THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J 945/2023

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS' UNION **Applicant**

and

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION **Second Respondent**

Heard: **12 October 2023**

Delivered: **17 November 2023**

This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 17 November 2023.

JUDGMENT

VAN NIEKERK, J

Introduction

[1] Section 19 of the Constitution guarantees the right of every citizen to make political choices and to participate in the activities of a political party.[1] The nature of the rights established by section 19(1) are fundamental to the democratic project. As the Constitutional Court observed in *Ramakatsa and others v Magashule and others*:[2]

> 'During the apartheid order, the majority of people in our country were denied political rights which were enjoyed by a minority. The majority of black people could not form or join political parties of their choice. Nor could they vote for those who were eligible to be members of Parliament. Differently put, they were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government of the day, including those affecting them… The purpose of s19 is to prevent this wholesale denial of political rights to citizens of the country from ever happening again.'

[2] The Local Government: Municipal Systems Act[3] (the Systems Act) places limitations on the rights of municipal employees to hold political office in a political party. Until 2022, that limitation extended only to the echelon of senior management, comprising municipal managers and managers directly accountable to them. In 2022, the Systems Act was amended to provide for the insertion of section 71B.[4] Section 71B extends the prohibition to all municipal employees, whatever their status. In consequence, technicians, secretaries, receptionists, clerks, gardeners, drivers, cashiers, plumbers and

[1] Section 19 reads as follows:
'19. **Political rights**. - (1) 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.
(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
(3) Every adult citizen has the right –
(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
(b) to stand for public office and, if elected, to hold office.'

[2] 2013 (2) BCLR 202 (CC) at para [64].

[3] Act 32 of 2002

[4] Act 3 of 2022, promulgated on 17 August 2022.

other artisans, librarians and the like, all of whom are far removed from the realm of municipal decision-making, may not hold office in a political party.

[3] The applicant (the union) is a registered trade union that represents employees in the local government sector. Despite previous opposition to the limitation on holding office in a political party, the union does not challenge the constitutionality of section 71B insofar as it applies to the band of municipal management previously prohibited from doing so, i.e. municipal managers and those managers directly accountable to them. The union accepts that municipal employees engaged in that senior echelon wield important decision-making powers and influence over municipal resources and policy, which could potentially result in a conflict of interest between their fiduciary duties as employees and the interests of any political organisation in which they may hold office. In any event, the union has no inherent interest in the senior echelon of municipal management.

[4] In these proceedings, the union contends that the prohibition on municipal employees engaged outside of the echelon of senior municipal management from holding political office in a political party is unconstitutional and invalid. First, the union submits that the limitation on the rights of those employees engaged outside of the senior echelon of the municipal management is substantively irrational because it is not connected to any legitimate government purpose. In other words, the union disputes that the means chosen by the legislature are rationally connected to the ends sought to be achieved. Secondly, the union submits that section 71B limits a number of constitutional rights (in particular, the political rights guaranteed by section 19 of the Constitution), in circumstances where the limitation cannot be justified in terms of section 36(1) of the Constitution.

[5] The application is opposed by both the first respondent (SALGA), an employers' organisation representing the interests of municipalities across the country, and the second respondent, the Minister of Co-operative Governance and Traditional Affairs (the Minister). Despite an initial intention to abide by the decision of the Court, the Minister states that she reconsidered her

position after discussion with various stakeholders, including SALGA, and elected to oppose the application.

[6] The issue to be determined then is whether section 71B of the Systems Act, to the extent that it prohibits municipal staff other than municipal managers and managers accountable to them from holding political office in a political party, passes constitutional muster.

Legislative history and background,

[7] In 2011, the Systems Act was amended by the Local Government: Municipal Systems Amendment Act[5] (Amendment Act) to provide, among other things, for the insertion of section 56A. In accordance with one of the stated purposes of the Amendment Act, section 56A barred municipal managers and managers accountable to them from holding political office in political parties. Section 56A read as follows:

> **'56A Limitation of political rights of municipal managers and managers directly accountable to municipal managers**
>
> (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.'

[8] The union launched a constitutional challenge against the Amendment Act. The challenge was brought on a procedural ground, disputing that the process followed to pass the Amendment Act complied with the provisions of section 76 of the Constitution. The union also challenged the Amendment Act on substantive grounds, contending that the limitation of the political rights of municipal managers and managers accountable to them was invalid on account of an unjustifiable limitation of the rights guaranteed by section 19 of the Constitution. The procedural challenge was upheld by the High Court,

[5] Act 7 of 2011.

which declined to decide the substantive challenge and referred its order to the Constitutional Court for confirmation in terms of section 167(5) of the Constitution. The Constitutional Court confirmed the High Court's declaration of invalidity of the Amendment Act and afforded the legislature an opportunity to correct the defect.[6] The Constitutional Court similarly declined to consider the substantive challenge to the Amendment Act on the basis that since the entire Act had been found to be invalid on the basis of the procedural challenge, nothing was to be gained from any consideration of the substantive challenge.

[9] In 2022, the legislature corrected the procedural defect which had led to the declaration of invalidity of the Amendment Act. On 17 August 2022, the legislature promulgated the corrected Local Government: Municipal Systems Amendment Act 3 of 2022 (the new Amendment Act), which inserted a new section 71B. That section reads as follows:

> '**71B Limitation of political rights**
>
> (1) A staff member may not hold political office in a political party, whether in a permanent, temporary or acting capacity.
>
> (2) A person who has been appointed as a staff member before subsection (1) takes effect, must comply with subsection (1) within one year of the commencement of subsection (1).'

[10] The main and obvious difference between the old section 56A and the newly-enacted section 71B is that the latter extends the limitation of political rights to all staff members. Section 1 of the Systems Act defines 'staff' to mean "*in relation to a municipality… the employees of the municipality, including the municipal manager*". As I have noted, section 71B thus bars all municipal employees, regardless of their positions (and not limited to municipal managers and those managers accountable to them), from holding political office in any political party, in any capacity. The new Amendment Act, with the exception of section 13, commenced on 1 November 2022. For convenience,

[6] Reported as *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs and others* 2017 (5) BCLR 641 (CC).

I refer to the extension of the prohibition on holding political office to all staff members effected by section 71B as 'the impugned extension' and to the previously applicable, more limited prohibition in respect of municipal managers and managers accountable to them, as the 'narrow limitation'.

[11] The legislative history of the impugned extension is not disputed. The relevant Bill that later became the new Amendment Act was introduced to the National Assembly in February 2019. The initial amendments sponsored by the Department provided for the limitation of political rights only in respect of municipal managers and managers directly accountable to them (i.e. as provided by the previously applicable section 56A). The Minister records that during deliberations on the Bill in the National Assembly, SALGA made representations to the effect that the limitation on holding political office in a political party should extend to every staff member employed by the municipality. The Minister records that these representations found favour with the National Assembly and that the amendment was unanimously accepted. The Minister records further the Department's position that the proposed legislation would enable an efficient and effective system of local government administration and governance, but notes that the Department had always recognised that "*ultimately it would be up to the courts to rule and decide on the constitutionality or otherwise of the final promulgated amendments"*.

[12] SALGA's intervention in the legislative process appears to have been conducted on the basis of submissions made in June 2020, when SALGA made a slide presentation regarding a study that it had conducted. The study recorded that the purpose of the proposed extension was to achieve what was termed the professionalisation of local government in the face of an inability by municipal managers to exercise proper disciplinary supervision in circumstances where party officials were employed by the same municipality, but in lower positions. In SALGA's view, the amendment presented an opportunity to professionalise local government by limiting the rights of officials with political influence and thus improve service delivery. On 25 June 2020, the Department made a presentation in which it motivated for the

limitation of political rights only in respect of the senior echelon municipal management, i.e. the narrow limitation. When the Bill was eventually passed by the National Assembly on 3 May 2022, it was introduced in terms, among others, that made reference to the professionalisation and depoliticisation of local government administration and the necessity that all municipal staff, not only municipal managers and those managers reporting directly to them, be prohibited from holding political office while in the employ of a municipality. The chairperson of the portfolio committee noted that this would 'go a long way' in addressing the distinction between political leadership and administration that had tended to characterise local government. SALGA's views won the day and section 71B was adopted.

Preliminary issues

Condonation

[13] The Minister seeks condonation for the late filing of her answering affidavit. In terms of a directive issued by this Court after the period for the filing of answering affidavits in terms of the Rules had expired, the affidavit was to have been filed by no later than 8 September 2023. The affidavit was served only on 5 October 2023. The primary reason proffered for the delay was a change in heart in the Department's position on the matter, which required a reworking of the answering affidavit and the heads of argument. Having initially elected to abide by the decision of the Court, after consultation internally and with SALGA, the Department decided to align itself with the averments and views expressed by SALGA.

[14] Condonation for the late filing of the Minister's answering affidavit is granted, if only because the present matter raises issues of considerable public interest, all of which require that the Minister's views be properly ventilated and considered. While the interests of justice require that the late filing of the affidavit be condoned, it does not necessarily follow that there can be no implications in relation to liability for the costs occasioned by the delay in filing the answering affidavit and heads of argument, and the consequent postponement of the application by a week. These are dealt with below.

The non-joinder challenge

[15] The Minister contends that the National Assembly ought to have been joined to the proceedings since it has a direct and substantial interest which may be affected by the Court's judgment. The Minister avers that on the facts, the limitation that is the subject of dispute was conceived during a parliamentary process in circumstances where the Department, under which the legislation resides, had not introduced the limitation. As I understand the submission, a decision on the impugned extension would amount to an intrusion on the National Assembly, which may well seek to make submissions and defend the position taken on the extension. The Minister does not assert that the application is fatally defective because the National Assembly was not joined as a party to these proceedings. Rather, the Minister submits that the National Assembly ought to be afforded an opportunity to make submissions.

[16] There is no merit in this submission. Parliament is not to be cited when the substance of a legislative provision is challenged except in exceptional circumstances. When the content of legislation is impugned, it is usually only the executive that must be cited.[7] The fact that the impugned provision was introduced only during the legislative process does not impact on this rule. There is thus no basis for a postponement of the application for the purpose of affording the National Assembly an opportunity to intervene.

The Rule 16A point

[17] The second preliminary point raised by the Minister is that the applicant has failed to comply with Rule 16A of the Uniform Rules. That Rule requires a party raising a constitutional issue to prepare a notice containing a clear and succinct description of the constitutional issue raised, and for the notice to be placed on a dedicated notice board in the relevant High Court. The purpose of the Rule is to bring the fact of any constitutional challenge to the attention of persons who may have an interest in nor be affected by that challenge.

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[7] *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC).

[18] This Court has its own rules, and the Uniform Rules are not applicable, except to the extent that the Court may have recourse to them when its own rules do not regulate a particular situation that may arise. That is a matter for direction by the court.[8] In any event, on 15 September 2023, the applicant filed a document headed 'Notice of Hearing: Constitutional Issue', together with a brief description of the present matter and a request that the registrar place the notice on an appropriate notice board. The registrar correctly advised the union that such a notice is not required by the Rules of this Court and declined to place it on the notice board. There is thus no merit in the submission that the proceedings ought to be adjourned so that "*the application be circulated far and wide"*.

Submissions

[19] The union submits that the impugned extension fails to pass constitutional muster first, because there is no rational connection between the limitation and its purpose. Specifically, the union contends that the impugned extension is irrational in relation to its promulgated purpose as stated in the Amendment Act. Secondly, the union submits that the impugned extension is not rational in relation to its broader purpose, as can be ascertained from the legislative process and as asserted by SALGA. Thirdly, the union contends that the impugned extension infringes on the rights of municipal employees engaged outside of the level of management comprising municipal employees and those reporting to them infringes the rights of those employees in a manner that cannot be justified in terms of section 36(1) of the Constitution.

[20] The union does not dispute that depoliticising and professionalising local government to improve service delivery is a legitimate government purpose, nor does the union dispute that political interference in municipal administration hampers the efficient and effective functioning of municipalities. The union also accepts that the test for rationality does not require a determination of whether the policy at issue is substantively good or bad –

[8] See Rule 11(3) and (4) of the Rules for the Conduct of Proceedings in the Labour Court GN 1665 of 1996.

what matters is whether the reasons given for the making of the policy and the means used to arrive at the policy are rationally connected to the end sought.

[21] The union contends further that the impugned extension is irrational since it seeks to address a problem already addressed by the narrow limitation, read with other provisions of the Amendment Act and other applicable laws. Specifically, the union submits that the relevant decisions to prioritise the interests of communities being served by municipalities, free from political interference, are decisions made by senior municipal managers and not junior employees. The Systems Act imposes clear criteria and procedures for the appointment of senior managers, their terms and conditions of employment and the evaluation of their performances. A failure to exercise the authority over municipal staff and permit themselves to be politically managed and held accountable by junior employees holding political office would palpably be in breach of their terms and conditions of employment. If senior municipal managers acted lawfully and do not allow themselves to be unlawfully influenced by junior employees who happen to hold political office, the purpose of the narrow limitation would be fully achieved, and there would be no need for the impugned extension. Thus, the real problem is not the holding of political office in any political party, it is the abuse of office.

[22] On the other hand, SALGA contends that only a complete ban on political membership at all levels of local government will achieve the objectives of stable local government and the promotion of service delivery. In essence, SALGA contends that the impugned extension will depoliticise and professionalise local government and thus avoid political interference, which it claims is the root cause of poor service delivery. The causal link asserted by SALGA is that when junior municipal staff hold positions in political parties, they are able to use their political influence to dictate to those employees engaged in the senior management echelon. Further, SALGA ascribes the many incidents of violence in protest against poor or non-existent service delivery to this interference, which it submits requires a complete ban on all employees from holding positions in all political parties.

[23] The Minister records that throughout the legislative process, the position of the Department of Co-Operative Governance and Traditional Affairs (the Department) was that it was ultimately for the courts to rule on the constitutionality or otherwise of section 71B. The Minister regards the extension of the prohibition against holding office in any political party to all municipal employees as a legitimate government instrument to professionalise the local government sector, and to ensure improved service delivery and stability in that sector. For these reasons, the Minister supports SALGA's submissions to the effect that section 71B is rational, and that the limitation on political rights is justifiable in terms of section 36(1) of the Constitution.

[24] In summary, the rational objective basis identified by SALGA to justify the connection between the impugned extension and the purpose of improved service delivery are the claims that the prohibition of the rights of employees engaged below the senior echelons of principal management will axiomatically lead to reduced political interference in municipal decision making. The fundamental purpose of the impugned extension is thus to eliminate the distortion brought about in the administration of municipalities when junior employees holding high political rank dictate to municipal managers and other senior managers how they should discharge their functions. When a junior employee abuses high political rank, that employee effectively takes over the role of senior management in the municipality, with the consequence of political infighting and an adverse effect on service delivery.

[25] As I have noted, despite initially not supporting the limitation imposed by the impugned extension, the Minister, having reconsidered her position, broadly supports SALGA's submissions. In particular, the Minister avers that one of the biggest factors hampering service delivery at local government level is political interference occasioned by officials employed in municipalities who use their power derived from the political position they hold, to influence the running of municipalities. The Minister avers further that experience has taught that even junior employees of municipalities can cause political

instability by holding political leadership positions. In short, the Minister submits that in reality, the power to interfere in the running of municipalities is derived from political rank, and not by virtue of the authority conferred by any particular municipal post.

Applicable legal principles

[26] The rationality threshold is one established by the rule of law. It requires the Court to determine whether the measure adopted by the legislature is properly related to the public good that it seeks to realise.[9] In contrast, the limitation enquiry in terms of section 36 is an enquiry grounded in reasonableness and proportionality. In other words, the rationality requirement is not aimed at testing the fairness or reasonableness of legislation, nor is it aimed at deciding whether there are alternative or better means that might have been used. The rationality requirement poses the threshold question "*whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise*. *If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad*".[10]

[27] A constitutional challenge based on justifiability requires a two-stage inquiry. The first is whether the impugned provision limits any right in the Bill of Rights, and if it does, whether that limitation can be justified in terms of section 36(1).[11] Central to the present enquiry is the freedom to make political choices, expressed in section 19 to include the right to form a political party and to participate in the activities of a political party. Holding political office in a party is a form of participation in an activity of a political party. Neither of the

[9] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) (*Law Society of South Africa*) at para [35].
[10] *Law Society of South infra*. See also *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O and Others* 2017 (6) SA 331 (CC) at para [75].
[11] Section 36 reads as follows:
'**Limitation of rights**. – (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking account irrelevant factors, including –
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.'

respondents' dispute that the impugned extension constitutes an infringement of a section 19 right. The issue for determination then is whether the impugned extension meets the threshold of justifiability. This requires, among other things, an assessment of the nature and extent of the limitation, the relation between the limitation and its statutory purpose, and whether less restrictive means are available to achieve the same purpose.

Analysis

[28] I turn first to what the union submits is the promulgated purpose of the new Amendment Act and the submission that the impugned extension is not rational in relation to that purpose. Specifically, the union points to the preamble to the new Amendment Act, which records that the purpose of section 71B is to "*bar municipal managers and managers directly accountable to principal managers from holding political office in political parties"*, and submits that the stated purpose is limited to a re-enactment of the narrow limitation established by the previously applicable section 56A, only barring principal managers and managers accountable to them from holding political office in political parties. As I understood the submission, the union contends that there is thus no appropriate relationship between the stated or promulgated purpose of barring only municipal managers and managers directly accountable to them from holding political office in political parties on the one hand, and the impugned extension barring all staff members from holding political office in political parties on the other.

[29] I am not persuaded that in this instance, the wording of the preamble is relevant to an interpretation of section 71B. It is more likely than not that the drafter omitted to align the wording of the preamble with the wording of section 71B when that section was finally adopted. While the rules of statutory interpretation permit a Court to have regard to the stated objects of legislation and to find guidance in the preamble to legislation, there is no dispute that the impugned extension was what SALGA refers to as a 'last minute change', and that the inconsistency between the preamble and the wording of section 71B can be explained as an administrative oversight. What is at issue in the present instance is the relationship between the limitation of a constitutional

right (in the form of the impugned extension) and the purpose as articulated by the respondents, that purpose being to depoliticise and professionalise local government by eradicating political interference in municipal decision-making, so as to maintain management stability and thus improve service delivery. That is a matter that is best assessed in the justifiability inquiry, which requires, among other factors, a consideration of the relation between the impugned limitation and its stated purpose.

[30] Turning then to the limitations analysis, the first stage of a section 36 (1) inquiry is whether the statutory provision limits any right in the Bill of Rights. In the present instance, there is no dispute that the impugned limitation limits a section 19 right. Indeed, section 19 is headed 'Limitation of political rights' and its express purpose is to do precisely that. The respondents contend however that the impugned extension meets the justifiability threshold established by section 36 (1).

[31] The nature of the right established by section 19 is one that guarantees all citizens full and equal political rights irrespective of race, colour, gender, creed or origin, and ensures that government will be based on the will of the people, reflected in regular, free and fair elections. The right to participate in the activities of a political party is a fundamental component of section 19, and the holding of office in a political party is itself participation in the activity of a political party. Indeed, in its answering affidavit, SALGA submits that political rights are historically significant, or that the right infringed by section 71B is an important right. The nature of the right, giving life as it does to some of the fundamental values of the Constitution and viewed in the context of a history of disenfranchisement, requires compelling justification for any limitation.

[32] The nature and extent of the impugned extension is such that it does not directly limit all political rights. As SALGA points out, the impugned extension does not impact on political rights other than the holding of political office by staff members of a municipality, who remain free to exercise any other rights in terms of section 19. That may be so, but as I have observed, the political rights are interconnected. A prohibition on a municipal employee engaged in

the lower echelon of management holding office in a political party could well dissuade that employee from other forms of participating in political activity.

[33] A limitation will not be proportional if other, less restrictive means could have been used to achieve the same legislative ends. Put another way, a provision that limits a fundamental right must be appropriately tailored and narrowly focussed, with a margin of appreciation to be afforded to the state in relation to whether there are less restrictive means available to achieve the stated purpose.[12] In the present instance, there is a less restrictive means to achieve the legislative purpose, in the form of the narrow limitation, a limitation that has been in existence since 2011 and by which, on the Minister's undisputed account, resulted in "*stabilization of the municipal sector which for years has been plagued by political infighting, resulting in instability*". Given what is contended to be the success of the narrow limitation in the form of the previously applicable section 56A, the obvious question is why the impugned extension is necessary to achieve a purpose already achieved?

[34] The primary factor that arises for consideration in the present instance is the relationship between the impugned extension and its purpose. As a starting point, I would observe that where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law, usually the organ of state responsible for its administration, must place material regarding those considerations before the court. If the state fails to do so, and there are cogent objective factors pointing in the opposite direction, the state will have failed to establish that the limitation is reasonable and justifiable.[13] Evidence must be tendered to demonstrate that that the existence and enforcement of the impugned extension can reasonably be expected to control the risks that the respondents have identified, and advance the purpose of the extension.

[35] The Minister has placed no evidence before the court to justify the impugned extension as constitutionally valid. She submits that the Court need not

[12] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para [104].
[13] *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Others* (2014) (1) SACR 327 (CC) at para [84].

conduct or adopt a purely factual enquiry, but ought rather to 'apply common sense' as and 'judicial knowledge'. There is no merit in this appeal. As I have indicated, the applicable principle is one that requires a party relying on justification to place sufficient information before the Court as to the policy that is being furthered, the reason for that policy and why it is considered reasonable in pursuit of that policy to limit a constitutional right.[14] This is not a case where the Court can uphold a claim of justification based only on what is contended to be common sense and judicial knowledge.

[36] SALGA's position, as reflected in the presentation to the National Assembly, is that the limitation on senior municipal managers holding political office resulted in only partial professionalisation of local government management and that the 'scenario often painted' by interviewees is that junior officials are able to hold senior managers to account or 'politically manage' them, by reason of their political ranking. In these proceedings, in its answering affidavit, SALGA records that it has been collecting evidence on an annual basis since 2000 and that a spike in service delivery protests in 2017 and the extent of political killings, especially of municipal councillors, became a grave cause for concern. SALGA commissioned a report from the HSRC into the causes of political killings that was produced in July 2019 and formed the basis of its presentations to Parliament. Also referred to in the answering affidavit is the Moerane Commission report of 2018, which focused on political killings in KwaZulu-Natal. Among the commission's recommendations was that government depoliticize and professionalize the public service. This call for professionalisation was intended to prevent the politics of patronage, incumbency and personal accumulation.

[37] A secondary purpose to which SALGA refers is to achieve equality between municipal employees. As I understood the submission, it was necessary for the legislature to extend the prohibition on holding office in a political party to all employees, since a failure to do so would discriminate against employees

[14] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as* amicus curiae*)* 2001 (4) SA 491; *Phillips and another v Director of Public Prosecutions and others* 2003 (3) SA 345 (CC) at para [18]; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and others* 2005 (3) SA 280 (CC) at para [36].

in the senior management echelon. This is not a matter that was pursued with any vigour at the hearing of this application. There can be little doubt that the differentiation between senior managers (municipal managers and those accountable to them) and junior staff is a permissible differentiation, given that the former exercises decision-making powers, while the latter does not. The differential in decision-making capacity is a matter that goes ultimately to the primary purpose articulated by SALGA – the elimination of unauthorised and unwarranted political interference in municipal decision-making.

[38] The evidence on which SALGA relies to justify the impugned extension points to a number of reasons for dysfunctional municipalities but fails unequivocally to establish that the extension of the prohibition on holding office in political parties by junior municipal employees would necessarily result in either more professional municipal management, or improved service delivery. But there is no direct evidence to suggest that the solution to curbing the violence, political infighting, political killings, service delivery protests and the like to which SALGA points, is the limitation of the holding of political office beyond the limitation that already exists. The HSRC report on which SALGA relies comprised a sample group of whom only 3% were municipal managers, the bulk being councillors. The main source of threats and violence was the public community, the balance coming from members of political parties, business people and members of trade unions. Nowhere in the report is it mentioned that persons employed in municipalities, in whatever capacity, were a source of either threats or violence. The bulk of the report concerns itself with public violence committed against municipal employees, mostly councillors, with not one of the respondents stating that any threat of any sort emanated from junior staff, let alone on any causal link drawn between the holding of the party political position and interference and intimidation of staff at municipal managerial level. In short, the report, in the main, found that threats of violence came from community members themselves on account of their frustration concerning the lack of municipal service delivery, the root causes of which are not explored in the report. Further, threats and violence were found to have emanated from members of political parties in the public, consequent on intraparty contestations for power (the political infighting

referred to by the Minister in her answering affidavit) and in some instances, violence committed as a criminal act out of frustration with unemployment and the lack of employment opportunities. There is nothing in the report with recommendations that concerns anything close to the impugned extension as a solution to the issues raised by SALGA and the Minister as being contributory factors to either poor service delivery or instability in the municipal sector. SALGA has drawn a false conclusion on which it relies. As I have indicated, the Minister proffers no evidence in support of any justification for the complete ban on the holding of political office. In the circumstances, I find that insufficient evidence has been introduced to establish that the impugned extension is rationally connected to the stated purposes of the professionalisation of municipal sector management and improved service delivery in that sector.

[39] The lack of any direct evidence that prohibiting all municipal employees engaged below the echelon of senior management, whatever their status and regardless of their decision-making capacity, there are a number of mistaken assumptions that underlie SALGA's proffered justification. First, it cannot be assumed that every junior employee who holds a political position in a political party would necessarily wield undue influence in the workplace. It is also mistaken to assume that if affected junior employees resigned, as would be mandated by the implementation of the impugned extension, they would suddenly cease to politically manage their former seniors in the principal management. Any 'political management' would simply move out of the workplace and into the broader community, a situation that presents different and possibly greater problems. Municipalities and municipal managers are armed with numerous legal remedies to avert unlawful interference from junior municipal employees who hold political office. These include the enforcement of the code of conduct for principal employees, which expressly prohibits undue influence by employees over others. Where junior employees make themselves guilty of misconduct, there are processes in place to take the necessary disciplinary measures. In extreme cases, legal remedies, both civil and criminal, or available to affected municipalities. A failure by municipalities to have recourse to existing remedies and thus strengthen and enforce

already existing processes designed to ensure accountability, cannot be the basis for the denial of constitutional rights. Put another way, a failure to implement existing remedies on account of a lack of moral courage or other reason, cannot be a basis to deny the hard-won right to political participation in the form of holding a position in a political party. Finally, the purpose of depoliticizing and professionalising local government is in effect, a call to sanitize decision-making in municipalities from any form of political interference. This is precisely what the narrow limitation, which is neither challenged nor disputed, seeks to do. It bars decision-makers employed by municipalities from holding political office in political parties. The notion that only a complete ban on all staff members from holding political office in a political party will achieve what is an undisputed purpose is an assumption that cannot be sustained on the available evidence.

[40] In so far as the respondents assert a connection between the impugned extension and the improved service delivery purpose in the form of the stabilisation of local government, it seems to me that this is a basis that puts the cart before the horse. It may well be that improved service delivery will result in the stabilisation of local government, but stabilisation is a consequence of the purpose of improved service delivery being achieved; it is not a means used to achieve that purpose. Put another way, stabilisation is not, and cannot, be an independent purpose divorced from the real purpose of service delivery. In any event, the Minister appears to have conceded that the narrow limitation that previously found reflection in section 56A served to stabilise the municipal sector. Specifically, the Minister states that the narrower limitation, in the experience of the Department, "*did in fact result in stabilisation of the municipal sector which for years has been plagued by political infighting, resulting in instability*". The logical decision to be drawn is that the impugned extension is seeking to achieve a purpose already achieved by the narrow limitation.

[41] In summary, there is no dispute that many municipalities are dysfunctional, and that the objectives of professionalising municipal management and improving service delivery are legitimate objectives which require urgent

implementation. But the intuitive response that the impugned limitation represents, which is to deny all municipal employees regardless of their occupational status the right to hold political office in a political party, is not justifiable in terms of the evidence that was made available to the court. Intuition is not a basis for justifiability. Justification requires evidence. As I have indicated, the Minister proffered no evidence. The evidence that was presented by SALGA references more deep-seated causes of conflict in the local government sector, and fails to establish precisely how a limitation of the constitutional right to political activity will achieve the objectives that have been identified. The limitation in the form of the impugned extension thus cannot be justified in terms of section 36 (1) of the Constitution, and section 71B is unconstitutional to the extent that it denies municipal employees, who are not municipal managers or managers accountable to them, from holding any political office in any political party.

Remedy

[42] Section 172(1)(a) of the Constitution requires that the Court declares the impugned extension invalid to the extent of its inconsistency with the Constitution. The impugned extension denies municipal staff employed outside of the echelon of senior management the rights afforded them in terms of section 19 of the Constitution. It must accordingly be declared invalid. The defect can be cured by removing the impugned extension from the section, while leaving in place the narrow limitation. The declaration of invalidity reflected below renders the impugned extension invalid with immediate effect, without limitation on its retrospective effect.

Costs

[43] The present application was served on 7 July 2023. Answering affidavits were thus due on 21 July 2023. The Minister was afforded an extension, by agreement with the union, until 1 September 2023. After a directive was sought as to the conduct of the matter, the respondents were directed to file answering affidavits by no later than 8 September 2023. The Minister's answering affidavit was filed on 10 October 2023, some two months after the

initial due date and five weeks late. In terms of the directive, the application had been set down for hearing on 6 October 2023. The hearing could not proceed on that date, primarily on account of the Minister's failure to file an answering affidavit and heads of argument. The application was postponed to 12 October 2023, with a directive that the Minister file heads of argument by 9 October 2023. The costs of the postponement were reserved.

[44] In a matter such as the present, the *Biowatch* principle[15] is applicable. In the present instance, given that the union has succeeded in the application to vindicate the constitutional rights of its members, it is entitled to its costs. The matter is of sufficient complexity to warrant the costs of two counsel.

[45] The costs of the postponement on 6 October 2023 ought properly to be borne by the Minister. Had the Minister filed an answering affidavit and heads of argument timeously, the postponement would not have been necessary.

Order

I make the following order:

1. It is declared that the inclusion of the phrase 'staff member' in section 71B of the Local Government: Municipal Systems Act 32 of 2000 is unconstitutional and invalid.

2. To remedy the defect:

   2.1 The phrase 'staff member' in section 71B of the Local Government: Municipal Systems Act 32 of 2000 is severed; and

   2.2 Section 71B of the Local Government: Municipal Systems Act 32 of 2000 is to be read to provide as follows:

> '**71B Limitation of political rights** – (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.

[15] *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC).

(2) A person who has been appointed as a municipal manager or manager directly accountable to the municipal manager before subsection (1) takes effect, must comply with subsection (1) within one year of the commencement of subsection (1).'

3. It is declared that the orders in paragraphs 1 and 2 above shall operate with retrospective effect to 1 November 2022.

4. The orders in paragraphs 1 to 3 are referred to the Constitutional Court for confirmation.

5. The costs of this application, including the costs of two counsel, shall be paid by the first and second respondents, jointly and severally, the one paying the other to be absolved, but for the costs occasioned by the postponement of the application on 6 October 2023, which costs, including the costs of the second respondent, shall be paid by the first respondent.

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André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	F Boda SC & MZ Gwala
Instructed by:	Cheadle Thompson & Haysom
For the first respondent:	FJ Nalane SC & NP Mashabela
Instructed by:	State Attorney
For the second respondent:	E Labuschagne SC & V Mabuza

Instructed by: Diale Mogashoa Attorneys