal manager must, within 12 months of the promulgation of the Regulations, review the municipality's staff establishment having regard to the principles set out in the Regulations, the functions and powers listed in Part B of Schedule 4 to the Constitution, Part B of Schedule 5 to the Constitution, Chapter 5 of the Municipal Structures Act, and based on the municipality's strategic objectives and the municipality's core and support functions.

70. Regulation 8 of the Appointment Regulations provides that the municipal council must at its next meeting following receipt of the staff establishment; approve the staff establishment, with or without amendments, as proposed by the municipal manager.

71. Since the coming into effect of the Appointment Regulations, 28 municipalities in the Western Cape have reviewed their staff

establishments and these have been approved by the respective municipal councils as required by the Regulations.

72. If an order limiting the retrospectivity of any order of unconstitutionality is not made, it is not clear what the status of the reviewed staff establishments of these 28 municipalities in the Western Cape will be. Should these staff establishments be found to be invalid, the contracts of officials and staff appointed in terms of such staff establishments would similarly be invalid.

73. Furthermore, municipalities will be at large to appoint staff irrespective of whether such posts are provided for in their particular staff establishments.

(4.5) Item 2A of the code of conduct for councillors

74. The Amendment Act inserted Item 2A into the code of conduct for councillors which provides that a councillor may not vote in favour of or agree to a resolution which is before the municipal council or a committee of the council which conflicts with any legislation applicable to local government.

75. If an order limiting the retrospectivity of any order of unconstitutionality is not made, any disciplinary proceedings instituted against a councillor for contravention of Item 2A would be subject to review. More importantly, however, there would be no legislative means to hold councillors accountable for voting in favour of unlawful resolutions, even in circumstances where it can be shown that this has been done knowingly.

(5) CONCLUSION AND REMEDY

76. It is apparent from what is set out above that the facts as to the potential implications of the failure to limit the retrospectivity of any order of invalidity were not placed before the High Court at the time of the hearing, and as such the implications of such an order, on not only the respondents but indeed all municipalities and the rate payers who they serve, were not taken into account by the High Court when it made its order.

77. As such, given the potentially far reaching consequences for the orderly administration of municipalities across the country as set out above, I submit that this would be an appropriate matter for this Court to exercise its discretion in terms of section 172(1)(b) of the Constitution via two methods:

77.1. To direct that any declaration of invalidity will operate only prospectively, i.e. that any decisions and/or actions taken under or in terms of the Amendment Act and prior to the date of the order will be unaffected, even if proceedings relating to them are yet to be finalised. Such an order will be independent of any suspension of invalidity referred to in paragraph 77.2 below and is necessary to curtail the potential damaging effect that an otherwise unfettered order of invalidity will have.

77.2. I submit further that, given the nature of the amendments brought into effect by the Amendment Act and the length of time that the amended provisions have been in force that it would be in the interests of justice and equity to provide the Legislature with time to remedy the unconstitutionality in order to limit the disruptive effects that the order of invalidity will undoubtedly have on the orderly and effective administration of municipalities across the country in the future.

78. As such I submit that, in the event that this Court were to confirm the order of invalidity, that such order should operate with prospective effect only and further that the order be suspended for a period of 24 months to allow the

legislature a reasonable period of time to remedy the invalidity by way of the promulgation of fresh legislation.

ANTON WILHELM BREDELL

I certify that:

1. The Deponent acknowledged to me that:

   1.1. He knows and understands the contents of this Affidavit;
   1.2. He has no objection to taking the prescribed oath;
   1.3. He considers the prescribed oath to be binding on his conscience.

2. The Deponent thereafter uttered the words: *"I swear that the contents of this Affidavit are true, so help me God"*.

3. The Deponent signed this Affidavit in my presence at the address set out hereunder on this the day of AUGUST 2016.

COMMISSIONER OF OATHS