

**UNIVERSITY OF THE WESTERN CAPE**



**UNIVERSITY of the  
WESTERN CAPE**

**FACULTY OF LAW**

Mini-thesis submitted in partial fulfilment of the requirements for the award of  
LLM degree

Zimkhitha Mhlahlo

Student number: 3717656

Supervisor: Professor Nico Steytler

**ASSESSING THE CONSTITUTIONALITY OF SECTION 56A OF THE  
LOCAL GOVERNMENT: MUNICIPAL SYSTEMS AMENDMENT ACT,  
2011 (ACT 7 OF 2011)**

## DECLARATION

I, Zimkhitha Mhlahlo, declare that “**Assessing the Constitutionality of section 56A of the Local Government: Municipal Systems Amendment Act, 2011 (Act 7 of 2011)**” is my own work, that it has not been submitted before for any degree or examination at a University, and that all the sources I have used or quoted in this paper are acknowledged as complete references.

Student: Zimkhitha Mhlahlo

Signature:



*I dedicate this thesis to the memory of my loving grandmother, MaMkhuma, and my family. May this serve as the first of many, for generations to come.*



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## **KEYWORDS**

Municipal managers

Managers

Local government

Political rights

Political office

Constitutionality

Local Government: Municipal Systems Amendment Act 7 of 2011

Municipalities



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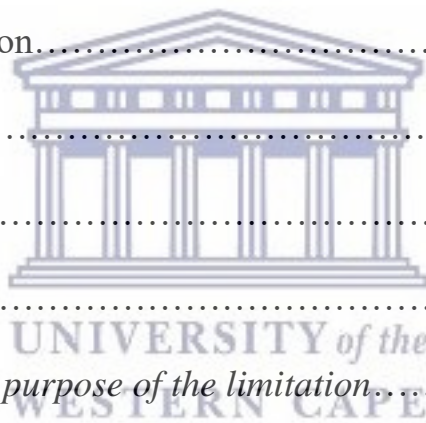
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# CHAPTER 1

## INTRODUCTION

### 1.1. PROBLEM STATEMENT

In the South African local government context, municipalities are operationally governed through two arms: the political arm and the administrative arm. Both arms work simultaneously in ensuring that the municipality ‘move[s] progressively towards the social and economic upliftment of communities and the provision of basic services.’<sup>1</sup> Even though these arms work together, there has to be a separation of powers and adherence to the rule of law. Each arm must operate within its functions and do so without any favour or prejudice. Municipal managers head the administrative arm of the municipality.<sup>2</sup> They are appointed by the political structure, known as the municipal council, of each municipality.<sup>3</sup> Their role includes accountability and responsibility for, inter alia: the formation and development of an economical, effective, efficient and accountable administration; the management of municipal administration in accordance with the law; the appointment of staff and managing the communications between the municipality administration and its political structures.<sup>4</sup> In consultation with the municipal manager, the municipal council appoints managers directly accountable to the municipal managers.<sup>5</sup> The managers are referred to as section 56 managers (managers). Municipal managers and section 56 managers are the glue that holds the administrative side of municipalities together and are custodians of municipal finances.

The Local Government: Municipal Systems Amendment Act 7 of 2011 (Systems Amendment Act) was promulgated into law on 5 July 2011. This amendment of the Local Government: Municipal Systems Act of 2000 was aimed at addressing what was perceived to be an alarming increase in the instances of maladministration within municipalities.<sup>6</sup> The amendment introduced measures to ensure that professional qualifications, experience and

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<sup>1</sup> Preamble of Local Government: Municipal Systems Act 32 of 2000 (Systems Act).

<sup>2</sup> Section 55(1) Systems Act.

<sup>3</sup> *Mbana v Mnquma Municipality* 2004 (1) BCLR 83 (Tk).

<sup>4</sup> Section 55 (1) (a), (b), (e), & (j) Systems Act.

<sup>5</sup> Section 56(a) Systems Act

<sup>6</sup> Preamble of Systems Amendment Act.

competence were the criteria governing the appointment of municipal managers or managers' directly accountable to municipal managers in local government, as opposed to politically-affiliated appointments.

Of particular interest to this study is the amendment of the Local Government: Municipal Systems Act (2000) through the addition of section 56A. Section 56A provides that: 'A municipal manager or manager directly accountable to a municipal manager may not hold political office in a political party, whether in a permanent, temporary or acting capacity'.<sup>7</sup> Section 56A thus seeks to provide for a separation between politics and municipal administration.

Fearful of an encroachment on the political rights of municipal managers, the South African Municipal Workers Union (SAMWU) brought a case to the High Court against the Minister of Cooperative Governance and Traditional Affairs.<sup>8</sup> SAMWU challenged the constitutionality of the Local Government: Municipal Systems Amendment Act (2011) on two grounds: firstly, that the procedure followed in adopting the Act was unconstitutional; and secondly, that section 56A was a violation of the political rights of municipal managers and managers under section 19(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution). Section 19(1) stipulates: 'Every citizen is free to make political choices, which includes, the right to participate in the activities of a political party'. The High Court held that the Local Government: Municipal Systems Amendment Act (2011) was adopted by a procedure that is unconstitutional, as the relevant Bill was processed through a procedure provided for by section 75 rather than by section 76 of the Constitution.<sup>9</sup> The High Court declined to rule on the second argument advanced by SAMWU.

As the High Court invalidated a law, the Constitutional Court has to confirm or set aside the decision. This court, too, did not consider the merits of section 56A. The Constitutional Court relied on its judgement in the *Tongoane*<sup>10</sup> case as precedent, and asserted that 'it would be an exercise in futility should a court hold an entire statute unconstitutional, to analyse sections of

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<sup>7</sup> Section 56A (1) Systems Amendment Act.

<sup>8</sup> *South African Municipal Workers Union v Minister of Co-operative Governance and Traditional Affairs* (3558/2013) [2016] ZAGPPHC 733 (23 February 2016) (SAMWU HC).

<sup>9</sup> SAMWU HC para 9.

<sup>10</sup> *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*(CCT100/09) [2010] (8) BCLR 741 (CC) (11 May 2010).

it in order to ascertain the validity or demise thereof'.<sup>11</sup> As a consequence, the Constitutional Court found it was non-essential to decide the constitutionality of section 56A. The Constitutional Court held:

‘Although the Substantive Challenge raises issues that directly implicate rights in the Bill of Rights, there is nothing to be gained from considering the challenge at this point. There is no guarantee that the section will not change once it has been passed in accordance with the correct procedures. In my view, providing a post-obiter assessment of section 56A of the Amendment Act circumvents the course and intrudes upon the correct legislative processes’.<sup>12</sup>

The Constitutional Court thus did not rule on the constitutionality of section 56A. The reasoning of the Constitutional Court is that, ‘providing a post-obiter assessment of section 56A of the Systems Amendment Act circumvents the course and intrudes upon the correct legislative processes.’<sup>13</sup> The silence of the Court has however created a climate of uncertainty as to the constitutionality of section 56A. This could allow for the further continuation of an alleged infringement of the political rights of municipal managers and managers directly accountable to municipal managers. A clear pronouncement on the constitutionality of section 56A would no doubt have laid to rest such concerns and guided the consultation process undertaken by the national legislature with regard to the Local Government: Municipal Systems Amendment Act (2011).

## 1.2. Significance of the Issue

The silence of the Constitutional Court as to the constitutionality of section 56A with regard to section 19(1) of the Constitution has deprived the legislature of constitutional guidance in the current consultations on the Local Government: Municipal Systems Amendment Act (2011). This has allowed for an uncertain situation where a section may now be adopted while serious doubts remain on its constitutionality. Far from resolving the issue at hand, the Constitutional Court has postponed the inevitable. Should section 56A be adopted again it is

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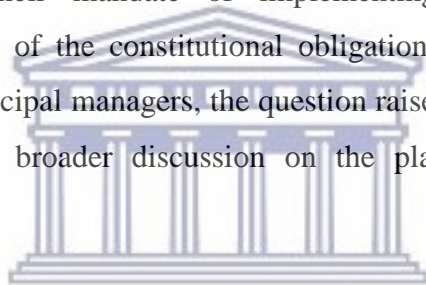
<sup>11</sup>*South African Municipal Workers' Union v Minister of Co-operative Governance & Traditional Affairs and Others* [2017] ZACC 7 para 27 (SAMWU CC).

<sup>12</sup> SAMWU CC para 81.

<sup>13</sup> SAMWU CC para 84.

quite certain that more litigation will be brought with regards to its constitutionality. This study assesses the constitutionality of section 56A and aims to provide a clear direction that could be followed when adopting the provision in a revised Local Government: Municipal Systems Amendment Act.

The issue also raises a question about the balance between individual rights and community rights. Individual rights, in this regard, refer to the rights of municipal managers and managers (directly accountable to municipal managers) to participate in politics or hold political office. On the other hand, the community has the right to service delivery that is adequate, equal, efficient and sustainable.<sup>14</sup> A community is further entitled to transparency, accountability, openness and responsiveness in the affairs of the municipality that affect their community rights. Municipal managers greatly impact on how the municipality administration functions, how the finances are managed and how decisions are made for service delivery, through their mandate of implementing the municipal Integrated Development Plan.<sup>15</sup> In view of the constitutional obligation to provide services and the important role played by municipal managers, the question raised is critical. Furthermore, the question also falls within a broader discussion on the place of politics in municipal administration.



### 1.3. Research Question

This study will assess the following question:

Is section 56A of the Local Government: Municipal Systems Amendment Act, 2011 (Act 7 of 2011) a justifiable limitation on the right of municipal managers and managers directly accountable to municipal managers to hold office in political parties?

To answer this question the following sub-questions will be explored:

- (a) What is the content of section 56A of the Local Government: Municipal Systems Amendment Act (2011) and is it a limitation of political rights under section 19(1) of the Constitution?
- (b) What is the content of section 19(1) of the Constitution?

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<sup>14</sup> Preamble of Local Government: Municipal Systems Act.

<sup>15</sup> Section 60 Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).

- (c) Is there a conflict between the provision of section 56A and section 19(1)?
- (d) If so, is section 56A a justifiable limitation on the rights in section 19(1)?

## 1.4. Argument

Municipal managers and managers directly accountable to municipal managers take part in developing and shaping the outcomes of local government. Municipal managers are heads of administration and custodians of municipal finances, and also have other administrative powers. Thus, the position of a municipal manager or manager directly accountable to a municipal manager should not be taken lightly as it has a significant impact on the performance of a municipality.

Local government faces a variety of complex challenges, such as, nepotism, unfinished projects and mismanagement of funds in municipalities. For example, irregular spending in municipalities has had a rapid increased estimate since the 2014 financial year.<sup>16</sup> There is further evidence of a high incidence of irregular or inappropriate appointments, coupled with low capacity, poor skills development programmes and weak institutional management. These irregularities impact on the success or failure of a municipality, with the municipal managers' competencies playing a significant role.

As a means of redirecting municipal administration to becoming more professional and adopting the meritocratic appointments of senior managers, the rule embedded in section 56A, simply stipulates that municipal managers and managers cannot be political office bearers. The Local Government: Municipal Systems Amendment Act<sup>17</sup> (2011) defines political office as the position of a chairperson, deputy chairperson, secretary, deputy secretary, or treasurer of the party nationally or in any province, region or any other area in which the party operates.<sup>18</sup> It will be argued in this study that the limitation of the political rights of municipal managers and managers is just and fair. Section 56A may restrict municipal managers and managers from holding office but it does not interfere with their

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<sup>16</sup> Auditor-General South Africa 'MFMA 2015-2016-General Report' available at <https://www.agsa.co.za/Documents/Auditreports/MFMA20152016.aspx> (accessed 24 June 2017).

<sup>17</sup> Definitions of Systems Amendment Act.



participation in political arenas. Municipal managers can be active members of the political party of their choice; however, they cannot hold a position of the stipulated positions in a political structure.

The Constitution stipulates that everyone is entitled to participate in politics, be it just as an active member or by holding political office. This is a constitutional right envisaged in section 19(1) of the Constitution. On the other hand, section 56A seeks to limit this constitutional right by partially excluding municipal managers and managers from holding office in a political party while being a senior manager in a municipality. These two provisions are seemingly in conflict with each other. This study will argue that although section 56A contradicts constitutional political rights, the contradiction may be justified under the limitation clause in section 36 of the Constitution.

## 1.5. Literature review

There is no available literature exploring the constitutionality of section 56A. However, there is an extensive discussion of politically affiliated appointments of municipal managers and managers. Much of the literature has focused on the outcomes of politically affiliated appointments. In a report titled, 'The quality of local government: a study into the functionality of municipal governance arrangement',<sup>19</sup> De Visser, Steytler and May argue that it is a common practice of councils who are constituted by political actors to make appointments based on political affiliations rather than skills and experience.<sup>20</sup>

De Visser, Steytler and May highlight: 'A fundamental concern raised [in municipalities], is the detrimental impact of excessive and undue political interference by external party political structures in municipal governance'.<sup>21</sup> These political appointments are equivalent to deployment, so that the appointee will be beholden to the political party that appointed him/her.<sup>22</sup> De Visser, Steytler and May also submit that relationships of municipal governance and external political party structures impact all municipal governance in

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<sup>19</sup> De Visser J, Steytler N & May A *The Quality of Local Government: A Study into the Functionality of Municipal Governance Arrangement* (2009).

<sup>20</sup>De Visser, Steytler & May (2009) 36.

<sup>21</sup> De Visser, Steytler & May (2009) 6.

<sup>22</sup>De Visser, Steytler & May (2009) 38.

decision-making. It can be noted that once an incumbent of a political party holds the position of municipal manager, the power and accountability of the municipal manager shifts from the municipal manager ensuring a successful and capable municipality, to the political party. This relationship has seen most municipalities failing to be viable, and thus the democracy of local constituents becomes limited.<sup>23</sup>

According to Koma, in certain administrations municipal administrator and senior management positions are filled with people who are either unqualified or possess irrelevant qualifications.<sup>24</sup> This has negatively impacted on municipalities as such appointees do not have the relevant expertise to deal with the financial management and legal framework of municipalities. Political considerations in the appointment of senior management without required qualifications bring into being weak leadership in strategic senior management including, inter alia, corporate governance; shortage of skills to implement financial management legislation and misplacement of skills within municipalities. Weak leadership in senior management positions can seriously weaken the performance of municipalities.

Powell asserts that municipal managers and managers must have relevant skills and expertise in financial management as they are the custodians of municipal finance. Based on audit report outcomes, Powell argues that the financial standing of various municipalities in accordance with the Municipal Finance Management Act, 2003 (Act 56 of 2003) (MFMA) standards is not achieved in practice. He further asserts that it is a key priority to improve the quality of municipalities, including through the appointment of professional and skilled individuals to senior management positions.<sup>25</sup> Moreover, municipal administration must be insulated from undue political influence. The objective to deepen democracy is achievable through the depoliticised administration of municipalities.

On the other hand, political representatives are elected by the constituents, they understand the grievances and challenges of their communities, and thus collaboration with municipal managers to ensure service delivery may not always have negative outcomes. According to

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<sup>23</sup> Department of Cooperative Governance & Traditional Affairs *Local Government Turnover Strategy* (2009) 17.

<sup>24</sup> Koma S.B 'State of local government in South Africa: issues, trends & options' (2010) (1) *Journal of Public Administration* 115-116.

<sup>25</sup> Powell D 'Imperfection transition: local government policy reform in South Africa, 1994-2012' in Booyesen S (ed) *Local Elections in South Africa: Parties, People, Politics* (2012) 22-23.



De Visser, the close interaction between politicians and officials is one of the strengths of local democracy as it brings the administration closer to, and in frequent contact with the community through the council.<sup>26</sup> Maserumule further asserts that effective and strategic leadership is needed to take bold and decisive actions against poor performance and lack of accountability.<sup>27</sup> The coming together of the political and administrative components of a municipality with the necessary skills, competencies and knowledge befit the imperatives of a developmental system of local government.

A parallel can be drawn with the United States model of municipal managers, which possesses some of the qualities of the South African model. In the United States, municipal managers are referred to as City Managers and are appointed by the council. The United States model assumes that locally elected officials and appointed administrators bear separate responsibilities.<sup>28</sup> In their article, Zhang and Fieock argue that ‘not only are experience and credentials of the manager important in initial hiring decisions, they can provide a safeguard for elected officials’ decisions to assign greater [administrative] powers to the manager for a certain period whom they find trustable and capable.’<sup>29</sup> The authors further suggest that the council may be more inclined to assign powers to managers who identify with their political perspectives. The United States model advances political likeness of council and city managers; thus, it is suggested that municipal managers should identify with the city council’s political inclination. City managers should identify with a political inclination of the municipal council but may not practise favouritism. The city manager must work together with the council for the advancement and the improvement of democracy in local government.

The matter and question of the constitutionality of section 56A have not been dealt with before, there is no available literature currently at hand to answer the constitutionality of this section. Solutions should be explored and examined in order to answer the question at hand.

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<sup>26</sup> De Visser J, Steytler N & May A *The Quality of Local Government: A Study into the Functionality of Municipal Governance Arrangement* (2009) 36.

<sup>27</sup> Maserumule M H ‘Framework for strengthening the capacity of municipalities in South Africa: a developmental local government perspective’ (2008) *Journal of Public Administration* 43.

<sup>28</sup> Zhang Y & Feiock RC ‘City managers’ policy leadership in council-manager cities’ (2009) 20 *JPART* 461

<sup>29</sup> Zhang & Feiock (2009) 462-464.

This paper thus adds to the literature on this matter by providing insight and information on the remedies that can be applied to assess the constitutionality of section 56A.

## 1.6. Chapter Outline

In addition to this chapter, this study is divided into a further three chapters.

Chapter 2 deals with section 56A and the quest for competent administrators and professionalism. The chapter examines section 56A as a mechanism for ensuring competency and professionalism in municipal administration.

Chapter 3 is devoted to the constitutional analysis of the research question. The discussion will include the following constitutional questions:

- 3.1. The meaning of section 19(1) of the Constitution: Political Rights;
- 3.2. The conflict between section 19(1) of the Constitution and section 56A;
- 3.3.3.3 If there is a conflict, is section 56A nevertheless justified in terms of section 36 of the Constitution?

Chapter 4 provides the major conclusions as well as recommendations.

## 1.7. Research Methodology

This research is a desktop study which analyses various journal articles, books and chapters in books relating to municipal management and administration. There is also an analysis of the available case law on the limitation of the political rights of municipal managers. To draw important lessons from municipalities that have implemented the limitation of political rights, the study uses a comparison research methodology where the adoption of the provision has added positive value to or impacted negatively on municipalities.

## CHAPTER 2

### SECTION 56A AND THE 2011 MUNICIPAL SYSTEMS AMENDMENT ACT: THE QUEST FOR PROFESSIONALISM

#### 2.1. INTRODUCTION

Municipal administrators are appointed to ensure effective, efficient and sustainable service delivery to their municipalities. This will not happen if there is a prevalent reputation of the appointment of incompetent, unqualified and incapable senior managers in municipal administration. Some appointments, such as the appointment of incompetent but politically aligned individuals to senior positions and the appointment of politicians as senior managers who dominate political structures, were flawed and had catastrophic consequences. Those consequences include, inter alia, maladministration, failed or incomplete municipal projects and mismanagement of funds; as a result some municipal administrations collapsed.<sup>30</sup> To remedy the status quo, De Visser recommended that the solution lies in the better use of the legal framework and effective political and administrative leadership.<sup>31</sup> As a result there has been an attempt to professionalise the appointment of senior managers.<sup>32</sup> Legislative mechanisms such as the Local Government: Municipal Systems Act, 32 of 2000 and the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) were introduced to promote competent municipal administrators. These legislative mechanisms, however, had loopholes that allowed the municipal political leadership to dictate and manipulate the administrative arm. As a step in the direction of professionalisation and depoliticisation of municipal administration, the Local Government: Municipal Systems Amendment Act was promulgated into law in 2011. The Local Government: Municipal Systems Amendment Act (2011) imposed a duty on local government to ensure the

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<sup>30</sup> Auditor General South Africa MFMA 2015-2016 Consolidated General Report on the Local Government Audit Outcome (2016) 11.

<sup>31</sup> De Visser J 'The political-administrative interface in South African municipalities: assessing the quality of local democracies' *Commonwealth Journal of Local Governance* (2010) 6.

<sup>32</sup> Department of Cooperative Governance & Traditional Affairs *Local Government Turnover Strategy* (2009) 16.

appointment of competent administrators through compliance with certain qualifications and requirements.

The focus of this chapter is to locate section 56A within the quest for professionalisation under the Local Government: Municipal Systems Amendment Act (2011). This will be done by, firstly, discussing the problem of political interference that section 56A sought to deal with. It will do so by examining and discussing the interface between the political arm and the administration, and by examining the consequences of the political-administration interface. Secondly, this chapter will discuss the content of section 54A and section 56A and how they are interdependent. Thirdly, it will discuss section 56A as part of the quest for professionalism by the Local Government: Municipal Systems Amendment Act (2011). This includes the competency requirement for the appointment of municipal managers, the enforcement of the competency requirements and the role played therein by the municipal council, as well as the role played by the Member of the Executive Council (MEC) of Cooperative Governance and Traditional Affairs and the national government in the enforcement of the competency requirements.

## **2.2. Political interference in municipal administration**

Local public administration is composed of two arms: the political and the administrative. The political arm forms part of the legislative arm; and the administrative arm forms part of the executive arm, as is the case in the other spheres of government. However, in local government this is not the case as in municipal administration; although officially there is a separation of powers, this is not so in practice. Public service is not totally depoliticised since there has to be a certain level of co-operation between the political arm and the administrative arm. There needs to be depoliticisation of the administration to a certain extent. Prior to the adoption of the legal framework embodied in the Local Government: Municipal Systems Amendment Act (2011), local government found itself in a conflictual situation with politicians manipulating and encroaching on the powers of the administrative arm, leading to confusion of the roles and responsibilities of the arms of local government. This resulted in the deterioration of the development of local government. These conflictual situations also involved senior political officials politicising the appointment of senior managers, advancing their political agendas and neglecting the mandate of administration. De Visser asserts:

‘Towards the end of the first decade of local government, research showed that it was not uncommon for municipalities to appoint officials who were also office bearers in political parties. A municipal official would then also be the chairperson, secretary or treasurer of a national, regional or local structure of a political party represented in the council. In political terms, that official could then be more senior than the councillors or even the mayor. In instances where the incumbent official abused this political leverage, it dislocated the municipality’s governance arrangements entirely as the mayor would have to take instructions from an official instead of the other way around’.<sup>33</sup>

The dynamic of municipal administration requires the senior managers to work together with the political arm of the municipality in order to ensure effectiveness and efficiency in a municipality. However, in practice, co-operation between politicians and the administration seems to be lacking as politicians tend to encroach upon the domains of municipal administrators.<sup>34</sup> De Visser submits that –

‘[The] political-administrative interface has become the ‘Achilles heel’ of many municipalities. There is no doubt that councillors, members of municipal executives and officials are struggling to define clear roles amongst themselves. This is aggravated by undue political interference by political parties. There is growing concern around the inappropriate relationship between regional party structures and municipalities. There are reports of instances where regional party structures seek to operate municipalities by remote control’.<sup>35</sup>

The notion of political neutrality in municipal administration is a mirage. Yawa asserts that public service is not a totally depoliticised or politically neutral institution especially at the higher echelons of municipal management.<sup>36</sup> He further asserts that there should be an extent to which local public administration is depoliticised; however, expecting political neutrality

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<sup>33</sup> De Visser ‘Municipal public service’ in *Local Government Law and Policy* Ch. 7 (unpublished manuscript 2017).

<sup>34</sup> De Visser (2010) 92-93.

<sup>35</sup> De Visser (2010) 94-95.

<sup>36</sup> Yawa M *An Analysis of the Politics and Administration Nexus in Municipal Policy making: A Case of Emalahleni Local Municipality, Eastern Cape* (Unpublished Thesis, the University of Fort Hare, 2015) 2.

would be ignoring the primacy of politics.<sup>37</sup> Politics is arguably perceived as one of the elements that shape and define organisational structures and the content of local public service.

Surty conducted a research study which asserts that, according to interviews she held, there was a lurking reality of incompetent senior managers who held high political offices being appointed to administrative offices.<sup>38</sup> De Visser, Steytler and May indicate that it is not uncommon for senior management to be populated by party officials.<sup>39</sup> Surty argues that where municipal managers are also leaders in a political party, they adopt a sense of security and perform their duties in a substandard degree.<sup>40</sup> This not only negatively impacts on the development of a municipality but also affects the mandate of service delivery. Moreover, incompetency, inefficiency and disregard of one's role and responsibility in senior management, appear to be directly associated with politically deployed municipal managers. De Visser, Steytler and May argue that the appointment of a party official who occupies a position higher than any councillor, to an administrative post, plays havoc with all the legal lines of accountability.<sup>41</sup>

The call for depoliticisation of municipal public administration is to help ensure better management of municipalities in order to adhere to the mandates, duties and functions that municipal administrations are empowered to undertake. The context of South African local public administration, however, is that it remains faced with the challenge of political interference in the realm of municipal administrations. Functions of the administration are being taken over by politicians and political party influences.

There are two problems that lurk in municipal administrations that will be discussed in the scope of this chapter, and they will be the focus of this chapter. These two problems are: (a) the appointment of politicians as senior managers who then dominate the political structures; and (b) the appointment of incompetent but politically aligned individuals to senior positions.

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<sup>37</sup> Yawa (2015) 2-4.

<sup>38</sup> Surty F *The Political/Administrative Interface: The Relationship between the Executive Mayor and the Municipal Manager* (Unpublished LLM thesis, the University of the Western Cape, 2010) 36.

<sup>39</sup> <sup>39</sup> De Visser J, Steytler N & May A 'The quality of local democracies: The study into the functionality of municipal governance arrangements' (2009) 41.

<sup>40</sup> Surty (2010) 36-37.

<sup>41</sup> De Visser, Steytler & May (2009) 41.



### **2.2.1. Appointment of politicians as senior managers who then dominate the political structures**

There is a plethora of existing legislative frameworks, policies and municipal by-laws that guide the conduct of both political office bearers and administrators. However, this has not stopped politicians from encroaching on the administrative realm. The Local Government: Municipal Systems Act 32 of 2000 provides that councillors (politicians) must not intervene in the administration;<sup>42</sup> however, this is not adhered to in practice. It is argued that the political party structures micro-manage and serve factional or personal interests and interfere in the appointment of staff. The appointment of the municipal managers and the section 56 managers are made by the council, thus often resulting in political appointments. De Visser stated that there are instances in practice whereby an appointment of a section 56 manager is potentially a source of conflict and tension between the municipal manager and the municipal council.<sup>43</sup> These politically influenced appointments are detrimental to the mandate of developmental local government.



### **2.2.2. Appointment of incompetent but politically aligned individuals to senior positions**

The senior manager's position is subjected to the scrutiny of politicians and may at times be subjected to political manipulation. This is a challenge that remains a daunting one. Research indicates that often political parties appoint a person who is not assertive in order to retain power and control over such a municipal administrator.<sup>44</sup> This was also evident in the *Mlokoti* case where a candidate was appointed as a municipal manager through political influence even though he was not the best candidate for the position.<sup>45</sup>

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<sup>42</sup> Schedule 1, Item 11.

<sup>43</sup> De Visser (2010) 98.

<sup>44</sup> Surty (2010) 54.

<sup>45</sup> *Mlokoti v Amathole District Municipality and Another* [2008] ZAECHC 184 (*Mlokoti* case).

On the other hand, the challenge of political appointments emanates from the duty of a council to appoint managers who are directly accountable to the municipal manager.<sup>46</sup> Surty states:

‘The appointment of managers who are directly accountable to municipal managers is a highly contentious issue in local government. Although legislation dictates that the council must consult with the municipal manager before appointing these managers, the ultimate appointment lies with council. In practice this does not work well as the municipal manager is in charge of his or her administration, and thus, having politicians determine who will be managers heading the relevant departments that the municipal manager is ultimately responsible for creates a doubt as to whether this is not in fact an encroachment of the area of supervision of the municipal manager.’<sup>47</sup>

The interface may occur in various situations: from appointing political office bearers to senior management office, to undue influence by politicians in the operations of the municipal administration. This influence may take place even if an appointee is not a political office bearer. Some scholars argue that an incumbent of a senior management office should be ethical and have integrity because even when a manager is not a politician he or she can still be subject to undue influence by political structures.<sup>48</sup> De Visser, Steytler and May assert that in order to counter political influence, there should be more emphasis placed on the strict application of the criteria for appointments.<sup>49</sup>



### **2.3. The Local Government: Municipal Systems Amendment Act (2011)**

In 2011, the Local Government: Municipal Systems Amendment Act was promulgated into law. The objective of this Act was, among other things, the quest for the professionalisation and depoliticisation of the appointment of municipal managers and senior managers.<sup>50</sup> The quest for professionalisation is being sought through the promulgation of new statutory provisions and the setting of regulations, which includes among other things, competency

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<sup>46</sup> Section 56(1) (a) (i) Systems Act.

<sup>47</sup> Surty (2010) 54.

<sup>48</sup> Surty (2010) 45.

<sup>49</sup> De Visser J & Steytler N (2009) 55.

<sup>50</sup> Preamble of Systems Amendment Act.



requirements. The insertion of provisions, such as section 56A and section 54A, seeks to separate politics from administration and ensure competent administrators are appointed. Moreover, it seeks to address the politicisation of the senior management positions by ensuring that professional administrators are appointed in municipalities.

The Local Government: Municipal Systems Amendment Act (2011) is not only solving challenges faced by local government, but also has intentions of building a committed workforce with the necessary intellectual capacity, competencies and experience to help deepen democracy and accountability as well as improve service delivery to communities. It further seeks to professionalise local public administration to ensure fair, efficient, effective and transparent municipal administration.

### **2.3.1. Quest for professionalisation in municipal administration**

Professionalisation is enshrined in the Constitution as one of the principles and values governing public administration. Section 195(1) (a) provides that public administration must be governed by democratic principles and values, including the promotion and maintenance of the high standard of professional ethics.<sup>51</sup> The Local Government: Municipal Systems Amendment Act (2011) further provides in-depth and expanded provisions to ensure that municipal administrations are governed by qualified and skilled senior managers. It further ensures that this is achieved through regulation of the appointment of municipal managers and managers. As mentioned above, the main provisions adopted for the purpose of this study in the quest for professionalisation are section 54A and section 56A. Section 54A and section 56A are part of a series of measures established by the Local Government: Municipal Systems Amendment Act (2011) and the accompanying regulations to professionalise the appointment of municipal managers and senior managers. The aim of both section 54A and section 56A, and how they work simultaneously in the quest to professionalise and depoliticise local public administration, are briefly discussed below.

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<sup>51</sup> Section 195 (1) (a) Constitution.

### 2.3.1.1. Section 54A

Section 54 A of the Local Government: Municipal Systems Amendment Act (2011) deals with the appointment of municipal managers and ensures that appointed municipal managers are qualified and competent. Section 54A (1) (a) stipulates that ‘a municipal council must appoint a municipal manager as head of the administration of the municipality’.<sup>52</sup> Steytler and De Visser highlight that a municipal manager plays a pivotal role in the functioning of a municipality and is not merely a personnel appointment.<sup>53</sup> They further emphasise:

‘The municipal manager is the primary interface between, on the one hand, the political structures and office-bearers, and the municipal administration on the other hand. He or she is the custodian of all records and documents of a municipality. As accounting officer, the municipal manager carries the overall responsibility for the municipality’s financial affairs.’<sup>54</sup>

As highlighted above, the office of a municipal manager is the key structure of a municipality, and thus must be occupied by an individual who can undertake the key responsibilities and perform the duties in a professional manner as mandated by law. As a result, section 54A (2) provides that ‘a person appointed as a municipal manager must at least have skills, expertise, competencies and qualifications as prescribed.’<sup>55</sup> A decision to appoint a person who does not have the skills, expertise, competencies or qualifications as prescribed by the Local Government: Municipal Systems Amendment Act (2011) is null and void.<sup>56</sup>

### 2.3.1.2. Section 56A

Section 56A, which has created a controversy within the local government sphere,<sup>57</sup> provides that ‘a municipal manager or manager directly accountable to a municipal manager may not

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<sup>52</sup> Section 54A (1) (a) Systems Amendment Act.

<sup>53</sup> Steytler N & De Visser J *Local Government of South Africa* (2016) ch. 8-27.

<sup>54</sup> Steytler & De Visser (2016) ch. 8-27.

<sup>55</sup> Section 54A (2) Systems Amendment Act.

<sup>56</sup> Section 54A (3) (a) Systems Amendment Act.

<sup>57</sup> *South African Municipal Workers’ Union v Minister of Co-operative Governance & Traditional Affairs and Others* [2017] ZACC 7.

hold political office in a political party, whether in a permanent, temporary or acting capacity'.<sup>58</sup> The Systems Amendment Act further defines political office bearers as:

‘(a) The position of chairperson, deputy chairperson, secretary, deputy secretary or treasurer of the party nationally or in any province, region or other area in which the party operates; or

(b) Any position in the party equivalent to a position referred to in paragraph (a), irrespective of the title designated to the position.’<sup>59</sup>

Section 56A regulates the appointment of municipal managers and section 56 managers by ensuring that political office bearers are not appointed to municipal administration, as such appointments had previously shown unfavourable outcomes, such as, corruption and maladministration.<sup>60</sup> Political officials who are qualified and meet the requirements for appointment and desire to be senior managers are therefore required to choose between being a political official or a senior manager. According to law, they can either preserve their political office or be a senior manager. An individual cannot hold both positions at the same time.

Section 56A seeks to address that an individual should not be appointed to the office of municipal manager or section 56 manager if that individual holds political office. There should be a separation of political officials and administrative officials. Steytler and De Visser assert that in the context of vulnerability to politicisation, coupled with a dire shortage of qualified and experienced applicants, municipalities too often appoint senior managers without the requisite qualifications, experience, and/or skills.<sup>61</sup> Section 56A seeks to develop politically neutral municipal administrations by nullifying one aspect of the politicisation of this institution.

## 2.4. Competency Requirements for Municipal Manager Appointments

An assessment conducted by the Department of Co-operative Governance and Traditional Affairs on the ‘State of Local Government’ revealed capacity constraints and weaknesses in

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<sup>58</sup> Section 56A (1) Systems Amendment Act.

<sup>59</sup> Definitions of Systems Act.

<sup>60</sup> De Visser, Steytler & May (2009) 41.

<sup>61</sup> Steytler & De Visser (2016) ch 8-31-32.

governance and institutional performance.<sup>62</sup> These weaknesses include weak financial controls, a high incidence of irregular and inappropriate appointments and ineffective institutional leadership.<sup>63</sup> Prior to the amendment of the Local Government: Municipal Systems Act (2000), there was no explicit and in-depth outlining of the requirements for appointment, other than that an applicant had to be competent and have skills.<sup>64</sup> On the other hand, the Local Government: Municipal Finance Management Act regulations set out a comprehensive set of requirements which the municipal manager, as accounting officer, must comply with.<sup>65</sup> The Local Government: Municipal Systems Amendment Act (2011) made provision for regulations spelling out competence requirements for the appointment of a municipal manager and section 56 managers.<sup>66</sup> The competence requirements are embodied in the regulations for the appointment of municipal managers and section 56 managers.

A successful applicant for the position of a municipal manager and a section 56 manager must first have complied with the competency requirements. Secondly, if he or she qualifies with the necessary competencies, then he or she must also adhere to the requirement established in section 56A and not be a politician. This requirement envisaged in section 56A as part of the quest to professionalise local public administration will be discussed below.

#### **2.4.1. Section 56A as part of the quest for professionalism**

In response to the persistent reports of inadequate appointments, section 54A of the Local Government: Municipal Systems Amendment Act (2011) and the requirement of section 56A are therefore significantly interlinked to tighten the legal framework for the appointment of senior managers. Modumo asserts that ‘for any administrative reform to succeed, emphasis must be placed on the methods under which public administration operates and the approach

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<sup>62</sup> Department of Co-operative Governance and Traditional Affairs *State of Local Government Report* (2009) 12-15.

<sup>63</sup> Department of Co-operative Governance and Traditional Affairs (2009)17.

<sup>64</sup> Section 54A (2) Systems Act.

<sup>65</sup> Section 60 & Section 61 MFMA.

<sup>66</sup> Local Government: Municipal Systems Act & Regulations: Regulation for Appointments of Municipal Managers and Section 56 Managers. Act 32 of 2000 (Regulations).

within which that reform is to be followed'.<sup>67</sup> It can thus be argued that competency, depoliticisation and the quest for professionalisation in municipal public administration are methods for ensuring administration that is effective and efficient. Methods of professionalising local public administration, such as developing management structures, also give priority to the needs of the community and address the developmental duties of local government.<sup>68</sup> Section 56A of the Local Government: Municipal Systems Amendment Act (2011) sought to professionalise the position of senior managers by depoliticising their appointments through regulating and stipulating that candidates are not political office bearers or politically affiliated candidates. It further provides a procedure for appointments geared towards eradicating challenges, such as the political and administrative interface.

#### **2.4.2. Regulations for Appointment of Municipal managers and section 56 managers**

The regulations for the appointment of municipal managers and section 56 managers were intended to realise the spirit and intent of the Local Government: Municipal Systems Amendment Act (2011) in creating a professional local public administration. The regulations also sought to improve the capacity of municipalities to perform their functions and improve service delivery by ensuring that they recruited and retained suitably qualified candidates, especially senior managers. The regulations envisage that a person appointed as a senior manager must have a combination of competencies, such as:

- (a) Qualifications, skills, knowledge and expertise;
- (b) Leadership competencies; and
- (c) Functional (service delivery) competency.<sup>69</sup>

Cluster 1 under Annexure B of the Regulations requires a municipal manager to have obtained a minimum competence of at least a National Diploma; four years' experience within a specified discipline, of which three years are in a reputable middle management

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<sup>67</sup> Modumo OS 'De-politicisation of service delivery in local government: prospects for development in South Africa' (2006) 9 *African Journal of Public Affairs* 87.

<sup>68</sup> Section 153 (a) Constitution.

<sup>69</sup> Section 22 (2) (a) (c) and (d) Regulations.

position within local government and professional registration or a discipline certificate. The maximum competence requirements are a relevant postgraduate qualification; fifteen years' experience, of which six years are of a reputable senior management experience in local government and professional registration or a discipline certificate.<sup>70</sup>

Moreover, an appointed candidate must display knowledge of key and related local government acts and regulations. They must also have expert knowledge in more than one functional field in their area of expertise.<sup>71</sup> In addition, they must at all times adhere to ethical and honest behaviour and integrity in personal and municipal engagements in order to promote institutional confidence, trust and value based practices.<sup>72</sup> Lastly, a candidate must strive towards achieving the organisational mandates, goals and 'common purpose of local governments contextual structures pertaining to political-administrative leadership interlinks'.<sup>73</sup> The municipal manager or section 56 managers must support municipal collective leadership by promoting co-operative functioning in the achievement of municipal priorities and objectives.

## **2.5. Enforcement of competency requirements**

The Local Government: Municipal Systems Amendment Act (2011) provides enforcement mechanisms through three main actors: the municipal council, the MEC of Cooperative Governance and Traditional Affairs, and national government. These three enforcement actors and their roles are briefly discussed below.

### **2.5.1. The Municipal Council**

The Systems Act provides that the duty to appoint a municipal manager and section 56 managers vests in the municipal council.<sup>74</sup> This provision enables the municipal council to exercise its responsibility in ensuring that the requirements and the regulations of appointing senior managers are adhered to. Before any other sphere of government can intervene in

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<sup>70</sup> Annexure B, Regulations.

<sup>71</sup> Annexure B, Item 1.2 Regulations.

<sup>72</sup> Annexure B, Item 2.2 Regulations.

<sup>73</sup> Annexure B, Item 2.4 Regulations.

<sup>74</sup> Section 54A (1) (a) Systems Act.



ensuring fulfilment of a municipal executive's obligation, it is the duty of a municipal council to ensure that the rules and regulations relating to the appointments of senior managers are adhered to. The municipal councils role in ensuring the adherence and the enforcement of these regulations includes properly advertising the position nationally.<sup>75</sup> This is done in order to reach the best and suitable candidates for the senior management positions in municipalities. Steytler and De Visser suggest that the instructions to advertise apply only to the requirements in the Systems Act and not the MFMA.<sup>76</sup>

The next step that the municipal council must enforce is to appoint a suitable person who complies with the requirements determined in the regulations in terms of the Systems Act.<sup>77</sup> If there is no candidate who complies with the requirements as per the regulations there must be re-advertisements of the post. It is essential that the person appointed as senior manager to have the relevant skills and qualifications as provided in the regulations.<sup>78</sup> It is the duty of the municipal council to make sure that the procedures and the criteria of appointing managers is applied as per the regulations.

The municipal council, as the executive and legislative body of a municipality, must enforce, promote the adherence to and application of, the stipulated laws. Should the municipal council fail to execute its mandate, the MEC must intervene.



### 2.5.2. The MEC

In section 54A (8) of the Local Government: Municipal System Amendment Act (2011) it is stated:

‘If a person is appointed as a municipal manager in contravention of the requirements, the MEC for local government must, within 14 days of receiving the information provided by the municipal council, take appropriate steps to enforce compliance by the municipal council. This may include application to court for a declaratory order on the legality and validity of the appointment by a municipal council’.<sup>79</sup>

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<sup>75</sup> Section 54A (4) (a) Systems Act.

<sup>76</sup> Steytler & De Visser (2016) 8-29.

<sup>77</sup> Section 54A (4) (b) Systems Act.

<sup>78</sup> Steytler & De Visser (2016) 8-31.

<sup>79</sup> Section 54A (8) Systems Amendment Act.

Moreover, the MEC may, on request by the municipal council, second a national or provincial official, with relevant qualifications, experience and competences, to act as municipal manager if a post of municipal manager has become vacant, until a suitable candidate is appointed.<sup>80</sup> The MEC as an overseer plays a pertinent role in ensuring that local government maintains essential standards for fulfilment of the local public administration mandates.

### 2.5.3. The National Government

The Minister of Cooperative Governance and Traditional Affairs may intervene only when the MEC for local government fails to enforce the requirements. As mandated by the Constitution, the national executive may intervene when a provincial executive member does not fulfil an executive obligation.<sup>81</sup> The Minister may issue a directive to the MEC, or assume responsibility. Moreover, section 54A (9) of the Local Government: Municipal Systems Act (2000) stipulates that where an MEC for local government fails to take appropriate steps to ensure enforcement of competence requirements by the municipal council, the Minister may take appropriate steps.<sup>82</sup>



### 2.6. Conclusion

The adoption of the Local Government: Municipal Systems Amendment Act (2011) sought to provide enabling mechanisms that advance professionalism in local public administration. As mentioned above, local government has shown capacity constraints and weaknesses in governance and institutional performance. In response to the challenges, the Local Government: Municipal Systems Amendment Act was promulgated into law in 2011. There are now clear multi-tier enforcement mechanisms to build a competent, professional and qualified workforce, rather than to recruit political deployees who are not qualified for the senior management positions. This is done to help improve service delivery to municipal electorates. The Local Government: Municipal Systems Amendment Act (2011), together

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<sup>80</sup> Section 24 (1) Regulations.

<sup>81</sup> Section 100 (1) Constitution.

<sup>82</sup> Section 54A (9) Systems Amendment Act.



with the provisions of section 56A, outline government's resolve to depoliticise local public administration in order to ensure efficient, effective and transparent municipal administration. This is achievable by compliance with the requirements of competence embodied in the regulations for appointments of municipal managers and section 56 managers. The Local Government: Municipal Systems Amendment Act (2011) also grants enabling powers to the Minister to regulate a wide range of human resource matters, including the regulation of the appointment of municipal managers and section 56 managers. The mechanisms to ensure professional, local public administration revealed the importance placed on mitigating the extent of the bad consequences of the problem of political interference in municipal administration.



## CHAPTER 3

### A CONSTITUTIONAL ANALYSIS OF SECTION 56A OF THE LOCAL GOVERNMENT: MUNICIPAL SYSTEMS AMENDMENT ACT (2011)

#### 3.1. INTRODUCTION

The Local Government: Municipal Systems Amendment Act inserted section 56A, a provision that limits the political rights of municipal managers and managers. The purpose of the enactment was to remedy the capacity constraints and weakness in governance and institutional performance by professionalising local public administration. This enactment was challenged in court on the grounds that it infringes the political rights of municipal managers and managers.<sup>83</sup> Every right in the Bill of Rights in the Constitution is however subjected to the limitation clause which may allow an infringement, provided that there are justifiable and fair reasons for limiting such right.<sup>84</sup> The rights embodied in the Bill of Rights are thus not absolute. This chapter will discuss, firstly, the rights in section 19(1) of the Constitution; secondly, the conflict between section 19(1) and section 56A of the Local Government: Municipal Systems Amendment Act (2011), and thirdly, whether section 56A is a justifiable limitation of section 19(1) in terms of section 36 of the Constitution.

#### 3.2. The rights in section 19(1) of the Constitution

The Bill of Rights is a cornerstone of democracy embodied in Chapter 2 of the Constitution. It enshrines the rights of all people in our country and affirms the democratic values of

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<sup>83</sup> *South African Municipal Workers Union v Minister of Co-operative Governance and Traditional Affairs* (3558/2013) [2016] ZAGPPHC 733 (23 February 2016) (*SAMWU HC*).

<sup>84</sup> Section 36 Constitution.

human dignity, equality and freedom.<sup>85</sup> The State must respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>86</sup> Section 19 guarantees every citizen rights of democratic political participation. Section 19(1) provides that:

- ‘(1) Every citizen is free to make political choices, which includes the right-
- (a) to form a political party;
  - (b) to participate in the activities of, or recruit members for, a political party, and
  - (c) to campaign for a political party or cause.

Political rights reinforce a citizen’s right to engage in politics within the Republic of South Africa. This right is fundamental to protecting and maintaining a democratic government. This right is important as it gives citizens increased power to have an input regarding whom they choose to govern them. Every citizen has rights to engage in all constitutionally recognised political platforms, whether national, provincial or local political participation. In *Doctors for Life International v The Speaker of the National Assembly*, the Constitutional Court pointed out that the primary aim of the Constitution is to establish and safeguard representative democracy that has participatory elements and that Parliament must give effect to a right of political participation grounded in the principle of democracy.<sup>87</sup> Albeit not absolute, political rights form part of one of the most important fundamental rights in the democratic South Africa.

The history of discriminatory laws against certain groups of South African citizens, and the denial of basic human rights such as political rights, have resulted in a strong and watertight manifestation, realisation and protection of political rights in the Bill of Rights. It is argued that in a democracy, political rights are the vehicle that drives and ensures that the participatory and representative rights of the citizens of the Republic are upheld. In South Africa the subject of political rights is valued and is of paramount importance in ensuring that democracy, representation, freedom of association and equal opportunities are afforded to all. The Constitution protects, promotes and uplifts the rights to political choice as it embodies a variety of constitutional political rights. Political rights should also be interpreted within the context of legislation that is applicable and gives effect to the provisions of section 19 which

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<sup>85</sup> Section 7 (1) Constitution.

<sup>86</sup> Section 7 (2) Constitution.

<sup>87</sup> *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 111.

have been adopted in the democratic dispensation. De Waal submits that some of this legislation includes the Electoral Commission Act,<sup>88</sup> the Electoral Act,<sup>89</sup> the Abolition of Restrictions on Free Political Activity Act,<sup>90</sup> the Independent Broadcasting Authority Act,<sup>91</sup> and the Labour Relations Act.<sup>92</sup>

These constitutional political rights are, among other things, the right to form a political party, the right to participate in political party activities, the right to free and fair elections, and lastly, the right to hold public office. The right to hold public office is only applicable to adult voting citizens.

### **3.2.1. Section 19(1) –The right to make political choices**

The purpose of section 19(1) is to ensure that people are free to associate themselves with any political cause without any fear of prejudice or adverse consequences. Section 19(1) is linked to, and strengthened by, other constitutional rights, such as, the right to freedom,<sup>93</sup> the right to association,<sup>94</sup> the right to equality<sup>95</sup>, and the right to assembly.<sup>96</sup> Due to its important constitutive effect in a representative democracy, the freedom to make political choices is likely to be afforded higher protection than other freedoms.<sup>97</sup> De Waal submits that the freedom to make political choices often gives rise to problems in the employment relationship. Thus section 197(3) of the Constitution stipulates that no employee of the public service may be favoured or prejudiced only because that person supports a particular political cause. The Labour Relations Act (Act 66 of 1995) also aims to protect employees from being forced to toe a certain political line.<sup>98</sup>

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<sup>88</sup> Act 51 of 1996.

<sup>89</sup> Act 73 of 1998.

<sup>90</sup> Act 206 of 1993.

<sup>91</sup> Act 153 of 1993.

<sup>92</sup> Act 66 of 1995.

<sup>93</sup> Section 12 (1) (a) Constitution.

<sup>94</sup> Section 18 Constitution.

<sup>95</sup> Section 9 Constitution.

<sup>96</sup> Section 17 Constitution.

<sup>97</sup> De Waal J 'Political Rights' in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 2 ed (1999) 23-4.

<sup>98</sup> De Waal (1999) 23-4.

Participation in political settings is a critical element of social inclusiveness together with the realisation of human rights. Participating in political spaces enables every individual to take part and have a standing to express his or her opinions on decisions that affect an individual's community and country at large.<sup>99</sup> The right to make political choices and participate in political settings is thus seen as an important mechanism of overcoming exclusion, marginalisation and discrimination that have overshadowed South Africa for decades prior to the democratic dispensation. It is submitted that attaining the right to make political choices works as a form of dismantling barriers that were/are frequently faced by previously disadvantaged groups. The right to make political choices is a well-established principle of human rights enshrined in our Constitution and international human rights instruments.

The right to make political choices in the South African context encompasses the ability to exercise other rights such as, the right to form a political party<sup>100</sup>; the right to participate in the activities of a political party<sup>101</sup> and the right to recruit members for a political party<sup>102</sup>.

### 3.2.2. The right to form a political party

South Africa is a constitutional democracy which encompasses the following principles and values expressed in section 1(d) of the Constitution:

‘The Republic of South Africa is one, sovereign, democratic state founded on [these] following values:

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.’

According to February, civil and political rights give expression to representative democracy. All the rights enshrined in the Constitution must be read and interpreted against the backdrop

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<sup>99</sup> United Nations *Participation in political and public life* available at <http://passthrough.fw-notify.net/download/178613/http://www.un.org/esa/socdev/documents/disability/Toolkit/Participationin-Political-Publiclife.pdf> (accessed on 12 March 2018) 3.

<sup>100</sup> Section 19(1) (a) Constitution.

<sup>101</sup> Section 19(1) (b) Constitution.

<sup>102</sup> Section 9(1) (c) Constitution.

of section 1.<sup>103</sup> Brickhill and Babiuch submit that democratic values must be promoted when a court interprets the provisions of section 19.<sup>104</sup>

The right to form a political party is a constitutional right that every citizen is free to exercise and enjoy. In section 19(1) (a) it is envisaged that every citizen can form a political party as empowered by the Constitution.<sup>105</sup> Every citizen holds a constitutional right to organise a political party with like-minded people and to attain some common political goals. This right is supported by the constitutional rights of association, free speech and equality. The right to form a political party includes the right to decide on the name, objectives, and constitution of the political party.<sup>106</sup> However, when one decides to form a political party, the State has the right to review the newly introduced political party's laws and objectives to ensure that they do not infringe on any of the constitutional provisions.<sup>107</sup> The formation of the political party must thus be in accordance with the Constitution and the applicable law, such as, the Electoral Commission Act (Act 51 of 1996) and the Electoral Act (Act 73 of 1998). The Electoral Commission Act (1996) provides that political parties should be registered.<sup>108</sup> These requirements already impose restrictions where a political party wants to compete in elections. In order for a political party to be included on an electoral ballot according to the Electoral Act, it must be registered in terms of the Electoral Commission Act (1996). This right is thus applicable to all who wish to exercise it, and as long as the Constitution and legal provisions are applied, no one has the authority to deny anyone their right to form a political party. Everyone has the freedom to associate themselves with a political cause, provided it does not infringe the Constitution.

The right to form a political party is a key institution in a multi-party democracy as entrenched in the Constitution. It is integral to the constitutional workings of national and provincial legislatures. Maduna submits that the right to form a political party is a necessary component of a modern democratic system, and provides links between citizens and the

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<sup>103</sup> February J 'Political participation' in Rembe N (ed) *Reflections on Democracy and Human Rights: A Decade of the South African Constitution* (2006) 146.

<sup>104</sup> Brickhill J & Babiuch R 'Political Rights' in Woolman S & Bishop M, et al (ed) *Constitutional Law of South Africa* 2 ed (2013) 45-7.

<sup>105</sup> Section 19(1) (a) Constitution.

<sup>106</sup> De Waal (1999) 23-5.

<sup>107</sup> Maduna P 'Political Rights' in Cheadle MH, Davis DM & Haysom NRL (eds) *South African Constitutional Law: The Bill of Rights* (2002) 269-270.

<sup>108</sup> Section 15 Act 51 of 1996.



government.<sup>109</sup> The political party is the vehicle for mobilising public opinion, providing organisational focus the executive and ensuring accountability, particularly if there is a strong opposition. The right to form a political party also includes the possibility of one being elected as the party's president or chairperson or holding an official position in the party. As mentioned above, the Constitution affords everyone the right to form a political party, provided that the party and its formation do not contravene other constitutional rights.

### 3.2.3. The right to participate in political party activities

The right to participate in political settings was first set out in Article 21 of the Universal Declaration of Human Rights<sup>110</sup> and further elaborated upon in Article 25 of the International Covenant on Civil and Political Rights.<sup>111</sup> Both these articles guarantee all citizens the right without unreasonable restrictions, to take part in public affairs directly or through freely or democratically appointed representatives; to vote and to be elected in elections; and to have equal access to public services.<sup>112</sup> Section 39(1) (c) of the Constitution moreover states that the court must consider international law when interpreting the Bill of Rights.<sup>113</sup> The Constitution enshrines the right to participate in political party activities in section 19(1) (b). In the case of *Ramakatsa v Magashule*<sup>114</sup> the Constitutional Court considered the rights enshrined in section 19(1)(b). The Court highlighted that:

‘During the apartheid order, the majority of people in our country were denied political rights which were enjoyed by a minority. The majority of black people could not form or join political parties of their choice. Differently put, they were not only disfranchised but were also excluded from all decision-making processes undertaken by the government of the day, including those affecting them... The purpose of

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<sup>109</sup> Maduna (2002) 269-270.

<sup>110</sup> Article 21 Universal Declaration of Human Rights.

<sup>111</sup> Article 25 International Covenant on Civil and Political Rights.

<sup>112</sup> United Nations *Participation in political and public life* available at <http://passthrough.fw-notify.net/download/178613/http://www.un.org/esa/socdev/documents/disability/Toolkit/Participationin-Political-Publiclife.pdf> (accessed on 12 March 2018) 4.

<sup>113</sup> Section 39(1) (c) Constitution.

<sup>114</sup> *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) para 64.

section 19 is to prevent the wholesale denial of political rights to citizens of the country from ever happening again'.<sup>115</sup>

In the above-mentioned case, the Constitutional Court recognises the constitutional effect the rights in section 19(1) (b) have by guaranteeing and allowing citizens to make political choices and participate in political party activities.

Political party activities may include a vast range of activities, such as, advocating and advancing the vision and objectives that the political party of one's choice believes in and stands for. In a democratic country like South Africa, every citizen is included in participating in party activities as long as such activities are not inconsistent with the Constitution. The right to participate in political activities is a right that one has a freedom of exercising but within a set of limitations. As mentioned above, these party activities must not be inconsistent with any right embodied in the Bill of Rights.<sup>116</sup> An example of the limitations imposed on this right is that political parties are prohibited from having any political party activities during the voting process.<sup>117</sup> The provision provides that holding or taking part in political meetings, demonstrations and marches on voting day is a criminal offence.<sup>118</sup> These limitations provide the liberty for voters to exercise their constitutional rights to make political choices, freely and without any undue influence.

The right to participate in political activities has various dimensions, both internal and external. It applies to internal activities such as attending meetings, chairing meetings or holding an office within the political party.<sup>119</sup> One's choice to participate in politics through holding an office in a political party is a constitutionally entrenched right that every citizen is entitled to exercise. The external activities of a political party include the right to recruit members for a political party.

#### **3.2.4. The right to campaign for a political cause**

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<sup>115</sup> *Ramakatsa* para 65.

<sup>116</sup> De Waal (1999) 23-5.

<sup>117</sup> Section 108 Electoral Act.

<sup>118</sup> Section 108 Electoral Act.

<sup>119</sup> *Maduna* (2002) 272.



The right of freedom to campaign for a political cause is an assurance that the Constitution in section 19(1) (c) seeks to ensure that every citizen is not intimidated or prejudiced by political canvassing. To cement this right, applicable national legislation, in section 87 of the Electoral Act (1998), provides that prevention of reasonable access to voters is an offence, and that, moreover, it is unlawful to prevent political demonstrations, marches or the holding of political meetings and any political events.<sup>120</sup> This is aligned with the Constitutional rights to freedom of association and freedom of expression which the Constitution promotes and protects to ensure that everyone is afforded equality. However, it is submitted that even though the Constitution protects these rights, the discord of political parties including but not limited to sabotaging and manipulation of political party campaigns may at times result in litigious actions. It is further submitted that such encounters are unavoidable and can transpire more often than not in a multi-party democracy. There is however a Code of Conduct set in place to deal with such actions.<sup>121</sup> The right to campaign includes engaging in meetings, writing propaganda materials, door-to-door canvassing, etc. The right to campaign may however at times be limited in accordance with the provisions of some statutes.<sup>122</sup>

Campaigning for a political party or cause is an instance of the making of political choices. Together with the right to form and participate in the activities of a political party and the right to recruit members for a political party, these rights and the right to campaign help us to understand what else amounts to a protected political choice.<sup>123</sup> Brickhill and Babiuch argue that the right to make political choices is limited to choices relating to political parties or causes.<sup>124</sup>

### **3.3. Is there conflict between section 19(1) of the Constitution and section 56A of the Local Government: Municipal Systems Amendment Act 7 of 2011)?**

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<sup>120</sup> Section 87 Electoral Act.

<sup>121</sup> De Waal (1999) 23-6.

<sup>122</sup> Steytler & De Visser (2016) 4-10.

<sup>123</sup> Brickhill & Babiuch (2013) 45-6.

<sup>124</sup> Brickhill & Babiuch (2013) 45-8.

A conflict may arise when a provision envisaged in an Act infringes on a provision in the Bill of Rights. A conflict can be either through a direct or an indirect application of the Bill of Rights. A direct conflict arises when a text of the Constitution and of a statute is, on the face of it, in conflict.<sup>125</sup> If a conflict does not carry the elements of a direct application, it may arise indirectly. Woolman asserts that indirect conflict arises when, although the two texts appear on face value not to conflict, but when applied in practice, they conflict.<sup>126</sup>

Section 56A of the Local Government: Municipal Systems Amendment Act (2011) limits a political right. This creates a conflict between a constitutional right and the Local Government: Municipal Systems Amendment Act (2011). Section 19(1) (a) provides that a person may start a political party and by necessity be the leader of a political party. Section 56A on the other hand says that a municipal manager cannot be a political officeholder and thus by virtue of this limitation cannot be a leader of a political party. Furthermore, Section 19(1) (b) provides that every citizen may participate in the activities of a political party, which includes taking on leadership positions such as a being an elected official of same political party. However, section 56A carries an express prohibition that a municipal manager may not be one of the listed political officials.

Section 19(1)(a) and (b) of the Constitution guarantees political choices to every adult citizen, however, section 56A seeks to limit the exercise of these rights of municipal managers and managers. It is thus submitted that this is the extent to which a direct conflict arises between the constitutional provision and a statute.

### **3.4. Justification of limitation of political rights**

When a court is faced with a matter of assessing constitutionality of a provision and finds that a constitutional right has been infringed, it must decide whether the infringement amounts to a justifiable limitation in terms of section 36(1) of the Constitution.

Section 36(1) provides criteria to justify limitations of rights. It states:

‘(1) The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable

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<sup>125</sup> Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 3-31

<sup>126</sup> Woolman S ‘Application’ in Chaskalson M et al *South African Constitutional Law* vol 2 2ed (2014)31-33.

in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.’

Section 36(2) provides that no other law may limit rights entrenched in the Bill of Rights, except for limitations envisaged in subsection (1).

On a strict reading of section 36 all human rights in the Bill of Rights are not absolute. International human rights instruments also contain limitations, which lays out circumstances when a right can be subject to derogation.<sup>127</sup> Rights can also be limited by the rights of others, as well as competing social interests.<sup>128</sup> In the South African context of human rights, in order to sustain a limitation on fundamental rights, the limitation must satisfy the requirements of the limitation clause set out in section 36(1).

### 3.4.1 General Application

The first requirement in section 36(1) is that the limitation must be of general application and thus must not only apply to specific cases or individuals. All forms of legislation qualify as law and thus fall under the scrutiny of section 36(1). A law of general application gives effect to aspects of the rule of law, thus all limitations must be authorised by legal rules.<sup>129</sup> The imposed limiting measure must be in terms of something the Court recognises as law.<sup>130</sup>

The law of general application as the first requirement must be applied or tested when the Court reviews a legislative provision. Motala and Ramaphosa assert that the requirement of general application is an affirmation of the rule of law, which is meant to prevent the

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<sup>127</sup> Motala Z& Ramaphosa C *Constitutional Law Analysis and Cases* (2002) 414.

<sup>128</sup> De Vos P et al *South African Constitutional Law in Context* (2014) 349.

<sup>129</sup> Rautenbach IM ‘Proportionality and the limitation clause of the South African Bill of Rights’ (2014) 17(6) *PELJ* 2249.

<sup>130</sup> De Vos et al (2014) 360 – 361.

arbitrary exercise of power.<sup>131</sup> They further assert that this requirement is meant to curtail the spectre of violations that may be committed at the whim of state officials.<sup>132</sup> This requirement is thus meant to prevent the targeting of specific individuals; it is applicable to all. On the contrary, it is imperative to note that a limitation, even though it is of general application, may not always be a good enough justification, in some instances there has to be proportionality. In *S v Williams and Others*,<sup>133</sup> the Court held that: ‘although a provision concerned is of general application, the limitation it imposes on the rights in question is, in the light of all circumstances, not reasonable, not justifiable and it is furthermore not necessary’<sup>134</sup> This case was about convicted juveniles who were sentenced to receive a moderate correction through corporal punishment and the Court had to decide on the constitutionality of section 294 of the Criminal Procedure Act<sup>135</sup>. The Constitutional Court held that the provision was unconstitutional.

In the case of the assessment of the constitutionality of section 56A, the provision meets the test of a law of general application. The next step is to assess whether it meets the other requirements to be a justified limitation.



### 3.4.2 Justifiable limitation

Limitations are accepted if justified for infringing a right in an open and democratic society based on human dignity, freedom and equality.<sup>136</sup> If an infringement can be justified in terms of the section 36 criteria, the infringement is not unconstitutional.<sup>137</sup> Currie and De Waal argue that the existence of the general limitation clause does not pave the way to limit the rights in the Bill of Rights without strong reasons.<sup>138</sup> The section requires that the limitation clause be applicable to all and whether there is not any alternative to achieve the purpose other than infringing or restricting someone’s rights. It is argued that fairness and

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<sup>131</sup> Motala & Ramaphosa (2002) 415.

<sup>132</sup> Motala & Ramaphosa (2002) 514.

<sup>133</sup> *S v Williams and Others* 1995 (7) BCLR 864 (CC).

<sup>134</sup> *S v Williams* para 92.

<sup>135</sup> Act 51 of 1977.

<sup>136</sup> Section 36 (1) Constitution.

<sup>137</sup> Currie I & De Waal *J Bill of Rights Handbook* 6 ed (2013) 151.

<sup>138</sup> Currie & De Waal (2013) 151.

reasonableness in every case are ensured by applying the same criteria of justification to all cases regarding the limitation of rights.

A limitation of a fundamental right is justifiable provided that it passes the test of proportionality and all the factors are taken into consideration. In *S v Makwanyane*, Justice Chaskalson stated that where there is a limitation of a right, there needs to be a balancing of competing values and an assessment of proportionality.<sup>139</sup> Justice Chaskalson further observed that:

‘In the balancing process, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could be achieved through less damaging measures to the right in question’.<sup>140</sup>

Moreover, justification of a limitation clause must be aligned with proportionality. Section 36 sets a proportionality test for justification. Proportionality refers to the determination of reasonableness and justifiability that must be conducted.<sup>141</sup> This determination must be done in a context of an open and democratic society based on human dignity, equality and freedom assessed in light of all the relevant factors. The components of proportionality require a rationale connection to the objective sought; there must be a balance of interests.<sup>142</sup> In this case of the limitation imposed, this test is guided by five factors that are to be taken into consideration when applying the limitation clause.

In *Makwanyane*, the Constitutional Court highlighted five explicit factors and their relation and application to the basic values of an open and democratic society. In this case it was stated that the following is necessary to be considered in detail:

‘The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves weighing up of competing values, and ultimately an

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<sup>139</sup> *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) para 104 (*‘Makwanyane’*).

<sup>140</sup> *Makwanyane* paras 105-107.

<sup>141</sup> Cheadle, Davis & Haysom (2002) 703.

<sup>142</sup> Motala & Ramaphosa (2002) 418.

assessment based on proportionality. The fact that different rights have different implications for democracy in an open and democratic society based on freedom and equality means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principle can be established, but application of that principle differs on case to case basis. This is inherent in the requirements of proportionality, which calls for balancing of different interests. In the balancing, the relevant consideration will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited, its efficacy, and particularly where a limitation has to be necessary, whether the desired end could reasonably be achieved through other means less damaging to the right in question'.<sup>143</sup>

With reference to the abovementioned case, it is therefore submitted that in instances of the limitation of fundamental rights there has to be a balancing of the conflicting values; an assessment based on the proportionality test, having taken the five factors into account. In *S v Bhulwana*, the Constitutional Court indicated that the focus is on the purpose, effect and importance of the infringing legislation on one side of the scale, and the nature and effect of the infringement caused by the legislation on the other.<sup>144</sup> There must be a balance of the scales; the more substantial the inroad into fundamental rights, the more persuasive the ground of justification must be.<sup>145</sup>

### 3.4.3. The five factors

The five factors are guidelines that ensure reasonableness and justifiability of a limitation of rights and these factors must be considered when applying the limitation clause. These factors are to be considered simultaneously with the other requirements when applying the justification inquiry. This justificatory inquiry is done through separating the questions that arise in the factors, and the court has to take these factors into account when undertaking a section 36 limitation analysis. The five factors are applied in order to inform a proportionality test.

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<sup>143</sup> *Makwanyana* para 149.

<sup>144</sup> *S v Bhulwana* 1995 (12) BCLR 1579 (CC) ('*Bhulwana*').

<sup>145</sup> *Bhulwana* para 18.



(i) *Nature of the right*

The nature of the right must be determined within the context of the Bill of Rights to determine the importance of the right relative to other rights.<sup>146</sup> Currie argues that in South African court cases, when applying section 36, attention is always paid to the importance of the right by referring to how important the limitation is in an ‘open democratic society based on human dignity, equality and freedom’.<sup>147</sup> Another important aspect to determine is the importance and weight of the right in the Bill of Rights. For example, the right to political choices encompasses rights, such as, the right to freedom of association and so on; such rights are also taken into consideration when determining the nature of the right.<sup>148</sup>

The nature of the right also refers to the nature of the bearer of the right, whether it is a juristic or natural person.<sup>149</sup> Currie and De Waal highlight that a right that is of particular importance to the Constitution’s ambition to create an open democratic society that is based on human dignity, equality and freedom, is likely to carry more weight in the exercise of balancing rights against justification for their limitation.<sup>150</sup>

In the case of limitation of political rights expressed in section 56A, the Court has to assess the importance of the limited right relative to other rights. In determining the scope of the interest of the society and the infringement of the right commences with the mischief that the limitation is intended to remedy. This is thus based on a general understanding of the need for constitutional protection of the interest in respect of society in a democratic modern state. Every right in the Bill of Right carries its own history. According to Cheadle, Davis and Haysom: ‘it is accordingly necessary to have a understanding of the right’s history in the comparative constitutional jurisprudence and a more specific understanding of the reasons for the inclusion of the right in the South African Constitution’.<sup>151</sup>

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<sup>146</sup> Currie (2010) 2254.

<sup>147</sup> Currie (2010) 2254.

<sup>148</sup> De Vos et al (2014) 363-365.

<sup>149</sup> Currie (2010) 2255.

<sup>150</sup> Currie & De Waal (2013) 164.

<sup>152</sup> Cheadle, Davis & Hayson (2002) 709.

### *(ii) Importance of the purpose of the limitation*

The purpose of the limitation is an aspect of paramount importance as a constitutional right is being subjected to an infringement. The limiting law must be of sufficient importance to justify the limitation of a fundamental right.<sup>152</sup> To determine the importance of a law's purpose, it is the court's responsibility to appeal to a system of values against which to measure that purpose. According to Cheadle, Davis and Haysom the system of values is premised on the values of an open and democratic society, based on human dignity, equality and freedom.<sup>153</sup> The step that one has to take in assessing the inclusion of this factor is to first determine whether the law's purpose accords with the value system. Thus, in order for section 56A to be justifiable on a basis of reasonableness it must embody the values of an open and democratic society. Moreover, after the first determination, one must determine whether the purpose is sufficiently important to justify the limitation of a constitutional right.<sup>154</sup> In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court described the sufficiency of the purpose as a purpose which all reasonable citizens would agree to be compellingly important.<sup>155</sup> It is important to highlight that the importance of the purpose of the limitation of a right involves and refers to the benefits and the importance of achieving that benefit by limiting the right in an open democratic society. In this sense, the importance of the purpose of limiting a right must be determined.<sup>156</sup>

### *(iii) Nature and extent of limitation*

This factor is concerned with the assessment of the way in which the limitation affects the right concerned. In determining how the limitation affects the right, attention must be focussed on whether the effects of the limitation are serious or relatively minor. Section 36 (1) (c) thus focusses on the intrusiveness and intensiveness of the limitation in respect of the conduct and interest that are protected by the right.

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<sup>152</sup>Cheadle, Davis & Haysom (2002) 709.

<sup>153</sup> Cheadle, Davis & Haysom (2002) 709-710.

<sup>154</sup> Cheadle, Davis & Haysom (2002) 710.

<sup>155</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 36-43.

<sup>156</sup> Currie & De Waal (2013) 180-181.

*(iv) Relation between limitation and its purpose*

Section 36(1) (d) refers to whether the limitation is capable of making a contribution to the achievement of the purpose and, if it does, what the extent of the contribution is. If the limitation is not capable of furthering the purpose, it is weak.<sup>157</sup> The relationship between the limitation and its purpose is a necessary element of proportionality analysis to determine whether the limiting law will serve its purpose. In *Makwanyane*, capital punishment was defended on the grounds of prevention and restitution. Even though execution could prevent further criminal acts by the convicted, the Court held that the evidence in support of the limitation of right to life was not sufficient to demonstrate the means will achieve the purpose of the limitation.<sup>158</sup> The relation between the limitation and its purpose thus involves how the limitation promotes the purpose.

This factor focuses on the rationality of the relationship between the limitation and the purpose of the limitation. In *South African Defence Union v Minister of Defence*, the Constitutional Court determined that maintaining a disciplined military was a constitutional requirement; however there was no rational connection that could be drawn from limiting soldiers forming part of a union and the law's purpose.<sup>159</sup> Justice O'Regan held that:

‘There can be no doubt of the constitutional imperative of maintaining a disciplined and effective Defence Force. I am not persuaded, however, that permitting members of the Permanent Force to join trade unions, no matter how activities are circumscribed will undermine the discipline and efficiency of the Defence Force. Indeed, it may well be that in permitting members to join trade unions and in establishing proper channels for grievances and complaints, discipline may be enhanced rather than diminished. Whether this proves to be the case will depend, of course, on a variety of factors including the nature of the grievance procedures

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<sup>157</sup> Currie (2014) 2257.

<sup>158</sup> *Makwanyane* para 184.

<sup>159</sup> *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC) (‘*South African Defence Union*’)

established, the permitted activities of trade unions in the Defence Force, the nature of grievances themselves and the attitudes and conducts of those involved.’<sup>160</sup>

De Vos et al assert that it makes no sense to undertake a complex consideration of the balance between a right and a limiting measure which bears no rational relationship to its aim.<sup>161</sup>

*(v) Less restrictive means to achieve the purpose*

This factor relates to the proportionality element: that when there are two or more suitable ways of furthering the purpose of a limitation effectively, the one that interferes less intensively with the right that is to be limited, must be chosen.<sup>162</sup> Alternative ways of limiting, as effectively, the right for the same purpose must be taken into account.<sup>163</sup> Currie and De Waal submit that if a less restrictive but equally effective method exists to achieve the purpose of the limitation, then that less restrictive method must be preferred.<sup>164</sup> It is thus argued that there must be an exhaustion of alternative limitation measures that are less harsh and will render the same benefit. Although proportionality is applied in all factors, factor (e) is likely to be the factor by reference to which most arguments are upheld or dismissed by a court of law. Currie and De Waal submit that a law that invades rights more than is necessary to achieve its purpose is disproportionate.<sup>165</sup>

In *Makwanyane*, it was held that the purpose of deterring crime, a purpose served by imposing a death penalty punishment, can be achieved by long prison sentences instead.<sup>166</sup>

The Constitutional Court in this case chose alternatively a less restrictive means which would achieve a goal of deterring and rehabilitating perpetrators by imposing longer prison sentences. In *Prince v the President of the Law Society of the Cape of Good Hope*, in a challenge on the constitutionality of a statutory prohibition on use and possession of cannabis, the court highlighted that the prohibition constituted a limitation on the religious rights of Rastafarians. The judges however, disagreed as to whether an exemption would

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<sup>160</sup> *South African National Defence Union* para 35.

<sup>161</sup> De Vos et al (2014) 371.

<sup>162</sup> Klatt M & Meister *The Constitutional Structure of Proportionality* (2012) 9-22.

<sup>163</sup> Rautenbach IM *Constitutional Law* 6 ed (2012) 313-314.

<sup>164</sup> Currie & De Waal (2013) 170.

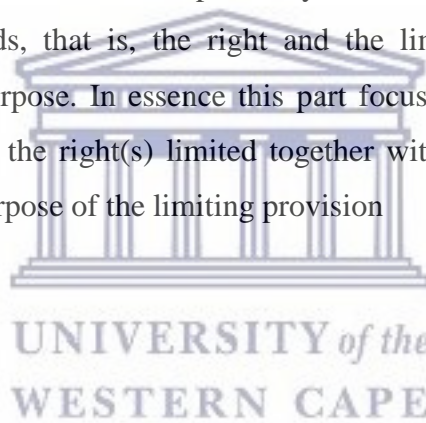
<sup>165</sup> Currie & De Waal J (2013) 170.

<sup>166</sup> *Makwanyane* para 184.

constitute a less restrictive means of the State achieving its objectives.<sup>167</sup> This controversial decision of *Prince* raises a question of whether a state should always employ a least restrictive means even though such might be costly. Woolman and Botha argue that a state should not apply less restrictive means in circumstances where the State would be required to allocate more resources and prioritise needs.<sup>168</sup>

### 3.5. Is section 56A a justifiable limitation?

In order to answer this question, this section of the chapter deals with each of the above-mentioned requirements and factors that must be applied to justify a limitation imposed on a constitutional right. It will be done so by going through each of the five factors and applying the proportionality test in the limitation imposed by section 56A. This part involves the balancing of competing goods, that is, the right and the limiting measure that serves a constitutionally acceptable purpose. In essence this part focuses on the weighing-up of the nature and the importance of the right(s) limited together with the extent of the limitation against the importance and purpose of the limiting provision



#### 3.5.1. Nature of the right

The limitation imposed by section 56A is of a political nature. This section limits the right of municipal managers and managers. It provides that municipal senior managers are prevented from being political office bearers. Political rights in the South African democratic dispensation play a pivotal and crucial role, more especially as we are a multi-party democratic country. Political rights in a multi-party democracy ensure equal participation and representation. This right is a constitutional right and affords citizens rights, such as the right to vote in elections and to participate in political party activities.

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<sup>167</sup> *Prince v the President of the Law Society of the Cape of Good Hope* 2002 (3) BCLR 231 para 65-70.

<sup>168</sup> Woolman S & Botha H 'Limitations' in Woolman S & Bishop M *Constitutional Law of South Africa* (2014) vol 2 2 ed 91.

Section 56A infringes a political right of municipal managers as the Constitution in section 19(1) (a) & (b) provides that every citizen has the right to form a political party; to participate in political party activities and recruit members for a political party.<sup>169</sup> The right to form a political party (and be the chairperson or president of that party) and to be an office holder are both important political rights. It is submitted that the rule applies impersonally and not only to particular people or groups, nor is it arbitrary or unequal in its application.

### **3.5.2. Importance of the limitation**

The limitation imposed by section 56A is important as the limitation is necessary for a proper functioning, well governed and financially viable municipal administration. This limitation encompasses the importance of promoting local government objectives and promoting society's rights to service delivery that are adequate and efficient. In Chapters 1 and 2 it was highlighted that in most municipalities, political interference results in maladministration and failed or unfinished municipal projects that are meant to develop communities. Moreover, some municipalities are burdened by unskilled, unqualified, incompetent but politically powerful municipal managers and managers. It is thus necessary to secure a separation between the political and the administrative arms of a municipality. The limitation imposed by section 56A is also necessary for the objective of ensuring professionalism and depoliticisation of municipal administrations. The weighing up of the importance of limiting these two aspects of political rights is drawn from balancing the infringed right, the harm done and the benefits to be achieved by section 56A.

This limitation seeks to ensure that municipal administrations are headed by a professional administration so that the rights of the municipality's constituents to adequate and effective service delivery can be realised. The nature of this provision is more sensitive to the reality of the dilemma that has/is being experienced in local public administrations and therefore seeks to find a fair and just compromise between two competing values – which are the right to political choices and ensuring effective, efficient and competent municipal managers and managers, exempted from political power and undue political influence

### **3.5.3. Nature and extent of limitation**

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<sup>169</sup> Section 19 (1) (a), (b) & (c) Constitution.



Section 56A limits the right to political choice to a limited extent. It restricts municipal managers and managers from being political office bearers; it thus only applies to senior officials. As discussed below, only political rights circumscribed are the right to form a political party and the right to participate in political party activities as elected office bearers. Section 19 carries other rights other than those entrenched in subsection (1), therefore, the rights such as the right to vote and the right to free and fair elections are fully afforded to municipal managers to exercise. The extent of the limitation applies only to municipal managers and section 56 managers and can thus be labelled as a ‘minor’ limitation. It is therefore submitted that this limitation is less severe, as it also affords municipal managers and managers a freedom of choice – the choice to choose between being a municipal manager or to be a political office bearer. Moreover, this limitation is temporary, only as long as a person is a municipal manager or a manager. The limitation does not unreasonably strip municipal managers and managers of all choices available to them.

This limitation is not a denial of rights; as a consequence, a senior municipal official who wants to start a political party can resign as municipal manager or manager. Therefore, a municipal manager can escape the limitation by resigning. They are afforded a choice to be either a senior civil servant or be a politician but cannot be both.



#### 3.5.4. Relation between limitation and purpose

The purpose of deterring and limiting municipal managers and managers from holding political office, is because research has shown that some municipal councils have appointed managers who might belong to the ruling party, but who have no skills, experience or competencies for the job.<sup>170</sup> The purpose of deterring municipal managers and managers from being a political office bearer and manager at the same time is to neutralise the interference by political parties. The purpose is to ensure professionalism and non-politicisation of municipal administrations, thus moving towards achieving the objectives of local government and ensuring adequate and efficient service delivery for all. There is thus a rational connection between the limitation imposed by section 56A and the purpose of limiting the political rights of municipal managers and managers. It is also the purpose of this provision to draw clear lines between political and administrative functions of municipalities. This is done

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<sup>170</sup> De Visser J ‘Towards a professionalised municipal administration’ (2009) 12(2) *LGB* 5.

to ensure maintenance of professionalised and politically neutral local public administration that solely performs its functions without prejudice or favour.

### 3.5.5. Lesser means

After determining the reasoning and purposes of limiting rights as constitutionally acceptable, the other step to consider is whether there is available less restrictive means other than limiting political rights of municipal managers. In the court decisions of *Makwanyane* and *Williams*, it was held that there were less restrictive means that could be applied other than those proposed in legislation that limited constitutional rights of the parties of both cases. However, applying this factor to section 56A, it is submitted that less restrictive means, such as the code of conduct for municipal staff members,<sup>171</sup> have shown to be inadequate and thus less likely to solve issues of political influence in municipal administrations. In section 2(d) of schedule 2 of the Systems Act, it is provided that a municipal staff member must always act impartially and treat all people equally and without favour. However, this is not always the case as politically influenced appointees tend to prioritise their political interest thus resulting in partiality. Having the code of conduct requires parties who can invoke accountability and report on political influence in decision-making. This may be less effective than limiting political rights directly. Some political party members who are in municipal administration may choose not to utilise the code of conduct against a senior municipal official who is also a member or office holder in a political party. It is thus submitted that the section 56A limitation is likely the most effective means that can be applied in ensuring professionalism in municipal administrations and ensuring accountability of municipal managers. This limitation is thus well tailored considering all the other relevant circumstances.

### 3.6. Is the section 56A limitation fair and just?

In weighing-up the right that is limited by section 56A, the extent and the purpose of the imposed limitation, and the absence of effective alternative measures, the test of

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<sup>171</sup> Schedule 2 Systems Act.

proportionality has been applied. In considering the relative importance of political rights infringed upon it is shown that the limitation is imposed only on two aspects thereof; it is not an entire denial of the exercise of political rights. Moreover, municipal managers are afforded a freedom to choose between holding a political office and retaining their positions as municipal managers. If a manager wishes to be a political office bearer, he/she can resign as a senior civil servant of a municipal administration.

The limitation and the purpose that this limitation seeks to remedy are arguably reasonable enough to meet the test of justification and fairness. The infringement imposed by section 56A deals primarily with the right of an individual (the municipal manager) against the rights of members of a community that a municipal manager must serve. It also affects the development, professionalisation and depoliticisation of local public administration and local governance at large. It is submitted that this limitation has the capability to contribute to the achievement of the purpose, namely, to professionalise local public administration. There are good enough reasons for the infringement, such as, the securing of more professional, impartial and efficient municipal administrators. It is further submitted that the limitation is fair and just based on the purpose it sought to serve, and constitutes relatively minor infringement, as all other political rights, such as voting in elections, can still be exercised by municipal managers and managers.

Also, in determining the scale and the portion of the right which the section 56A limitation measure is focused on, it does not strike at the core of political rights and thus does not limit the core of section 19. In addition, the limitation is applicable in terms of general application. Every municipal manager and manager are subject to the limitation imposed by section 56A. No politician or any political party-favoured candidate may be exempted from the impunity of this limitation.

### **3.7. Conclusion**

The rights in the Bill of Rights are a cornerstone of our democracy and should always thus be promoted and protected. These rights are however not absolute and may at times be subjected to being limited. The right that is infringed by section 56A is section 19(1) of the Constitution in the Bill of Rights, and it cannot be excluded from being limited. The limitation is constitutional if the justification and proportionality test are passed. There are five factors that

are used when applying the proportionality test; all these factors are relevant and should be applied to ensure that the limitation is just and fair.

Given the poor track record of some municipalities regarding maladministration and corruption, the overall summation of this chapter is that the limitation imposed by section 56A is just and fair in an open and democratic society, based on human dignity, equality and freedom. This provision is necessary to promote a more professional, effective and efficient local public administration.



## CHAPTER 4

### CONCLUSION

#### 4.1. INTRODUCTION

The aim and purpose of this paper has been to assess the constitutionality of section 56A of the Local Government: Municipal Systems Amendment Act (2011). The critical assessment was done through focusing on whether section 56A is constitutional or not, in accordance with the provisions of the Constitution, particularly, section 19(1) and section 36. This paper has weighed the importance of constitutional rights while considering whether the constitutionality of the limitation imposed by section 56A is justifiable in accordance with the limitation clause. This has been done through an assertion that depoliticising and professionalising local municipal administrations serves as an important instrument that ensures effective service delivery by appointing competent, skilled and qualified municipal managers and managers. Moreover, the limitation imposed by section 56A limits only two aspects of the political rights embodied in section 19 of the Constitution.

This chapter presents a summation of the findings that serves as the answer to the research question and concludes with recommendations.

#### 4.2. Section 56A as a professionalism advancement tool in local government

The legislative mandate of local government is to ensure accountability, openness and responsiveness to the local constituents also through a competent local public administration, headed by municipal managers with the assistance of senior managers. Municipalities with strong financial management capacity, administrative capacity and competent municipal managers are more likely to result into functional and development-focused local public administrations. As discussed in both Chapters 2 and 3, professionalisation of municipal administration through the appointment of municipal managers and managers is of paramount

importance in ensuring that municipalities are managed as per the constitutional objectives of local government and the values of our democracy. Section 56A serves as an instrument of advancing professionalism in the local public administration sector. This section carries a purpose of advancing professional, managerial and competent personnel without the influence of political parties conflicting with the functions and powers of the administrative arm. This is possibly achievable through the separation of political party office bearers and municipal administrative work.

Section 56A is important as it seeks to ensure that the political parties in municipal councils also do not appoint an individual based on his/her political standing but rather his or her skills, qualifications and competency. A weak administrative leadership that is easily influenced by politics can easily weaken the performance of a municipality. The key priority of section 56A is to improve the quality of municipalities by ensuring that municipal administrations are isolated from undue political influence.<sup>172</sup> Local government needs effective and strategic personnel in senior municipal administrative positions in order to take decisive and fearless decisions against poor performance and lack of accountability in municipalities.

Sections 54A and 56A were inserted in the Local Government: Municipal Systems Amendment Act (2011) with the intention of building municipalities with committed senior civil servants with the necessary intellectual capacity, qualifications, skills and competency to assist in empowering municipalities to move progressively towards the social and economic upliftment and provision of basic services to the poor and the disadvantaged. Section 55A also advances professionalism in public local administration to ensure fair, efficient and effective municipal administrations, thus eradicating weaknesses in governance and institutional performance.

### **4.3. The infringed right in section 19(1)**

Section 19 of the constitution embodies political rights that are to be enjoyed freely and without prejudice by the citizens of South Africa. The importance of political rights in a

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<sup>172</sup> Powell D (2010) 23.



democratic dispensation is undeniable and uncontested. It is also important to bear in mind the prejudicial treatment and the denial of political rights of black people in South Africa prior to 1994, thus, the constitutional protection and advancement of freedom of choice regarding the exercise of political rights. Political rights are generally understood as rights relating to the protection of individual and collective choices and freedom, and recently, the discourse in the governance of local municipalities further highlights the importance of the protection of the rights.<sup>173</sup> Moreover, in *Ramaketsa*, the Court highlighted the value and the importance of political rights to participate in the activities of a political party.<sup>174</sup>

Section 56A limits these political rights of municipal managers and managers. However, this provision limits only parts of the political rights embodied in section 19. Section 56A expresses that municipal managers are prohibited from being political office bearers during the period they are municipal managers. Research shows that instances of political office bearers being senior municipal civil servants have resulted in prioritisation and advancement of political agenda and neglect of the mandate of civil service.<sup>175</sup> Section 56A has thus been adopted as a solution to fix this occurrence by limiting the rights of managers to hold political office and be a senior civil servant, concurrently.

It is also imperative to note that this provision only limits two aspects of political rights in section 19(1). These two aspects are, firstly, that the municipality manager cannot be a political office holder and by virtue of that is limited from starting a political party which is a political right in terms of section 19(1) (a). Secondly, a senior civil servant cannot participate in political party activities by being elected into a political office. Municipal managers that have the desire to hold political office must choose between civil service and being a politician but cannot be both as per the expression of section 56A. He/she cannot hold both positions simultaneously.

#### **4.4. The application of section 36 –the limitation clause inquiry**

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<sup>173</sup> Tissington K & Adeleke F ‘The State of Civil and Political Rights in South Africa’ available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/740-op-ed-the-state-of-civil-and-political-rights-in-south-africa> (accessed 16 June 2018).

<sup>174</sup> *Ramaketsa* para 60-64.

<sup>175</sup> Surty F (2010) 34.

In order to figure out the constitutionality of a provision, the limitation clause inquiry must be applied. In the instance of section 56A, political rights envisaged in section 19(1) (a) and (b) are being infringed, however, in this paper it has been shown that the limitation is constitutional in terms of section 36. The limitation advances professionalisation and a competent workforce of the civil service and it seeks to empower the public interest to have adequate service delivery. This limitation does not only pertain to certain senior servants, it applies to all municipal managers and managers, and therefore equality is maintained.

The requirements for a limitation and particularly the five factors have been taken into consideration. Firstly, the nature of section 56A is of paramount importance and serves as an instrument that is advocating for competent local public administration. This provision seeks to promote the public administration objectives as set out in section 195 of the Constitution. Secondly, this provision seeks also to ensure that municipal administration is depoliticised and professional. Thirdly, this limitation is regarded as minor rather than an extensive limitation. It applies to municipal managers for only the term they are public servants and thus they can exercise their once limited political rights once they vacate office. Moreover, municipal managers are afforded a choice to resign from administrative office should they wish to pursue a political career.

Also, this limitation neutralises the challenge that many municipalities face of political supremacy in all aspects and arms of local government. Lastly, the purpose of this limitation is not harsh and is likely to hold more power than any other means that has been tried and has not succeeded. Considering the above summations, the test of proportionality is thus passed and balances the infringed political rights against the purpose and extent of the limitation. Furthermore, it can thus be concluded that the limitation imposed by section 56A is constitutional.

#### **4.5. Recommendations**

The assessment of the constitutionality of section 56A has been done and it can thus be recommended that firstly, section 56A serves an important purpose, secondly, it is a justifiable limitation of section 19(1) and lastly, it is recommended that section 56A should be retained if the Local Government: Municipal Systems Amendment Act (2011) is again

considered by Parliament, following the correct legislative route. This provision will ensure that local public administration is professionalised and safeguarded by senior civil servants whose mandate is to ensure good governance and service delivery to all. These senior civil servants will focus solely on being public servants without having to prioritise political party benefits.



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