

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 WRITTEN SUBMISSIONS

INTRODUCTION.....	3
THE APPLICATION TO ADDUCE FURTHER EVIDENCE	7
<i>Explanation for the failure to lead evidence in the High Court</i>	<i>9</i>
<i>Materiality of the further evidence</i>	<i>12</i>
<i>No prejudice and interests of justice</i>	<i>13</i>
IMPLICATIONS OF CONFIRMING THE ORDER OF INVALIDITY	15
<i>Appointment and remuneration of municipal managers</i>	<i>19</i>
<i>Performance agreements for municipal and senior managers</i>	<i>23</i>
<i>Limitations on the employment of dismissed municipal staff</i>	<i>24</i>
<i>Municipal staff establishments.....</i>	<i>26</i>
<i>Item 2A of the code of conduct for councillors.....</i>	<i>27</i>
REMEDY	28
CONCLUSION	34

INTRODUCTION

1. The Applicant ('SAMWU') instituted proceedings in the North Gauteng Division, Pretoria ('the High Court') for, *inter alia*, orders-¹
 - 1.1. declaring the entire Local Government Municipal Systems Amendment Act 7 of 2011 ('the Amendment Act') to be inconsistent with the Constitution and invalid, on the basis that the incorrect parliamentary procedure had been followed in enacting it;
 - 1.2. 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 on the right to make free political choices; and
 - 1.3. referring the declarations of invalidity, if granted, to this Court for confirmation.

¹ Notice of Motion rec. vol. 1 pp. 1-6.

2. The High Court, on 23 February 2016, 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 the order of invalidity to this Court for confirmation, in terms of section 167(5) of the Constitution.² The High Court, having found that the entire Amendment Act was unconstitutional, declined to make any finding in regard to the validity of Section 56A.³

3. SAMWU has applied to this Court for⁴

3.1. an order confirming the High Court's order declaring the Amendment Act to be invalid ('the confirmation proceedings'); and

3.2. leave to appeal directly to this Court against the High Court's failure to determine whether section 56A of the Systems Act is inconsistent with the Constitution ('the direct appeal application').

² Judgment of High Court rec. vol. 6 p. 501 para 161.

³ Judgment of High Court rec. vol. 6 p. 501 para 160. (Section 56A was inserted into the Systems Act by section 5 of the Amendment Act).

⁴ Notice of application in terms of Rules 16 and 19 rec. vol. 7 pp. 514-518.

4. Whilst the Premiers of all nine provinces were cited as Respondents before the High Court, for reasons dealt with below, 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.
5. The Twelfth Respondent, the Premier of the Western Cape Province ('the Premier') has filed an application in terms of Rule 30 of the Rules of this Court, read with section 19(b) of the Superior Courts Act 10 of 2013 ('the Superior Courts Act'), for leave to place further evidence before this Court and to participate in the hearing and these proceedings.
6. An affidavit, deposed to by the Western Cape Provincial Minister of Local Government ('the Provincial Minister') on behalf of the Premier, in support of the relief sought by the Premier, has been filed together with the application for leave to adduce further evidence.

7. Should this Court grant such leave, submissions will be made on the appropriateness or otherwise of a limitation of the retrospectivity of the High Court's declaration of invalidity, and on what constitute a just and equitable remedy in the circumstances of this matter.⁵
8. The Premier does not take issue with the merits of the High Court's order of invalidity, nor does she seek to address the arguments put up by SAMWU in respect of the direct appeal application.⁶
9. In essence, it is submitted 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 should be suspended for a period of 24 months to allow the legislature a reasonable period of time to remedy the invalidity.

⁵ Bredell affidavit para 34.

⁶ Bredell affidavit para 35.

THE APPLICATION TO ADDUCE FURTHER EVIDENCE

10. In terms of section 19(b) of 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.
11. 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*'.⁷
12. Although appeal courts have a discretion under section 19, leave to adduce further evidence is ordinarily granted only where '*special grounds exist, [or where] there will be no prejudice to the other side and further evidence is necessary in order to do justice between the parties*'.⁸

⁷ Section 19 of the Superior Courts Act is the equivalent of section 22 of the Supreme Court Act and accordingly, finds application in proceedings of and before this Court.

⁸ *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) ('*Prince*') at para 21. See also *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) ('*Rail Commuters Action Group*') at paras 42 - 43.

13. In *Prophet v National Director of Public Prosecutions*⁹ this Court held that -

‘(T)here are two routes for the admission of late evidence on appeal in this Court. The first is Rule 31 of the rules of this court which permits parties to adduce relevant material that is common cause or otherwise incontrovertible or is of an official, scientific, technical or statistical nature and capable of easy verification. The second is in terms of s 22 of the Supreme Court Act, which is incorporated into the Rules of this Court by Rule 30. This Court has considered the circumstances in which evidence may be tendered in terms of s 22 on several occasions and concluded that it may only be done in exceptional circumstances where the evidence sought to be submitted is 'weighty, material and to be believed' and there is a reasonable explanation for the late filing of the evidence.¹⁰ [emphasis added]

14. In addition, the following basic requirements¹¹ as to when a Court ought to accede to an application for the leading of further evidence on appeal have been accepted by this Court and the Supreme Court of Appeal.¹²

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 before the Court below.

⁹ *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) (*‘Prophet’*).

¹⁰ *Prophet* at para 33. See also *Rail Commuters Action Group* at para 43 and *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 at para 24.

¹¹ Per Holmes JA in *S v De Jager* 1965 (2) SA 612 (A) at 613B.

¹² *De Aguiar v Real People Housing (Pty) Ltd* 2011 (1) SA 16 (SCA) (*‘De Aguiar’*) at para 12. See also *Prophet* at para 33, *President of the Republic of South Africa and Others v Quagliani, and Two Similar Cases* 2009 (2) SA 466 (CC) at para 70 and *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) at para 61.

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 matter.

Explanation for the failure to lead evidence in the High Court

15. When the judgment of the High Court was brought to the attention of the Provincial Minister and his officials during or about April 2016, it became apparent that the judgment would 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 since the provisions of the Amendment Act came into effect on 5 July 2011.¹³

16. The Provincial Minister's office was at pains to ascertain why there had been no involvement of either the Western Cape Provincial Department of Local

¹³ Bredell affidavit para 18.

Government or the office of the Premier 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.¹⁴

17. These queries were raised with the Provincial Minister's 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 Premier's offices by the Office of the State Attorney, Pretoria ('the Pretoria State Attorney'), upon whom the papers had been served.¹⁵

18. From those investigations it was concluded that the founding papers had not been brought to the attention of either the Provincial Minister or the Premier, subsequent to service on the Pretoria State Attorney by SAMWU.¹⁶ As such neither the Provincial Minister or the Premier had knowledge of the matter until the judgment, and its effect, was brought to the attention of the Western Cape Department of Local Government during or about late April 2016.¹⁷

¹⁴ Bredell affidavit para 19.

¹⁵ Bredell affidavit para 20.

¹⁶ Bredell affidavit para 21.

¹⁷ Bredell affidavit para 22.

19. After having read and considered the judgment, the Provincial Minister formed the view that the consequences of a confirmation of the High Court's declaration of invalidity, would have disastrous effects for municipalities in the Western Cape (over which he has a monitoring and support role and municipalities in other provinces), if due regard is not had to the issue of retrospectivity.¹⁸ In particular the effect that a confirmation of the High Court's order of invalidity, without a limitation on the retrospectivity thereof, would have on the legality of the myriad of decisions already taken, pursuant to the Amendment Act to date, all of which could potentially 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.¹⁹
20. It is submitted that a full and proper explanation has been tendered for why the further evidence sought to be adduced was not led at the hearing before the High Court. It is further submitted that the failure to lead the relevant evidence before the High Court was not due to any negligence or remissness on the part of the Provincial Minister or the Premier.²⁰

¹⁸ Bredell affidavit para 23.

¹⁹ *Id.*

²⁰ See *De Aguiar* at para 11.

Materiality of the further evidence

21. Having regard what is set out below, it is apparent that the evidence which is sought to be placed before this Court is true and is unlikely to give rise to substantial disputes of fact.

22. 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 of the failure to limit the retrospectivity of such an order.

23. As such, it is submitted that the evidence sought to be placed 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 called upon to make in the confirmation proceedings.²¹

²¹ Bredell affidavit para 28.

24. It is further submitted that the evidence 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 for the evidence to be admitted.²²

No prejudice and interests of justice

25. None of the parties to these proceedings have opposed the admission of the further evidence.

26. On 25 April 2016 the State Attorney sought the consent of all the parties who had participated in the proceedings before the High Court for the admission of the further evidence.²³ On 10 May 2016 SAMWU's attorneys indicated that they had requested instructions from their client in regard to the request to file the further affidavit, however, to date no further response has been received from SAMWU.²⁴ 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

²² Bredell affidavit para 29.

²³ Bredell affidavit annexure AB1.

²⁴ Bredell affidavit annexure AB2.

response had been received to the letter of 25 April 2016 that the Provincial Minister's affidavit would be prepared.²⁵

27. No any objections have been raised subsequent to the delivery of the Provincial Minister's affidavit.²⁶ Further, it is submitted that no party would be prejudiced by the admission of the further evidence.²⁷
28. Given that there is neither opposition nor prejudice, it is submitted that the further evidence ought to be admitted.²⁸
29. Further, it appears from the affidavits filed in the High Court that one aspect of the retrospectivity issue was canvassed by the parties and that it was not in dispute, as between SAMWU and the National Minister, that in the circumstances of this matter a limitation on the retrospectivity of any order of invalidity made would be appropriate.²⁹ However, the issue was not considered by the High Court in its judgment.

²⁵ Bredell affidavit annexure AB3.

²⁶ The affidavit was served on the various parties on 19 August 2016.

²⁷ Bredell affidavit para 29.

²⁸ *Falk and Another v National Director of Public Prosecutions* 2011 (11) BCLR 1134 (CC) at para 50-51.

²⁹ AA (first respondent) rec. vol. 1 p. 57 para 16.5.2. The National Minister suggests that the suspension any declaration of invalidity for a period of 24 months would be appropriate. RA rec. vol. 2 p. 154 para 9. SAMWU states that it has no objection to any order of constitutional invalidity that might be made being suspended for a period of 12 months.

30. Given that the appropriateness or otherwise of a limitation of the retrospectivity of the declaration of invalidity was not dealt with by the High Court, and given that none of the parties placed any evidence before that Court as to the potentially far reaching and prejudicial effects of a declaration of invalidity, without more, it is submitted that it would be in the interest of justice for this Court to receive the further evidence and submissions regarding the potential consequences of such an order. For these reasons it is further submitted that it would be in the interests of justice for this Court to receive submissions on what would constitute a just and equitable remedy taking into account all the circumstances of this matter.

IMPLICATIONS OF CONFIRMING THE ORDER OF INVALIDITY

31. 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.³⁰

32. The National Treasury in its 2011 Local Government Budgets and Expenditure Review ('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.³¹

33. This conclusion was based, *inter alia*, on the National Treasury's –

33.1. analysis of municipal finances which suggested that personnel issues lay at the heart of many of the financial problems experienced by municipalities;³²

³⁰ Bredell affidavit para 36.

³¹ Bredell affidavit para 40.

³² Bredell affidavit para 38.

- 33.2. findings 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;³³
- 33.3. estimation that at an aggregate level, approximately 30% of the total municipal operating budgets at the time were spent on remuneration of personnel;³⁴ and
- 33.4. conclusion that emphasis needed to be placed on whether this expenditure yielded value for money for municipalities and the communities they serve.³⁵

³³*Id.*³⁴

Bredell affidavit para 39.

³⁵*Id.*

34. In essence the Amendment Act sought to:³⁶
- 34.1. address the appointment and competencies of municipal managers and managers directly accountable to municipal managers (‘senior managers’);
 - 34.2. regulate the employment of municipal employees who had been dismissed or were subject to disciplinary processes by other municipalities; and
 - 34.3. regulate the duties, remuneration, benefits and other terms and conditions of employment for municipal managers and senior managers.
35. In addition, the Amendment Act introduced the requirement that municipal managers and senior managers may not simultaneously hold political office in a political party.³⁷

³⁶ Bredell affidavit para 43.

³⁷ Section 56A.

36. 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 the office of the Provincial Minister *vis-à-vis* the regulation of the employment of municipal managers and senior managers in municipalities.³⁸
37. The implications of certain of the key amendments brought into force by the Amendment Act are dealt with below.

Appointment and remuneration of municipal managers

38. Prior to the coming into force 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, while providing that '*a person appointed as municipal manager must have the relevant skills and expertise to perform the duties associated with that post*', did not define what constituted the relevant skills and expertise.

³⁸ Bredell affidavit para 45.

39. This *lacuna* created the potential for the appointment of persons who lacked the skills necessary to properly perform the tasks of municipal managers.³⁹ 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.⁴⁰ The legislature, in order to address this *lacuna*, enacted Section 54A of the Systems Act.⁴¹
40. If the entire Amendment Act is declared unconstitutional, without any limitation on the retrospectivity thereof, several key concerns arise.
41. The Regulations enacted in terms of the provisions of section 72(1)(gB)⁴² of the Systems Act, would be subject to challenge if the retrospective effect of

³⁹ Bredell affidavit para 48.

⁴⁰ *Id.*

⁴¹ Bredell affidavit para 49.

⁴² Section 72(1)(gB), which was inserted into the Systems Act by the Amendment Act, 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. The National Minister has promulgated 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') in terms of this section.

the declaration of invalidity is not suspended, as the Appointment Regulations will in effect be *ultra vires* the Systems Act.⁴³

42. The recruitment and appointment procedures adopted by municipalities in order to comply with the provisions of Section 54A and the Appointment Regulations will similarly be rendered *ultra vires* and subject to challenge.⁴⁴
43. 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.⁴⁵
44. 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.⁴⁶ So too, would any decision in terms of which the appointment of a person as municipal manager was declared null and void

⁴³ Bredell affidavit para 50.2.

⁴⁴ Bredell affidavit para 50.3.

⁴⁵ Bredell affidavit para 50.4.

⁴⁶ Bredell affidavit para 50.5.

for want of compliance with the provisions Section 54A read with the Appointment Regulations⁴⁷, be open to challenge.⁴⁸

45. Further, the Amendment Act inserted section 72(2A) into the Systems Act which empowers the National Minister to make regulations relating to the duties, remuneration, benefits and other terms and conditions of employment of municipal managers and senior managers.
46. The National Minister has, in terms of section 72(2A) enacted Regulations determining the upper limit of the total remuneration package payable to municipal managers and senior managers with effect from 1 July 2014 and determining the total remuneration packages payable to municipal managers and senior managers with effect from 1 July 2015.⁴⁹

⁴⁷ Section 54A(3)(a) and (b).

⁴⁸ Bredell affidavit para 50.5. The provisions of section 56 of the Systems Act in terms of which senior managers are appointed, were substituted in their entirety by the Amendment Act and now mirror the provisions of Section 54A. As such, the same concerns which arise in regard to the appointment of municipal managers apply equally to the recruitment and appointment of senior managers during the same period. Bredell affidavit para 51-53.

⁴⁹ GN 225 of 29 March 2014: Upper limit of total remuneration package payable to municipal managers and managers directly accountable to municipal managers (*Government Gazette* No. 37500). GN 578 of 1 July 2015: Local Government: Total remuneration packages payable to Municipal Managers and Managers directly accountable to Municipal Managers (*Government Gazette* No. 38946).

47. Any municipal manager or senior manager whose remuneration package has been determined in accordance with these 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.⁵⁰

Performance agreements for municipal and senior managers

48. Municipal managers and senior managers may only be appointed in terms of a written employment contract 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). Prior to the coming into force of the Amendment Act performance agreements were required to be concluded within a reasonable period.⁵¹
49. 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

⁵⁰ Bredell affidavit para 56-57. In the Western Cape Province 95 senior managers have been appointed to their posts since the coming into force of the Amendment Act.

⁵¹ 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 concluded such agreements. Bredell affidavit para 59.

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

50. 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).⁵² In the absence of performance agreements, municipal managers and senior managers cannot be held accountable for not meeting their key deliverables which will ultimately impact on service delivery.⁵³

Limitations on the employment of dismissed municipal staff

51. The Amendment Act introduced Section 57A which, *inter alia*, provides limitations on how and when municipal staff dismissed for misconduct may be re-employed. In addition it expressly prohibits the re-employment of municipal staff dismissed for financial misconduct contemplated in section 171 of the Local Government: Municipal Finance Management Act 56 of 2003, corruption or fraud, for a period of 10 years.

⁵² Bredell affidavit para 61.

⁵³ *Id.*

52. 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.
53. If an order limiting the retrospectivity of the order of invalidity 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.⁵⁴
54. 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.⁵⁵ In addition, persons who were employed contrary to the aforementioned positions and subsequently dismissed on the

⁵⁴ Bredell affidavit para 64.

⁵⁵ Bredell affidavit para 65.

basis of non-compliance with the aforementioned statutory and regulatory requirements could challenge their dismissals as being substantively unfair.⁵⁶

Municipal staff establishments

55. 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.⁵⁷ 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.
56. 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.
57. Since the coming into effect of the Appointment Regulations, 28 municipalities in the Western Cape have reviewed their staff

⁵⁶ *Id.*

⁵⁷ Bredell affidavit para 66.

establishments and these have been approved by the respective municipal councils as required by the Appointment Regulations.⁵⁸

58. In the absence of an order limiting the retrospectivity of the High Court's order of invalidity, it is not clear what the status of the reviewed staff establishments of these 28 municipalities in the Western Cape will be.⁵⁹ Should these staff establishments be found to be invalid, the contracts of officials and municipal staff appointed in terms of such staff establishments would similarly be invalid.⁶⁰
59. Furthermore, municipalities will be at large to appoint staff irrespective of whether such posts are provided for in their particular staff establishments.⁶¹

Item 2A of the code of conduct for councillors

60. 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

⁵⁸ Bredell affidavit para 71.

⁵⁹ Bredell affidavit para 72.

⁶⁰ *Id.*

⁶¹ Bredell affidavit para 73.

the council which conflicts with any legislation applicable to local government.

61. 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.⁶² 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.⁶³

REMEDY

62. It is submitted that for the reasons set out above this is an apposite matter for this Court to exercise its powers to regulate the consequences of the High Court's declaration of invalidity.

⁶² Bredell affidavit para 75.

⁶³ *Id.*

63. The power to regulate the consequences of a declaration of invalidity flows from Section 172(1) of the Constitution, which provides:

“When deciding a constitutional matter within its power, a court—

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.” [emphasis added]

64. Section 172(1)(b)(i) contains a broad discretionary power that allows Courts to limit the retrospectivity of a declaration of invalidity, provided that it is *'just and equitable'* to do so.⁶⁴ As such a confirmation of the High Court's declaration of invalidity will have retrospective effect unless this Court orders otherwise for reasons pertaining to justice and equity.⁶⁵

65. The exercise of the wide powers granted to a Court to suspend the effect of an order of invalidity can be utilised for numerous reasons, which often

⁶⁴ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 ('*National Coalition*') at para 87.

⁶⁵ *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd* 2015 (5) SA 370 (CC) (*Cross-Border Road Transport Agency*) at para 21. See also *National Coalition* at para 84.

relate to giving the legislature time to intervene or to concerns as to the effect an order might have on the administration of justice.⁶⁶

66. As a general principle an order of invalidity should have no effect on matters which have been finalised prior to the date of the order of invalidity.⁶⁷ Further, this Court almost invariably exercises the power to limit the effect of retrospective invalidity.⁶⁸ Where good grounds exist to limit retrospectivity, this Court will exercise its power to do so.⁶⁹
67. Indeed this Court in *Mistry v Interim Medical and Dental Council of South Africa and Others*⁷⁰ found that there was a 'general rule favouring prospectivity'.⁷¹ In that matter the Court refused an order with retrospective effect and granted one prospectively only, on the basis that any general declaration of invalidity with retrospective effect -

“would impact negatively on good government by rendering unlawful all such searches conducted after the retrospective date specified. This could create considerable uncertainty with regard to the validity of proceedings which were

⁶⁶ *Cross-Border Road Transport Agency* at para 25. See also *De Kock and Others v Van Rooyen* 2005 (1) SA 1 (SCA) para 25.

⁶⁷ *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at para 32.

⁶⁸ See *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC) ('*Estate Agency Affairs Board*') at para 48 and footnote 65, and the cases cited therein.

⁶⁹ *Estate Agency Affairs Board* at para 48.

⁷⁰ *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) ('*Mistry*').

⁷¹ *Mistry* at para 41.

conducted on the basis of evidence obtained as a result of such searches. It could also give rise to delictual claims by persons subjected to searches and seizures after that date, and add further burdens to a health budget already under considerable strain.”⁷²

68. This Court, in *Estate Agency Affairs Board* stated that though the Constitutional provisions in *Mistry* were different (*Mistry* having been decided in terms of the Interim Constitution), this Court’s general approach in that matter was apposite.⁷³
69. It is trite that this Court may make an order of prospective invalidity or limit the retrospective effect of the order of invalidity to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under the invalidated statute.⁷⁴
70. Further, in determining whether an order of prospective invalidity ought to be made, the interests of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and the desirability of a smooth transition from the old legislative regime to the new.⁷⁵

⁷² *Id.*

⁷³ *Estate Agency Affairs Board* at para 50.

⁷⁴ *Minister of Police and Others v Kunjana* (CCT253/15) [2016] ZACC 21 (27 July 2016) at para 35. See also *S v Zuma* 1995 (2) SA 642 (CC) at para 43.

⁷⁵ *Id.*

71. If the Court is persuaded upon a consideration of these conflicting concerns that it is appropriate to suspend the order made, it will do so in order to afford the legislature an opportunity to correct the defect.⁷⁶
72. This Court has stated that where a host of possibilities exist for curing the constitutional invalidity (and a Court is able to provide appropriate interim relief to the affected litigant) it will generally be best to permit the legislature to determine in the first instance how the unconstitutionality should be cured.⁷⁷
73. In this matter, a limitation of the retrospective effect of the order of invalidity and an order directing that the order of invalidity should operate only prospectively will not deprive SAMWU, as the successful litigant in this particular matter, of effective constitutional relief.
74. 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,

⁷⁶ *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC) at para 21.

⁷⁷ *C and Others v Department of Health and Social Development, Gauteng, and Others* 2012 (2) SA 208 (CC) at para 48.

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.

75. The potential disruption to the municipalities in the Western Cape Province (and indeed the rest of the country) as a consequence of a failure to limit the retrospective effect of any order of unconstitutionality is likely to have far reaching effects on the ability of such municipalities, many of which are already facing serious capacity constraints, to deliver services to the communities which they serve.
76. In light 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 it is submitted 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.

CONCLUSION

77. In the event that this Court were to confirm the order of invalidity, it is submitted that such order should operate with prospective effect only and further that the order should be suspended for a period of 24 months to allow the legislature a reasonable period of time to remedy the invalidity.

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26 August 2016