IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

23/2/2016

CASE NUMBER: 3558/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 23 Feb 2016

SIGNATURE: .....

In the matters between: -

SOUTH AFRICAN MUNICIPAL WORKER'S UNION Applicant

AND

THE MINISTER OF CO-OPERATIVE GOVENANCE AND TRADITIONAL AFFAIRS First Respondent

THE SPEAKER OF THE NATIONAL COUCIL OF PROVINCES Second Respondent

THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Third Respondent

THE PREMIER OF THE EASTERN CAPE	Fourth Respondent
THE PREMIER OF THE FREE STATE	Fifth Respondent
THE PREMIER OF GAUTENG	Sixth Respondent
THE PREMIER OF KWAZULU-NATAL	Seventh Respondent
THE PREMIER OF MPUMALANGA	Eighth Respondent
THE PREMIER OF THE NORTHERN CAPE	Ninth Respondent
THE PREMIER OF LIMPOPO	Tenth Respondent
THE PREMIER OF NORTH WEST	Eleventh Respondent
THE PREMIER OF THE WESTERN CAPE	Twelfth Respondent
THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	Thirteenth Respondent

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JUDGMENT

JANSEN J

"***Quis custodiet ipsos custodes?***"

[1] This application consists of two issues: —

[1.1] The first issue is a declaration of invalidity sought in relation to the entire Local Government Municipal Systems Amendment Act 7 of 2011 ("**the Amendment Act**") allegedly due to an incorrect procedure followed in enacting it.

[1.2] The second issue is whether section 56A of the Amendment Act is a justifiable limitation in terms of section 36 of the Constitution of the Republic of South

Africa, 1996 ("**the Constitution**") on the right to make free political choices in terms of section 19(1) of the Constitution.

[2] Different sets of counsel represented the respondents in respect of the two different issues. Effectively the application was argued as two different applications.

[3] It was argued at the hearing of these special motions by the first respondent that it was unnecessary to adjudicate upon the second issue set out above.

[4] Even though there were attempts at pre-trial meetings by the first respondent to have the two issues dealt with separately, the applicant wished both to be heard contemporaneously. In the matter of ***Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*** **(CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010)** ("***Tongoane***"), the Constitutional Court held 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 or demise. As the court first had to hear argument in order to assess the constitutional validity or otherwise of the statute as a whole, it also heard the issue regarding the unconstitutionality of section 56A thereof, were it to hold that the statute as a whole was not unconstitutional.

[5] The matter was set down for three days. On the first day the legal representatives were called in to sort out the court files which were in a state of disarray. Notwithstanding the loss of a day, the parties managed to finish their arguments within two days. Furthermore, the attorney for the applicants filed an affidavit explaining that all files had been in a perfect format and that he had no explanation

why heads of argument and the like were inserted at the front of the court bundles, etc. The court accepts his explanation unconditionally. The problems no doubt arose because there were two previous postponements of this matter, the first occasioned by what the respondents termed "new evidence" in reply in an affidavit of a Professor Tapscott whereupon Louw J allowed the first respondent to reply to Professor Tapscott's affidavit. The second postponement was occasioned by the fact that a point was raised from the bar by the respondents' representatives that a proper Rule 16A notice had not been placed on the designated notice board by the registrar of this court. The applicant's correspondent attorney deposed to an affidavit that she, personally, saw the registrar post the notice on the notice board "sufficiently timeously" prior to the hearing of the matter. Nonetheless it was ordered that a new Rule 16A be affixed to the notice board by the registrar.

[6] One can hence understand that the files may have been re-organised in the process.

[7] Three times was a charm for the applicant and argument proceeded before this court.

The first issue (Procedural):

[8] The nub of this issue is: should the Amendment Act have been promulgated in terms of section 75 or section 76 of the Constitution?

[9] It is contended by the applicant that the Amendment Act should have been passed in terms of section 76 of the Constitution which regulates ordinary Bills affecting provinces and not section 75, which regulates ordinary Bills not affecting provinces. *De facto* it was passed in terms of section 75.

[10] As is clear from the section 75 and section 76 procedures: —

[10.1] Section 76 gives more weight to the position of the National Council of Provinces (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;

[10.2] If the NCOP objects to a version of the Bill approved by the Mediation Committee, in respect of a Bill which has been introduced in the National Assembly, the Bill lapses unless it is passed again by the National Assembly with a two-thirds majority; and

[10.3] In respect of section 76 Bills, each provincial delegation casts only one vote. The support of five of the nine provincial delegations is a prerequisite. However, when the NCOP deals with a Bill that does not affect the provinces – a section 75 Bill – each delegate to the NCOP votes as an individual (or party member) and a majority of those present must support the Bill for it to be passed. The laws for which the Constitution prescribes the section 75 process are (as are national issues) important to provinces but are not laws which concern provincial government as such.

[11] What is important to note is that in terms of section 76(3), which refers to ordinary Bills affecting provinces, the following is prescribed: —

> "*(3)* ***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;***

(c) ***section 182;***

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

(e) ***section 196; and***

(f) ***section 197.*** " [emphasis added]

The Three Tiers of Government in South Africa:

[12] The Constitution provides for an intergovernmental system with special emphasis on social services and the delivery of basic services.

[13] In section 40(1) the Constitution provides for a "***... government ... constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated***". The term "distinctive" is used to indicate that each sphere exists in its own right and is the final decision-maker on a defined range of functions and is accountable to its constituency for its decisions.[1]

[14] Most social services are shared functions between the national and provincial governments. Basic services such as water, electricity and refuse-removal fall within the municipal infrastructure performed within a regulatory framework imposed by national and provincial legislation.

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[1] **Intergovernmental Relations and Service Delivery in South Africa: A ten year overview** – commissioned by the Presidency August 2003 Chapter 2.

[15] The regulatory framework for purposes of monitoring is set by the national government. The national legislature has the duty to intervene in order to enforce its regulatory framework, when necessary.

[16] Parliament is therefore entitled to enact legislation which enforces its regulatory framework. The same applies to provinces which also have all regulatory and supervisory powers over municipalities. Municipalities on the other hand, must operate within the framework prescribed for them. Thus, although "distinctive", the municipal, provincial and national spheres are interdependent.

[17] It is for this reason that the boundaries between the different spheres of government are termed as "soft".

[18] Co-operative government in terms of section 41(1)(c) of the Constitution requires effective, transparent, accountable and coherent governance. Hence each sphere of government must collaborate in order to attain common goals.

[19] How the three tiers of government operate was first analysed in the Constitutional case of ***Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*** **(CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999).** In this matter the President himself had referred the matter to the Constitutional Court, invoking the provisions of section 84(2)(c) of the 1996 Constitution for the first time.

[20] The Liquor Bill had been passed by the National Assembly on 31 August 1998 in terms of section 76(1). The President refused to assent to it and referred it back to the National Assembly which simply referred it back to the President with no amendments.

[21] The Western Cape government and the Minister of Trade and Industry lodged affidavits on instructions of the Constitutional Court.

[22] Part A of Schedule 5 of the Constitution lists the functional areas of exclusive legislative competence of the three tiers of government. Parliament may only intervene in terms of section 44(2) of the Constitution, when it is necessary. Section 44(2) and (3) provides as follows: —

> "***(2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—***
>
> ***(a) to maintain national security;***
>
> ***(b) to maintain economic unity;***
>
> ***(c) to maintain essential national standards;***
>
> ***(d) to establish minimum standards required for the rendering of services; or***
>
> ***(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.***
>
> ***(3) 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.***" [emphasis added]

[23] Whether intervention is necessary depends on various legal, factual and policy factors. The President found himself ill-equipped to express an opinion – hence the referral to the Constitutional Court.

[24] The Bill was introduced in terms of section 76 read with section 44(1)(b)(ii) and section 44(2) of the Constitution. According to the Minister of Trade and Industry the National Assembly was entitled to reconsider the Bill based on the "***national legislature's legitimate right to intervene in order to preserve the economic unity and to establish national standards***".

[25] The judgment emphasises that the Constitution constitutes the Republic as "***one, sovereign, democratic state***". Cooperative governance is therefore envisaged. Other provisions, such as section 40(1) expressly stipulates that the "***government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated***" (as pointed out above). National legislation is vested in parliament, provincial legislature in the provincial sphere and in municipal councils in the local sphere. Section 40 is part of Chapter 3. All of this includes a "new philosophy", which creates a cooperative governance with concomitant obligations. In terms of section 40(2) all spheres of government are bound by the government principles set out in Chapter 3 of the Constitution. Each sphere has a constitutional duty "***not*** (to) ***assume any power or function except those conferred on them in terms of the Constitution***".

[26] In terms of section (104)(1)(a)(i)–(ii) the legislative power vested in the provincial legislature is, *inter alia*, to pass legislation for its province regarding: —

> "***(i) any matter within a functional area listed in Schedule 4;***
>
> ***(ii) any matter within a functional area listed in Schedule 5.***"

[27] Similarly section 104(4) provides that provinces may legislate with regard to matters reasonably necessary for, or incidental to, the exercise of a power concerning a

Schedule 4 matter and that such legislation, for all purposes, is Schedule 4 legislation. What is difficult to understand is the role of section 44(3) for Schedule 5 matters. As was pointed out by Cameron J, section 44(3) allows for an extended encroachment on the exclusive competences by permitting national legislation for Schedule 5 when there is a reasonably necessity for such legislation, or when it is incidental to the effective exercise of a Schedule 4 power. Cameron J was at pains to point out that another construction is that section 44(3) has no bearing on Schedule 5, but merely delineates the ambit of national legislation covered by section 146, which regulates conflicts between national and provincial legislation falling within functional areas listed in Schedule 4. He held that such a construction is supported by the fact that section 44(3) alludes to Schedule 4 legislation.

[28] Schedules 4 and 5 of the Constitution provide as follows: —

"***Schedule 4***

FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE

PART A

Administration of indigenous forests
Agriculture
Airports other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering, excluding lotteries and sports pools
Consumer protection
Cultural matters
Disaster management
Education at all levels, excluding tertiary education

Environment

Health services

Housing

Indigenous law and customary law, subject to Chapter 12 of the Constitution

Industrial promotion

Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislature's legislative competence

Media services directly controlled or provided by the provincial government, subject to section 192

Nature conservation, excluding national parks, national botanical gardens and marine resources

Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence

Pollution control

Population development

Property transfer fees

Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5

Public transport

Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law

Regional planning and development

Road traffic regulation

Soil conservation

Tourism

Trade

Traditional leadership, subject to Chapter 12 of the Constitution

Urban and rural development

Vehicle licensing

Welfare services

PART B

The following local government matters to the extent set out in section 155(6)(a) and (7):

Air pollution
Building regulations
Child care facilities
Electricity and gas reticulation
Fire fighting services
Local tourism
Municipal airports
Municipal planning
Municipal health services
Municipal public transport
Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto
Storm water management systems in built-up areas
Trading regulations
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems (emphasis added)

Schedule 5

FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE

PART A

Abattoirs
Ambulance services

Archives other than national archives

Libraries other than national libraries

Liquor licences

Museums other than national museums

Provincial planning

Provincial cultural matters

Provincial recreation and amenities

Provincial sport

Provincial roads and traffic

Veterinary services, excluding regulation of the profession

PART B

The following local government matters to the extent set out for provinces in section 155 (6) (a) and (7):

Beaches and amusement facilities

Billboards and the display of advertisements in public places

Cemeteries, funeral parlours and crematoria

Cleansing

Control of public nuisances

Control of undertakings that sell liquor to the public

Facilities for the accommodation, care and burial of animals

Fencing and fences

Licensing of dogs

Licensing and control of undertakings that sell food to the public

Local amenities

Local sport facilities

Markets

Municipal abattoirs

Municipal parks and recreation

Municipal roads

Noise pollution

Pounds
Public places
Refuse removal, refuse dumps and solid waste disposal
Street trading
Street lighting
Traffic and parking" [emphasis added]

[29] Clearly an overlap of Schedule 4 and 5 is inevitable. A similar issue arose in 1941 in the Indian Federal Court when Sir Maurice Gwyer CJ stated: —

> ***"It must inevitably happen from time to time that legislation though purporting to deal with a subject in one List touches also upon a subject in another List, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere."***[2]

[30] In terms of section 104(1)(b) each province may pass legislation for "its province". However, the national legislature may override such legislation for purposes of national security and essential national standards, including the minimum standards required for the rendition of services.

[31] Intra-provincially the provincial legislation falls within the provinces' function – inter-provincially, the national legislature may interfere.

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[2] ***Subrahmanyam Chettiar v Muthuswami Goudan*** **AIR 1947 FC 47** at 51 quoted in ***Federation of Hotel & Restaurant Association v Union of India*** **AIR 1990 SC 1637** paragraph 13. See also Cameron AJ in the Liquor Bill case *supra* note 4 paragraph 61: ***'It is sufficient to say that, although our Constitution creates exclusive provincial legislative competences, the separation of the functional areas in Schedules 4 and 5 can never be absolute.'***

[32] A determination of the character of the legislation is called for, which is complicated. One piece of legislation may have various substantial characters. Different parts of the legislation may thus require different assessments.

[33] In ***Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995*** **[1996] ZACC 15; 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC)**, the Constitutional Court had to determine whether a provincial Bill fell within the legislative competence granted to the provinces in Schedule 6 of the interim Constitution. Chaskalson J expressed the opinion that the "purpose" of legislation is very relevant: —

> "***It may be relevant to show that although the legislation purports to deal with a matter within Schedule 6 its true purpose and effect is to achieve a different goal which falls outside the functional areas listed in Schedule 6. In such a case a Court would hold that the province has exceeded its legislative competence. It is necessary, therefore, to consider whether the substance of the legislation, which depends not only on its form but also on its purpose and effect, is within the legislative competence of the KwaZulu-Natal provincial legislature.***" [emphasis added]

[34] Not only the stated purpose of legislation but also its effect is therefore determative of the purpose of legislation. Hence the citation of the preamble to the Amendment Act earlier on in this judgment.

[35] The goal of the study **Oversight Model of the South African Legislative Sector September 2001**, compiled by the Legislative sector of South Africa, is to encourage the development of common standards, vision and principles and the

implementation of best oversight practices in South Africa as set out in the preamble to the document. It aims to make different spheres of the government partners in the attainment of different service delivery areas.

[36] *Sub. cap* **Oversight According to the Elements of the Sector Oversight Model** the following is stated at page 12: —

> "***Firstly, the term 'oversight' in the South African political context, as in many others, is customarily perceived as the purview of opposition politicians. Those exercising oversight are generally afforded the luxury of hindsight, and are ultimately divorced from the responsibility for failure. The model attempts to redefine this image of oversight by introducing an oversight regime based less on institutional or political confrontation. Instead, it tries to redefine legislatures as a central component in the Public Service delivery machine. The redefinition rests on the understanding that if the legislatures' oversight role is exercised in pursuit of good government, then the legislatures also bear some responsibility for overall government performance.***
>
> .....
>
> ***Secondly, the Westminster-based parliamentary system sanctions a government with a clear majority to pursue the platform upon which it was brought to power. Therein lies government's prerogative. Yet, the need for accountability, transparency, and representativity are never taken for granted. Securing these three essential principles in the system, without compromising its strengths, is what the Budget Cycle Model (BCM) seeks to achieve.***" [emphasis added]

[37] Attached hereto is an addendum of the constitutional provisions which refer directly and indirectly to oversight and accountability on the part of the three tiers of government as set out in the **Oversight Model of the South African Legislative Sector**.

[38] From the sections of the Constitution, as set out in attached addendum, it is abundantly clear that the three tiers government are distinctive, interdependent and interrelated at the same time, with very soft boundaries between them, as put by Christina Murray and Richard Simeon, in the article **"Tagging" Bills in Parliament section 75 or section 76** published in 2006 Volume 123 Issue 2 SALJ at page 232.

[39] Furthermore, as can be seen from the constitutional sections cited, Schedule 4 presents a plethora of "functional areas" in respect of which both the provincial and national legislature may enact laws.

[40] Only in respect of a small number of largely unimportant functions set out in Schedule 5, do the provinces have exclusive jurisdiction and even then, the national legislature may step in, for certain clear and limited purposes.

[41] It is because of this significant overlap between national and provincial legislation that it is necessary for the NCOP to approve Bills which "affect" provinces in terms of section 76 of the Constitution.

[42] Section 76 thus requires a super-majority to override the NCOP. The section 75 procedure ensures that even when provinces are not the governing institutions, their concerns will be taken into account, because a section 75 Bill will enjoy scrutiny twice.

[43] It can readily be understood that how an act is classified is very important. Whether a provincial delegation votes as a unity in terms of section 76, or as individuals, may, in most cases, be determinative as to whether the NCOP passes a Bill. The outcomes may differ substantially depending upon the approach adopted.[3]

[44] In South Africa, the quandary is exacerbated by the wording of section 44(1)(b)(ii) which provides that "***legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution must follow the s 76 route***". [emphasis added]

[45] Section 76(3), as stated, *inter alia* provides that legislation which "***falls within a functional area listed in Schedule 4***" has to follow the section 76 route.

[46] Murray and Simeon *op cit.* argue convincingly that the "tagging" procedure currently used by the Parliament is inaccurate: —

> "***The division of powers under the 1996 Constitution***
>
> ***The soft boundaries between the spheres of government are evident in a number of aspects of the model of multi-level government established by the Constitution. The concurrent jurisdiction of the national sphere and provinces over many important matters is just one example. Others include the expectation, in s 125, that provinces***

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[3] ***"[T]he categories of laws enumerated in sections 91 and 92 are not in the logical sense mutually exclusive; they overlap or encroach upon one another in many more respects than is usually realised. To put it another way, many rules of law have one feature that renders them relevant to a provincial class of laws and another feature which renders them equally relevant logically to a federal class of laws. It is inherent in the nature of classification as a process that this should be so."*** : W R Lederman 'Classification of laws and the British North America Act' in W R Lederman *Continuing Canadian Constitutional Dilemmas* (1981) 236 quoted in P Macklem, R C B Risk, C J Rogerson, K E Swinton, L E Weinrib & J D Whyte *Canadian Constitutional Law* 2 ed (1997) 173.

will usually implement national legislation that falls within functions listed in schedule 4; the responsibility that provinces and the national government share for supporting local government; the national sphere's obligation to support provincial government, spelt out most clearly in s 125; the largely centralized revenue-raising power balanced by a constitutional requirement of equitable sharing of revenue; the criteria set out in s 146 for determining what law should prevail when national and provincial laws conflict (these assume that the national government will establish norms and standards which provinces will maintain); national powers of intervention in both the provincial and local sphere and provincial powers of intervention in local government; the establishment of a single public service; and, perhaps most complicated of all, overlapping responsibility for policing under ss 206 and 207."

[47] Other than in countries such as Canada and the United States, the learned authors *loc. cit.* point out that the different tiers of government do not compete in South Africa, but have to work together to a societal goal, in a co-operative and symbiotic model. South Africa, as is the case with Germany, has functions according to an "integrated" model.[4]

[48] The national legislature prescribes the nine provincial delegations which make up the NCOP (although the representatives of local governments may also participate in the

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[4] ***Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*** **1997 (2) SA 97 (CC)** (*Certification judgment II*) paragraph 64: "***In substance the NCOP has no more than a delaying power, and if its support is not secured, the legislation can be passed by a simple majority in the NA.***"

NCOP, but have no voting rights). The provincial premier is the head of a delegation. Six delegates are permanent members and are nominated by their constituencies. There are three other members of the provincial legislature. Three further members are chosen on an *ad hoc* basis because of their expertise when the Bill is being considered.

[49] The national sphere has exclusive legislative power over matters relating to public service. With section 75 legislation the NCOP has a mere indirect engagement. Under section 75 the NCOP has little pressure it can put on the National Assembly. Its views are considered lightly and are easily ignored by the National Assembly.[5] [6]

[50] Thus the NCOP "passes" a section 76 Bill but only "considers" a section 75 Bill.

[51] The single most important sentence in Murray and Simeon's article is the following at *op cit.* page 29: —

> "***(T)hus, through the s 76 and s 75 procedures the Constitution ensures that all Bills will be considered from a provincial perspective and that no Bill will be passed too hastily. … Thus, just as whether judges interpret federal or provincial powers narrowly or broadly can greatly influence the nature of decentralization in a federal system, so whether s 76 is interpreted narrowly or broadly will have major consequences for the integrity, effectiveness and influence of the provinces.***"

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[5] ***Ex parte Chairperson of the National Assembly: in re Certification of the Constitution of the Republic of South Africa*** 1996 (4) SA 744 (CC) ("**The First Certification**" Judgment) at paragraph [419].

[6] ***Liquor Bill*** case *supra* note 4 paragraph 25.

[52] Each Bill introduced in Parliament includes in its attached memorandum a statement in which the law advisors advise in respect of which section they believe the Bill should be tagged. However, the ultimate decision as to how a Bill should be tagged must be taken by Parliament. A Joint Tagging Mechanism ("**JTM**") comprised of the Speaker, Deputy Speaker of the National Assembly, the Chairperson and the Deputy Chairperson of the NCOP, is responsible for tagging. If agreement cannot be reached by the JTM, a second legal opinion must be obtained, thereafter a reference to the National Assembly (when there is still no agreement) is called for and, as a last resort, a reference to the Constitutional Court.

[53] In other words, for purposes of tagging the purpose of the Bill is the overriding consideration. This is so, *a fortiori*, because of the provisions of section 44(3) of the Constitution. In ***Tongoane*** at paragraph [60] it was held that "***(t)he more it*** (a Bill) ***affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content***".

[54] That the procedure to be adopted in adopting a Bill is not dictated by legislative competence is borne out by section 76(3) which requires the section 76 route to be followed for certain classes of legislation including section 195(3) and (4) as well as section 197 – over which provinces have no legislative competence.

[55] In order to "tag" a Bill, Parliament must not only consider the "functional areas" listed in Schedules 4 and 5 but also the subject matter of the Bill. Peter W Hogg comments as follows on the Canadian position: —

> "***The process is, in Laskin's words, 'an interlocking one, in which the British North America Act and the challenged legislation react on one***

another and fix each other's meaning'. Nevertheless, for the purposes of analysis it is necessary to recognise that two steps are involved: the characterisation of the challenged law (step 1) and the interpretation of the power-distributing provisions of the Constitution (step 2)."[7]

[56] Unfortunately many laws concern various functions, such as water laws and environmental laws. An example is the Disestablishment of South African Housing Trust Limited Bill B3-2002, now the Disestablishment of South African Housing Trust Limited Act 26 of 2002, which was treated as a Bill concerning a company and not the Schedule 4 matter "housing".

[57] The Joint Tagging Mechanism works with a "pith and substance approach". The true nature and character of the Bill is sought to be ascertained. It is not uncommon that it may be clear that a Bill in certain respects does affect provinces and in other respects not and hence different sections of the Bill have, theoretically, to follow different routes in order to be passed. Such Bills qualify as so-called "mixed Bills".

[58] This leads to an inchoate and fragmentary approach to the enactment of Bills. Premiers must then comment on incomplete Bills, which is clearly an impossible task. New Joint Rules of Parliament are imminent, declaring that mixed Bills must

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[7] Peter W Hogg *Constitutional Law of Canada* loose-leaf ed (2003) paragraph 15.4 at 15-6, ***quoting Bora Laskin 'Tests for the validity of legislation: What's the "Matter"?'*** (1955) 11 *University of Toronto LJ* 114 at 127. Abel has argued that the process is actually a three-step one: "identification of the 'matter' of the statute, delineation of the scope of the competing classes, and then a determination of the class into which the challenged statute falls" - Albert S Abel *Laskin's Canadian Constitutional Law* 4 ed (1975) 97; Anthony Blackshield & George Williams *Australian Constitutional Law and Theory: Commentary & Materials* 3 ed (2002) 648-653 where the impact of the second step on the first step is emphasised.

be passed both by the NCOP and individual delegates (which is bound to give rise to dissent).

[59] In Australia a different approach is adopted. Evatt J held as follows in ***Huddart Parker Ltd v Commonwealth*** **(1931) 44 CLR 492** at 527:[8] —

> "***The task is essentially different under the Australian Constitution. The question is still one of construction; but it is construction of the express powers conferred upon the central Parliament. No doubt the powers of the States are very important, but their existence does not control or predetermine those duly granted to the Commonwealth. The legislative powers of the States are only exclusive in respect of matters not covered by specific enumeration of Commonwealth powers. It is the grant to the Commonwealth that must first be ascertained. Whatever self-governing powers remain belong exclusively to the States.***"

[60] The doctrine of "pith and substance" was once the vogue in patent law as well. The correct approach to adopt is a purposive approach, which contextualises the Bill in accordance with the test to be adopted in order to interpret a written document as stated by Wallis JA in ***Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*** **[2013] ZASCA 176; 2014 (2) SA 494 (SCA).**

[61] Cameron AJ in the ***Liquor Bill*** case made it clear that one should shy away from the pith and substance test and rather pose the question as to how a Bill affects the

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[8] Quoted in Michael Crommelin 'Federalism' in P D Finn (ed) *Essays on Law and Government* (1995) 168 at 178.

constitutional jurisdiction of provinces or municipalities. The learned judge thus, already, espoused the concept of purposive construction.

[62] The purposive construction allows provinces to be actively involved in Bills which affect them.

[63] Section 76 procedures ensure that, as envisaged by section 41(1) that intergovernmental relations be conducted with "***mutual trust and good faith***" and that each sphere, including the national sphere, must respect "***the geographical, functional*** [and] **. . . *institutional integrity***" of the others. This is a central purpose of the NCOP; and section 76 is its most effective tool.[9]

[64] In order to assess the contention that the Bill should have been passed in terms of section 76, regard has to be had to the contents of the Amendment Act. The preamble thereto gives an exposé of its contents: —

> "***LOCAL GOVERNMENT: MUNICIPAL SYSTEMS AMENDMENT ACT 7 OF 2011***
>
> ***To amend the Local Government: Municipal Systems Act, 2000, so as to insert and amend certain definitions; to make further provision for the appointment of municipal managers and managers directly accountable to municipal managers; to provide for procedures and competency criteria for such appointments, and for the consequences of appointments made otherwise than in accordance with such procedures and criteria; to***

[9] Murray and Simeon *op cit.* at p 20.

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

dealing with the appointment of municipal managers; and to provide for matters connected therewith." [emphasis added]

[65] The Minister's powers to enact regulations pertaining to municipalities, in respect of the matter set out above, *prima facie* appears to affect local municipalities directly and provinces only tangentially.

[66] An important case to consider is the matter of ***Democratic Alliance v President of South Africa and Others*** **2014 (4) SA 402 (WCC).** This case, it was argued on behalf of the second and third respondents, is effectively on all fours with the present case.

[67] A clear distinction was drawn between the following two concepts: —

[67.1] Legislative competence (which involves the determination of the subject-matter or the substance of the legislation).

[67.2] Whether the provisions of a Bill in substantial measure fall within a functional area listed in schedule 4.

[68] These two separate tests were listed in ***Tongoane*** at paragraphs [58] and [59].

[69] It was emphasised in the Democratic Alliance case that a so-called "pith and substance" test is used for legislative competence and the "substantial measure" test for tagging. In terms of the pith and substance test for legislative competence, provisions which fall outside the pith and substance of the legislation are seen as merely incidental. On the other hand, in terms of the substantial measure test all the provisions of a Bill are taken into account, even incidental provisions, in order to

establish whether the Bill in substantial measure affects functional areas listed in schedule 4.

[70] It is important to note that the terms of section 76(3) of the Constitution are peremptory.

[71] The legislative and executive powers to support local government can be employed by provincial government to strengthen government structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions as was held in the ***Ex parte Chairperson of the National Assembly: in re Certification of the Constitution of the Republic of South Africa*** 1996 (4) SA 744 (CC) ("***The First Certification***" Judgment) at paragraph [367].

[72] Section154 of the Constitution reads as follows: —

> *"(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 representation with regard to the draft legislation.***"

[73] Section 154(2) of the Constitution recognises, by implication, that both national and provincial legislation may affect *"**the status, institutions, powers or functions of local government**"*.

[74] Section 155(6) of the Constitution builds on the powers granted to provincial governments over municipalities by section 154, and provides a further dynamic on the part of provinces in respect of the manner in which municipalities legislate and administer. It reads as follows: —

> *"**(6) Each provincial government...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).**"* (emphasis added)

[75] Section 155(7), in particular, affords national and provincial governments the power to regulate the exercise of municipal executive authority by setting standards and

minimum requirements. It was thus submitted that setting such standards and minimum requirements directly affect the interests, concerns and capabilities of provincial governments.

[76] However, the term *"regulating"* within the context of section 155(7) has been held by the Constitutional Court to connote *"a broad managing or controlling rather than direct authorisation function"* (***The First Certification Judgment*** at paragraph [377].) The regulatory power enables both national and provincial governments to set standards and minimum requirements and monitor compliance with those standards.

[77] ***The Memorandum on the Objects of the Local Government Municipal Systems Amendment Bill 2010*** pertinently stipulates the following: —

> *"**The Local Government: Municipal Systems Act (Act No. 32 of 2000) ("the Systems Act"), authorises the Minister to set norms and standards or guidelines in relation to personnel matters, but does not give the minister any effective regulatory powers relating to these matters especially as far as they relate to municipal managers and managers directly accountable to municipal mangers. The main object of this Bill is to grant the Minister adequate regulatory powers in respect of municipal managers and managers directly accountable to municipal managers. The Bill furthermore also addresses key elements of the Local Government Turnaround Strategy.**"*

[78] In the ***First Certification Judgment*** at paragraph [371] the Constitutional Court described the legislative and executive power granted to provinces to promote the

development of local government capacity *"**to perform its functions and manage its affairs"*** **as *"more dynamic"*** than its support role and concluded that: —

> *"**Taken together these competences are considerable and facilitate a measure of provincial government control** over the manner in which municipalities administer those matters in parts B of NT schs 4 and 5. **This control is not purely administrative. It could encompass control over municipal legislation** to the extent that such legislation impacts on the manner of administration of LG matters."* (emphasis added)

[79] It is for the above reasons that the applicant contends that the Amendment Act constitutes legislation envisaged by section 76(3) of the Constitution.

Legislation envisaged in section 76(3):

[80] The Applicant submits that because the Bill provides for legislation envisaged in section 76(3) of the Constitution (notably section 195(3) and (4) and section 197) it should have been tagged as an ordinary Bill affecting the provinces. It is accordingly necessary to establish whether the Bill: —

[80.1] Constitutes national legislation as envisaged by section 195(3) which ensures the promotion of the values and principles in section 195(1) of the Constitution;[10] or

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[10] Section 195(1) states:

> ***"Basic values and principles governing public administration.**—(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
>
> *(a) A high standard of professional ethics must be promoted and maintained.*
>
> *(b) Efficient, economic and effective use of resources must be promoted.*

[80.2.] Regulates the appointment of people in public administration on policy considerations;[11] or

[80.3] Regulates the functions and structure of the public service;[12] or

[80.4] Regulates terms and conditions of employment in the public service;[13] or

[80.5] Deals with whether an employee in the public service may be favoured or prejudiced only because they support a political party or cause.[14]

[81] It is the applicant's contention, particularly due to the introduction of regulations to be issued in terms of the Amendment Act, that the said Bill provides for legislation

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(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation." [emphasis added]

[11] section 195(4).

[12] section 197(1).

[13] section 197(2).

[14] section 197(3).

envisaged in terms of section 195(3) and (4) as well as section 197(1), (2) and (3) of the Constitution.

The first respondent's submissions:

[82] The first respondent correctly identifies the amendments introduced by the municipal Systems Amendments Act as relating to the following issues: —

> *"Appointment of a municipal manager;*
>
> *Appointment of managers directly accountable to the municipal manager;*
>
> *Limitation of political rights of municipal managers and managers directly accountable to the municipal manager;*
>
> *Employment contracts of municipal managers and managers directly accountable to the municipal manager;*
>
> *Employment of dismissed staff and record of disciplinary proceedings;*
>
> *Staff establishments;*
>
> *Bargaining council agreements;*
>
> *Regulations;*
>
> *Code of Conduct for councillors."*

[83] The only section of the Amendment Act which has a wider range than municipal government is the permissive section allowing the Minister to make regulations relating to the duties, remuneration, benefits and the terms and conditions of employment of municipal managers and managers directly accountable to the municipal manager and other matters as set out above.

[84] The first respondent discusses the governance structures of local governments. According to the Systems Act a municipality consists of political structures, administrative structures, and the community of the municipality.

[85] The three critical organs of municipal governance are: —

1. the municipal council
2. the mayor
3. the municipal manager

[86] The interplay between these organs is critical for effective service delivery and good governance.

[87] The political structure of a municipality includes the municipal council, the executive structures, namely the executive committee, executive mayor, and the committees of the councils.

[88] The Constitution vests both the legislative and executive powers of a municipality in a municipal council (section 151(2) of the Constitution).

[89] The councillors are elected to represent local communities on municipal councils and are bound by the Code of Conduct for Councillors.

[90] The Systems Act also draws a clear distinction between the political structures and the municipal administration.

[91] A political office bearer is defined as follows in the Systems Act: —

a) The Speaker;

b) The Executive Mayor;

c) The Mayor;

d) The Deputy Mayor;

e) The Deputy Executive Mayor; and

f) Members of the Executive Committee

[92] The council of a municipality, in terms of section 4 of the Systems Act, has a duty, *inter alia* to: —

a) exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interest of the local community;

b) provide, without fear or prejudice, democratic and accountable government;

c) encourage an involvement of the community;

d) strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;

e) give members of the local community equitable access to municipal services to which they are entitled; and

f) contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.

[93] The Systems Act also provides the legal framework for the appointment and functioning of the most senior levels of municipal administration, namely the municipal manger and mangers directly accountable to him or her. In terms of section 54A(1)(a), the municipal manger is the head of the administration of a municipal council.

[94] The importance of a municipal manager as the head of the administration of a municipal council was emphasised in the case of ***Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development Executive Council of KwaZulu Natal v President of the Republic of South Africa*** **1999 (12) BCLR 1360 CC** at paragraph [109],where it is stated that the manager is: "*...**a key structure of a municipality and not merely a personnel appointment as contemplated in section 161 (d) of the Constitution**".*

[95] The municipal manager is the primary interface between the political structures and office bearers and the municipal administration. The functions of a municipal manager, who must meet prescribed financial management competency levels, are set out in section 55 of the Systems Act.

[96] The mainstay of the applicant's argument is the constitutional provisions which enable both national and provincial governments to set standards and minimum requirements for local government and to monitor compliance with those standards.

[97] The applicant also contends that the "broad purpose" of the Bill also falls squarely within the ambit of section 97(1)–(2) and section 195(3)–(4) of the Constitution.

The second and third respondent's submissions:

[98] The second and third respondents submit the following: —

[98.1] The section to which regard has to be had is section 76(3) of the Constitution.

[99] It was emphasised by the second and third respondent that the goal of tagging was to ensure that provinces fully and effectively exercise their appropriate role in the

process of considering national legislation which substantially affect them, as was held in ***Tongoane*** at paragraph [69]. The principle that the question of tagging is broader than the determination of legislative competence was accepted by the second and third respondents.

[100] The second and third respondents unreservedly accepted the "substantial measure" test for tagging which permits a consideration of all the provisions of a Bill and their impact on matters which substantially affect provinces. It accepted the dictum in ***Tongoane*** at paragraph [72] that "***(w)hether 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***".

[101] In ***Democratic Alliance v President of South Africa and Others*** *supra* at paragraph [88] it was emphasised that a Bill must <u>not</u> be tagged as requiring a section 76 procedure if it would only cause certain knock-on effects on matters in respect of which provinces may regulate in terms of Schedule 4. Furthermore, in the said matter it was held that only legislation which directly regulates the matters referred to in section 76(3) and (4) namely sections 44(2), 65(2), 163, 182, 195(3) and (4), 196, 197, 220(3) and Chapter 13 were determinative of whether a Bill should follow the section 76 procedural route. Furthermore, the knock-on effects could only play a role when it had such an effect on all provinces uniformly.

[102] It was emphasised that the applicant did not contend that the Amendment Act in substantial measure fell within the provincial legislative competence and that the question was confined to whether the Amendment Act fell within the provisions of section 195(3) and (4) and/or section 197 of the Constitution. Furthermore, it was

emphasised that the applicant, as a second string to its bow, as set out above, suggested that the monitoring, supervision and support powers of provincial government played a role in the tagging process. It was pointed out that this argument was not mentioned in the affidavits and that such powers would differ from province to province and municipality to municipality and could not therefore give the NCOP an enhanced legislative vote as it had to collect the votes of all nine provinces.

[103] In any event, the Joint Tagging Mechanism obtained a legal opinion that the Amendment Act be classified as a section 75 Bill. On 4 August 2010 the Chairperson of the NCOP accepted this recommendation and the speaker did so on 3 August 2010. At no point in time was the tagging of the Bill questioned. It is further important to note that the Bill preceding the Amendment Act, namely the Local Government: Municipal Systems Act 32 of 2000, was also tagged as a section 75 Bill.

[104] In any event the second and third respondent made short shrift of the section 195(3) argument in stating that the national legislation contemplated by section 195(3) is primarily the Public Service Act. It was argued on the behalf of the second and third respondent that the Amendment Act deals with only a particular category of employees at municipal level *vis-à-vis* "the public administration" or "the public service".

[105] It was further argued that because the Amendment Act deals with employees at municipal level only, it does not substantially affect the provinces.

[106] Section 197 of the Constitution provides as follows: —

> ***"197 Public Service"***
>
> ***(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."***

[107] Section 196(4)(f)(iv) refers, for example, only to national and provincial organs of state.

[108] Section 196 of the Constitution provides for a Public Service Commission to promote, investigate, monitor and enforce the values and principles set out in section 195 throughout the public services.

[109] Section 195(4) stipulates that "***(t)he 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***".

[110] This national legislation is the Public Service Act 103 of 1994.

[111] It is significant that a "public service" is identified within the public administration in section 197. Thus public administration does not equate to public service. Section 197(2) stipulates that the terms and conditions of the public service must be regulated by national legislation. Significantly section 197(4) relates to how provincial governments must deal with members of the public in their administration within a framework of uniform norms and standards applying to the public services.

[112] It was argued on behalf of the second and third respondent that "public service" refers to only national and provincial departments and government components. A department is also defined as such in the Public Service Act. Thus, it was argued, employees at local government level are not part of the public service. It was submitted that the only legislation envisaged in section 197 is the Public Service Act which does not include municipal employees. However, this argument is circuitous given the fact that one cannot interpret a provision of the Constitution with reference to an Act. One must give effect to the provisions of the Constitution. Nonetheless, the only national legislation in place, currently, is that envisaged in section 197(1).

[113] The Local Government Municipal Systems Act 32 of 2000 section 50(1) and (2) states the following in respect of public administration: —

> "***50. Basic values and principles governing local public administration***

> ***(1) Local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution.***
>
> ***(2) In administering its affairs, a municipality must strive to achieve the objects of local government set out in section 152(1) of the Constitution, and comply with the duties set out in sections 4(2) and 6."***

[114] It was thus submitted that the Amendment Act does not deal with the overall legislative framework envisaged by section 195(3) and (4) of the Constitution but a small subsector of employment relations within municipalities.

[115] Should the second and third respondents' submissions be accepted, then the proper route to have followed in enacting the Amendment Act was, indeed, section 75.

[116] The question does not end there, however. It is wholly unclear why the local sphere should not, along with the national and provincial sphere, be regarded as the public service and the tendency is to suggest that all public servants must be integrated into one single, public service.

[117] At present, the Public Service consists of national and provincial government staff. Over the next few years government will try to place employees of all three spheres of government in a public administration regime, as the Public Administration Management Act 11 of 2014 ("**the PAM**") indicates (which was assented to on 19 December 2014).

[118] Currently, the "public service" is not considered to include municipal employees.

Section 195 and the Public Administration:

[119] I have referred to section 195(1) above and do not repeat its provisions.

[120] Section 195(2) *et. seq.* read as follows: —

> "***195 Basic values and principles governing public administration***
>
> ***(1)*** ...
>
> ***(2) The above principles apply to—***
>
> ***(a) administration in every sphere of government;***
>
> ***(b) organs of state; and***
>
> ***(c) public enterprises.***
>
> ***(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.***
>
> ***(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.***
>
> ***(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.***" (emphasis added)

[121] Section 195(5), thus, clearly indicates that legislation may differentiate between different sectors, administrations or institutions as the current Public Service Act does.

The background to the passing of the Amendment Act:

[122] In establishing the route which should have been followed in passing the Amendment Act, assistance may be gleaned from the reasons why it was promulgated, which contextualises its provisions.

[123] The Amendment Act is but one measure aimed at improving and contributing to a better functioning and effective local government for purposes of delivering quality services to the citizens of this country.

[124] Local government has played a significant role since the ushering in of the new municipal dispensation in December 2000. More people have increased access to basic services and more opportunities have been created for their participation in the society.

[125] Professor Nico Steytler, together with Professor Jaap de Visser and Ms Annette May, conducted research as a team for the Community Law Centre in 2009, which study is entitled *"**The Quality of Local Democracy: a study into the functionality of municipal governance arrangement**"*. The first respondent (who in large part limited his argument to the constitutionality or otherwise of section 65(A)) submitted this study in evidence.

[126] The first respondent submitted that more than 30 interviews were conducted.

> ***"More than 30 interviews were conducted with municipal office bearers, councillors and officials in 5 municipalities in 4 provinces (North West, Gauteng, Eastern Cape and Western Cape), which differed according to size, location and levels of functionality. Although the interviews were a small sample, the in depth interviews revealed behavioural dynamics that were uncontested, if not confirmed, by the wide readership of local government stakeholders the report enjoyed."***

[127] The memorandum to the Amendment Act pertinently states that the South African Local Government Association ("**SALGA**") was consulted on the Amendment Act as well as the provincial departments responsible for local government. SALGA represents the views of all municipal councils and its members are best placed to appreciate the significance of any problems within a municipality. The memorandum similarly makes it clear that all the departments responsible for local government were consulted and that the Bill was published for public comment in terms of section 154(2) of the Constitution.

[128] In this regard it is not without significance that it is the labour union of South African Municipal Workers which launched this application. One can understand a reluctance on the part of employees to be bound by more stringent employment provisions. The fact that neither of the provinces, nor SALGA nor the Institute for Local Government Management of South Africa ("**ILGM**"), a body representing senior managerial positions in local government, deemed it fit to oppose this application, is significant.

[129] The Minister identified the problem that the local government system was gradually becoming less effective due to internal and external negative practices.

[130] He further identified that satisfactory practices are not institutionally sound but depends on a few leaders and personalities.

[131] There is already a Code of Conduct in place for councillors in the Systems Act. This Code provides, for example that: —

- ***Councillors are elected to represent local communities on municipal councils, to ensure that municipalities have structured mechanisms of accountability to local communities, and to meet the priority needs of communities by providing services equitably, effectively and sustainably with in the means of the municipality.***
- ***The Code also prohibits a councillor from interfering in the administration of the municipality, unless the council has given the councillor a mandate.***
- ***The Code also prohibits the instructing of an employee of council without authorization.***
- ***It is a criminal offence for a councillor to attempt to influence the municipal manger, any other staff member, or an agent of a municipality to not enforce an obligation in terms of the Systems Act, other legislation, a bylaw or a council decision.***

[132] The political office bearers of a municipality have been referred to above.

[133] The government further identified that a deliberate subversion of policy intent can happen due to the capture of systems by local elites (bureaucrats or politicians, and

business people), interest groups and individuals utilising corrupt and criminal means to advance personal interest rather than the community and public interest.

[134] By 2009 many local governments had been crippled leading to the increase of protests against poor service delivery.

[135] Hence the government investigated the state of local government nationally and convened a National Indaba on local government on 21 to 22 October 2009 which was attended by senior government officials from all three spheres of government, traditional leaders, representatives from labour civil society, academics and the business sector.

[136] As set out in the answering affidavit of the first respondent: —

> ***"The government came to the conclusion that one of the major negatives in local government sphere of local government is corruption, nepotism and lack of accountability and improper influence by political elites."***

[137] The Indaba adopted certain declarations, *inter alia* that there was a need for a National Turnaround Strategy for Local Government. Hence the Department of Cooperative Governance and Traditional Affairs (**COGTA**) developed a Local Government Turnaround Strategy which was adopted by the Cabinet on 25 November 2009. One of the objectives identified in this strategy was to improve performance and professionalism in municipalities.

[138] As stated by the first respondent in his heads of argument: —

> ***"The government also identified that it is important to prohibit holding joint offices because of the conflicting pressures that this places on individuals***

and because of its impact on public perception of local government administration."

[139] The key problems which were targeted by the Amendment Act were identified by the Acting Minister as follows: —

"

- ***First, that the Bill sent a clear message that municipalities must and will be more professional in a manner in which they do their business;***
- ***Second, the amendment sought to ensure that competent and well qualified officials are appointed to provide the best possible service to the people;***
- ***Third, they also regulate various matters on human resource management in a manner that promotes great uniformity and predictability across municipalities;***
- ***They deepen accountability of senior municipal officials to the council and by the same token, place certain obligations on political elected officials."***

[140] Once this is so the Amendment Act may be seen as national intervention to set higher standards and minimum requirements for local government and to monitor compliance with these standards.

[141] The applicant's argument is concerned with the question whether the Amendment Act "provides for legislation envisaged" in one of the listed provisions (in particular sections 195 and 197). The phrase "provides for legislation envisaged in" requires that the legislation in question should to a substantial extent directly regulate the matters contemplated in the listed provisions.

[142] Although section 76(3) requires the section 76 route to be followed *inter alia* where the legislation falls within a functional area listed in Schedule 4 (being subject-matter in respect of which the national and provincial legislatures have concurrent legislative competence), the question is whether section 76 necessarily has to be followed merely because there is concurrent legislative competence. In terms of section 104(1)(b) provincial legislatures have legislative competence *inter alia* on "any matter for which a provision of the Constitution envisages the enactment of provincial legislation". The national legislature has a similar power by virtue of its residual legislative authority (section 44(1)(a)(ii)). The Constitution might, conceivably, quite outside the functional areas of Schedule 4, envisage the enactment of legislation on the same subject matter by both national and provincial legislatures.

[143] In this regard the following was held in ***Tongoane*** *supra* at paragraph [72]: —

> "***To summarise: any 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. What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, 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."

[144] Sections 154 and 155(7), dealing with local government, appear to be examples of the latter kind, since both national and provincial governments are authorised thereunder to pass legislation to support and strengthen the capacity of municipalities to manage their own affairs and to oversee the effective performance by municipalities of their functional areas of responsibility.

[145] The original Municipal Structures Act 117 of 1998 ("**the Structures Act**") appears to be national legislation enacted pursuant to sections 154 and 155(7). Although most of the original Structures Act was legislation contemplated in section 155(2), the provision therein (contained in section 82) for the appointment of municipal managers probably fell within sections 154 and 155(7) rather than section 155(2). The original Systems Act further regulates the functions and employment of municipal managers in sections 55 to 57.

[146] The Amendment Act, which seems to be concerned mainly with municipal managers, appears to be legislation of a similar kind – it transfers the appointment provision from section 82 of the Structures Act to section 54A of the Systems Act and amends other aspects of the Systems Act relating to municipal managers.

[147] If this analysis is correct, the question is whether national legislation of the kind contemplated in sections 154 and 155(7) is required to follow the section 76 route. On the face of it, the answer is no because those provisions are not listed in

section 76(3). It is also not legislation of the kind contemplated in section 76(4) because the Systems Act and the Amendment Act do not directly regulate Schedule 5 functional areas (any more than they regulate Schedule 4 functional areas) but are concerned with the support, strengthening and oversight, in general, of the functioning of municipalities.

[148] The question is whether the Amendment Act can be characterised as national legislation of the kind contemplated in section 195(3), section 195(4) or section 197. Given the fact that the public administration referred to in section 195 refers to all spheres of government, it could be stated that the Amendment Act is, indeed, legislation envisaged in at least section 195(3).

[149] However, the reference to a public service within the public administration within section 197(1) would seem to indicate the contrary. In terms of section 197(2) the terms and conditions in the public service must be regulated by national legislation, which currently is the Public Service Act which does not include municipal employees. It can cogently be argued that until the Public Service Act is amended, municipal employees, as yet, are not considered to form part of the public service.

[150] It would appear from section 195(2)(a) that municipal employees form part of the public administration. Thus there may be separate national legislation in respect of municipal employees in terms of section 195(3).

[151] When regard is had to section 195(2)(a) of the Constitution it is stated that the principles set out in section 195(1) apply to administration in every sphere of government. In the Local Government Turnaround strategy at page 23 it is made clear that the vision for the future is a single public service. Section 195(6) makes it

clear that the nature and functions of different sectors, administrations or institutes of public administration are relevant factors to be taken into account in legislation relating to public administration.

[152] Given the importance of the provinces' enforcement and monitoring role in respect of municipalities, and its concurrent legislative competence to legislate in order to support and strengthen local municipalities it appears as though the more burdensome procedure prescribed in section 76 should have been followed in enacting the Amendment Act (as provided for by section 195(3) for example).

[153] Murray and Simeon state the following regarding when a statute should be tagged as a section 76 or section 75 statute —

> "*1. **Does the Bill expect provinces to implement any part of it under s 125(2)(b) of the Constitution? If so, the Bill should follow the s 76 procedure.***
>
> *2. **Does the Bill contain provisions that would normally fall for implementation by the provinces under s 125(2)(b) but over which the national government retains the responsibility for implementation? If so, the Bill should follow the s 76 procedure.***
>
> *3. **Could this law, in the future, conflict with a provincial law? Or, in other words, are there provisions in this law that deal with matters over which a province has jurisdiction? If so, the Bill should follow the s 76 route.***

4. ***Does the Bill have implications for any policy or law which provinces are already implementing or may implement? If so, the Bill should follow the s 76 procedure.***

5. ***Is the intrusion of the national Bill on a Schedule 4 matter trivial? If so, the Bill should follow the s 75 route."***

[154] The Structures Act was also tagged as a section 75 statute. This cannot of course be decisive because the Acts preceding the Amendment Act may have been incorrectly tagged. But it does indicate that the legislation in question was not conceived by the lawmaker as providing for legislation of the kind contemplated in the provisions of the Constitution listed in section 76(3). If the applicant accepts that the original legislation was correctly tagged in terms of section 75, one would expect it to explain why the Amendment Act stands on a different footing. The applicant does so with reference to the 2009 COGTA report "**State of Local Government in South Africa**" at pages 17–18 (paragraph 2.6) which, as is pointed out by Professor Steytler, contributed fundamentally to the passing of the Amendment Act: —

"*2.6* ***Weak national and provincial oversight of local government***

Section 154(1) of the Constitution requires both the National and the Provincial Governments by legislation or other means to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. Failure in this regard may result in the invocation by the national sphere of government to the provincial sphere of section 100 of the Constitution.

Provincial supervision, monitoring and support of local government is a Constitutional obligation in terms of sections 154(1) and Section 155(6) and (7) of the Constitution. The provincial sphere can intervene in a municipality within its jurisdiction in terms of section 139 of the Constitution. To give effect to these obligations, the departments for local government were established with the specific mandate to oversee and support municipalities. The principle for the application of sections 100 and 139 has always been to invoke them as a last resort.

However, as increasing performance challenges built up within the local sphere over the last decade, with over 30 municipalities having experienced an intervention, it became apparent that these mechanisms were not well-supported by national government or sufficiently institutionalised, due to the absence of post-intervention measurement of improvement, and the weak application of intergovernmental checks and balances, i.e. the oversight and review process by the Minister, the NCOP and the Provincial Legislatures."

[155] The same report at page 19 (paragraph 2.7) states the following: —

"*2.7* ***<u>Governance and oversight: the role of the provincial Departments responsible Local Government and the Offices of the Premiers</u>***

The provincial Departments responsible for Local Government and the Offices of the Premier are the oversight, support and lead governance entities in provinces. Both offices have previously been

found to be under-resourced, poorly structured and capacitated, and often lacking a core focus on their oversight and governance mandates. Systemic weaknesses and low capacity translate into poor responsiveness and structural ability to act as a responsive sphere of government."

[156] Some of these issues stipulated above were already addressed in the Organised Local Government Act 52 of 1997 which provides for the recognition of national and provincial organisations representing the different categories of municipalities. Clearly the provinces' role in overseeing and monitoring the municipalities is given great prominence. Hence, it appears that one can rely on section 195(3) to argue that the Amendment Act should have followed the section 76 route.

[157] When regard is had to all that is stated above it would appear as though the Public Service Act is still determinative as to the categories of government included therein which are limited to national and provincial governments. Nonetheless, the municipalities and their interaction with the provinces are coming to the forefront and is an issue which commands serious consideration.

[158] Given all the above considerations it is held that the incorrect route was followed in enacting the Amendment Act. The correct route should have been section 76 particularly because of the enhanced importance of the interplay between the municipalities and provinces.

[159] In consequence, the Amendment Act is held to be unconstitutional.

[160] In the result it is unnecessary to deal with the substantive issue, namely section 56A.

Conclusion:

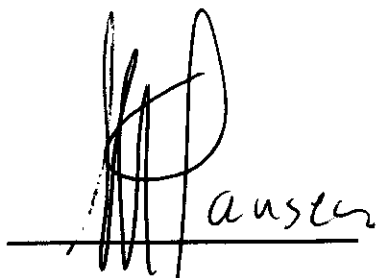
[161] In the premises, the following order is made: —

Order

1. It is declared that the Local Government Municipal Systems Amendment Act 7 of 2011 is invalid in its entirety for want of compliance with the procedures set out in section 76 of the Constitution.

2. In terms of the provisions of section 167(5) of the Constitution order number (1) above is referred to the Constitutional Court for confirmation.

3. No order as to costs is made as the arguments advanced by the respondents warranted judicial scrutiny.



MM JANSEN

JUDGE OF THE HIGH COURT

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ADDENDUM

Constitutional provisions on oversight and accountability

The relevant constitutional provisions that refer directly and indirectly to oversight and accountability are as follows: —

Section 41(2)	An Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations, and for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
Section 42(3) and (4)	(3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action. (4) The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting provinces.
Section 55(2)	The National Assembly must provide for mechanisms – (a) to ensure that all executive organs of state in the national sphere of government

	are accountable to it; and (b) to maintain oversight of - (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.
Section 55(2)	The National Assembly must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of— (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.
Section 56	The National Assembly or any of its committees may – (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; (b) require any person or institution to report to it; (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or institutions.
Section 66(2)	The National Council of Provinces may

	require a Cabinet member, a Deputy Minister or an official in the national executive or a provincial executive to attend a meeting of the Council or a committee of the Council.
Section 67	Not more than 10 part-time representatives designated by organised local government representing the different categories of municipalities may participate in the proceedings of the National Council of Provinces, when necessary, but may not vote.
Section 69	The National Council of Provinces or any of its committees may – (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; (b) require any person or institution to report to it; (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or institutions.
Section 70(1)	The National Council of Provinces may – (a) determine and control its internal arrangements, proceedings and procedures;

	and (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
Section 89	(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of – (a) a serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the functions of office. (2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office.
Section 92	(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. (3) Members of Cabinet must … provide Parliament with full and regular reports concerning matters under their control.
Section 93(2)	Deputy Ministers are accountable to Parliament for the exercise of their powers and the performance of their functions.
Section 100(2)	If the national executive intervenes in a

	province by assuming responsibility for the relevant executive obligation which that province cannot or does not fulfil, the national executive must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began. The intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention. The Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.
Section 102	(1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet, excluding the President, the President must reconstitute the Cabinet. (2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.
Section 59	(1) The National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees, and conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but

	reasonable measures may be taken to regulate public access, including access of the media to the Assembly and its committees.
Section 114(2)	A provincial legislature must provide for mechanisms to ensure that all provincial executive organs of state in the province are accountable to it; and to maintain oversight of— (i) the exercise of provincial executive authority in the province, including the implementation of legislation; and (ii) any provincial organ of state.
Section 115	A provincial legislature or any of its committees may— (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; (b) require any person or provincial institution to report to it; (c) compel, in terms of provincial legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or institutions.
Section 116(1)	A provincial legislature may— (a) determine and control its internal arrangements, proceedings and procedures; and

	(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
Section 125(4)	Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.
Section 130(3) and (4)	(3) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the Premier from office only on the grounds of— (a) a serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the functions of office. (4) Anyone who has been removed from the office of Premier in terms of subsection (3) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.
Section 133(2) and (3)	(2) Members of the Executive Council of a province are accountable collectively and individually to the provincial legislature for the exercise of their powers and the performance of their functions. (3) Members of the Executive Council of a province must provide the provincial

	legislature with full and regular reports concerning matters under their control.
Section 139(2)	If a provincial executive intervenes in a municipality which cannot or does not fulfil an executive obligation by assuming responsibility for the relevant obligation in that municipality the provincial executive must submit a written notice of the intervention to the Cabinet member responsible for local government affairs, the relevant provincial legislature and the National Council of Provinces within 14 days after the intervention began. The intervention must end if the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention. The Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.
Section 118	(1) A provincial legislature must facilitate public involvement in the legislative and other processes of the legislature and its committees, and conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but

	reasonable measures may be taken to regulate public access, including access of the media to the legislature and its committees.
Section 139(3)	When the relevant provincial executive intervenes in a municipality which cannot or does not fulfil an executive obligation by dissolving the Municipal Council, the provincial executive must immediately submit a written notice of the dissolution to the Cabinet member responsible for local government affairs; and the relevant provincial legislature and the National Council of Provinces. The dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.
Section 139(6)	When the relevant provincial executive intervenes in a municipality which cannot or does not approve a budget or any revenue-raising measures necessary to give effect to the budget; or which, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or which admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must submit a written notice of the intervention to the Cabinet member responsible for local government affairs; and, the relevant

	provincial legislature and the National Council of Provinces, within seven days after the intervention began.
Section 146(6)	A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.
Section 154	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.
Section 155(6)	Each provincial government must establish municipalities in its province in a manner consistent with the applicable national legislation 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.
Section 155(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.
Section 231(2), (3) and (4)	(2) An international agreement binds the

	Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Note: This is not an exhaustive list of provisions of the Constitution.