**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 54/16

In the matter between:

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| **SOUTH AFRICAN MUNICIPAL WORKERS' UNION** | Applicant |
| and | |
| **MINISTER OF CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS** | First Respondent |
| **SPEAKER OF THE NATIONAL ASSEMBLY** | Second Respondent |
| **CHAIRPERSON OF THE 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 |

**Neutral citation:** *South African Municipal Workers' Union v Minister of Co-Operative Governance & Traditional Affairs and Others* [2017] ZACC 7

**Coram:** Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J

**Judgments:** Khampepe J (majority): [1] to [104]
Jafta J (dissenting): [105] to [122]

**Heard on:** 10 November 2016

**Decided on:** 9 March 2017

**Summary:** Declaration of invalidity — confirmation — procedural challenge — substantive challenge — classification of bills — test for tagging

Separation of powers — legislative process — remedy — suspension — costs — legislative competence

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**ORDER**

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Applications for confirmation of the order of the High Court of South Africa, Gauteng Division, Pretoria, and leave to appeal from the High Court of South Africa, Gauteng Division, Pretoria:

The following order is made:

1. The declaration of invalidity of the Local Government: Municipal Systems Amendment Act 7 of 2011, made by the High Court of South Africa, Gauteng Division, Pretoria, is confirmed.
2. The declaration of invalidity is suspended for a period of 24 months to allow the Legislature an opportunity to correct the defect.
3. Leave to appeal is granted.

4. The applicant's late filing of its written submissions is condoned.
5. No order is made on the appeal in respect of the Substantive Challenge.
6. The appeal against the order of the High Court in respect of costs succeeds and paragraph 3 of that order is set aside and replaced with the following:

   "The second and third respondents are ordered to pay the applicant's costs in respect of the Procedural Challenge to the Local Government: Municipal Systems Amendment Act 7 of 2011, including costs of two counsel."
7. The second and third respondents are ordered to pay the applicant's costs in respect of the Procedural Challenge in this Court, including the costs of two counsel.

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**JUDGMENT**

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KHAMPEPE J (Nkabinde ACJ, Cameron J, Froneman J, Madlanga J, Mbha AJ, Mhlantla J and Musi AJ concurring)

*Introduction*

[1] This matter comes to us as two distinct but related applications brought by the applicant. The first is a confirmation application, in which the applicant seeks confirmation of a declaration of constitutional invalidity of the Local Government: Municipal Systems Amendment Act (Amendment Act)[1] made by the High Court of South Africa, Gauteng Division, Pretoria (High Court),

[1] 7 of 2011.

on 23 February 2016 (Procedural Challenge).[2] The second is an application for leave to appeal directly to this Court against the same order of the High Court in respect of its failure to find that section 56A of the Amendment Act, read with the definition of "political office" in section 1,[3] is inconsistent with the Constitution (Substantive Challenge) and in respect of its failure to award the applicant costs.[4]

*Parties*

[2] The applicant is the South African Municipal Workers' Union (SAMWU), a registered trade union whose members are drawn from all levels of municipal employees.

[3] There are thirteen respondents, the majority of whom have not participated in the proceedings. Only the respondents taking part in the proceedings are detailed below.

(a) The first respondent is the Minister of Co-operative Governance and Traditional Affairs (Minister). The Minister opposes the Substantive Challenge and has undertaken to abide the judgment of the High Court regarding the Procedural Challenge.

(b) The second and third respondents, who appear jointly, are the Speaker of the National Assembly (Speaker) and the Chairperson of the National Council of Provinces (Chairperson) respectively. Their opposition in this application is limited to the Procedural Challenge; they do not oppose the

[2] *South African Municipal Workers Union v Minister of Co-Operative Governance and Traditional Affairs* [2016] ZAGPPHC 733 (High Court judgment).

[3] The Amendment Act inserted section 56A into the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) and inserted the definition of "political office" into section 1 of the Systems Act. For ease of reference I refer to the new section 56A of the Systems Act as section 56A of the Amendment Act.

[4] I will refer to the confirmation application as the "Procedural Challenge" and the application challenging the constitutionality of section 56A, read with the definition of "political office" in section 1, of the Amendment Act as the "Substantive Challenge".

confirmation of the declaration of invalidity but seek that this Court amend the order of the High Court to suspend the declaration of invalidity and limit its retrospective effect.

(c) The twelfth respondent is the Premier of the Western Cape (Premier). The Premier did not participate in the High Court proceedings. Before this Court, the Premier seeks only to make submissions and place evidence of the negative consequences that will ensue if the declaration of invalidity is not suspended and if its retrospective effect is not limited.

*Factual background*

[4] On 5 July 2011, the Amendment Act was promulgated.[5] It amended the Systems Act[6] to, inter alia, address what was perceived to be an alarming increase in the instances of maladministration within municipalities. The Amendment Act introduced measures to ensure that professional qualifications, experience and competence were the overarching criteria governing the appointment of municipal managers or managers directly accountable to municipal managers in local government, as opposed to political party affiliation.[7]

[5] The bill preceding the Amendment Act was submitted to Parliament as the Local Government: Municipal Systems Amendment Bill (Bill).[8] Thereafter the Bill was "tagged" by the Joint Tagging Mechanism (JTM), a committee of Parliament consisting of the Speaker and the Deputy Speaker of the National Assembly and the Chairperson and the Deputy Chairperson of the National Council of Provinces.[9]

[5] 7 of 2011: Local Government: Municipal Systems Amendment Act, 2011, GN 559 *GG* 34433, 5 July 2011.

[6] See n 3 above.

[7] See the debates of the National Assembly (Hansard) 24 March 2011 at 2006-2010 (Mr E N Mthetwa, Acting Minister of Co-operative Governance and Traditional Affairs).

[8] Local Government: Municipal Systems Amendment Bill, 2010, GN 394 *GG* 33189, 14 May 2010.

[9] Chapter four of the Constitution provides for Parliament to follow separate procedures for enacting:

[6] The process that was followed in passing the Bill was:

(a) The Bill was introduced in the National Assembly on 27 July 2010 and referred to the JTM.
(b) On 28 July 2010, the JTM received a legal opinion from a parliamentary legal advisor stating that the Bill contained no provision to which the procedure set out in section 76 of the Constitution applied, and recommending that it be classified as a section 75 bill.
(c) The recommendation was approved by the Speaker on 3 August 2010 and by the Chairperson on the following day.
(d) On 8 February 2011, the portfolio committee held public hearings in respect of the Bill and, on 22 March 2011, presented an amended version, which was passed in the National Assembly on 12 April 2011.
(e) The National Council of Provinces (NCOP) passed the Bill on 19 April 2011, and it was signed by the President on 2 July 2011.

[7] The procedure followed in passing the Bill forms the basis of SAMWU's Procedural Challenge.

[8] Section 56A of the Amendment Act read with the definition of "political office" in section 1 introduced the restriction that municipal managers or managers directly accountable to municipal managers could no longer hold political office in a political party.

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(a) ordinary bills that do not affect the provinces (section 75);
(b) ordinary bills that affect the provinces (section 76);
(c) money bills (section 77); and
(d) bills amending the Constitution (section 74).

The process of classifying a bill into one of the four categories above is called "tagging". This process determines the procedures the bill must follow in order to become law. Bills are tagged by the JTM, advised by the Parliamentary Legal Adviser. The JTM decides on the classification of the bill by consensus.

[9] Section 56A of the Amendment Act provides:

> "(1) A municipal manager or manager directly accountable to a municipal manager may not hold political office in a political party, whether in a permanent, temporary or acting capacity.
>
> (2) This section does not apply to a person appointed as municipal manager or a manager directly accountable to the municipal manager when subsection (1) takes effect."

[10] The definition of "political office" in section 1 is as follows:

> "'**political office**', in relation to a political party or structure thereof, means—
>
> *(a)* the position of chairperson, deputy chairperson, secretary, deputy secretary or treasurer of the party nationally or in any province, region or other area in which the party operates; or
>
> *(b)* any position in the party equivalent to a position referred to in paragraph *(a)*, irrespective of the title designated to the position".

[11] The above sections of the Amendment Act form the basis of SAMWU's Substantive Challenge.

*Litigation History*

*In the High Court*

[12] On 23 January 2013, SAMWU instituted proceedings in the High Court to challenge the constitutional validity of the Amendment Act on two bases: the Procedural Challenge and the Substantive Challenge.

[13] SAMWU sought the following relief in the High Court:

(a) an order declaring the entire Amendment Act to be inconsistent with the Constitution and invalid on the basis that an incorrect procedure had been followed in enacting it;

(b) an order declaring section 56A of the Amendment Act, read with the definition of "political office" in section 1, to be inconsistent with the Constitution and invalid on the basis that it amounted to an unjustifiable limitation, in terms of section 36 of the Constitution, of the right to make free political choices in terms of section 19(1) of the Constitution;[10]

(c) an order referring the declarations of invalidity sought to this Court for confirmation if granted; and

(d) an order directing the Minister to pay the costs of the application, jointly and severally with any of the respondents who wished to oppose the application.

[14] The Minister opposed the Substantive Challenge. The Speaker and the Chairperson opposed the Procedural Challenge.

*Procedural Challenge*

[15] SAMWU contended that the Amendment Act was incorrectly tagged as an ordinary bill not affecting the provinces (section 75 bill). It argued that the Bill should have been tagged as an ordinary bill affecting the provinces (section 76 bill), and should consequently have been passed in accordance with the provisions of section 76 of the Constitution.[11] Section 76(3)[12]

[10] This section provides:

"Every citizen is free to make political choices, which includes the right—

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause."

[11] High Court judgment above n 2 at paras 8-9.

[12] This section provides:

"A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:

(a) Section 65(2);

(b) section 163;

provides that a bill *must* be dealt with in terms of either sections 76(1) or 76(2)[13] if it provides for legislation envisaged in, inter alia, sections 195(3) and (4) or section 197 of the Constitution. SAMWU argued that the Bill fell within these categories. This was the thrust of SAMWU's attack. In addition, SAMWU relied on the powers conferred by sections 154 and 155 of the Constitution on both national and provincial governments to regulate municipalities and municipal executive authority through setting standards and monitoring compliance with those standards.

[16] In the alternative, SAMWU contended that the Bill constituted legislation envisaged in section 44(3) of the Constitution as it provided for matters reasonably necessary for, or incidental to, the effective exercise of power concerning a matter listed in Schedule 4 of the Constitution ("Functional Areas of Concurrent National and Provincial Legislative Competence").[14]

[17] It argued that, as a result of the Bill having been incorrectly tagged, when the NCOP voted in terms of the procedure laid down in section 75(2)(a) of the Constitution,[15] each *provincial delegate* in a provincial delegation had one vote. SAMWU submitted that, had the Bill been

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(c) section 182;

(d) section 195 (3) and (4);

(e) section 196; and

(f) section 197."

[13] Section 76(1) provides for the procedure to be followed when the National Assembly passes a bill. Section 76(2) provides for the procedure to be followed when the NCOP passes a bill. Both subsections are significantly more onerous than the procedures provided for under section 75 and they both give more weight to the position of the NCOP, chiefly through the requirement that if one House rejects a bill accepted by the other, the legislation must be referred to the Mediation Committee.

[14] See n 12 above. Bills falling within a functional area listed in Schedule 4 must be dealt with in accordance with the procedures set out in section 76.

[15] This section provides:

"When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead—

(a) each delegate in a provincial delegation has one vote".

correctly categorised, in terms of section 76, the procedure in section 65(1)[16] would have been followed and each *province* would have had a vote and would have been required to be present (in contrast to section 75(2), which only requires that one third of the provincial delegates be present). SAMWU therefore asserted that the Amendment Act was invalid for want of compliance with section 76.

[18] The Speaker and the Chairperson made joint submissions in the High Court on the Procedural Challenge. In an explanatory affidavit, the Speaker took pains to explain the process that was followed in tagging the Bill, but stated that the Speaker and the Chairperson would abide the decision of the Court. No averments were made as to whether the JTM erred in its tagging of the Bill or whether the Amendment Act is unconstitutional.

[19] The Speaker and Chairperson changed their position at a later stage in the proceedings and filed written submissions opposing the relief sought by SAMWU. They submitted that the Bill was not a bill substantially affecting the provinces and that it could not be construed as legislation contemplated in section 195(3) of the Constitution because the legislation contemplated there is primarily the Public Service Act.[17]

[20] The Minister's opposition in the High Court was limited to the Substantive Challenge. However, he submitted, in respect of the Procedural Challenge, that "in the unlikely event [that the High Court] were to find that the Bill was tagged incorrectly . . . such a technical error on a subject

[16] Section 65(1) of the Constitution provides:

> "Except where the Constitution provides otherwise—
>
> (a) each province has one vote, which is cast on behalf of the province by the head of its delegation; and
>
> (b) all questions before the National Council of Provinces are agreed when at least five provinces vote in favour of the question."

[17] 103 of 1994. See High Court judgment above n 2, at paras 104-5.

Parliament is competent to legislate on, would not lead to [a] declaration of constitutional invalidity by a Court of law". Alternatively, he submitted that, if the Court were to declare the Amendment Act unconstitutional, the declaration should be suspended for a period of not less than 24 months to enable Parliament to rectify its error.

[21] According to the High Court, the crux of the Procedural Challenge was whether the Amendment Act should have been promulgated in accordance with the procedures set out in section 75 or section 76 of the Constitution.[18] The Court stated that the question was whether the Amendment Act could be characterised as national legislation of the kind contemplated in sections 195(3), 195(4) or 197 of the Constitution. The High Court found that, given that "public administration" mentioned in section 195 of the Constitution refers to all spheres of government, the Amendment Act could at least be characterised as legislation envisaged in section 195(3) of the Constitution.[19]

[22] The High Court also found that the Amendment Act sets standards and minimum requirements for local government and therefore constitutes legislation envisaged by section 195(3).[20] It further held that because of the importance of the provinces' monitoring and enforcement roles with regard to municipalities, as well as their concurrent powers to pass legislation in order to support and strengthen local government, the Bill should have followed the section 76 procedure.[21]

[23] The High Court upheld the Procedural Challenge and declared the Amendment Act unconstitutional and invalid. The declaration was not

[18] High Court judgment id at para 8.

[19] Id at para 148.

[20] Id at paras 140-156.

[21] Id at para 152.

suspended, nor was there any limitation placed on the declaration's retrospective effect. The High Court referred its order to this Court for confirmation in terms of section 167(5) of the Constitution.[22]

*Substantive Challenge*

[24] SAMWU contended that section 56A of the Amendment Act is invalid because it violates a number of provisions in the Constitution.[23] The most notable is the freedom to make political choices (section 19(1))[24] and the right of employees in the public service not to be prejudiced on the ground that they support a political party or cause (section 197(3)).[25] SAMWU submitted that section 56A of the Amendment Act limits these rights in a manner that cannot be justified in terms of section 36(l) of the Constitution. The Minister conceded that this section is a limitation on certain fundamental rights, but contended that the limitation is justifiable.

[25] SAMWU also submitted that the definition of "political office" in the Amendment Act is "so broad and vague" that it is not possible for municipal managers or managers directly accountable to municipal managers, appointed after the Amendment Act came into effect, to know how to regulate their conduct and activities to comply with its provisions.

[22] This section provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

[23] Sections 9(1) (equality); 15(1) (freedom of conscience, religious thought, belief and opinion); 16 (freedom of expression); 18 (freedom of association); 19(1) (freedom to make political choices) and 22 (right to freedom of trade, occupation and profession).

[24] See n 10 above.

[25] Section 197(3) of the Constitution provides that "[n]o employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause."

[26] The Speaker and the Chairperson did not substantially oppose the Substantive Challenge in the High Court; they merely pointed out that they consider the Amendment Act to be constitutionally valid.

[27] Despite hearing arguments on the Substantive Challenge, the High Court chose not to make a determination on the issue. The High Court held that in *Tongoane* this Court decided "that it would be an exercise in futility should a court hold that an entire statute is unconstitutional, to analyse sections of it in order to ascertain the validity or demise thereof".[26] Relying on this statement, the High Court found that it was unnecessary to decide the Substantive Challenge.

[28] No costs order was made.

*In this Court*

[29] SAMWU has applied to this Court for an order in the following terms:

(a) 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;
(b) granting leave to appeal against the High Court's judgment in respect of its failure to determine whether section 56A of the Amendment Act, read with the definition of "political office" in section 1, is inconsistent with the Constitution; and the Court's failure to award SAMWU costs in its favour;
(c) upholding SAMWU's appeal in this Court;
(d) directing that the first to third respondents pay SAMWU's costs in respect of both the confirmation application and the application for leave to appeal; and

[26] High Court judgment above n 2 at para 4, referring to *Tongoane v National Minister for Agriculture and Land Affairs* [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (*Tongoane*) at para 116.

(e) granting further and or alternative relief.

*Procedural Challenge*

[30] SAMWU advances the same arguments it made before the High Court in support of the confirmation of the declaration of invalidity. It submits that the declaration of invalidity should be confirmed because the High Court correctly held that Parliament erred in tagging the Bill as a section 75 bill rather than a section 76 bill.

[31] The Minister submits that he takes no issue with the order of the High Court on the issue of tagging and accordingly does not make any submissions in this Court on the matter.

[32] The Speaker and the Chairperson submit that, despite their active opposition to the procedural relief sought in the High Court, they will abide the outcome of the proceedings before this Court. However, they submit that, should this Court confirm the declaration of invalidity, the Amendment Act must be referred back to Parliament to remedy the procedural defect, and that Parliament should be afforded a period of 24 months to follow the correct procedure.

[33] As regards the issue of retrospectivity, the Speaker and the Chairperson submit that the High Court should have limited the retrospective effect of the declaration of invalidity so that it has no bearing on any actions already taken in terms of the Amendment Act. They state that they have carefully considered the Premier's application in respect of retrospectivity and agree that the concerns raised are legitimate.

[34] The Premier submits that, if the declaration of invalidity were to apply retrospectively, it will have far-reaching and potentially devastating consequences for all municipalities. She highlights a myriad of

administrative decisions that have been taken in terms of the Amendment Act and given effect to during the time that its provisions have been in effect. The Premier submits that thousands of decisions already taken pursuant to the provisions of the Amendment Act will be rendered susceptible to review or setting aside for want of legality if the aspect of retrospectivity is not addressed by this Court.

[35] The "dire" consequences for the orderly administration of municipalities, which may result from declaring the Amendment Act invalid outright without limiting the retrospective effect, include—

(a) a negative impact on the procedures applicable to the appointment of municipal workers;
(b) potential challenges by candidates who unsuccessfully applied for a position as a municipal manager over the last five years for want of compliance with requirements brought about by the Amendment Act, against their exclusion;
(c) further similar challenges by any person whose appointment as a municipal manager was declared null and void for want of compliance with section 54A of the Amendment Act;[27]
(d) a negative impact on managers whose remuneration packages were determined in accordance with the provisions of the Amendment Act and the relevant regulations; and
(e) potential reviews of disciplinary proceedings instituted against municipal workers for contravention of any provisions introduced by the Amendment Act.

[27] Section 54A of the Amendment Act addressed matters concerning the appointment of municipal managers and acting municipal managers.

[36] The Premier submits that this would be an appropriate matter for this Court to exercise its discretion in terms of section 172(1)(b) of the Constitution[28] by—

(a) ordering that the declaration of invalidity will operate prospectively; and
(b) providing the Legislature with time to remedy the procedural defect of the Amendment Act in order to limit the disruptive effects that the order of invalidity will have on the orderly and effective administration of municipalities across the country.

*Substantive Challenge*

[37] SAMWU submits that the High Court's failure to decide the Substantive Challenge was based on an incorrect reading of *Tongoane*. It argues that *Tongoane* is distinguishable on the facts as that decision concerned legislation that was due to be repealed. SAMWU also argues that, as the High Court is not a court of final appeal, it would have been desirable for the High Court to have expressed its views on the Substantive Challenge.[29]

[38] SAMWU argues that it is in the interests of justice for this Court to determine the Substantive Challenge. SAMWU submits that if the declaration of invalidity is not confirmed, section 56A of the Amendment Act will remain in force and will continue to violate constitutional rights. If the declaration of invalidity is confirmed, SAMWU expresses concern over a possible re-enactment of section 56A without any changes. In this respect,

[28] This section provides:

> "When deciding a constitutional matter within its power, a court—
>
> (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."

[29] Citing *S v Jordan* (*Sex Workers Education and Advocacy Task Force*) [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) (*Jordan*) at para 21.

SAMWU points out that the Minister's position continues to be that the provision is of great importance and is sufficient to justify the limitation of political rights. In SAMWU's view, this means that the constitutional rights of municipal managers or managers directly accountable to municipal managers remain under threat.

[39] The Minister argues that, if the entire Amendment Act is declared unconstitutional, it is unnecessary to decide the Substantive Challenge. He submits that the High Court was correct not to decide the Substantive Challenge. He further argues that hearing the Substantive Challenge in this Court is premature as the High Court has not considered that issue. He concludes that there is no appealable judgment or order.

[40] Alternatively, the Minister argues that, if this Court takes the view that it must, in the interests of time and costs, decide the Substantive Challenge, section 56A of the Amendment Act does not violate the Constitution as it constitutes a justifiable limitation of rights.

*Issues*

[41] The preliminary issues to be determined are:

(a) Whether this Court has jurisdiction to determine the applications before it.
(b) Whether leave to appeal should be granted.
(c) Whether SAMWU's late filing of its written submissions should be condoned.
(d) Whether the submissions of the Premier should be considered in this Court.

[42] In respect of the Procedural Challenge, the issues to be determined are:

(a) Whether the order of constitutional invalidity should be confirmed.
(b) If the order of constitutional invalidity is confirmed—

i. whether the declaration of invalidity should be suspended to allow the Legislature an opportunity to cure the procedural defect; and
ii. whether there should be a limitation on the retrospective effect of the declaration.

[43] In respect of the Substantive Challenge, the issues to be determined are:

(a) Whether this Court should decide if section 56A of the Amendment Act violates the Constitution.
(b) Whether this Court should interfere with the costs order of the High Court.

*Preliminary issues*

*Jurisdiction and leave to appeal*

[44] The Procedural Challenge comes to us as a confirmation application in terms of section 167(5) of the Constitution. This falls within the exclusive jurisdiction of this Court.

[45] The Substantive Challenge engages this Court's jurisdiction as it is a challenge to the constitutionality of a legislative provision that is alleged to limit a right in the Bill of Rights. This falls squarely within the meaning of "constitutional matter" in section 167(3)(b)(i)[30] of the Constitution.[31]

[46] The part of SAMWU's application that deals with costs also engages this Court's jurisdiction. This Court has held that "the award of costs in a constitutional matter itself raises a constitutional issue".[32] Accordingly, I

[30] This section enables the Constitutional Court to decide "constitutional matters".

[31] See *Fraser v ABSA Bank* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 47; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 14.

[32] *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; 2017 (1) SA 645 (CC) (*LHR*) at para 12. See also *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para 10.

am of the view that the application for leave to appeal also engages this Court's jurisdiction.

[47] Section 167(3)(b) of the Constitution provides that this Court—

"may decide—

i. constitutional matters; and

ii. any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[48] In *Phillips*[33] we reiterated that "[i]t has been held in several decisions of this Court that the decision whether to grant or refuse leave to appeal is a matter for the discretion of the Court, and that it will be granted if the applicant raises a constitutional matter and it is in the interests of justice to grant leave to appeal".[34]

[49] As stated above, I am of the view that the application for leave to appeal raises constitutional issues in respect of the Substantive Challenge and the challenge as to costs in the High Court. In these circumstances, I find that it is in the interests of justice that leave to appeal be granted.

*Condonation*

[50] On 2 June 2016, this Court issued directions calling for SAMWU to file its written submissions by no later than 10 August 2016 and for the respondents to file theirs by no later than 30 August 2016.

[33] *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC).

[34] Id at para 30.

[51] SAMWU failed to file its documents by the set date. Ostensibly, this was because its correspondent attorneys failed to serve the documents on the Minister within the prescribed period. The documents were also not filed in this Court in the correct format. The Registrar consequently could not accept the filing of the documents. Upon being informed of this noncompliance, the correspondent attorneys proceeded to remedy the situation within five days.

[52] SAMWU submits that the period of noncompliance has not been lengthy and that there has been little, if any, prejudice to this Court or to any of the respondents. It further submits that a full explanation has been provided and a proper case has been made for condonation to be granted.

[53] The delay was short and, while the explanation given is unsatisfactory, it is not unreasonable to the extent that a refusal of condonation is warranted. The application is also unopposed and granting condonation will result in little prejudice to the respondents. Under these circumstances, it is in the interests of justice to grant SAMWU condonation for the late filing of its written submissions.

*Additional evidence of the Premier*

[54] The Premier has applied to submit further submissions and evidence in the proceedings before this Court. The Premier contends that her submissions ought to be considered in terms of rule 30 of the Rules of this Court, read with section 19(b) of the Superior Courts Act.[35] She also submits that section 173 of the Constitution confers on this Court the power to protect and regulate its own proceedings, taking into account the interests of justice.[36]

[35] 10 of 2013.

[36] Section 173 provides that—

[55] The Premier's submissions and further evidence deal with two principal issues:

(a) the implications of the confirmation of the High Court's order of invalidity without limiting the retrospectivity thereof; and
(b) the appropriate remedy.

[56] None of the other parties has signified any opposition to the Premier's application to place these submissions before this Court. As a matter of fact, SAMWU and the Minister have filed notices of intention to abide the relief sought by the Premier. Furthermore, the Speaker and the Chairperson have made submissions that support the arguments raised in the Premier's submissions.

[57] The applicable rule in this instance is rule 31 of the Rules of this Court. Rule 31 pellucidly states that any party to the proceedings "shall be entitled . . . to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record", provided the facts in that material are "common cause or otherwise incontrovertible" or "are of an official, scientific, technical or statistical nature capable of easy verification".[37] It is common cause that the Premier

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"[t]he Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[37] The rule provides:

"1. Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—

a. are common cause or otherwise incontrovertible; or

b. are of an official, scientific, technical or statistical nature capable of easy verification.

is a party to these proceedings. It is also common cause that the issues of suspension and retrospectivity were never canvassed in the High Court.

[58] Consequently, the information that the Premier wishes to place before this Court meets the requirements set out in rule 31 of the Rules of this Court. The submissions of the Premier are accordingly admitted.

*Procedural Challenge*

[59] The Procedural Challenge is a confirmation application in terms of section 172(2)(a) of the Constitution. This Court has stated that "section 172(2) confirmation proceedings are not routine, for it does not follow that High Court findings of constitutional invalidity will be confirmed as a matter of course".[38] Accordingly, I must first consider whether the Amendment Act is indeed unconstitutional for want of compliance with section 76 of the Constitution.

[60] The legislative process is regulated by Chapter 4 of the Constitution. Section 76(3)[39] of the Constitution stipulates that a bill must be dealt with in terms of either section 76(1) or 76(2) if it provides for legislation envisaged in, inter alia, sections 195(3) and 195(4)[40] or section 197[41] of the Constitution. The provisions of section 76(3) are peremptory.[42]

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2. All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

[38] *Phillips v Director of Public Prosecutions* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 8.

[39] See n 12 above.

[40] Sections 195(3) and (4) provide as follows:

"(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service."

[41] Section 197 provides:

[61] In *Tongoane* this Court held that the test for tagging must be informed by its purpose. In that matter, this Court recapitulated that the tagging process is not concerned with determining the sphere of government that has the competence to legislate on a matter, nor is it concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how a bill should be considered by the provinces and in the NCOP. How a bill should be considered by the provinces depends on whether it affects the provinces. The more the bill affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content. One of the purposes of tagging is therefore to determine the nature and extent of the input of provinces on the content of legislation affecting them. Indeed, all legislation mentioned in section 76(3) is legislation that substantially affects the interests of provinces.[43]

[62] The purpose of the Amendment Act is, in relevant part, stated in the preamble as follows:

"[T]o 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

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"(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

(4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service."

[42] *Tongoane* above n 26 at para 109.

[43] Id at paras 60-4.

made otherwise than in accordance with such procedures and criteria; . . . to make further provision for the evaluation of the performance of municipal managers and managers directly accountable to municipal managers; . . . 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 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".

[63] In *Tongoane* this Court stated that:

"[A]ny Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 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 section 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. . . . Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f); and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence."[44]

[64] The enquiry is thus two-fold: first, whether the Bill falls within the explicit list of legislative matters; second, whether the Amendment Act, in

[44] *Tongoane* above n 26 at para 72. My emphasis.

substantial measure, falls within one of the concurrent legislative competences of the provinces listed in Schedule 4 of the Constitution.

[65] SAMWU's procedural attack relies on sections 195(3) and (4),[45] and section 197[46] of the Constitution; the powers conferred by sections 154[47] and 155[48] of the Constitution; and, alternatively, section 44(3)[49] of the Constitution.

[66] Section 195(3) of the Constitution directs that legislation must ensure the promotion of the values and principles listed in section 195(1).[50] The

[45] See n 40 above.

[46] See n 41 above.

[47] Section 154 provides:

> "(1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.
>
> (2) Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation."

[48] Section 155 in relevant part provides:

> "(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—
>
> (a) provide for the monitoring and support of local government in the province; and
>
> (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.
>
> (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

[49] Section 44(3) provides:

> "Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4."

[50] See section 195(3) above n 40. Note that in terms of section 195(2), all the values listed in section 195(1) apply to all spheres of government.

Amendment Act aims to promote the values listed in section 195(1). This is because, if one has regard to—

(a) the preamble of the Amendment Act;
(b) section 54A (Appointment of municipal managers and acting municipal managers);
(c) section 56A (Limitation of political rights of municipal managers and managers directly accountable to municipal managers);
(d) section 57A (Employment of dismissed staff and record of disciplinary hearings);
(e) the amendment of other provisions by the Amendment Act (notably the amendments to section 106, which deals with non-performance and maladministration and gives the MEC various responsibilities regarding non-performance and maladministration); and
(f) the purposes of the Amendment Act as succinctly summarised and enumerated in the High Court judgment,[51]

the Amendment Act clearly seeks to promote a number of the values listed in section 195(1) of the Constitution, for example:

(a) the promotion and maintenance of a high standard of professional ethics;[52]
(b) the promotion of efficient, economic and effective use of resources;[53] and
(c) the cultivation of good human resource management and career development practices, to maximise human potential.[54]

[51] High Court judgment above n 2 at paras 122-140.

[52] Section 195(1)(a).

[53] Section 195(1)(b).

[54] Section 195(1)(h).

[67] This, in terms of section 76(3)(d) of the Constitution, is enough to trigger the requirement that the Bill should have been dealt with in accordance with the procedure set out in section 76.

[68] As regards the other claims, I am unconvinced that they specifically trigger the application of section 76. Section 195(4) of the Constitution deals with appointments in "public administration" and section 197 deals with the "public service". The assessment of the High Court that "the 'public service' is not considered to include municipal employees"[55] cannot be faulted. This because "public service" and "public administration" refer only to national and provincial spheres of government.[56]

[69] As to the submissions regarding sections 154 and 155 of the Constitution as well as Schedule 4, I am of the view that the Amendment Act does not constitute legislation as contemplated. However, as this Court in *Tongoane* stated, "all the legislation mentioned in section 76(3) is legislation that substantially affects the interests of provinces".[57] The fact that the Amendment Act constitutes legislation as envisaged in section 195(3) means that the interests of the provinces are sufficiently implicated to trigger the application of section 76.

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[55] High Court judgment above n 2 at para 118.

[56] For instance, section 8 of the Public Service Act 103 of 1994 states:

> "The public service shall consist of persons who are employed—
>
> (a) in posts on the establishment of departments; and
>
> (b) additional to the establishment of departments."

Departments are defined as "a national department, a national government component, the Office of a Premier, a provincial department or a provincial government component" under section 1 of the Public Service Act. It is clear that the Public Service Act excludes municipal employees. Further to this point, it would seem that the Public Service Commission established in section 196 of the Constitution has jurisdiction over the public service and yet does not have jurisdiction over municipal employees, by virtue of the definition of "public service" set out above. Furthermore, section 195(2) explicitly states that the principles set out in subsection (1) apply to administration in all spheres of government. The inclusion of this particular section is indicative of the fact that not all spheres of government (national, provincial and local) are ordinarily or automatically included in the meaning of public administration.

[57] *Tongoane* above n 26 at para 64.

[70] For the reasons stated above, the declaration of invalidity made by the High Court must be confirmed. The next matter to consider is the appropriate remedy in the circumstances. Before that, however, I will deal with the Substantive Challenge.

*Substantive Challenge*

[71] The High Court declined to decide the Substantive Challenge on the basis of this Court's statement in *Tongoane* that—

> "[o]nce it is concluded that [the relevant Act] is unconstitutional in its entirety because it was not enacted in accordance with the provisions of section 76, it seems to me that that is the end of the matter. Although the anxiety of the applicants to finalise the matter in the light of the energy and time they invested in it is understandable, there is nothing left for this Court, as a court of final appeal, to consider."[58]

[72] Although the statement applied from *Tongoane* does apply to the Substantive Challenge before this Court, it was imprudent for the High Court to have placed reliance on that statement to decide not to consider the Substantive Challenge before it. This is because, although the High Court declared the Amendment Act unconstitutional and thus invalid in its entirety on procedural grounds, its declaration was not final, nor was it binding or of any force and effect at the time of its finding.

[73] As a point of departure, it must be reiterated that this Court must reach its own conclusion on all orders of constitutional invalidity, and make the final decision on whether a law is indeed unconstitutional in terms of section 167(5) of the Constitution.[59] This position is buttressed by section 172(2)(a)

[58] High Court judgment above n 2 at para 4 citing *Tongoane* above n 26 at para 116.

[59] In *Phillips v Director of Public Prosecutions* above n 38 at para 8, this Court stressed that—

of the Constitution, which reinforces that this Court must confirm an order of invalidity before the order can have any force.[60] These provisions provide a clear limitation on the High Court's competence to make final decisions regarding the constitutional validity of the Amendment Act. Only this Court may make an order of constitutional invalidity that is final and binding.[61]

[74] This view is also supported by the reasons given by this Court for its decision not to deal with the substantive issue in *Tongoane* itself, which the High Court relied on. There this Court stated that, once the constitutional attack succeeded on procedural grounds, "there [was] nothing left for this Court, *as a court of final appeal*, to consider".[62]

[75] The High Court was plainly not a court of final appeal in this matter. This Court again expatiated on this in *Director of Public Prosecutions, Transvaal* when it held that one of the purposes of section 172(2) of the Constitution is—

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"[it] 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." (My emphasis).

[60] Section 172(2)(a) provides:

"The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament . . . *but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court*." (My emphasis).

[61] See *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at paras 60-1. See also Du Plessis et al *Constitutional Litigation* (Juta & Co. Ltd, Cape Town 2013) at 92, 101 and 104.

[62] *Tongoane* above n 26 at para 116. My emphasis.

"to *ensure that it is only this Court* that has the power to declare invalid provisions in national or provincial legislation on the grounds that they are inconsistent with the Constitution. This purpose flows from the express language of section 172(2)".[63]

[76] In addition, because this Court is not bound to confirm the High Court's order of constitutional invalidity, it would have been helpful for the High Court to have considered the Substantive Challenge in the event that this Court decided not to confirm the order of constitutional invalidity. This position was succinctly laid down in *Jordan* as follows:

"Where the constitutionality of a provision is challenged on a number of grounds and the Court upholds one such ground *it is desirable that it should also express its opinion on the other challenges*. This is necessary in the event of this Court declining to confirm on the ground upheld by the High Court. In the absence of the judgment of the High Court on the other grounds, the proper course to follow may be to refer the matter back to the trial court so that it can deal with the other challenges to the impugned provision. Thus *failure by the High Court to consider other challenges could result in unnecessary delay in the disposal of a case*."[64]

[77] Plainly put, the failure of the High Court to express its opinion on the Substantive Challenge carried with it the potential to frustrate the proper assessment of the appeal, should this Court have found it necessary to consider this issue. For these reasons, it would have been desirable for the High Court to express itself on the Substantive Challenge.

[78] The position is different in this Court. Given the success of the Procedural Challenge in this Court as a Court of final appeal, the invalidity of the Amendment Act is final. It is no longer valid and, accordingly, there is nothing to be gained from a posthumous assessment of the Substantive

[63] *Director of Public Prosecutions, Transvaal* above n 61 at para 60-1. My emphasis.

[64] *Jordan* above n 29 at para 21. My emphasis.

Challenge. The success of the Procedural Challenge is dispositive of the entire matter.

[79] During the hearing, SAMWU argued that the impugned section will very likely be re-enacted in the same terms. However, for this Court to make a determination based on this assertion would amount to pure speculation. It would be imprudent to anticipate a question of constitutional law before it is necessary to do so.[65]

[80] Moreover, in *Director of Public Prosecutions, Transvaal*, this Court held that courts' core responsibility is to adjudicate on "live disputes".[66] The Substantive Challenge is no longer a live dispute after the Procedural Challenge succeeds and the declaration of invalidity is confirmed.

[81] Although the Substantive Challenge raises issues that directly implicate rights in the Bill of Rights, there is nothing to be gained from considering the challenge at this point. There is no guarantee that the section will not change once it has been passed in accordance with the correct procedures.[67] In my view, providing a post-obit assessment of section 56A of the Amendment Act circumvents the course and intrudes upon the correct legislative process.[68]

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[65] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 21.

[66] *Director of Public Prosecutions, Transvaal* above n 61 at para 222. See also *National Coalition on Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21; *JT Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 17; *President, Ordinary Court Martial v Freedom of Expression Institute* [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at paras 12-6, 18 and 23.

See also Chaskalson et al *Constitutional Law of South Africa*, Second Edition, Volume 1 (Juta & Co Ltd, Kenwyn 2014) at 7-18.

[67] *Tongoane* above n 26 at para 116. See also *Land Access Movement of South Africa v Chairperson, National Council of Provinces* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) at para 89; *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 31.

[68] See *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46 at para 63.

*Remedy*

[82] Section 172(1)(a) of the Constitution explicates that a finding of unconstitutionality must be followed by a declaration of invalidity.[69] Section 172(1)(b) empowers this Court to make any order that is just and equitable when deciding a constitutional matter within its power, including an order suspending a declaration of invalidity or limiting the retrospective effect of that declaration.[70]

[83] The wording of section 172(1)(b) makes plain two pertinent points. The first is that, in the context of an order of constitutional invalidity, suspension of the order is not applied automatically. A declaration of invalidity renders the impugned legislation invalid immediately with retrospective effect.[71]

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[69] This section 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".

See also *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*) at para 59, where this Court explains:

> "It is clear from this provision that a Court is obliged, once it is has concluded that a provision of a statute is unconstitutional, to declare that provision to be invalid to the extent of its inconsistency with the Constitution."

[70] Section 172(1)(b) provides:

> "When deciding a constitutional matter within its power, a court—
>
> (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."

See also *Dawood* id at para 59:

> "In addition, the Court may also make any order that it considers just and equitable including an order suspending the declaration of invalidity for some time."

[71] See discussion in *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC) at para 13. See also *Executive*

This is because it is undesirable for a constitutionally invalid provision to remain effective once a court of law has found it to be inconsistent with the Constitution.

[84] The second is that, once an Act has been found to be constitutionally invalid, its invalidity operates retrospectively unless a court finds that it would be just and equitable to limit its retrospective effect. This Court's jurisprudence is quite clear about the possible factors to be taken into account when deciding whether it would be just and equitable to grant a party the exceptional remedy of suspension or limited retrospectivity.[72]

*Limiting the retrospective effect of the declaration of invalidity*

[85] This Court has held that limiting retrospectivity can be used "to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the invalidated] statute".[73] The submissions of the Premier succinctly set out the dislocating consequences that will ensue should the retrospective effect of the declaration of invalidity not be limited.

[86] A great host of decisions and actions have been taken across all nine provinces under the Amendment Act. To allow the invalidity to operate retrospectively would plainly cause disruption to the orderly and effective administration of municipalities. This would be untenable. For these reasons the declaration of invalidity must operate prospectively.

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*Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) (*Executive Council*) at paras 104-6.

[72] See for example *South African National Defence Union v Minister of Justice* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC); *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) (*Director General, Department of Home Affairs*); *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) (*Ntuli*); *Coetzee v Government of the Republic of South Africa* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC); *Executive Council* id.

[73] *Minister of Police v Kunjana* [2016] ZACC 21; 2016 (2) SACR 473 (CC); 2016 (9) BCLR 1237 (CC) (*Kunjana*) at para 63 citing *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 43.

*Suspension of the declaration of invalidity*

[87] The Speaker and the Chairperson seek a suspension of 24 months to correct the procedural defects of the Amendment Act. In the High Court, the Minister sought 24 months' suspension and SAMWU agreed to 12 months. The fact that neither party objects to a suspended declaration of invalidity does not, however, mean that we should suspend the declaration by default. This Court must balance the interests of the successful litigant, on the one hand, and the potential disruption to the administration of justice that would result from the lacuna, on the other hand.[74] When weighing these factors in *Executive Council*, this Court held that it was clear that "justice and good government" may require that the Legislature be given the opportunity to remedy the situation, if it wishes to do so.[75]

[88] The High Court did not suspend the order of invalidity. Whether the High Court erred in failing to do so should be briefly addressed. I am of the view that the answer to this question is "no", for two main reasons.

[89] First, the respondents are not automatically entitled to suspension. In *Ntuli* the Court held that in the same way that arguments are made to justify an infringement of rights under the limitations clause, it is important that all the relevant information is placed before the Court when it is asked to suspend a declaration of invalidity.[76]

[90] Second, none of the parties to the proceedings before the High Court led any specific evidence before the High Court as to the far reaching and

[74] *Director General, Department of Home Affairs* above n 72 at para 21. See also *Mistry v Interim National Medical and Dental Council* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at para 37; *Ntuli* above n 72 at para 41.

[75] *Executive Council* above n 71 at para 112.

[76] *Ntuli* above n 72 at para 41.

potentially dire consequences of a failure to limit the effect of the declaration of invalidity. This is made plain by the novel submissions of the Premier. Although the defect in the law was procedural – not substantive – and in such circumstances a suspension may often be appropriate,[77] suspension does not simply follow as a matter of course.[78] In the absence of evidence being put before the Court as to why the Court should have suspended the order, it would hardly be fair to conclude that it erred in failing to do so. It was only in the proceedings before this Court that clear reasons were given for the suspension of the order of invalidity and the limitation of its retrospective effect.

[91] Having had regard to the Premier's submissions, I am of the view that the declaration of invalidity should be suspended for a period of 24 months to allow the Legislature to cure the procedural defect.[79] The Amendment Act brought about reforms that inform the proper functioning of the municipalities. I am of the view that the reforms provided for in the Amendment Act are not provided for in any other legislation. Accordingly, suspension is justified to minimise disturbance in the running of the municipal administration.[80]

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[77] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) at paras 213-4.

[78] See *Ntuli* above n 72 at para 42. See also *Minister of Agriculture, Forestry and Fisheries v National Society for the Prevention of Cruelty to Animals* [2016] ZACC 26; 2016 (11) BCLR 1419 (CC) at paras 22-3, which dealt with the extension of a suspension order, and reiterated that extensions will not be granted lightly as a matter of course or for the asking.

[79] SAMWU consented to a suspension for a period of 12 months in the High Court. In this Court each respondent asked for a suspension for a period of 24 months. Twelve months may prove to be too short a period. In the circumstances, 24 months is perhaps a just and equitable period of suspension to allow the Legislature an opportunity to remedy the defect. See *Jordan* above n 29 at para 128; *NSPCA v Minister of Agriculture, Forestry and Fisheries* [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC) at para 41; *Matatiele Municipality v President of the Republic of South Africa (2)* [2006] ZACC 12; 2007 (1) BCLR 47 (CC) at para 99; *Doctors for Life* above n 77 at para 214.

[80] Compare *Kunjana* above n 73 at para 41, where the Court did not suspend a declaration of invalidity as a "lacuna is avoided in that the offences contemplated by the Drugs Act are already covered by section 22 of the Criminal Procedure Act, which provides for a constitutionally sound warrantless search procedure".

*Section 56A Amendment Act*

[92] During the hearing, counsel for SAMWU made submissions on why this Court should decide the Substantive Challenge even if the whole Amendment Act were declared invalid. These submissions were to a large extent grounded in concerns relating to remedy.

[93] SAMWU submitted that the Substantive Challenge should still be determined because, should this Court suspend the declaration of invalidity to enable the Legislature to cure the procedural defect, section 56A would still affect the rights of municipal managers or managers directly accountable to municipal managers during the period of suspension. SAMWU also submitted that there is no reason to suspend the declaration of invalidity in respect of section 56A, as its continued operation is not critical to the effective administration of municipalities.

[94] During the hearing, counsel for the Premier conceded that there would be little disruption to government processes were the declaration of invalidity not suspended in respect of section 56A.

[95] These concessions are, however, not determinative. The Court must still consider whether it is necessary to keep the section alive in order to avoid disruption.

[96] The evidence that SAMWU has put before this court is not conclusive. During the hearing, counsel for the applicant acknowledged that there may very well be legitimate reasons that it would be undesirable for municipal managers or managers directly accountable to municipal managers to hold certain positions of political office. Furthermore, the reason for SAMWU's "remedial attack" on the suspension of section 56A is deeply rooted in their Substantive Challenge. Put differently, their remedial arguments against the suspension of section 56A emanate from the premise that the section is

substantively unconstitutional. However, the Substantive Challenge is not being decided here. In these circumstances, singling out section 56A in respect of remedy would come unduly close to deciding the Substantive Challenge, and would likewise be a moot exercise.

[97] For these reasons, I see no legal basis to make an exception for section 56A in relation to remedy.

*Costs*

[98] The High Court did not make an order as to costs on the basis that "the arguments advanced by the respondents warranted judicial scrutiny".[81] A court of appeal can interfere with a costs order of a court a quo where that court has not exercised its discretion judicially or where it has been influenced by wrong principles or misdirection of facts.[82]

[99] SAMWU appeals the High Court's costs order on the basis that it succeeded in its Procedural Challenge. It contends, on the basis of *Biowatch*, that there was no reason for the High Court to have deprived it of costs.

[100] SAMWU argues that in *Biowatch* this Court reaffirmed the principle that ordinarily in constitutional litigation against the State "if the government loses, it should pay costs of the other side, and if government wins, each party should bear its own costs".[83]

[81] High Court judgment above n 2 at para 161.

[82] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at paras 82-92; *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at paras 138-9; *LHR* above n 32 at para 8; *Naylor v Jansen* [2006] ZASCA 94; 2007 (1) SA 16 (SCA) at para 14; *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at para 19.

[83] *Biowatch* above n 32 at paras 21-2.

Having regard to the reason given by the High Court for ordering that each party pay its own costs, as well as the clear principles this Court laid down in *Biowatch*,[84] I am of the view that the High Court did not act judicially in deciding on costs. I see nothing in the judgment of the High Court that demonstrates an effective exercise of its discretion.[85] Costs were dealt with in one line, and no reasons were given as to why *Biowatch* was not applied. Accordingly, this Court should overturn the costs order of the High Court.

[101] During the hearing, counsel for SAMWU submitted that costs in the High Court and in this Court should be borne by the respondents only in respect of that part of the application they respectively opposed. SAMWU prays that the Speaker and the Chairperson bear the costs in respect of the Procedural Challenge, and that the Minister bears the costs in respect of the Substantive Challenge.

[102] That part of SAMWU's appeal dealing with costs should succeed and the order of the High Court should be replaced with an order awarding SAMWU costs in respect of the Procedural Challenge. The costs in relation to the Procedural Challenge in the High Court should be borne by the Speaker and the Chairperson. No order was made in respect of the Substantive Challenge and I see no basis to award SAMWU costs against the Minister in this regard.

[103] As to costs in this Court, because SAMWU was successful in respect of the Procedural Challenge, costs should be awarded to SAMWU. As in the

[84] Id at paras 21 and 29. See also *Affordable Medicines* above n 82 at para 138; *Dawood* above n 69 at para 69; *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC); *Du Toit v Minister of Transport* [2005] ZACC 9; 2006 (1) SA 297 (CC); 2005 (11) BCLR 1053 (CC) at para 55; *Volks NO v Robinson* [2005] ZACC 2; 2005 (5) BCLR 446 (CC); *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC).

[85] *Biowatch* above n 32 at para 28.

High Court, these costs shall be borne by the Speaker and the Chairperson. No order has been made in respect of the Substantive Challenge; accordingly no order as to costs is made.

*Order*

[104] The following order is made:

1. The declaration of invalidity of the Local Government: Municipal Systems Amendment Act 7 of 2011, made by the High Court of South Africa, Gauteng Division, Pretoria, is confirmed.
2. The declaration of invalidity is suspended for a period of 24 months to allow the Legislature an opportunity to correct the defect.
3. Leave to appeal is granted.
4. The applicant's late filing of its written submissions is condoned.
5. No order is made on the appeal in respect of the Substantive Challenge.
6. The appeal against the order of the High Court in respect of costs succeeds and paragraph 3 of that order is set aside and replaced with the following:

   "The second and third respondents are ordered to pay the applicant's costs in respect of the Procedural Challenge to the Local Government: Municipal Systems Amendment Act 7 of 2011, including costs of two counsel."
7. The second and third respondents are ordered to pay the applicant's costs in respect of the Procedural Challenge in this Court, including the costs of two counsel.

JAFTA J (Zondo J concurring):

[105] I have had the benefit of reading the judgment prepared by my colleague Khampepe J (main judgment). I agree with the main judgment except on one issue. This relates to whether during the period of suspension municipalities may enforce section 56A of the Amendment Act, which was

declared invalid in its entirety by the High Court. This Court confirms that declaration of invalidity in these proceedings.

[106] Despite the concession by the state parties that excluding section 56A from operation during suspension will not disrupt the administration of municipalities, the main judgment declines to keep it out. Two reasons are advanced for this conclusion. First, it is asserted that the SAMWU has placed before this Court inconclusive evidence that supports the exclusion. Second, it is reasoned that the remedy of excluding section 56A is "rooted in their Substantive Challenge" and in those circumstances "singling out section 56A in respect of remedy would come unduly close to deciding the Substantive Challenge".[86]

[107] I am unable to agree with both reasons. With regard to inconclusive evidence, SAMWU bore no duty to place evidence before this Court for excluding the relevant section from operation during suspension. On the contrary that duty was on the state parties which sought the suspension of the declaration of invalidity.

[108] In *Ntuli* this Court declared:

> "It is the duty of the Minister responsible for the administration of the statute who wishes to ask for an order of invalidity to be suspended . . . to place sufficient information before the Court to justify the making of such an order, and to show the time that will be needed to remedy the defect in the legislation."[87]

[109] Here, as the main judgment rightly points out, the Minister responsible for the administration of the relevant legislation placed no information in support of suspension before the High Court and this Court. It was only the

[86] Main judgment at [96].

[87] *Ntuli* above n 72 at para 40.

Premier of the Western Cape Province who furnished that information in this Court. But importantly that information does not show that section 56A is needed for the proper administration of municipalities during the period of suspension. It was this fact that drove counsel for the Premier to concede that there would be no disruption in municipal administration if section 56A was not enforced during the suspension of the invalidity order.

[110] Absent information that justifies suspension of the declaration of invalidity in respect of section 56A, there can be no legal basis for granting suspension in respect of that section. The fact that a proper case for suspension was made in respect of other sections of the same Act does not justify the preservation of section 56A as well. As observed in the main judgment, the purpose of the suspension is "to minimise disturbance in the running of the municipal administration".[88] On the facts that purpose will be achieved without invoking section 56A. Moreover, there is no principle that requires suspension to cover the whole Act that has been declared invalid. When it comes to a remedy like suspension, a court enjoys a wide discretion that is exercised in order to achieve justice and equity.

[111] This discretion is derived 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

[88] Main judgment at [91].

> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[112] This section empowers a court to make "any order that is just and equitable". Furthermore, the section stipulates that such an order may include a suspension of the declaration of invalidity for any period and on *any conditions*. This unrestrained remedial power enables courts to accomplish the purpose of making just and equitable orders.

[113] In *Hoërskool Ermelo* this Court proclaimed that the exercise of remedial powers in section 172(1)(b) does not depend on a declaration of invalidity.[89] In that case Moseneke DCJ said:

> "It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct."[90]

[114] Therefore I disagree with the view implied in the main judgment to the effect that section 56A may be excluded from the order of suspension only if the Substantive Challenge is decided and that, since the challenge is not determined, there is no legal basis to exclude section 56A. The exclusion of this section flows from the wide remedial powers conferred by section 172(1)(b).

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[89] *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo*).

[90] Id at para 97.

[115] The enquiry for determining an order that is just and equitable does not focus only on the interests of one side to litigation. Instead it involves the balancing of the interests of both sides. In *Director General, Department of Home Affairs* the Court laid down the proper approach in assessing whether a suspension should be ordered. There Goldstone J stated:

> "The suspension of an order is appropriate in cases where the striking down of a statute would, in the absence of a suspension order, leave a lacuna. In such cases, the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna. 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'. It will also seek to tailor relief in the interim to provide temporary constitutional relief to successful litigants."[91]

[116] Two important principles emerge from the statement. The first is that a successful litigant must obtain immediate constitutional relief. This accords with what the Court pronounced in *Bhulwana* in these terms:

> "Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants."[92]

[117] In reaffirming this approach in *Mvumvu* we said:

> "Unless the interests of justice and good government dictate otherwise, the applicants are entitled to the remedy they seek because they were successful. Having established that the impugned provisions violate their rights entrenched in the Bill of Rights, they are entitled to a remedy that will effectively vindicate those rights. The

[91] *Director General, Department of Home Affairs* above n 72 at para 21.

[92] *S v Bhulwana, S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) (*Bhulwana*) at para 32.

Court may decline to grant it only if there are compelling reasons for withholding the requested remedy. Indeed the discretion conferred on the courts by section 172(1) must be exercised judiciously."[93]

[118] The second principle that comes out of the statement in *Director General, Department of Home Affairs* is that where a court decides to suspend the declaration of invalidity, it may also grant temporary constitutional relief to successful litigants. This principle was applied in a number of cases.[94]

[119] In *Johannesburg Municipality* this Court suspended a declaration of invalidity on certain conditions, which included the exclusion of the application of the Act that was declared invalid in some areas.[95] This was done to afford successful litigants immediate relief. In that matter we said:

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[93] *Mvumvu v Minister of Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at para 46.

[94] *Gaertner v Minister of Finance* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) and *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (*Johannesburg Municipality*).

[95] In *Johannesburg Municipality* id at para 95, an order in these terms was issued:

"[1] The declaration of invalidity is suspended for 24 months from the date of this order to enable Parliament to correct the defects or enact new legislation.

[2] The suspension is subject to the following conditions:

(i) Development tribunals must consider the applicable integrated development plans, including spatial development frameworks and urban development boundaries, when determining applications for the grant or alteration of land use rights.

(ii) No development tribunal established under the Act may exclude any by-law or Act of Parliament from applying to land forming the subject-matter of an application submitted to it.

(iii) No development tribunal established under the Act may accept and determine any application for the grant or alteration of land use rights within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekwini Municipality, after the date of this order.

(iv) The relevant development tribunals may determine applications in respect of land falling within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekwini Municipality only if these applications were submitted to it before the date of this order."

(v)

"In circumstances where serious disruptions or dislocations in state administration would ensue if the order of invalidity takes immediate effect, section 172 explicitly authorises a court to suspend the order for a period determined by that court. The effect of the suspension is that the invalid law continues to operate with full force and effect.

In addition, the section authorises a court to impose any conditions it deems necessary to regulate the temporary arrangement of allowing the invalid law to continue to apply while the competent authority corrects the defects."[96]

[120] Since here 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 dictates that the section be excluded from the provisions which will remain in force. It is common cause that section 56A limits guaranteed rights of the members of SAMWU. The relevant rights are contained in section 19 of the Constitution. We do not know whether that limitation is justified. But this is immaterial for present purposes. What is of relevance is the fact that the application of the section during the period of suspension would give rise to a limitation of rights entrenched in the Bill of Rights, despite the fact that the section forms part of a law that has been declared invalid. And also that section is not required for the running of municipalities.

[121] It is apparent from the terms of section 56A itself that Parliament did not anticipate that its exclusion would cause a disruption in the administration of municipalities. Section 56A(2) stipulates that this provision does not apply to officials appointed before the Amendment Act came into force.[97]

[96] Id at paras 73-4.

[97] Section 56A provides:

"(1) A municipal manager or manager directly accountable to a municipal manager may not hold political office in a political party, whether in a permanent, temporary or acting capacity.

This means that all officials who were appointed before could continue enjoying their political rights guaranteed by section 19 of the Constitution until they retire or resign from their employment. There must be many such officials throughout the country. The provision does not require them to resign from party political office or prevent them from assuming such office after it had come into operation. Instead it singles out those who were appointed after it had come into effect.

[122] For all these reasons I would have suspended the declaration of invalidity on condition that municipalities are prohibited from enforcing section 56A during the period of suspension. This would have afforded SAMWU immediate constitutional relief.

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(2) This section does not apply to a person appointed as municipal manager or a manager directly accountable to the municipal manager when subsection (1) takes effect."

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| For the Applicant: | P Hathorn SC instructed by Chennels Albertyn |
| For the First Respondent: | M Sikhakhane SC and F J Nalane instructed by the State Attorney |
| For the Second and Third Respondents: | R T Williams SC, K Pillay and L Dzai instructed by the State Attorney |
| For the Twelfth Respondent: | Adv M Adhikari SC instructed by the State Attorney |