



CONSTITUTIONAL COURT OF SOUTH AFRICA

South African Municipal Workers' Union v Minister of Co-operative Governance and Traditional Affairs and Others

CCT 54/16

Date of hearing: 10 November 2016

Date of judgment: 09 March 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today, the Constitutional Court handed down judgment in an application for confirmation and leave to appeal arising from an order of the High Court of South Africa, Gauteng Division, Pretoria (High Court), in which the Court declared the Local Government: Municipal Systems Amendment Act (Amendment Act) unconstitutional in its entirety and declined to decide applicant's challenge to the constitutional validity of section 56A of the Amendment Act.

In May 2010, the Bill preceding the Amendment Act was submitted to Parliament. It was introduced in the National Assembly and referred to the Joint Tagging Mechanism (JTM) for classification and to the Portfolio Committee on Co-operative Governance and Traditional Affairs for consideration. During the enactment process, the JTM "tagged" the Bill as an ordinary Bill not affecting the provinces.

On 2 July 2011, the Bill was enacted following the process for ordinary bills not affecting the provinces, set out in section 75 of the Constitution. Among other things, the Amendment Act inserted section 56A into the Act, which introduced the restriction that municipal managers or managers directly accountable to municipal managers could no longer hold political office in a political party.

The South African Municipal Workers' Union (SAMWU) instituted proceedings in the High Court to challenge the constitutionality of the Amendment Act. First, it contended that the Amendment Act was incorrectly tagged as an ordinary bill not affecting the

provinces (section 75 bill), rather than an ordinary bill affecting the provinces (section 76 bill) (procedural challenge). Second, SAMWU submitted that section 56A, when read together with the definition of “political office” in section 1, is inconsistent with the Constitution as it amounts to an unjustifiable limitation of a number of rights, including the right to make free political choices as enshrined in section 19(1) of the Constitution (substantive challenge).

Regarding the procedural challenge, the High Court declared that the Amendment Act is unconstitutional and invalid as it failed to comply with the procedures set out in section 76 of the Constitution. The High Court found it unnecessary to decide the substantive challenge.

Before this Court, SAMWU sought a confirmation of the High Court’s declaration of invalidity with respect to the procedural challenge; and direct access to appeal the High Court’s failure to make a determination on the substantive challenge. The Minister did not oppose the confirmation of the declaration of invalidity, but argued that the substantive issue should not be determined if the confirmation application succeeded. The Speaker of the National Assembly and Chairperson of the National Council of Provinces jointly sought to limit the retrospective effect of the confirmation of the declaration. The Premier of the Western Cape did not oppose the application, but sought to place further evidence before the Court on the retrospective effect of the declaration of invalidity.

The majority judgment, written by Khampepe J (Nkabinde ACJ, Cameron J, Froneman J, Madlanga J, Mbha AJ, Mhlantla J and Musi AJ concurring), upheld the procedural challenge and confirmed the High Court’s declaration of invalidity. The majority held that the Bill provided for legislation aimed at promoting the values governing the public administration set out in section 195(1) of the Constitution, and as a result ought to have been enacted following the section 76 process. The Amendment Act was accordingly found to be unconstitutional for want of compliance with section 76 of the Constitution. Having found the Amendment Act to be unconstitutional in its entirety, the majority declined to consider the substantive challenge, as the success of the procedural challenge was dispositive of the entire matter.

The majority held that in order to avoid disruption, the declaration of invalidity should operate prospectively, and should be suspended for 24 months to allow the Legislature an opportunity to remedy the defect. SAMWU submitted that the declaration of invalidity should not be suspended in respect of section 56A, as the continued operation of this section is not critical to the effective administration of municipalities. The majority rejected this argument, and found that there was no legal basis to make an exception for section 56A in relation to remedy.

The minority judgment, written by Jafta J (Zondo J concurring), agreed with the majority judgment except on one issue, namely, whether, during the period of suspension, municipalities may enforce section 56A. The minority judgment held that since it was conceded that municipalities do not require section 56A for their day to day

administration, the duty to afford SAMWU with a temporary constitutional relief dictated that the section be excluded from the provisions that will remain in force. The minority would have suspended the declaration of invalidity on the condition that municipalities are prohibited from enforcing section 56A during the period of suspension, in order to afford SAMWU immediate constitutional relief.