



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 334/23

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS' UNION

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION**

Second Respondent

Neutral citation: *South African Municipal Workers' Union v Minister of Cooperative Governance and Traditional Affairs and Another* [2025] ZACC 4

Coram: Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Theron J, Tolmay AJ and Tshiqi J

Judgments: Mathopo J (majority): [1] to [78]
Kollapen J (dissenting): [79] to [189]

Heard on: 10 September 2024

Decided on: 9 April 2025

Summary: Local Government: Municipal Systems Act 32 of 2000 — Declaration of constitutional invalidity — confirmation — municipal employees — limitation of political rights — rational connection — unjustifiable limitation — retrospective effect

ORDER

On application for confirmation of an order of constitutional invalidity granted by the Labour Court of South Africa, Johannesburg:

1. The order of the Labour Court declaring the inclusion of the phrase “staff member” in section 71B of the Local Government: Municipal Systems Act 32 of 2000 unconstitutional and invalid is confirmed.
2. The declaration of invalidity shall operate retrospectively from 1 November 2022, being the date when the new Amendment Act commenced.
3. Paragraph 2 of the order of the Labour Court is upheld. Section 71B of the Local Government: Municipal Systems Act 32 of 2000 is to be read to provide as follows:
“71B Limitation of political rights—
 - (1) A municipal manager or manager directly accountable to a municipal manager may not hold political office in a political party, whether in a permanent, temporary or acting capacity.
 - (2) A person who has been appointed as a municipal manager or manager directly accountable to the municipal manager before subsection (1) takes effect, must comply with subsection (1).”
4. The respondents are ordered to pay the applicant’s costs in the Labour Court and in this Court, including the costs of two counsel.

JUDGMENT

MATHOPO J (Madlanga ADCJ, Majiedt J, Mhlantla J, Rogers J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] The ability to exercise one’s political rights forms the bedrock of constitutional democracy. Political participation, as enshrined in section 19 of the Constitution,¹ lies at the very heart of shaping the course of governance. However, in the pursuit of preserving this constitutional right lies a legitimate need for professionalism in local government in an attempt to curtail political interference and stabilise the municipal sector. This application attempts to strike a delicate balance in the interplay between upholding fundamental political rights and enforcing crucial limitations to protect the integrity of local governance.

[2] This is an application for confirmation of an order by the Labour Court of South Africa, Johannesburg (Labour Court),² which declared the inclusion of the phrase “staff member” in section 71B of the Local Government: Municipal Systems Act³ (Systems Act) unconstitutional and invalid. This was because the inclusion of that phrase bars all municipal employees, not only municipal managers and their direct subordinates, from holding office in political parties.

¹ According to section 19—

- “(1) Every citizen is free to make political choices, which includes the right—
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right—
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.”

² *South African Municipal Workers Union v Minister of Cooperative Governance and Traditional Affairs* [2023] ZALCJHB 323; [2024] 2 BLLR 221 (LC); (2024) 45 ILJ 595 (LC) (Labour Court judgment).

³ 32 of 2000.

[3] The applicant is the South African Municipal Workers' Union (SAMWU), a registered trade union that represents employees in the local government sector. The first respondent is the Minister of Cooperative Governance and Traditional Affairs (COGTA). The second respondent is the South African Local Government Association (SALGA).

[4] SALGA and COGTA contest the declaration of invalidity on the basis that a complete ban is necessary to depoliticise and professionalise local government and improve service delivery. The prohibition on municipal staff holding political party positions is therefore rational and constitutes a justifiable limitation in terms of section 36(1) of the Constitution.⁴ In turn, SAMWU's case is that, although it accepts that there can validly be a prohibition in respect of municipal managers and managers who report to the latter, the restriction in respect of other staff members is misaligned with the preamble of section 71B as it imposes a blanket ban on all municipal employees.⁵ SAMWU argues that the limitation of political rights pertaining to political positions for senior municipal managers is sufficient to ensure that service delivery is prioritised and is free from political interference, since decisions are taken by senior managers rather than junior staff.

⁴ Section 36(1) provides—

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking 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.”

⁵ The preamble provides that the purpose of section 71B is to “bar municipal managers and managers directly accountable to municipal managers from holding political office in political parties”.

Background

[5] On 5 July 2011, the Legislature promulgated the Local Government: Municipal Systems Amendment Act⁶ with the purpose of, among others, barring municipal managers and managers directly accountable to municipal managers from holding office in political parties (2011 Amendment Act). Section 56A was thereby inserted into the Systems Act to serve this stated purpose. Thus, the section was intended to bar the upper echelon of the municipal workforce from holding office in political parties.

[6] In March 2017, this Court in *South African Municipal Workers' Union I*,⁷ confirmed an order by the High Court of South Africa, Gauteng Division, Pretoria (High Court), declaring section 56A constitutionally invalid on procedural grounds⁸ and afforded the Legislature an opportunity to correct the defect.

[7] In August 2022, the Local Government: Municipal Systems Amendment Act⁹ (2022 Amendment Act) was promulgated, which inserted section 71B into the Systems Act. Section 71B, headed “Limitation of political rights”, reads as follows:

- “(1) A *staff member* may not hold political office in a political party, whether in a permanent, temporary or acting capacity.
- (2) A person who has been appointed as a staff member before subsection (1) takes effect, must comply with subsection (1) within one year of the commencement of subsection (1).” (Emphasis added.)

Section 71B forms the basis of SAMWU’s constitutional challenge.

⁶ 7 of 2011.

⁷ *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs* [2017] ZACC 7; 2017 (5) BCLR 641 (CC).

⁸ The declaration of invalidity was on the basis that the process followed to pass the 2011 Amendment Act did not comply with the provisions of section 76 of the Constitution. Since the old Amendment had been found to be invalid on the basis of the procedural challenge, this Court held that nothing was to be gained from any consideration of the substantive challenge.

⁹ 3 of 2022.

[8] Section 1 of the Systems Act defines “staff” as, “in relation to a municipality, the employees of the municipality, including the municipal manager”. The main difference between section 56A, introduced by the 2011 Amendment Act, and section 71B introduced by the 2022 Amendment Act, is that the latter extends the limitation of political rights to all municipal employees, regardless of the title or position held.

[9] For purposes of this judgment, the extension of the prohibition on holding political office to all staff members effected by section 71B will be referred to as “the impugned extension” and the erstwhile limitation, which imposed a prohibition on municipal managers and managers accountable to them, as the “narrow limitation”.

Litigation history

Labour Court

[10] On 7 July 2023, SAMWU launched a constitutional challenge in the Labour Court against section 71B of the Systems Act, to the extent that it bars employees, not only municipal managers and managers directly accountable to them, from holding political office in political parties.

[11] SAMWU challenged the impugned extension on the following three grounds:

- (a) that the impugned extension is irrational in relation to its promulgated purpose in the new Amendment Act;
- (b) that the impugned extension is irrational in relation to its broader purpose, as can be ascertained from the legislative process and as asserted by SALGA; and
- (c) that it limits the rights of employees in the impugned category to hold political office,¹⁰ their rights to freedom of association (section 18), and their right to dignity (section 10), and does so in a manner that cannot be justified in terms of section 36(1) of the Constitution.

¹⁰ Section 19 of the Constitution.

[12] According to the Labour Court, the essence of the matter was the relationship between the limitation of a constitutional right (in the form of the impugned extension) and the purpose as articulated by the respondents, being to depoliticise and professionalise local government by eradicating political interference in municipal decision-making, so as to maintain management stability and thus improve service delivery. It followed that the matter required assessment through a justifiability inquiry, which necessitates, among other factors, a consideration of the relation between the impugned limitation and its stated purpose.

[13] In line with the justifiability inquiry, the Labour Court recognised that there is no dispute that the impugned limitation limits section 19 of the Constitution. On the nature and the extent of the impugned limitation, the Labour Court found that political rights are interconnected and thus implicate other rights. The Court was of the view that there were less restrictive means to achieve the legislative purpose of the Systems Act, in the form of the narrow limitation, a limitation that has been in existence since 2011.

[14] On the relationship between the impugned extension and its purpose, the Labour Court held that evidence must be tendered to demonstrate that the existence and enforcement of the impugned extension can reasonably be expected to control the risks that the respondents have identified, and advance the purpose of the extension. Further, that COGTA had placed no evidence before the Court to justify the impugned extension as constitutionally valid. Addressing the argument that the intention of the limitation is to depoliticise and professionalise the public service, the Court found that there was insufficient evidence to establish that the impugned extension was rationally connected to the stated purpose of professionalising the municipal sector. The Court rejected the argument that every junior employee who holds a political position in a political party would necessarily wield undue influence in the workplace, stating that this amounted to no more than an assumption.

[15] The Labour Court rejected the assertion that a connection existed between the impugned extension and the purpose of improving service delivery in order to stabilise local government. Moreover, that it may well be that improved service delivery will result in the stabilisation of local government, but that stabilisation is a consequence of the purpose of improved service delivery being achieved, and not a means used to achieve that purpose. As a result, the Court concluded that the limitation could not be justified in terms of section 36(1) of the Constitution and declared the inclusion of the phrase “staff member” in section 71B as unconstitutional to the extent that it precludes municipal employees, who are not municipal managers or managers accountable to them, from holding political office. To remedy the defect, it held that the phrase “staff member” should be severed; and the provision should read:

- “(1) A municipal manager or manager directly accountable to a municipal manager may not hold political office in a political party, whether in a permanent, temporary or acting capacity.
- (2) A person who has been appointed as a municipal manager or manager directly accountable to the municipal manager before subsection (1) takes effect, must comply with subsection (1) within one year of the commencement of subsection (1).”¹¹

In this Court

SAMWU’s submissions

[16] SAMWU seeks an order confirming the Labour Court’s declaration of the inclusion of the phrase “staff member” in section 71B of the Systems Act as unconstitutional and invalid on the ground that the impugned extension constitutes an infringement of political rights in terms of section 19. It urges this Court to endorse the orders of the Labour Court.

[17] SAMWU refers to the well-known approach that a constitutional challenge to any dispute requires a two-staged test. Firstly, whether the statutory provision limits

¹¹ Labour Court judgment above n 2.

any right in the Bill of Rights, and secondly, if there is such a limitation, whether such limitation can be justified in terms of section 36(1) of the Constitution. As held by the Labour Court, SAMWU points out that the first element is not in dispute, at least in relation to political rights. According to SAMWU, the respondents bear the onus to satisfy this Court that the limitation is reasonable and justifiable in terms of section 36(1) – an onus that SAMWU contends they have not discharged.

[18] On the nature of the right and its importance, SAMWU argues that there is an interconnectedness between political rights and the right to freedom of association that is trite. It submits that limiting a person’s right to hold a political party position could very well dissuade that person from participating in political party activities, and even from voting, with the concomitant effect of directly undermining the fundamental constitutional right of universal adult suffrage. To reinforce this submission, SAMWU relies on *New Nation Movement*,¹² where it was held:

“If the content of section 19(3)(b) entails that an adult citizen desirous of standing for and holding political office may not be able to do so without forming or joining a political party, that pits section 19(3)(b) against section 18. That immediately becomes a weighty consideration in determining the content of the section 19(3)(b) right. Therein lies the relevance of the right to freedom of association in this discourse. The *Doctors for Life* and *UDM I* principle calls for a harmonious reading of sections 18 and 19(3)(b).”¹³

[19] SAMWU submits that there is a further intersectionality between political rights and the right to human dignity. According to SAMWU, the untested generalisation underpinning the impugned extension, that all municipal employees who hold political office will use their office to wield political influence, is an assumption that cannot be sustained absent any supporting evidence.

¹² *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC).

¹³ *Id* at para 20 with reference to *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 48 and *United Democratic Movement v Speaker of the National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at para 83.

[20] On the importance of the purpose of the limitation, SAMWU submits that, while it is undisputed that service delivery is important, it adds no value in determining whether the impugned extension is reasonable and justifiable, because there is no rational link between the impugned extension and the improved service delivery purpose. SAWMU's view is that the narrow limitation, in any event, is already better placed to achieve this undeniably crucial purpose. On the nature and extent of the limitation, SAMWU submits that the impugned extension potentially leaves no room for political participation of municipal employees whatsoever. The impugned extension wrongly assumes that every single employee would unscrupulously wield political influence. There is, further, no empirical evidence at all justifying these far-reaching intrusions and generalised assumptions.

[21] According to SAMWU, the impugned extension is substantively irrational. Relying on *Twee Jonge Gezellen*,¹⁴ SAMWU maintains that the test is whether there is an appropriate relationship between the limitation and its purpose, which, in this case, denotes two aspects to the rationality question. First, whether the impugned extension is rational in relation to its promulgated purpose as stated in the 2022 Amendment Act and second, whether the impugned extension is rational in relation to its broader purpose as gleaned from the minutes of the COGTA Portfolio Committee, and as asserted by SALGA.

[22] SAMWU submits that the stated purpose of section 71B is, in the relevant part of the preamble to the Amendment Act, "to bar municipal managers and managers directly accountable to municipal managers from holding political office in political parties". And this stated purpose clearly envisages a re-enactment of the narrow limitation, only barring municipal managers and managers directly accountable to municipal managers from holding political office in political parties. No stated purpose is served by the impugned extension.

¹⁴ *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011] ZACC 2; 2011 (3) SA 1 (CC); 2011 (5) BCLR 505 (CC) at para 64.

[23] SAMWU contends that the Labour Court ought to have expressed its view on the substantive rationality challenge *vis-à-vis* (in relation to) the unstated purpose separately from the rights infringement challenge. This purpose is to depoliticise and professionalise local government, i.e. to eradicate political interference in municipal decision-making, so as to maintain management stability and thus improve service delivery.

[24] According to SAMWU, there is simply no evidence of what SALGA proffers as a “rational objective basis justifying the connection”, i.e. that banning junior employees from holding political office will lead to senior managers being able to execute duties freely, which will result in better service delivery. On this basis alone, SAMWU argues that the impugned extension is irrational and not capable of achieving the improved service delivery purpose. SAMWU rejects the notion that all municipal managers and managers reporting to them could become stooges of junior officers who hold higher political rank.

[25] In response to the argument advanced by SALGA that junior employees may overstep the line or attempt to undermine municipal managers, SAMWU contends that SALGA must invoke the disciplinary processes already in existence and educate and remind the employees of their code of conduct as part of sustaining good local governance. And further, that their services may be terminated if they are guilty of serious misconduct.

[26] In conclusion, SAMWU submits that the argument that improved service delivery will result in the stabilisation of local government is devoid of merit. Stabilisation is not and cannot be an independent purpose divorced from service delivery (which is the real purpose), so the argument continues. SAMWU submits that stabilisation is a consequence of the improved service delivery purpose being achieved, not the means used to achieve it. The issue is the means towards the purpose, not the

consequence. It argues that there is no stabilised local government with a poor service delivery record.

[27] According to SAMWU, even if one assumes, in SALGA's favour, that stabilisation of local government is an independent purpose sought to be achieved by the impugned extension, SALGA has failed to establish any rational connection between the impugned extension and the stated objective of stabilising local government. Stabilisation in this sense appears to mean no political infighting, no political killings, no service delivery protests, and no violence. We were urged to accept that the solution to curb violence is not to ban constitutional rights of employees, but to ensure broader security through use of law enforcement, and to sustain ethical conduct through proper compliance with the constitutional mandate of municipalities.

COGTA's submissions

[28] COGTA opposes the relief sought by SAMWU on the basis that the Labour Court erred in not finding that policy considerations alone may be sufficient to justify the limitation of a right in the Constitution. Accordingly, COGTA submits that the order of the Labour Court should not be confirmed by this Court and that SAMWU's contentions are without merit. Initially, COGTA supported the narrow limitation but during deliberations on the Bill in the National Assembly, when SALGA proposed that the limitation should extend to every "staff member" employed by a municipality, COGTA reconsidered its position and decided to align itself with the views expressed by SALGA.

[29] COGTA submits that the Labour Court erred in finding that it failed to place before it either evidence or sufficient information regarding the policy being furthered, nor reasons for that policy and its reasonableness in limiting a constitutional right. COGTA's case is that the justification was based on policy considerations, not evidence. Thus, the Labour Court erred when it found that the limitation is unjustifiable on the basis that there was not enough evidence before the Court to justify the amendment. The relevant policy considerations were debated and agreed to during

deliberations in the National Assembly, and it was agreed that there was a need for professionalisation of administration in the municipal space and that there needed to be legislation to that effect.

[30] According to COGTA, the Labour Court accepted that the professionalisation of municipal management and improving service delivery are legitimate objectives which require urgent implementation, but failed to consider whether the policy considerations constituted sufficient grounds to limit the section 19 political rights. Instead, it restricted itself to the lack of evidence in arriving at its decision.

[31] COGTA submits that in *NICRO*¹⁵ this Court noted that there are cases where the concerns to which the limiting legislation is addressed are subjective and not capable of proof as objective facts. As Chaskalson CJ explained in his judgment, “a legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data”.¹⁶ Most importantly, this Court held that there may be cases where, despite the absence of information on the record (justifying the limitation), a court is nonetheless able to uphold a claim for justification based on common sense.

[32] COGTA says the Labour Court failed to consider the well-known fact that many municipalities are plagued by political destabilisation which has resulted in poor or no service delivery, thus, depriving the public of the much-needed services.

[33] Addressing the findings of the Labour Court that COGTA had placed no evidence to justify the impugned extension and that it also failed to place evidence as to the policy that is being furthered, the reason for that policy, and why it is considered reasonable in pursuit of that policy to limit constitutional rights, COGTA contends that

¹⁵ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (*NICRO*) at para 34.

¹⁶ *Id* at para 35.

the Labour Court ought to have relied on policy considerations because they constituted sufficient ground to limit the section 19 rights.

[34] It is COGTA's case that the Labour Court ought to have taken judicial notice of the effects of political interference in municipalities and applied common sense in determining whether the impugned extension is appropriate or not. This is especially so, because the impugned amendment is not purely fact- or evidence-based and the Labour Court failed to consider whether, absent any evidence, the limitation of rights is justifiable.

[35] The Labour Court accepted that the policy aimed at depoliticisation and professionalisation of the municipal space and the reasons for the limitation – namely, the improvement of service delivery as a legitimate and urgent purpose. COGTA contends that the Labour Court ought to have taken note of the devastating effects of political interference in some municipalities, such as, Tshwane, eThekweni and the City of Johannesburg. and should have found that the limitation is justifiable.

[36] The fallacy in the Labour Court's approach, so argues COGTA, is that armed with all the information from the National Assembly and independent reports, the Labour Court insisted on empirical evidence and wrongly concluded that the limitation was intuitive-based as opposed to evidence-based. According to COGTA, at the very least, the Labour Court ought to have considered these facts, as it is a matter of public record that many municipalities are destabilised by political infighting resulting in the disruption of much-needed services which the public is entitled.

[37] As a second string to its bow, COGTA places reliance on *National Coalition for Gay and Lesbian Equality*¹⁷ in its submission that, even if a respondent makes no attempt to discharge its burden of justification, a court must *mero motu* consider the possibility that a limitation of rights is justifiable. We were urged to accept that, even

¹⁷ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC).

if COGTA had not put up evidence to justify the limitation (which is denied), the Labour Court was nevertheless obliged to *mero motu* consider the possibility that the limitation of rights is justifiable. COGTA maintains that the limitation meets the rationality threshold and serves a legitimate government purpose of stabilising the municipal sector.

[38] In relation to the nature of the rights in section 19 of the Constitution, COGTA contends that what is required in this instance is the weighing of the harm done by the law as against the benefit the law seeks to achieve. The contention advanced is that section 71B limits the rights of employees in a municipality from holding political office. It does not bar them from associating with a political party of their choice, nor does it bar them from participating in political party activities. The inroad that section 71B makes into sections 18 and 19 of the Constitution, weighed against the benefit that stands to be derived, is minimal and is accordingly justified. And, section 10 of the Constitution is not impaired by section 71B. The limitation in section 71B clearly serves a purpose that will contribute to human dignity and equality, and the infringement is therefore justifiable.

[39] To conclude its submissions, COGTA argues that, given its history, the impugned extension is justifiable in that it furthers a rational and legitimate objective. It is legitimate for the government to limit the political rights of all staff members employed in municipalities. According to COGTA, the means suggested by SAMWU are not sufficient and only a complete limitation of the right to hold political office is appropriate.

SALGA's submissions

[40] SALGA aligns itself with most of COGTA's arguments and urges the Court to dismiss the application on the basis that depoliticisation and professionalisation of local government to improve service delivery is a legitimate government purpose. It contends that political interference in municipalities hampers the efficient and effective functioning of the municipalities, especially on the part of junior staff employees who

hold political office. Because the limitation impacts only the holding of political office by staff members of municipalities, it is minor as it affects a limited number of persons. According to SALGA, the purpose of the limitation would be achieved by removing the political influence of junior staff members who hold political office.

[41] SALGA further submits that a complete ban on staff members holding political office will achieve the objective of depoliticising the local government, as politicisation leads to instability due to internal political infightings. SALGA takes issue with the Labour Court's finding that the utilisation of disciplinary procedures would be a better means of achieving the stated legitimate purpose. It submits that the suggestion that internal disciplinary measures are adequate to deal with recalcitrant junior officials holding high political office loses sight of the reality that the political fallout for taking such a disciplinary measure, in itself, disrupts municipal governance and administration. Disciplinary steps against errant employees would not remove the disruption. If a municipal manager faces political consequences for not following the dictates of a junior official with higher political office in the same party, this would encourage compliance with such dictates. Consequently, argues SALGA, there are no less restrictive means to achieve the object of depoliticising local government.

[42] The fundament of SALGA's case is that the enquiry into less restrictive means is not fully answered by merely looking at the employer/employee relationship. It argues that, while it is correct that the abuse of political power by a junior official in the administration of a municipality would constitute misconduct worthy of disciplinary action, such disciplinary action will not remove the disruption. There are no less restrictive means that will achieve the object of depoliticising local government. According to SALGA, only an entire ban on holding political office for all staff members will achieve the objective of depoliticising local government, as the destabilisation of local government due to internal political action will be avoided.

[43] SALGA further contends that it is common cause that depoliticising and professionalising local government to improve service delivery is a legitimate

government purpose. It is further common cause, says SALGA, that political interference in municipal administration hampers the efficient and effective functioning of municipalities. According to SALGA, the question to be asked is whether the extended prohibition is rationally linked to the depoliticisation and professionalisation of local government administration, which answer is in the affirmative.

[44] SALGA relies on the Moerane Commission Report¹⁸ into political killings, particularly in KwaZulu-Natal, which recommended to the government that it should depoliticise and professionalise the public service as intended in Chapter 13 of the National Development Plan¹⁹ relating to local government. That policy framework intends to professionalise the public service in order to prevent the politics of patronage, incumbency, and personal accumulation. If the limitation of political rights regarding the holding of political office is consistent with a legitimate government purpose and policy, then there is no reason, in logic, why such limitation in respect of all municipal staff members is not equally consistent with such government policy, thus submits SALGA.

[45] SALGA further relies on its 2016 Study,²⁰ conducted by the Human Sciences Research Council (HSRC), which emphasised that incidents of violence, service delivery protests, and political killings stem from a combination of poor service delivery and political motivations. SALGA submits that the 2016 Study presents important evidence that illustrates how political infighting within municipalities is linked to service delivery failures, protests, and resulting violence.

[46] SALGA argues that, because the intention of the policy is aimed at enabling municipalities to comply with their constitutional obligation in terms of section 156 of the Constitution, the rationality challenge ought to have failed for the following reasons:

¹⁸ Moerane Commission of Inquiry *Report of the Moerane Commission of Inquiry into the underlying causes of the murder of politicians in KwaZulu-Natal* (2018) at 417.

¹⁹ National Planning Commission *Our Future – Make it Work National Development Plan 2030* (2012)

²⁰ South African Local Government Association (SALGA) *Violence in Democracy: The Political Killing and Intimidation of Local Representatives and Administrators* (2016).

- (a) as the limitation relates to enshrined political rights, the limitation needs to be assessed in terms of section 36(1) of the Constitution, and not merely on the basis of rationality;
- (b) even on the basis of rationality, section 71B meets the requirement of serving as a link to a legitimate government purpose and policy; and
- (c) the proportionality challenge should fail since the depoliticisation and professionalisation of local government is aimed at improving service delivery.

The limitation is, therefore, not disproportionate insofar as it relates to all staff members. According to SALGA, the amended section 71B is accordingly justifiable in terms of section 36(1) of the Constitution.

Issues

[47] There is no dispute that the impugned limitation offends, primarily, section 19 of the Constitution. The bone of contention between the parties is whether this is justified or not.

[48] Thus, the following issues arise for determination:

- (a) whether the impugned extension in terms of section 71B of the Systems Act is justifiable under section 36(1) of the Constitution;
- (b) whether the declaration of invalidity by the Labour Court should be confirmed; and
- (c) if confirmed—
 - (i) whether such declaration should be suspended to grant the Legislature an opportunity to remedy the defect; and
 - (ii) whether the declaration should operate with retrospective effect.

Condonation

[49] SALGA has requested condonation for the late filing of its written submissions, which were filed two court days out of the period prescribed in the directions issued by this Court. The delay is minimal and condonation is granted.

Analysis

Substantive rationality challenge vis-à-vis limitation of rights challenge

[50] Before proceeding to the section 36 analysis, it is necessary to address the distinction between SAMWU's rationality challenge and its rights-limitation challenge. While both challenges have been raised, they involve different considerations and burdens of proof. In a rationality challenge, the party impugning the provision bears the onus of demonstrating that the impugned provision lacks a legitimate government purpose or a rational relationship to such purpose. However, where legislation limits a fundamental right, as here, the burden shifts to the party seeking to justify the limitation under section 36(1) of the Constitution.

[51] In a line of cases, stretching back to *New National Party*,²¹ this Court has consistently held that, like all exercises of public power, there are constitutional constraints that are placed on Parliament. This is so because "there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily".²² It is now trite that the objector bears the onus of providing this justification. This Court, in *Glenister II*,²³ framed the principle thus:

²¹ *New National Party v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC).

²² *Id* at para 19.

²³ *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

“The onus of establishing the absence of a legitimate governmental purpose, or of a rational relationship between the law and the purpose, falls on the objector. To survive rationality review, legislation need not be reasonable or appropriate.”²⁴

[52] SAMWU challenges the rationality of section 71B’s blanket prohibition on two grounds: first, that it is irrational in relation to its promulgated purpose as stated in the 2022 Amendment Act, and second, that it is irrational in relation to its broader purpose of depoliticising and professionalising local government. However, given that section 71B clearly limits fundamental rights protected by section 19 of the Constitution, and this limitation is not disputed by the parties, it is appropriate to proceed directly to the section 36 justification analysis. Should this analysis reveal that the limitation cannot be justified, this would be sufficient to warrant a declaration of invalidity, rendering a separate consideration of the rationality challenge unnecessary.

The justifiability enquiry

[53] The fundamental issue before this Court is whether the impugned extension in terms of section 71B of the Systems Act is justifiable under section 36(1) of the Constitution. This requires a proportionality enquiry. The question to be asked is whether there is a limitation of a constitutional right and whether such limitation can be justified in terms of section 36(1) of the Constitution. This Court in *Makwanyane*,²⁵ held that the balancing of different interests forms an inherent requirement of proportionality:

“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

²⁴ Id at para 55, where this Court also relied on *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 86 and 89-90 and *New National Party* above n 21 at para 24.

²⁵ *S v Makwanyane* [1995] ZACC 3; 1995 (2) SACR 1 (CC); 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.”²⁶

As stated in *NICRO*, “[u]ltimately what is involved in a limitation analysis is the balancing of means and ends”.²⁷

[54] In order for the limitation to be justified, it must be reasonable and justifiable 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.²⁸

[55] The nature of the constitutional right at issue is the political right to make political choices, specifically, the right to participate in the activities of a political party, as provided for in section 19(1)(b) of the Constitution. The chilling effect of the impugned extension is that it restricts the entitlement and exercise of this right for municipal employees by precluding them from holding political office in a political party, irrespective of the title or position held by the employee(s).

[56] The rights enshrined in section 19 of the Constitution are not only crucial to individual political freedom but form an essential part of the broader democratic process. I agree with SAMWU that it is cold comfort to suggest that the impugned extension limits political rights only partially. Limiting this right hinders citizens’ ability to fully engage in the country’s political activities, and could very well dissuade citizens from participating in political party activities, thus directly undermining the

²⁶ Id at para 104.

²⁷ *NICRO* above n 15 at para 37.

²⁸ Section 36(1) of the Constitution.

fundamental constitutional value of universal adult suffrage. With constitutional rights not being absolute, this requires careful consideration by this Court.

[57] What must be kept in mind, however, is that although the purpose sought to be achieved by this limitation is creditable, it ought to be considered whether this goal can be realised without intruding so heavily on fundamental constitutional rights. It seems necessary to closely examine whether the limitation imposed by section 71B extends beyond what is reasonably necessary to realise the legitimate purpose.

[58] In *Manamela*,²⁹ this Court stressed that “[a]s a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be.” The impugned extension is very extensive in scope, in light of its far-reaching nature. It essentially excludes an entire group of citizens at different levels in the employ of a municipality from holding a political office. This legislative overkill applies to all “staff members” in the municipal sector, regardless of the title, position or responsibility held. However, unlike the erstwhile narrow limitation, this indiscriminate limitation fails to differentiate between employees who hold positions of authority, the upper echelon of the municipal workforce, and employees whose political associations would in all probability have no influence on their capacity to execute their duties impartially. This sweeping limitation raises considerable issues regarding its reasonableness and proportionality.

[59] It is trite that where the state seeks to limit constitutional rights in the Bill of Rights, it must support this by providing clear and convincing reasons. The political rights at issue are crucial to our democratic order and issues of past disenfranchisement weigh heavily in favour of the protection of these rights. In order to pass constitutional muster, there must be an appropriate relationship between the impugned extension and the stated purpose, for example, depoliticisation and the professionalisation of local

²⁹ *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) (*Manamela*) at para 32.

government for the enhancement of service delivery.³⁰ The respondents were unable to draw our attention to any empirical evidence justifying the stated purpose (limitation). I accept that in some instances empirical evidence may not always be required, however, it is my view that courts cannot operate on the mere say-so of Parliament.

[60] In an attempt to row away from this intractable position, the respondents invited us to rely on *NICRO* by adopting a common-sense approach and dispense with a need for empirical evidence in conducting this limitation analysis. As demonstrated above, even if we were to adopt a robust common-sense approach, the impugned limitation would still fail the rationality test. There are many fallacious assumptions that this legislative policy stance raises. The limitation fails on policy considerations alone, notwithstanding the absence of empirical evidence.

[61] The respondents also rely on Mr Hoosen's comment on SALGA's slide presentation. Mr Hoosen, a member of the National Assembly representing the Democratic Alliance in the province of KwaZulu-Natal, shared a casual conversation which he had with an "unnamed" senior municipal official who indicated that he could not discipline his junior employee who happened to be a senior political official in his political party. This proves nothing and ought to simply be rejected as untested hearsay evidence. Further, the respondents' submission on this score is fallacious – it carries with it an assumption that most, if not all, municipal employees belong to the same political party. It has not been shown how a junior official of party A can wield political influence over a senior municipal manager who is a member of party B.

[62] It is unconscionable, in the absence of any evidence, to expect this Court to rely on untested and generalised assumptions as evidence of common sense. The solution to curb undue influence and violence is not to ban the constitutional rights of employees, but to ensure broader security through the use of law enforcement and to sustain ethical

³⁰ *United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* [2002] ZACC 21; 2002 (11) BCLR 1179 (CC); 2003 (1) SA 495 (CC) at para 55 and *Pharmaceutical Manufacturers Association of South Africa* above n 24 at para 85.

conduct through proper compliance with the constitutional mandates of the municipalities.

[63] In my view, where there is an underlying policy for limiting the right, the Government is obliged to provide the Court with sufficient information to properly examine its purpose and by so doing assess the reasons for the limitation. In *NICRO*, it was said:

“In a case such as this where the government seeks to disenfranchise a group of its citizens and the purpose is not self-evident, there is a need for it to place sufficient information before the Court to enable it to know exactly what purpose the disenfranchisement was intended to serve. In so far as the government relies upon policy considerations, there should be sufficient information to enable the Court to assess and evaluate the policy that is being pursued.”³¹

[64] It is critical to draw a distinction between the promulgated purpose and stated purpose. The promulgated purpose of section 71B is to “bar municipal managers and managers directly accountable to municipal managers from holding political office in political parties”. It restates the narrow limitation. I agree with both the Labour Court and the respondents that this was most likely an administrative oversight, and this can be attributed to the fact that the impugned limitation was a last-minute change in the law-making process. It could not have been the intention of the law-maker to deliberately contradict the legislative purpose with its provisions.

[65] In this case, no evidence was placed before the Labour Court that there is an appropriate relationship between the impugned extension and the stated purpose. The respondents sought to advance as evidence the slide presentation made by SALGA to the COGTA Portfolio Committee. There can be no reliance on this. This presentation relies on the 2016 Study that in itself fails to establish any rational link between the impugned limitation and the stated purpose. This report made various findings, which

³¹ *NICRO* above n 15 at para 65.

include intra-political party violence and community violence related to poor service delivery (albeit it does not identify the root cause as being attributable to junior employees who hold political office). The report also identifies criminal conduct which is attributable to lack of job opportunities. There is nothing in the report that helps the respondents' case in establishing the link between the impugned limitation and the stated purpose.

[66] In the Labour Court, SALGA in its answering affidavit placed reliance on the National Development Plan³² by the National Planning Commission. SALGA specifically relies on page 414 of the National Development Plan, under the heading "what needs to be done". As correctly articulated by SAMWU in their reply, there is nothing in the National Development Plan about stripping junior municipal employees of their constitutionally guaranteed and historically significant rights to hold office in political parties.

[67] Another fallacy in the respondents' case is the assertion that holding political office is the sole vehicle through which political influence may be wielded. It ignores a situation where a person may well be capable of influencing political decisions by virtue of being closely affiliated with someone occupying political office. Employees do not have to hold office in a political party to influence the kind of mischief the statute is said to seek to mitigate. A person can be recognised as an influential figure within a party structure without formally occupying party office. Conversely, an influential office-bearer can (if inclined to do so) continue within the community to lean on senior managers, even if the office bearer no longer holds a position within the municipality. There is also a misplaced assumption that once the junior employee resigns, the political influence they have also dissipates with the resignation.

[68] It is untenable to assert that banning junior employees from holding political office would lead to senior managers being able to execute their duties better and that

³² National Planning Commission above n 19 at 414.

this would result in better service delivery. What the respondents also ignore is that if junior officials overstep their mark, they may be warned, suspended or dismissed. They also lose sight of the possibility that employees who are no longer office-bearers may still wield a lot of influence and power. It seems to me that SALGA's problems lie in their inability to implement legal remedies with regard to these infractions. Depriving junior staff members of their hard-fought right, enshrined in section 19 of the Constitution, to hold positions in a political party, simply because managers cannot exercise or administer disciplinary measures, is irrational.

[69] An important factor in the section 36(1) analysis is whether less restrictive means may be employed to achieve the legislative purpose.³³ I disagree that there are no less restrictive means by which this stated purpose could be achieved. In its meticulous judgment, the Labour Court correctly pointed out that there was a less restrictive means to achieve the object sought by the legislative purpose, a means which was introduced by the old Amendment Act and has, as per SALGA's concession, resulted in the "stabilisation of the municipal sector which for years has been plagued by political infighting, resulting in instability".³⁴ If this targeted limitation has a clear track record of having effectively accomplished the same legislative purpose, without infringing on the fundamental and political rights of all municipal employees, there seems to be no rationality in the superfluous extension of the limitation to all municipal employees. Section 36(1) "does not permit a sledgehammer to be used to crack a nut".³⁵ In this case it is not possible to hold that the limitation is justified because of the disconnect between the impugned extension and improved service delivery.

³³ See *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (2) SACR 101 (CC); 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51, where this Court held:

"What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution."

³⁴ Labour Court judgment above n 2 at para 33.

³⁵ *Manamela* above n 29 at para 34.

[70] The respondents sought to draw a comparison between the impugned extension and section 46 of the South African Police Service Act³⁶ which limits political rights of SAPS members. The respondents placed considerable reliance on this provision to argue that a similar limitation has been effected in other spheres of our society. This argument is untenable and has no substance. The members of the SAPS take an oath to uphold the Constitution and pledge to protect and serve the public. They are expected to abide by certain ethical standards. Therefore, their limitation of rights is not comparable with the limitation of rights of a junior municipal employee who is for instance an administrator or a plumber. This comparative argument seeks to assume that a member of SAPS has equal professional standing with a junior municipal employee. This is clearly a flawed and speculative argument which I reject. It is much more sensible to limit a member of the SAPS' political rights than it is to limit political rights of a municipal employee, such as an administrator who commands minimal to no authority.

[71] I have had the benefit of reading the judgment of my colleague Kollapen J (second judgment). While both judgments largely agree on the limiting effect of section 71B on the rights provided by section 19(1) of the Constitution, the second judgment's disaccord from this judgment is premised on the conclusion that the respondents have sufficiently established that the limitation provided for by section 71B satisfies the requirements provided for in section 36(1) of the Constitution. I disagree with this interpretation. I pause to emphasise that the respondents carried the burden of justifying the impugned extension in a section 36 analysis. This Court cannot be expected to accept unsupported assertions of public interest as an alternative to reasoning based on evidence. While the respondents have raised legitimate concerns and objectives, these do not relieve the respondents from their obligation to adequately justify the proportionality and necessity of the impugned extension with some form of evidence, at the very least, especially in the limitation of a significant right. It was incumbent upon them to adduce and submit evidence to demonstrate that the limitation

³⁶ 68 of 1995.

was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[72] The respondents have not convinced this Court that the impugned extension is the sole measure through which the stated objective may be achieved. The respondents implausibly relied on unsupported allegations. This approach is wrong. The respondents have failed to discharge the evidentiary burden required by section 36. Without any evidence, this Court is precluded from meaningfully evaluating whether the limitation of the section 19 right is reasonable and justifiable.

[73] In my view, less restrictive means in the form of the targeted narrow limitation therefore exist, they have been tried, tested and they have proved to be workable. They also remain unchallenged. Other mechanisms include the stringent enforcement of rules and disciplinary mechanisms to provide oversight and curtail political interference in the local municipal sector. It must be accepted that—

“[I]f the same objectives that a rights-limiting measure aims at can be achieved in a manner that is less restrictive of rights, then surely the less restrictive approach is preferable and the more extensive limitation is not justified.”³⁷

In the circumstances, the respondents, who have the burden of justifying the impugned extension in a section 36(1) analysis, have failed to do so.

Confirmation of the declaration of invalidity

[74] Section 172(1)(a) of the Constitution empowers a court to declare as invalid and unconstitutional any law or conduct to the extent of its inconsistency. Having established that the impugned extension is unjustifiable under section 36(1), it follows that the Labour Court’s declaration that the inclusion of the phrase “staff member” in section 71B of the Systems Act renders the section invalid and accordingly stands to be

³⁷ Richard “Service Conception of the Constitution: Authority, Justification and the Rule of Law in Proportionality Jurisprudence” (2019) 9 *Constitutional Court Review* 219.

confirmed. The blanket implementation of the limitation, regardless of the position and/or title of the municipal employee, is overbroad, and unconstitutionally hinders the political rights of municipal employees in a manner that cannot be justified in terms of section 36(1) of the Constitution.

[75] It remains to consider whether the declaration of invalidity should apply with retrospective effect and whether this Court should provide the Legislature with an opportunity to remedy the defect. The judgment of the Labour Court ordered that the declaration operate with retrospective effect from 1 November 2022. Political rights are a crucial aspect of local democracy, and although an order for the suspension of the declaration would allow the Legislature an opportunity to remedy the defect and tailor the limitation more precisely, that is, reviving the erstwhile narrow limitation, the period of suspension would still weigh heavily on this fundamental right. I am of the view that the retrospective application of this order will not have any disruptive effects or cause any confusion. Therefore, in the interests of justice, the declaration shall operate retrospectively from 1 November 2022, being the date when the new Amendment Act commenced.

Costs

[76] It has been well established in our law that “the award of costs is a matter which is within the discretion of the court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations”.³⁸ In awarding costs, the Labour Court considered the applicability of protection established in *Biowatch*³⁹ in pursuit of the vindication of the constitutional rights of SAMWU’s members, and the rights of all municipal employees affected by the impugned extension. It concluded that SAMWU must be awarded costs. I agree with the finding

³⁸ *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at para 138.

³⁹ *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

that costs must follow the result.⁴⁰ SAMWU is, therefore, entitled to its costs in the Labour Court and this Court.

Conclusion

[77] For these reasons, and in an attempt to remedy the defect caused by the new Amendment Act, severing the word “staff member” in section 71B and replacing it with the phrases “municipal manager and manager directly accountable to the municipal manager” such that this provision binds senior municipal managers is a necessary safeguard to the employees and provides SAMWU with the assurance that the blanket prohibition is untenable. The consequence thereof would be a resuscitation of the narrow limitation.

[78] In the result, the following order is made:

1. The order of the Labour Court declaring the inclusion of the phrase “staff member” in section 71B of the Local Government: Municipal Systems Act 32 of 2000 unconstitutional and invalid is confirmed.
2. The declaration of invalidity shall operate retrospectively from 1 November 2022, being the date when the new Amendment Act commenced.
3. Paragraph 2 of the order of the Labour Court is upheld. Section 71B of the Local Government: Municipal Systems Act 32 of 2000 is to be read to provide as follows:
“71B Limitation of political rights—
(1) A municipal manager or manager directly accountable to a municipal manager may not hold political office in a political party, whether in a permanent, temporary or acting capacity.

⁴⁰ *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 155.

- (2) A person who has been appointed as a municipal manager or manager directly accountable to the municipal manager before subsection (1) takes effect, must comply with subsection (1).”
4. The respondents are ordered to pay the applicant’s costs in the Labour Court and in this Court, including the costs of two counsel.

KOLLAPEN J (Theron J concurring):

Introduction

[79] I have had the pleasure of reading the judgment of my Colleague Mathopo J (first judgment) in which he concludes that the declaration of constitutional invalidity made by the Labour Court should be confirmed by this Court. He does so on the basis that the impugned provision, section 71B of the Systems Act, unjustifiably limits the right to hold political office found in section 19 of the Constitution. My view is that section 71B only has the effect of limiting the right to make political choices in terms of section 19(1) of the Constitution. In respect of that limitation, I reach the conclusion that the respondents have established that the limitation meets the requirements set out in section 36(1) of the Constitution. I would therefore not confirm the declaration of invalidity.

[80] The first judgment has comprehensively captured the background to the passing of section 71B, the litigation history, the parties’ submissions and the issues for determination. I associate myself with how they are set out there and will only expand upon them to the extent that it is necessary for purposes of this judgment. I also agree with the conclusion reached in the first judgment that condonation be granted to SALGA for the late filing of its written submissions.

[81] In addressing my disagreement with the first judgment, I will first contextualise section 71B and the wider limitation within the constitutional imperative of a fair and unbiased public administration and in particular the need to depoliticise local

government. I will then distinguish the substantive rationality challenge from the limitation challenge. Following that, I will address the various requirements in the limitation analysis. While dealing with the limitation analysis, I will—

- (a) deal with the respondents’ policy choice to depoliticise local government, and the place of section 71B in giving effect to that policy choice; and
- (b) consider what the state is required to do to justify the limitation in terms of section 36(1) of the Constitution when arriving at a policy choice that limits rights, and in particular, the nature of the evidence or information that must be advanced in support of the limitation.

I then conclude that the respondents have done enough to meet the threshold that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Context

The depoliticisation of local government

[82] Most peoples’ experience of government is manifested at the local level. It is that sphere of government that provides the most intensive interface as it provides the services that largely relate to the conditions under which people live, and which shapes their experience of democratic government.⁴¹ It is also at the heart of poverty eradication initiatives in the country.⁴² The provision of water, electricity, municipal

⁴¹ Section 152(1)(b) of the Constitution states that one of the objects of local government is to ensure the provision of services to communities in a sustainable manner.

⁴² Koma “The State of Local Government in South Africa: Issues, Trends and Options” (2010) 45 *Journal of Public Administration* 111 at 111. Service delivery at local government is also central in addressing the spatial divisions created by spatial apartheid, and closing the gap between services accessible to poor communities and the wealthy. See *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*; (*KwaZulu-Natal*; *Law Society and Msunduzi Municipality as amici curiae*) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 105 where this Court said:

“Local government thus bears the important responsibility of providing services in a sustainable manner to their communities. This task is particularly important given the deep divisions in our towns, the scars of spatial apartheid which still exist and the fact that many poor communities are still without access to basic facilities such as water, adequate sewerage systems, refuse collection, electricity and paved road.”

health services, road infrastructure,⁴³ and housing,⁴⁴ all fall within the domain of local government either exclusively or in concurrence with other levels of government.⁴⁵

[83] The heading of the Systems Act illustrates the significance and centrality of local government in the democratic project. The purpose of the Act is to—

“provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities”.

[84] It follows that it is crucial for local government to be professional and efficient, and to perform its functions impartially, fairly, equitably and without bias. This is no less than what section 195 of the Constitution decrees. It is headed “Basic values and principles governing public administration” and it states:

- “(1) Public administration must be governed by the *democratic values and principles enshrined in the Constitution*, including the following principles:
- (a) A high standard of professional ethics must be promoted and maintained.
 - ...
 - (d) Services must be provided impartially, fairly, equitably and without bias.
 - ...
 - (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.” (Emphasis added.)

⁴³ Section 156(1)(a) of the Constitution states that a municipality has the executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5.

⁴⁴ See Part 4 of the National Housing Act 107 of 1997 which sets out the functions and duties of local government in the delivery of housing.

⁴⁵ Those services, beyond being central to the quality of lives that are capable of being realised, also carry with them a constitutional imperative to the extent that many of those services are what government is obliged to provide within its available resources.

[85] One of the “democratic values and principles enshrined in the Constitution” is a non-partisan public service, which I will demonstrate is the primary goal of depoliticisation. The Constitution recognises a non-partisan public service as a core constitutional principle which is embodied in Principle XXX of the Constitutional Principles.⁴⁶ This Court in *Certification*⁴⁷ held that one aspect which is fundamental to the basic structures and premises of a new constitutional text contemplated by the Constitutional Principles is that of a non-partisan “public service broadly representative of the South African community”, serving all the members of the public in a fair, unbiased and impartial manner.⁴⁸

[86] Depoliticisation of local government, in its own right, is thus a legitimate government purpose. This is regardless of whether it results in improved service delivery or not. It is an end in itself.

[87] Robinson has noted that a non-partisan public service reflects the aims of most former commonwealth nations which shifted their focus towards building a model of bureaucracy which is based on hierarchy and meritocracy,⁴⁹ with its key aims being efficiency and effectiveness in the public service and its central features being—

“A separation between politics and elected politicians on the one hand and administration and appointed administrators on the other;

⁴⁶ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at 915. It states:

“There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.”

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Robinson *From Old Public Administration to the New Public Service: Implications for Public Sector Reform in Developing Countries* (United Nations Development Programme, Global Centre for Public Service Excellence, Singapore 2013) at 5.

Administration is continuous, predictable and rule-governed;

Administrators are appointed on the basis of qualifications, and are trained professionals.”⁵⁰

[88] Section 71B must be understood as the legislature’s chosen mechanism to achieve non-partisanship and effective local government and to appropriately manage the interface between politics and the administration. Since depoliticisation achieves this, it can comfortably be accepted as a legitimate government purpose. It seems to me that if the administration is unable to maintain its independence from the political environment, this exacerbates, among other ills, poor professionalisation, poor economic growth, the failure to alleviate poverty and the failure to manage corruption. So, setting clear boundaries between the administration and politics must have the advantage of preventing these ills. As Leite and Chipkin have noted:

“South Africa’s approach to state-building, by not setting clear boundaries on political and administrative office, has over time neglected empirical studies indicating the advantages of an independent bureaucracy in enhancing government performance (Oliveira et al, 2023), fostering economic growth (Evans & Rauch, 1999), aiding poverty alleviation (Henderson, Hulme, Jalilian & Phillips, 2007), and mitigating corruption (Dahlstrom, Lapuente & Teorell, 2012).

In nations characterised by patronage, those wielding political authority possess the latitude to dictate the trajectory of public officials throughout the government hierarchy, rather than just at the apex where democratic oversight might be justified (Kopecky et al, 2016). Efforts to reform the civil service in such states often pivot towards introducing merit-based systems for hiring and promotion, ensuring consistent salary structures free from political meddling, and protecting employees from politically-driven firings (Dahlstrom, Lapuente & Teorell, 2012).”⁵¹

⁵⁰ Id. See also McCourt *Models of Public Service Reform: A Problem-Solving Approach* (Policy Research Working Paper No 6428, The World Bank, Washington DC 2013).

⁵¹ Leite and Chipkin *Beyond Political Discretion: Reforming South Africa’s Senior Civil Service* (New South Institute, Johannesburg 2024) at 2 and the sources cited therein.

[89] Depoliticisation aims to prevent all these ills. But even if it struggles to cure those ills, it does not lose its value and utility as a legitimate government purpose in its own right. Depoliticisation is integral to ensuring administrative independence and setting clear boundaries between the administrative and political environments because politicisation occurs when politics interferes with administrative functions. Madumo argues that “[p]oliticisation in local government develops as a result of the interference by the political leaders in the administrative and managerial affairs of the local government”.⁵² This may come as no surprise to those who have engaged with the empirical evidence in this area in respect of other nations. It is why Robinson argues that—

“[M]any post-colonial states experienced a decline in the quality of governance and the effectiveness of public administration in subsequent years as neo-patrimonial pressures asserted themselves, and state resources and public appointments were subject to the personal influence of political leaders and their followers”.⁵³

[90] And so it is largely against that context that the idea of a non-partisan, depoliticised and professional public service, which is at the heart of this application, must be understood and appreciated. The politicisation of the public service stands in stark contrast to the ideal of non-partisan and non-biased public service just as it undermines the professionalisation of the public service if appointments and decisions are based on political considerations rather than the public good. Equally, politicisation runs the risk that services are provided in a politically biased fashion rather than fairly and equitably as the Constitution mandates. It also runs the risk that services are not provided at all, due to the possible crippling effect of political interference in service delivery.⁵⁴ In sum, depoliticisation is a legitimate and valuable end in itself because it

⁵² Madumo “De-politicisation of Service Delivery in Local Government: Prospects for Development in South Africa” (2016) 9 *African Journal of Public Affairs* 81 at 85.

⁵³ Robinson above n 49 at 6.

⁵⁴ An example of political interference can be seen in *Msengana-Ndlela v Nelson Mandela Bay Metropolitan Municipality* unreported judgment of the Eastern Cape High Court, Port Elizabeth Case No

seeks to serve as a bulwark against all the ills that may arise from a politicised and partisan public service.

[91] One must locate the legislature's creation of section 71B in this context, in other words, in the context of the need to ensure a non-partisan civil service that is free from political influence. The legislature has taken a policy decision to prohibit employees who work within the administration from holding office in a political party. This is its chosen mechanism to ensure that the independence of the administration is insulated from the political environment, and to create clear boundaries between the two. The question before this Court is whether this mechanism is reasonable and justifiable. I am of the view that it is.

[92] The first judgment unreservedly accepts that the depoliticisation of the public service serves a credible purpose and to that extent does not take issue with the so-called narrow limitation which originally only prohibited municipal managers and those directly accountable to them from being office-bearers in a political party. It is the wider limitation, the one that applies to all staff in a municipality, that the first judgment finds objectionable. Ultimately these confirmation proceedings turn on the reach of the wide limitation, and this Court is not called upon to determine the constitutionality of the narrow limitation. However, the distinction between the narrow and wide limitation is useful in that certain valuable common principles arise from both, that may find universal application and make the distinction less significant. While I accept that there is a distinction between the reach of the narrow and the wide limitation, I am doubtful that the distinction must result in different outcomes as the first judgment accepts. Below I will demonstrate why the wide limitation is just as necessary as the narrow limitation, and why an acceptance of the utility and importance of the narrow limitation must carry through to the wider limitation.

3282/2013 (19 May 2015) at paras 5-6. Here, a municipal manager resigned due to sustained inappropriate and undue influence from the executive mayor. There is nothing to suggest that influences of this nature could not occur within the administration itself.

The substantive rationality challenge

[93] SAMWU contends that the wide limitation is substantively irrational because it is not rationally connected to any legitimate governmental purpose. It contends that it is not rational in relation to the promulgated purpose in the preamble of the new Amendment Act which states that the purpose of section 71B is to “bar municipal managers and managers directly accountable to municipal managers from holding political office in political parties.” It also contends that it is not rational in relation to the broader purpose of depoliticisation, outlined by the respondents.

[94] The Labour Court contrasted the rationality threshold, which is one based on the rule of law, with the question of the relation between the limitation and its purpose, which is part of the section 36(1) analysis. It did so to distinguish the nature of the two enquiries. That Court held that the respondents failed to provide evidence indicating a rational connection between the wide limitation and the purpose of the provision. COGTA argued that the wide limitation was rational because it was based on legitimate policy considerations which were debated and deliberated on in the National Assembly. It thus argued that the Labour Court was correct in rejecting SAMWU’s rationality argument.

[95] SALGA argued that SAMWU misconceived the correct question. It argued that the question was not whether the narrow limitation was sufficient to give effect to depoliticisation and professionalisation. It argued that the true question under the rationality challenge was whether the wider limitation was rationally linked to depoliticisation and professionalisation. SALGA argues that there is a rational link because, as the Labour Court acknowledged, junior municipal employees who hold high political rank are capable of exerting influence over municipal managers or those that report to them, and they can influence how they discharge their functions.

[96] In relation to the promulgated purpose, the Labour Court took the view that it is most likely that the drafter omitted to align the wording of the preamble with the final provision, given that it was a “last minute change”. I agree with the Labour Court and

the first judgment's view on the stated purpose, that it was most likely an administrative oversight.

[97] With regard to the broader purpose, the Labour Court understood the crux of the issue to be whether there was a rational relationship between this purpose and the limitation of a constitutional right, in the form of the wide limitation. The Labour Court considered that this issue is best assessed through a justifiability enquiry. SAMWU contended that the Labour Court ought to have expressed its opinion on the rationality challenge in relation to the broader purpose, separately from the rights infringement challenge.

[98] While there is an overlap between the two challenges, it is worthwhile distinguishing the two. A substantive rationality enquiry and a limitation enquiry are separate and distinct enquiries. A substantive rationality enquiry seeks to determine whether there is a rational relationship between an impugned provision and a legitimate governmental purpose. In contrast, the limitation enquiry seeks to determine whether the law is reasonable and justifiable in an open and democratic society. The focus in a limitation enquiry is the nature of the right, and the extent of the limitation, and whether the interaction between the right and the limitation is reasonable and justifiable. Laws can be impugned on either basis, and it is why this Court has often dealt with them separately.⁵⁵

[99] In *New National Party* this Court held:

“The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds

⁵⁵ See *Independent Candidate Association SA NPC v President of the Republic of South Africa* [2023] ZACC 41; 2024 (2) SA 104 (CC); 2024 (3) BCLR 321 (CC) at paras 50-62 and 128-155.

bears the *onus* of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.”⁵⁶

[100] In *Pharmaceutical Manufacturers*,⁵⁷ this Court held in relation to the rationality threshold:

“It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”⁵⁸

[101] Rationality review is limited in scope. The crisp focus of rationality review is that the exercise of public power should not be arbitrary or irrational.⁵⁹ Courts cannot interfere in policy choices which are for the legislature to make, under the guise of rationality review.⁶⁰ Nor can it be used to invalidate legislation because a court disagrees with the means selected to achieve an objective or believes there are more appropriate or less invasive means that could be selected.⁶¹ In contrast, the limitation enquiry is a proportionality assessment, which entails balancing the right, the link between the limitation and its stated purpose, less invasive means and the other factors listed in section 36(1).

⁵⁶ *New National Party* above n 21 at para 19.

⁵⁷ *Pharmaceutical Manufacturers Association* above n 24.

⁵⁸ *Id* at para 85 (footnotes omitted).

⁵⁹ *Id*.

⁶⁰ *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) at para 17.

⁶¹ *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51 and *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 36.

[102] In my view, the applicants must fail on the rationality challenge. I have already stated above that depoliticisation is a legitimate government purpose. During the limitation analysis I expand on why section 71B is rationally connected to depoliticisation as an objective. In my view, it is not arbitrary or irrational because there is a sufficient connection between the need to depoliticise and professionalise local government and excluding employees working in local government from holding office in a political party. Such an exclusion ensures that there are no persons working in the public service who have deep partisan interests.

[103] Given that rationality is the minimum threshold, if a provision that limits a fundamental right can be justified under 36, it would inevitably also withstand a separate irrationality attack. I am of the view that the limitation imposed by section 71B survives a limitation analysis and thus find it unnecessary to consider the irrationality attack any further.

Is the limitation imposed by section 71B reasonable and justifiable?

[104] To answer this question, this Court must engage in the limitation analysis under section 36(1) of the Constitution. It provides as follows:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking 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.”

[105] The section 36(1) analysis is a balancing exercise, which requires this Court to come to an ultimate judgment on proportionality.⁶² The less intrusive the limitation on the right, the less the state needs to put up to justify the limitation.⁶³ This is critical for present purposes because, if section 71B only limits one component of the section 19 right, then all that is required is a level of justification that is relative to that component of the right.

[106] Since the first judgment impugns section 71B due to the lack of evidence in support of its necessity, the jurisprudence of this Court on the treatment of evidence during a section 36(1) analysis is relevant. In *Lawrence*⁶⁴ this Court held that:

“[T]he question is whether that purpose is justifiable in an open and democratic society based on freedom and equality is essentially a question of law; so too is the question whether there is a rational basis for the means to achieve the legislative purpose. That is not to say that evidence will not be relevant to these enquiries; it may well be. The evidence, however, is more likely than not to consist of ‘legislative facts’.”⁶⁵

[107] The Court went on to say that “[l]egislative facts do not have to be proved as strictly as adjudicative facts” and that “the question of ‘burden of proof’ is likely to be less important than where adjudicative facts have to be established.”⁶⁶ Adjudicative facts are thus facts that are supported by evidence. Legislative facts are findings or

⁶² As this Court held in *Manamela* above n 29 at para 32:

“[T]he Court must engage in a balancing exercise and arrive at a global judgment on proportionality . . . As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.”

⁶³ *Id.*

⁶⁴ *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC).

⁶⁵ *Id.* at para 52.

⁶⁶ *Id.*

assumptions that “need not and often cannot be supported by evidence.”⁶⁷ The present case is a classic case where reliance on legislative facts is apposite.

[108] It is therefore trite, because this Court has repeatedly affirmed it, that the burden of justifying the limitation is not the same as in civil and criminal matters.⁶⁸ Reliance on legislative facts is totally appropriate to justify a limitation of a right. The party with the onus of justifying the limitation must put up evidence and argument in support of the limitation, but if they fail, this does not mean that the limitation is unjustifiable, and the Court still has the obligation to conduct the justification analysis.⁶⁹ The enquiry is legal and normative in nature, not factual, even though evidence may assist in conducting that legal assessment. A limitation of a right is thus not automatically unreasonable and unjustifiable simply because the party cannot, or fails to, provide evidence which proves otherwise. It is the Court that must ultimately make a determination on whether the limitation is reasonable and justifiable, based on its own judgment following the balancing exercise referred to above.

The nature of the right

[109] The main proposition to note upfront is that section 71B does not limit section 19(2) and (3). It only imposes a limitation on section 19(1). And in respect of section 19(1), it only limits one component of that right.

[110] Determining the nature of the right requires an examination of the content and scope with reference to the text, historical context and purpose of the right in question.⁷⁰

⁶⁷ Davis “Judicial Notice in the Proposed Federal Rules of Evidence” (1969) *Washington University Law Quarterly* 453 at 455. See also Dyk “The Role of Non-Adjudicative Facts in Judicial Decision-Making” (2023) *Stanford Law Review Online* 10 at 11-12.

⁶⁸ *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 20 and *NICRO* above n 15 at para 34.

⁶⁹ *Phillips* id at para 20; *NICRO* id at para 36; and *National Coalition for Gay and Lesbian Equality* above n 17 at paras 33-57.

⁷⁰ *Ramakatsa v Magashule* [2012] ZACC 31; 2013 (2) BCLR 202 (CC) at para 64.

This Court neatly captured the important historical context of the right in *Ramakatsa*⁷¹ as follows:

“During the apartheid order, the majority of people in our country were denied political rights which were enjoyed by a minority. The majority of black people could not form or join political parties of their choice. Nor could they vote for those who were eligible to be members of Parliament. Differently put, they were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government of the day, including those affecting them. Many organisations whose objectives were to advance the rights and interests of black people were banned. These organisations included the present ANC. Participation in the activities of these organisations constituted a serious criminal offence that carried a heavy penalty. The purpose of section 19 is to prevent this wholesale denial of political rights to citizens of the country from ever happening again.”⁷²

[111] In departing from this history, the Constitution introduced a system of democracy where all political parties “occupy the centre stage and play a vital part in facilitating the exercise of political rights”.⁷³ Political parties do so by serving as a platform for citizens to participate in the democratic process,⁷⁴ and through which they exercise their franchise.⁷⁵ While this historical and purposive context is important in guiding the interpretation of the rights at issue, the exercise is not complete without a thorough examination of the nature of the right implicated in this case.

[112] The right to hold public office and the right to make the political choice to hold office in a political party are distinct rights protected by distinct sub-provisions in section 19. In some instances, there may be a link between a section 19(1) limitation and the exercise of a section 19(3)(b) right. This is a matter I address later in this judgment.

⁷¹ Id at paras 63–72.

⁷² Id at para 64.

⁷³ Id at para 65.

⁷⁴ Id at para 66.

⁷⁵ Id at para 68.

[113] Section 19 provides as follows:

- “(1) Every citizen is free to make *political choices*, which includes the right—
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right—
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to *stand for public office and, if elected, to hold office.*”
(Emphasis added.)

[114] The section 19(3)(b) right to stand for and hold public office is the right to candidature. That this is so is borne out by the historical context. The Freedom Charter, which inspired the creation of section 19(3)(b), stated that “every man and woman shall have the right . . . to stand as a candidate for all bodies which make laws”.⁷⁶ As much as black people were systematically deprived of the right to vote, they were equally deprived of the right to hold public office which made laws. This exclusion was concretised with the introduction of the tricameral system. Whether black people could hold certain positions within a party made no difference to the fact that the apartheid government intended to prevent black people from holding public office which would enable them to wield public power.

[115] It was this particular deprivation that section 19(3)(b) sought to extinguish. This is not to say that the right to hold office within a political party is not important and does not hold its own historical context: it most certainly does. It too is important in the ability of the collective to advance a political agenda, as well as the individual in

⁷⁶ The Freedom Charter, adopted at the Congress of the People, Kliptown, 1955 under the heading “The People Shall Govern!”.

embarking on a political career. This is simply to make the point that the right to hold office in a political party does not fit within the scope of section 19(3)(b). That this is so is further borne out by the Constitution itself.⁷⁷

[116] This is not to say that the rights are not interrelated, in the sense that a limitation on section 19(1) will never impact or affect section 19(3)(b). It may well do so. But it is not a foregone conclusion that a limitation on section 19(1) will always negatively impact on the exercise of the section 19(3)(b) right. Whether this occurs is a question that must be answered with reference to the circumstances of the case. This may often be determined by the internal arrangements of political parties which may require holding of office in a political party as a pre-condition to standing for public office.

[117] In sum, I recognise that in some instances, a provision that limits the right to hold office in a political party may have a residual impact on the right to hold public office. But that is by no means automatic, and it does not appear to me that the residual impact on section 19(3)(b) by the limitation of section 19(1) in this matter constitutes a limitation of the right in section 19(3)(b). Section 71B, then, ought not to be regarded as a law of general application which generally imposes a limitation on section 19(3)(b), since it does not expressly prohibit municipal employees from standing for, or holding public office.

[118] While the rights in section 19 are intertwined, and must be read and understood together,⁷⁸ this does not mean that we should give a right a meaning it clearly does not have. Each right plays a distinct role, and while some rights provide guidance into the meaning and applicability of other rights, one must afford each right its distinct meaning

⁷⁷ Another indication that section 71B does not apply to section 19(3)(b) is found in section 219 of the Constitution. It is headed “Remuneration of persons holding public office” and refers to, among others, members of the National Assembly, Members of the Cabinet, Deputy Ministers and Members of Executive Councils. Therefore, the Constitution clearly understands public office as office within government, and not within a political party. *New Nation Movement* above n 12 is a further indication that the right to hold public office under section 19(3)(b) is geared towards office in law-making bodies and not office within a political party. It concerned the right of independent candidates, persons who sought to hold public office without being a part of a political party, to stand for and hold public office.

⁷⁸ *New Nation Movement* above n 12 at para 16.

so as to retain the distinction created by the Constitution, and to give the respective rights their proper and full effect.

[119] The right we are concerned with here is essentially section 19(1) which is the freedom to make political choices. While section 71B may have a residual impact on section 19(3)(b), ultimately the nature of the right that it limits is the right to make the political choice to hold office within a political party.

[120] Turning specifically to the nature of section 19(1) this Court said:

“In relevant part section 19(1) proclaims that every citizen of our country is free to make political choices which include the right to participate in the activities of a political party. This right is conferred in unqualified terms. Consistent with the generous reading of provisions of this kind, the section means what it says and says what it means. It guarantees freedom to make political choices and once a choice on a political party is made, the section safeguards a member’s participation in the activities of the party concerned . . .

*This right may be limited only on authority of a law of general application. But even then only to the extent that the limitation is reasonable and justifiable in ‘an open and democratic society based on human dignity, equality and freedom.’”*⁷⁹
(Emphasis added.)

[121] The right thus entails the freedom to make political choices. There is no closed list as to what these choices may be.⁸⁰ It is an expansive right which intersects with many others that are political in nature, such as the right to, and freedom of, expression, association, belief, opinion and conscience.⁸¹ It is an important right in the broad

⁷⁹ *Ramakatsa* above n 70 at paras 71-2.

⁸⁰ *New Nation Movement* above n 12 at para 17.

⁸¹ This Court in *Pilane v Pilane* [2013] ZACC 3; 2013 (4) BCLR 431 (CC) at para 69 stated as follows:

“It strikes me that the exercise of the right to freedom of expression can be enhanced by group association. Similarly, associative rights can be heightened by the freer transmissibility of a group’s identity and purpose, expressed through its name, emblems and labels. These rights are interconnected and complementary. Political participation, actuated by the lawful exercise of

architecture of our democracy as it is central and unlocks the very idea of a participatory democracy and the opportunity to shape, and participate directly in the political and governance framework that the Constitution details.

[122] While acknowledging the historical, contextual and textual significance of the right to political activity, this Court also recognised that, despite this significance, it can be limited by a law of general application and on the basis that the limitation is reasonable and justifiable. It also does not entitle a citizen to participate in *any* activity of the party of their choice.⁸² Like all other rights, it is not absolute, and is also subject to reasonable limitations.

[123] The right to hold office in a political party does not constitute the section 19(1) right itself. The nature of the right in question forms part of the subspecies of the political rights set out in section 19(1). Section 71B, however, does not make inroads into any of the other rights that section 19(1) guarantees. The limitation does not prohibit nor does it affect the right to join a political party, to vote for and within that party, to participate in its activities (save for holding office in that party), and to advocate and campaign for the political party and its ideologies. Subsections 19(2) and (3), of course, still remain fully available to that person – subject to the limitation imposed on the exercise of those rights. Regarding its scope, therefore, the right in question forms but part of the entirety of the rights afforded by section 19(1).

[124] It is therefore relatively limited in its scope, and thus any limitation on it constitutes only a partial limitation on the section 19(1) right as a whole and even a much smaller part of section 19 as a whole. This must mean that the level of

these rights, can and should assist in ensuring accountability in all forms of leadership and in encouraging good governance”.

⁸² Brickhill and Babiuch “Political Rights” in Woolman and Bishop (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2014) at 34.

justification required to limit the choice to hold office in a political party must be narrower than the level of justification required to limit the entirety of section 19(1).⁸³

The importance of the purpose of the limitation

[125] At this point it is necessary to be clear about, and re-emphasise, the legitimate government purpose which is the primary target of section 71B. This is because the first judgment criticises the limitation for being excessive in achieving the purpose of enhancing service delivery and that there was no evidence to support the proposition that it would improve service delivery.⁸⁴ My reading of the respondents' case is not that improved service delivery is the primary goal and thus purpose of the limitation, rather, that it is a desirable by-product of depoliticisation and professionalisation. The first judgment itself acknowledges, by reference to what the Labour Court understood as "the essence of the matter", that the true purpose of section 71B was depoliticisation and professionalisation "so as to maintain management stability and thus improve service delivery".⁸⁵ Stability and improved service delivery are thus not the primary purposes of section 71B, but they are possible by-products of depoliticisation and professionalisation.

[126] Depoliticisation and professionalisation are the primary purpose of section 71B and it is this purpose that we must consistently capture as our focal point of the section 36(1) analysis. When evaluating the rational link, then, all that is necessary is to establish a link between excluding municipal employees from holding office in a

⁸³ In *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC) at para 18 this Court held:

"In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."

And in *Manamela* above n 29 at para 69 this Court said:

"The more invasive the infringement, the more powerful the justification must be".

The inverse must of course be true.

⁸⁴ First judgment at [71] and [73].

⁸⁵ First judgment at [12] (emphasis added).

political party and depoliticisation and professionalisation within local government. The respondents did not have to draw a direct link between excluding municipal employees from holding political office and improved service delivery. It would not be correct to suggest that an improvement in service delivery would obviate the need for depoliticisation. The objective of a depoliticised public administration stands on its own footing. Improved service delivery is not the only positive outcome of depoliticisation. It is depoliticisation itself that is envisaged in Constitutional Principle XXX and the provisions of section 195 of the Constitution. It is an objective worthy of being pursued as an end in its own right.

[127] While the narrow limitation was challenged previously before this Court on procedural grounds,⁸⁶ it was largely accepted in argument before us in this matter that the narrow limitation was not constitutionally offensive and was rational as it was sufficiently linked to the legitimate purpose of the depoliticisation of local government. This acceptance in my view has two important consequences. First, it is an acceptance of the legitimacy of depoliticisation as a purpose. Second, it constitutes an acceptance that the risk of politicisation was real, and that, at the level of the municipal manager and those directly accountable to them (senior managers), a prohibition of the kind contemplated by the narrow limitation was necessary and defensible. The parties accepted these two propositions as being self-evident. In other words, no evidence was required to convince the parties, including SAMWU, that depoliticisation was necessary, and that the narrow limitation took positive steps to achieve it.

[128] In fairness, the closeness to the levers of power of senior managers is certainly a factor that could be said to bring the risk of harm closer to materialisation. One must then be compelled to ask if politicisation is a real risk only when the top echelons of local government are also office-bearers in a political party. Why should that risk be any different or less real for junior municipal employees who occupy the top echelons

⁸⁶ *South African Municipal Workers' Union I* above n 7 at para 59. This Court, at paras 77-81, found it unnecessary to deal with the substantive challenge, and thus expressed no view on the constitutionality of the limitation imposed by the narrow limitation.

of a political party? For that distinction to hold good, one would have to accept that the risk of politicisation is negligible or non-existent when it comes to junior employees, even though they are office-bearers in a political party. I do not think that this is the case.

[129] Members of a political party, unlike employees of a municipality, are drawn together and bound together by a common political vision and a platform of action that all its members are committed to advancing. The duty of political office-bearers in realising those political objectives is a heightened one, given the positions of leadership they are elected to, and that in most instances they would be accountable to the membership of the party on their performance in achieving such objectives. They have a real and substantial interest in advancing the political objectives of their party which is invariably linked to their ability to seek and gain re-election if they so desire. These objectives and policy positions may not however always be aligned to those of the particular administration in which they are employed, and in some instances, they may represent an opposing policy stance. If an employee is tasked with executing an administrative function which is directly opposed to that employee's political objectives, there arises a conflict of interest, even if the employee is not a senior manager.

[130] By way of example, a political party may be opposed to the mandatory installation of pre-paid electricity meters and may actively campaign against it, while the administration in a particular municipality may have adopted a policy in support of it. In those instances, it would follow that when those office-bearers are employed in local government, there is at the very least a conflict between the party-political objectives and those of the employer. Some may be victimised, or even victimise others, purely because of their political affiliation.⁸⁷ If the employee is a high-ranking

⁸⁷ See, for example, *SA Municipal Workers Union on behalf of Mavimbela and Uthukela District Municipality* (2023) 44 ILJ 1366 (SALGBC) at para 48. Here, a deputy mayor was found to have dismissed a political employee simply because they did not approve of their political affiliation. While here it was a deputy mayor who did the firing, there is nothing to suggest that an employee high up in the administration could not do the same to persons below them in the hierarchy.

politician, they may even feel compelled to do so given their political objective as an officer in a political party. There is also the potential that those members may see the institution of local government as a site to advance the objectives of the political party – thus undermining efforts to fully and independently implement the policy. The obstruction could be so subtle that it is incapable of evidence – but it may still negatively impact the implementation of the policy.

[131] It is this risk that the wide limitation seeks to prevent. In other words, it does not need to be proved that an employee who is an office-bearer in a political party will obstruct the municipality's policy in advancement of their political objectives. But common sense dictates that there is a risk that such employees could undermine the implementation of that policy to achieve political objectives, given their dual-role as an office-bearer of a political party and an employee within the municipality. This is in appreciation of the fact that the employee is committed to advance the objectives of the party as an office-bearer in that party. It is in those circumstances that the risk of politicisation is heightened, and invariably, the many ills of politicisation referred to earlier (including poor service delivery).

[132] Depoliticisation seeks to avoid such risks. Clearly the risk here is not confined to the municipal manager and those directly accountable to them. In a programme to roll out meters, there may well be others lower in the administration's hierarchy that are responsible for overseeing or implementing various facets of the programme such as the provisioning of meters, the installation of meters, the setting up of an administration system for consumers and the like. I will demonstrate shortly that municipalities consist of administrative personnel below senior management, and these administrative personnel also wield a certain degree of power. All these officials are likely to have decision making powers and are required to give effect to the policy of the administration in the face of possible public opposition from their political party. Under those circumstances, a narrow limitation would be of limited effect, ignoring the risk that a senior office-bearer in a political party, who is employed even in a middle or junior management position in the administration, would carry.

[133] I use two examples to illustrate the point. According to its 2023 annual report, the administration of the City of Tshwane Metropolitan Municipality was headed by the City Manager.⁸⁸ Those directly accountable to the manager were the heads of only three of 16 municipal departments, and the heads of specialist offices and units.⁸⁹ These are the only persons that would fall into the narrow limitation. The heads of the remaining 13 departments were directly accountable either to the governance and support officer, or the chief operations officer. Therefore, the heads of those 13 departments, it would appear, would not have fallen within the reach of the narrow limitation.

[134] In addition, the narrow limitation would not have applied to all the staff who fell below the heads of those departments, even those right below the heads who wielded power in those departments and could perhaps influence those above them. This risk becomes stark when you consider the total number of employees who were below top and senior management: approximately 19 100.⁹⁰ Given that many in senior management (approximately 300) would not have reported directly to the City Manager, this left those, potentially influential within the administration, untouched by the narrow limitation. I think it is fair to assume that senior managers would generally enjoy some level of decision making, and it must then raise the question whether the narrow limitation sufficiently insulates local government from politicisation. This would be the result of a narrow limitation but not a wide one.

[135] The City of Tshwane is a metropolitan municipality with a higher capacity for senior and other employees, and so it may be said that this phenomenon is unique for metropolitan municipalities and the wider limitation may only be justified in that context. This is no different in smaller municipalities. Take the Knysna Local Municipality for example. Its latest annual report indicates that there were 540

⁸⁸ City of Tshwane Metropolitan Municipality *Annual Report 2022/23* (April 2024) at 23.

⁸⁹ Id at 58.

⁹⁰ Id at 224.

employees in total.⁹¹ If all the approved posts were filled, the narrow limitation would have applied to approximately seven persons, namely, the municipal manager, the chief financial officer and five managers who report directly to the municipal manager. The narrow limitation would not apply to the remaining employees – approximately 530 – even if they held powerful positions within the municipality or in a particular department.

[136] Those remaining 530 employees may well be fulfilling their administrative functions at different levels of authority but there is nothing to suggest that all of them are incapable of wielding political influence. The multiple levels of hierarchy and power within the administration, and the potential for political influence within those multiple levels, are so varied and nuanced that it seems to me impractical, and perhaps irrational, to draw a bright line between managers, those that report to them (or heads of departments), and the remaining employees. This is apart from the fact that those who report to a municipal manager can delegate their power to those who fall outside the narrow limitation. This delegation of power itself may confer significant power and influence on the delegate, who will be left untouched by the narrow limitation.

[137] There is therefore no justification for the differentiated approach suggested for senior managers as opposed to other members of the municipal staff who are also office-bearers in a political party. The importance of the purpose of the narrow limitation is no different to the importance of the purpose of the wider limitation. The risk may be different in the two scenarios, but it is real, tangible and substantive in both.

[138] In this regard, it is relevant to recall the observation of Leite and Chipkin, that those wielding political authority possess the latitude to dictate the trajectory of public officials throughout the government hierarchy and not just at its apex.⁹² Given that political influence can occur at positions outside the narrow limitation, it can hardly be

⁹¹ Knysna Local Municipality *Annual Report 2022/23* (March 2024) at 121.

⁹² Leite and Chipkin above n 51 at 2.

said that the narrow limitation gives proper effect to the principle of a non-partisan public service and the dictates of section 195 of the Constitution. It is difficult to see how a limitation that affects only a small portion of the upper echelons of local government can properly achieve the purpose of a depoliticised and professional public service. And so the emphasis cannot be on whether the position in government is a senior or junior one, but on the fact that political office-bearers generally wield political authority, and when that is brought to bear on local government, it may well carry the risk of blurred lines of accountability throughout the hierarchy of local government.

[139] However, beyond this, there is also the risk of the perception of bias. In our law, the test for bias does not require actual bias but can also be satisfied if there is a reasonable apprehension of bias.⁹³ It is not unreasonable to expect that many will know the identity of office-bearers in a political party. They are, after all, the face of the party and represent it in the public space. When those same people are employed in local government, it is not unreasonable that questions may be raised, valid ones as I have shown, about this dual accountability and bifurcated loyalty to the party and the administration. This in itself is a basis for a reasonable perception of bias which should be avoided if the integrity of local government is to be protected and if those whom it serves are expected to have faith in its legitimacy and its ability to serve all without bias.

[140] An unmanaged interface deepens this perception and with it comes a distrust in the ability of local government to deliver services fairly which, as the 2016 Study⁹⁴ has highlighted, often comes with deadly consequences. It is a risk that the limitation seeks to moderate and the broader purpose of the limitation – to depoliticise and professionalise the public service – resonates with the Preamble to the Systems Act,⁹⁵ the Constitution (including section 195) and the constitutional principles on which it is

⁹³ *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 30 and *S v Basson* [2005] ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC) at para 27.

⁹⁴ See the First Judgment at [45].

⁹⁵ Which refers to the need to comply with the Constitutional Principles.

founded. It also speaks to the ability of the state to effectively manage the transformation of our society through the improvement in the quality of the lives of its people through good governance, professionalisation and the delivery of services. One of the more important barometers in assessing this is whether the services the Constitution promises will be delivered, and if they are, that they will be delivered professionally, effectively, fairly and without bias. Few will argue that depoliticisation in the public service is not a purpose that is central to how we unfold and build this democracy in the coming years.

[141] Depoliticisation as a policy choice is founded on what the Constitution contemplates, and it largely accords with the values of a democratic government that must ensure accountability, responsiveness and openness.⁹⁶ It is also aligned to the nature of a professional, fair and unbiased administration that section 195 proclaims. It is a salutary purpose, and I have shown how the limitation in question aligns with that purpose. This above all goes to illustrate the importance of the limitation. Given its connection with the foundations of our Constitution and to the wellbeing of citizens, there is no doubt that the purpose of the limitation is of great importance.

The nature and extent of the limitation

[142] I now deal with what has been described as the width of the limitation. Section 71B applies to all staff members and its effect is to exclude all staff members of a municipality from being office-bearers in a political party. However, in reality, the category of persons may be considerably less than all staff members. It is reasonable to assume that not all staff members of a municipality are members of a political party. It is also reasonable to assume that not all members of staff who are members of a political party aspire to become office-bearers within the political party. So in the end, it is only those staff members who are members of a political party and who aspire to hold office in the political party who are affected. In a politicised country such as ours,

⁹⁶ Section 1(d) of the Constitution states that the Republic of South Africa is one, sovereign, democratic state founded on universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

it may well still be a substantial number of people and I do not wish to suggest that the numbers ultimately become dispositive. The point is simply that in practice the prohibition is likely to affect a relatively small proportion of South Africa's municipal workforce.

[143] The related and important issue is the nature of the limitation of the right. The limitation is confined to those who hold office in a political party. While I agree that holding office in a political party is an important component of the right to make political choices under section 19(1) of the Constitution, the rest of the rights in the section remain relatively intact, even with the wider limitation in place. These rights continue to represent a substantial part of the political rights that section 19 guarantees. The limitation is therefore not a wide limitation in so far as it relates to the full panoply of section 19 rights.

[144] The first judgment also suggests that the limitation could very well dissuade that person from participating in political party activities, and even from voting, with the concomitant effect of directly undermining the fundamental constitutional right of universal adult suffrage.⁹⁷ This assumes that members of political parties make political choices, participate in such activities and vote, only to the extent that they can run for political office. But many people make political choices, participate in political party activities and vote, without any desire to run for political office. If the limitation did have the consequence suggested in the first judgment, it would naturally be a cause for concern. But there is simply nothing to suggest that it will. It is indeed difficult to conceive that its ripple effect could be as wide as the first judgment suggests.

[145] I pause, however, to reflect on the argument that, even for those limited category of staff members of a municipality who seek to become political party office-bearers, they would invariably be required to make a choice between ongoing employment with the municipality and becoming an office-bearer in their political party. In this regard,

⁹⁷ First Judgment at [56].

it is fair to assume that those who seek to become office-bearers have a serious intention to play a more important role in politics and to possibly hold elected office, whether in the national, provincial or municipal sphere. For those persons who would still be employed in a municipality, it may not be unfair to require them to make a choice between a career in the administration or a career in politics at that stage, as the situation is simply that as one becomes more involved in the political space, the interface between the political and the administration becomes more fraught with risk. Bear in mind that this choice only needs to be made if the employee is in fact appointed to hold office in a political party.

[146] It is in this narrow case that the section 71B limitation kicks in, to safeguard the independence of the administration and create boundaries between the administration and the political environment. Indeed, this is why section 71A of the Systems Act, which has not been challenged, places a hold on the employment of an employee who is running for political office, and requires them to resign once elected. Section 71A of the Act is headed “Participation of staff members in elections” and provides that:

- “(1) A staff member may be a candidate for election to the National Assembly or a provincial legislature or may be nominated as a permanent delegate to the National Council of Provinces subject to the Code of Conduct for Municipal Staff Members contemplated in Schedule 2, and any other prescribed limits and conditions as may be regulated by the Minister.
- (2) A staff member who is nominated as a permanent delegate to the National Council of Provinces, must resign not later than the date on which he or she is appointed as a permanent delegate to the National Council of Provinces in the manner contemplated in section 61 (2)(b) of the Constitution of the Republic of South Africa, 1996.
- (3) A staff member may be a candidate for election to a municipal council subject to the Code of Conduct for Municipal Staff Members contemplated in Schedule 2 and any other prescribed limits and conditions as may be regulated by the Minister.”

[147] The Code of Conduct contemplated in the subsection in turn regulates the further relationship between staff members who become candidates for elections and their ongoing employment and connection with the municipality. Clause 11 of the Code is headed “Participation in elections” and provides as follows:

“A staff member of a municipality may not participate in an election of the council of the municipality, other than in an official capacity or pursuant to any constitutional right.”

[148] In giving content to section 71A, COGTA promulgated regulations regarding the participation of municipal staff members in elections.⁹⁸ Regulation 2 provides that:

“These Regulations apply to all staff members of municipalities.”

[149] In broad terms, regulations 3⁹⁹ and 4¹⁰⁰ provide that once a staff member is certified to be a candidate for municipal elections, they are deemed to be on annual

⁹⁸ Regulations regarding the Participation of Municipal Staff Members in Elections 2011, GN R210 GG 34095, 10 March 2011.

⁹⁹ Regulation 3 is headed “Staff members as candidates for and becoming members of legislatures” and it states:

- “(1) A staff member who is issued with a certificate in terms of section 31(3) of the Electoral Act, 1998 (Act 73 of 1998), or section 15(3) or 18(1)(d) of the Local Government: Municipal Electoral Act, 2000 (Act 27 of 2000), shall, on the working day following the day on which she or he receives the certificate, present a copy of the certificate to her or his employer.
- (2) A staff member contemplated in subregulation (1), shall be deemed to be on annual leave from the working day contemplated in subregulation (1) until the date on which the result of the election is declared in terms of section 190(c) of the Constitution.
- (3) If a staff member is elected, she or he shall apply for further annual leave until her or his resignation in terms of subregulation (5).
- (4) If a staff member has insufficient annual leave, she or he shall be deemed to be on unpaid leave for the period of leave taken in excess of her or his available annual leave.
- (5) Subject to section 21(2) of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998), a staff member who has been elected as a member of the National Assembly, a provincial legislature or a municipal council shall be deemed to have resigned from the employer concerned with effect from the date immediately before the date she or he assumes office.”

¹⁰⁰ Regulation 4 is headed “Use of employer’s property” and it states:

“A staff member, who is a candidate in elections, may not, for the purpose of her or his election campaign, utilise—

leave and are further prohibited from using the property of the municipality in advance of their election campaign. If elected, they are required to resign as employees of the municipality. Regulation 5 goes further, in that it prohibits any staff member who is a candidate in elections from utilising or accepting assistance from any staff member of the employer for the purposes of promoting their political campaign.¹⁰¹

[150] These provisions further demonstrate the risk of politicisation, but in another context – standing for election to public office. These provisions indicate the state’s awareness of a real risk that may arise when an employee of a municipality is engaged in a political activity: that employees may use their position in the administration to advance their political objectives which have nothing to do with their role as civil servants. It acknowledges that local government is an arena with resources that can be utilised for political gain. It further recognises the conflict that may arise when employees seek to advance their political goals while serving the public in local government.

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- (a) any immovable property of the employer but may utilise community halls, and any public amenities on the same terms and conditions applicable to—
 - (i) ordinary members of the public;
 - (ii) political parties; or
 - (iii) community and professional institutions; and
 - (b) any movable property of the employer, including any—
 - (i) financial resources;
 - (ii) communication technology;
 - (iii) equipment;
 - (iv) official emblems;
 - (v) official transportation;
 - (vi) official mailing lists; and
 - (vii) intellectual property.”

¹⁰¹ Regulation 5 is headed “Assistance from other staff members” and it states:

“A staff member, who is a candidate in elections, may not, during working hours, utilise or accept assistance from any staff member of the employer for the purpose of promoting her or his election campaign.”

[151] What is of interest here is that the prohibition on a continued relationship between the staff member and the municipality during the election period extends to all staff members and not just those in the upper echelons of management. This is clearly suggestive that the risk of politicisation and of political interference cannot realistically be confined to the class of employees covered by the narrow limitation. It is a risk that extends beyond that narrow channel and the response to that risk must recognise that. The narrow limitation does not sufficiently extend to employees who may have the power and influence to politicise the administration.

[152] I acknowledge the proposition that the right afforded to employees to stand for office in terms of section 71A might be meaningless given the effect of section 71B which negates the possibility to hold office in a political party. This Court in *New Nation Movement* has already recognised that the possibility to run for public office need not be tied to a person's relationship with a political party.¹⁰² Similarly, a person need not hold office within a political party to be able to stand for elected office. In that instance, both sections 71A and 71B operate harmoniously while protecting the administration from political influence.

[153] Is it unreasonable to expect a person in that position to make an election between their own individual political aspirations and the need for a depoliticised administration? This question requires a balancing of individual aspiration against the interests of the municipality and those whom it serves shaped by the expectation that such services will be delivered in a professional, fair and unbiased manner. This is precisely the type of balancing act that the limitation analysis requires us to conduct.¹⁰³ A constitutional democracy thrives when it creates opportunities for the development of its people. But the commitment to achieving the full potential of each person must also be moderated by the legitimate needs and interests of the broader society. The choice between individual political aspiration and the interests of the broader society

¹⁰² *New Nation Movement* above n 12 at para 188.

¹⁰³ *NICRO* above n 15 at para 37.

must in this case lean heavily in favour of the broader society in justification of the limitation. So, where the risk of politicisation and the ills that flow from it are high, it is reasonable to expect a person to make this choice.

[154] The first judgment also takes the view that the preferred method to deal with politicisation would be through a disciplinary process. While again in theory that may be so, in practice that approach may run into intractable difficulties. First, the very process of politicisation may often occur between the colluding activities of likeminded individuals who seek to advance a common political interest. Finding evidence that would be admissible and cogent may well prove difficult, as in that scenario we are dealing with two or more individuals who have every intention of keeping what they do under wraps without a paper trail. Political influence and politicisation will in all likelihood not be overt but subtle, which renders evidence of wrongdoing probably difficult to obtain.

[155] In addition, and even in the case of a junior staff member seeking to exercise undue influence over a senior staff member who may be junior in the party structure, a disciplinary route may prove unsustainable. What it would require is for the senior staff member to initiate a complaint and be a witness. That may not sound unreasonable. But when those two staff members hold opposite positions in terms of seniority in their political party, then it is tantamount to a junior party official initiating proceedings against a senior party official albeit in respect of conduct that occurred in the workplace. Whether that disciplinary process would ever materialise in this context must be doubtful, and a resort to disciplinary processes as the first resort hardly sounds like an effective option. I acknowledge that this assumes that the employees belong to the same political party, which may not always be the case. However, it may be the case for municipalities which have one or more political parties who are dominant in the particular region.

[156] The reliability of evidence in a politically charged environment diminishes when there is a conflict. As the Labour Court held in *Heyneke*¹⁰⁴ in the context of an apparently politically motivated dismissal of a municipal manager:

“Another consequence of the conflict is that it could impair the reliability of the evidence, located as it is in the context of a political milieu. The propensity for mendacity to serve party political or even shameless self-interest cannot be discounted.”¹⁰⁵

[157] While the allegedly politically charged decision in *Heyneke* came from the municipal council, decisions which are similarly charged could arise from within the administration itself – especially if those within the administration hold office in a political party. This is simply an example illustrating some of the avenues of political interference.

[158] It is important to record that the task of achieving a depoliticised public service rests ultimately on a wide number of complex factors. A legislative mechanism is one of them, but so is political will and a commitment by political parties to look beyond staff appointments and procurement, and to prioritise the needs of communities. To that extent, even the wide limitation has its limitations so to speak. An example that comes to mind is where an influential member of a political party (who is not an office-bearer) is deployed to local government in a position other than a municipal manager and those that are accountable to them.

[159] The wide limitation would not affect such a person since that person would not hold office in a political party. The wide prohibition would thus not prevent their ability to use the workplace to advance the political aims of their party and the activities of politicisation of such a person would be difficult to establish, manage and eliminate. If the law went as far as to prohibit such an eventuality, then it would go too far, because

¹⁰⁴ *Heyneke v Umhlathuze Municipality* (2010) 31 ILJ 2608 (LC).

¹⁰⁵ *Id* at para 11.

that would entail prohibiting all members of political parties from being local government employees. The extent of such a limitation would be wider than the limitation imposed by section 71B. To prohibit all members of a political party from being staff members in a municipality would constitute a form of overreach and would effectively undermine the entire spectrum of section 19 rights. This is not what section 71B does, nor will this be one of its unintended consequences. The limitation is therefore not as invasive and far reaching as the first judgment suggests that it is. It is confined to that part of the right that relates to the holding of office in a political party and also applies to employees who are appointed to office in that party. While the prohibition in form affects all municipal employees, in substance, it will only impact on those who are members of and hold office in a political party.

[160] The wide limitation was never intended to be a silver bullet, but rather an attempt to ensure that a mechanism existed that was substantial, even though not all encompassing. This is what the COGTA submitted during its oral submissions, that the wider limitation was simply one measure within the broader government strategy to achieve depoliticisation. The limitation must be seen in the context of its specific role in this broader strategy.

The relation between the limitation and its purpose

[161] Is the limitation related to the purpose of depoliticisation? Or does the limitation go further than is necessary to achieve the goal it seeks to achieve? A key criticism is that section 71B constitutes legislative overkill, it is using a sledgehammer to crack a nut, and that this is not necessary to improve service delivery. I have already made it clear above that the respondents have made depoliticisation and professionalisation their primary target. And it is improved service delivery and stabilisation that is the by-product of that main purpose. So in examining the relationship between the limitation and its purpose, we must examine the exclusion from holding office within a political party relative to depoliticisation and professionalisation.

[162] I have already demonstrated that the limitation is not only closely related to, but is necessary to achieve depoliticisation, which may lead to an additional benefit of improved service delivery. This is because the limitation creates appropriate boundaries between the administration and the political environment. It does not entail a complete separation, and it is not designed to do so – it is not a silver bullet. All of this is true for the wider limitation just as it is true for the narrow limitation. The limitation thus does not go further than is necessary to meet its purpose. It does just enough to ensure that those who work for the municipality as civil servants do not hold a position which may conflict with their role as civil servants. Just because it cannot be seen how this will improve service delivery is no reason for section 71B to be declared unconstitutional. The legitimate government purpose is depoliticisation, a legitimate goal in its own right. Section 71B is reasonable and justifiable as long as it is capable of achieving that goal, which in my view it is.

[163] What is left is the basis relied on by SALGA and COGTA to demonstrate the relationship between the limitation and its purpose and whether the information they have put up in justification is sufficient. The first judgment is critical of the respondents' failure to put up credible evidence in support of the limitation that section 71B seeks to introduce. I understand this criticism to mean that for the limitation to pass muster, it is incumbent on the respondents to prove that what they seek to avoid by section 71B is something that has occurred and that section 71B will be effective in eradicating it. I am doubtful about this proposition in cases where government seeks to introduce what I call forward-looking measures.

[164] This Court in *NICRO*¹⁰⁶ and *Centre for Child Law*¹⁰⁷ set out the test for what is required to justify a policy choice made in legislation:

- (a) Justification does not only depend on facts, but may derive from policy objectives based on reasonable inferences unsupported by empirical data.
- (b) The party relying on justification should place sufficient *information* (not evidence) before the Court covering the following three areas:
 - (i) the policy that is being furthered;
 - (ii) the reasons for that policy;
 - (iii) why it is considered as reasonable in pursuit of that policy to limit a constitutional right.

[165] As already noted above, this Court almost 30 years ago recognised in *Lawrence* that evidence has a role to play in the overall justification enquiry, but that evidence is not dispositive. And so, at the very least there is a duty on the respondents to place sufficient information before the court to cover the three areas mentioned above. Empirical data is not a requirement, and reasonable inferences may be drawn from the policy objectives in support of its justification.

[166] In its answering affidavit in the Labour Court, SALGA, in support of section 71B, referred to the report of the National Planning Commission which spoke to the need to stabilise the political and administrative interface by having a public service that is sufficiently autonomous to be insulated from political patronage. There

¹⁰⁶ This Court in *NICRO* above n 15 at para 36 held as follows:

“[T]he party relying on justification should place sufficient information before the Court as to the policy that is being furthered, the reasons for that policy and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the Court may be unable to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion.”

¹⁰⁷ In *Centre for Child Law v Minister of Justice and Constitutional Development* [2009] ZACC 18; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at para 54 this Court held as follows:

“The difficulty is that the Minister’s affidavit tenders no facts from which the legitimacy of this purpose, and the efficacy of its execution, can be assessed. This Court has said that justification does not depend only on facts, but may derive from policy objectives based on reasonable inferences unsupported by empirical data.”

are many similarities between what SALGA says in this regard and the context I have set out above. The depoliticisation imperative aligns in large measure with Constitutional Principle XXX and the provisions of section 195 of the Constitution, all of which require a public service that functions in a non-partisan and unbiased manner and that can deliver services efficiently and professionally partly *as a result of* depoliticisation.

[167] SALGA also relied on the work of the Moerane Commission that recommended the need to depoliticise and professionalise the public service. Further reliance was placed on the 2016 Study which, among other things, dealt with the spike in service delivery protests and concluded that frustration about the lack of service delivery was the main motive for threats and violence.

[168] What emerged from this information was both the constitutional imperative for the policy position as well as information from the ground about how depoliticisation was inextricably linked to, at the very least, the hope for better service delivery and the stabilisation of local government. SALGA also sought to rely on remarks made during parliamentary deliberations about how the political hierarchy was grafted onto the operations of the municipality to the detriment of efficiency and accountability. Here, it argues that narrow party-political interests took precedence over those of the municipality.

[169] I refer in particular to the remarks of a Mr Hoosen concerning the position of a junior official in the municipality who held a senior party position. This official did not show up for work and was not held accountable or disciplined since he was a senior party official. In my view, this anecdote need not suffice as evidence of undue political influence in the administration due to holding of political office. Rather, it illustrates the risk that the legislature seeks to avoid and thus provides a reason to ground the legislature's policy choice to rely on the wide limitation as a measure to achieve depoliticisation. It is reasonable to expect Mr Hoosen's experiences to play out in other

municipalities, since it aligns with the systemic issues discovered by the authors alluded to above.

[170] The use of this information is criticised in the first judgment as being hearsay. I can only imagine the difficulty in obtaining such information under oath from those involved in the politicisation of local government. But in any event, the cases from *Lawrence* all the way to *NICRO* remind us that the absence of empirical data can hardly be fatal in this exercise. This was information that the legislature was entitled to consider in support of the proposed amendment introducing the wide limitation. That information, even if anecdotal and based on hearsay, does not stand in isolation.

[171] On 5 June 2020, and in support of the wide limitation, SALGA made a PowerPoint presentation to the Portfolio Committee on Cooperative Governance and Traditional Affairs. In that presentation, it referred to the practical challenges that faced it in this sphere of governance and noted the following:

- (a) The appointment of a political party office-bearer to a position in the administration not only affects the administration but also the functioning of the council.
- (b) It is not uncommon for senior management to be populated by party officials.
- (c) 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.
- (d) Where the party officials are in a position below the municipal manager, the municipal manager cannot exercise disciplinary supervision, even if there are allegations of maladministration, absenteeism and so on.

[172] This observation by SALGA was based in part on interviews that it conducted with political leaders and members of the administration. Comments from some interviewees indicated the dangers of office-bearers holding positions in the administration and that this danger was not confined to the upper echelons of the

municipality. This appeared to accord with the observation of Mr Hoosen noted above. Again, in the toxic and dangerous environment that had engulfed local government and its interface with politics, it would be asking too much for those interviewed to come on the record to identify themselves and reduce to affidavit their concerns. It warrants consideration. The codification of a measure contemplated in section 71B cannot realistically be subject to empirical evidence.

[173] In the same PowerPoint presentation, SALGA also relied on the work of Professor Jaap de Visser who, in an article titled “The political-administrative interface in local government – Assessing the quality of local democracies”,¹⁰⁸ captured the reality of political interface in the following terms:

“Further confusion between the political party and the municipality is created when a senior party-political office-bearer becomes a municipal staff member. The normal lines of accountability then no longer apply, particularly when the staff member outranks the mayor. The staff member then actually becomes the political head, undermining the political leadership of the mayor. The municipality is thus ‘rewired’ in a very damaging way. This often leads to perennial power struggles that spill over into service delivery problems.”¹⁰⁹

[174] De Visser articulates not just the risk of those in the lower echelons of the administration acting in loyalty to their political views in priority over those of the administration, but also what I term the relational risk that is created when senior political office-bearers become municipal staff members and, in particular, when such office-bearers occupy relatively junior positions in the administration but enjoy political superiority over senior members of the administration. He refers to this as ‘rewiring’

¹⁰⁸ De Visser “The Political-Administrative Interface in Local Government – Assessing the Quality of Local Democracies” (2009) *Local Government Bulletin* 18 at 19.

¹⁰⁹ Id.

the municipality, and its consequences are power struggles that result in service delivery challenges.¹¹⁰

[175] In the same article De Visser also refers to what he terms the growing concern around the inappropriate relationship between regional party structures and municipalities. He refers to reports of instances where regional party structures seek to operate municipalities by remote control.¹¹¹ He goes on to say:

“The strongest evidence yet comes from a recent court case, involving the appointment of a municipal manager for Amatole District Municipality (*Vuyo Mlokoti v Amathole District Municipality and Mlamli Zenzile* (2009) 30 ILJ 517 (E), 6 November 2008). The court found that, under instruction from the ANC Regional Executive, the majority ANC caucus members of the council approved the appointment of one of the two final contenders for the position, despite the fact that the other candidate had outperformed him in the interview and assessments. The judge in the matter concluded that:

‘. . . the involvement of the Regional Executive Council of the ANC . . . constituted an unauthorized and unwarranted intervention in the affairs of [the municipality]. It is clear that the councillors of the ANC supinely abdicated to their political party their responsibility to fill the position of the Municipal Manager with the best qualified and best suited candidate on the basis of qualifications, suitability and with due regard to the provisions of pertinent employment legislation This was a responsibility owed to the electorate as a whole and not just to the sectarian interests of their political masters . . . [The council] has demonstrated a lamentable abdication of its responsibilities by succumbing to a political directive from an external body, regardless of the merits of the matter. It continues, with an equally lamentable lack of insight into its conduct, to contend that it was proper for it to have done so.’”¹¹²

¹¹⁰ See De Visser “The Political-Administrative Interface in South African Municipalities Assessing the Quality of Local Democracies” (2010) *Commonwealth Journal of Local Governance* 86 at 95-6 where De Visser explores the perennial power struggles further in his more comprehensive work on this issue.

¹¹¹ Id at 94.

¹¹² Id at 95.

[176] So in sum, what was before the legislature and the Labour Court in justification of the impugned provision was:

- (a) depoliticisation as a policy choice located in the Constitution and the National Development Plan;
- (b) the SALGA survey that captured the views of those involved in the administration of the damaging effects of an unmanaged and unregulated political interface between politics and the administration;
- (c) the HSRC survey that indicated how service delivery frustrations were the cause of tensions and violence, which could be combatted by depoliticisation;
- (d) the writings of an academic, supported by case law, of the consequences of an unmanaged interface between politics and the public service; and
- (e) a living example of it happening beyond the theoretical level.

[177] To the extent that the legislature was required to have sufficient information in effecting the wide limitation, there was sufficient information from various sources that provided a proper basis for the deliberations of the legislature and the ultimate decision it reached. If this information were insufficient to provide a basis for the legislature's policy choice, the question then would be what standard this information would have to meet to be regarded as sufficient in justification of the legislature's policy choices. The complexity of municipal structures and political structures indicates why it is not suitable to be categorical about what is needed to justify the narrow and wide limitations. This complexity also indicates why the wide limitation cannot realistically be subject to empirical evidence. The added complexity brought about when persons in these two structures interact with each other is precisely the type of complexity the legislature should be entrusted with. As a body of elected representatives, the legislature has the capacity to understand this complexity and to develop the right solutions to it. It should be given the benefit of the doubt when it has developed such a solution, as long as the solution is reasonable and justifiable when it limits rights in the Bill of Rights.

[178] The first judgment says that it is unconscionable to expect this Court to rely on untested and generalised assumptions as evidence of common sense. The information to which I have already referred, and which served before the legislature does not constitute untested and generalised assumptions. It consisted of the work including surveys and the experiences of SALGA, political and administration office-bearers, the work of the HSRC, and the considered views of an academic supported by a judgment of the High Court. Far from being untested and generalised assumptions, they represent a conscious and sincere attempt to grapple with a difficult issue in our society mindful of the constitutional implications that came with it, and in doing so, it satisfied the three requirements that *NICRO* and *Centre for Child Law* said should be met in such situations.

[179] In sum, there was sufficient information about the policy itself, the reasons for the policy and why the legislature considered it reasonable to limit a constitutional right in pursuit of that policy. The respondents have shown that the limitation is related to its overall purpose. They have established the relationship between the means and ends with sufficient information that illuminates the legislature's reasons for the limitation. The decision of the legislature was hardly arbitrary or irrational. It constituted the pursuit of a rational and legitimate response to the problems of political interference in local government.

[180] Ultimately, whether section 71B achieves its purpose in fact is a factual exercise that can only be determined once it has had the chance to live.¹¹³

Less restrictive means to achieve the purpose

[181] It was suggested by SAMWU, and to some extent has found favour in the first judgment, that the narrow limitation achieves the purpose of depoliticisation and professionalisation. To the extent that the respondents conceded that the narrow

¹¹³ Williams "Municipal Crisis: A Justifiable Limitation of Political Rights" (2023) 140 *SALJ* 38 at 49.

limitation resulted in stabilisation, I did not understand that to mean that all that was required in terms of depoliticisation had been achieved.

[182] This is for two reasons. First, it seems to me that the narrow limitation was certainly effective as a positive step towards depoliticisation. But this positive step forward does not equate to an effective fulfilment of depoliticisation. It also does not mean that the state is prohibited from taking greater measures, if those measures will advance the purpose of depoliticisation further. I have demonstrated that the narrow limitation may only target a very small percentage of the overall management structure of local government. Where this is so, the question that arises is whether it can still be said that the narrow limitation achieves a sufficient degree of depoliticisation if it does not affect those who still wield immense power, but who fall outside the scope of the narrow limitation. Clearly it does not.

[183] The second reason is that nobody has explained what stabilisation means. It is unclear to me whether the fact that the narrow limitation had a stabilising effect automatically means that depoliticisation was achieved. My view is that stabilisation and depoliticisation are not the same thing, even though they may influence each other. Stabilisation may indicate that the narrow limitation has made a difference, but this does not mean that depoliticisation is achieved.

[184] Mindful that depoliticisation is unlikely to be fully achieved with this measure alone, the narrow limitation leaves unaffected an entire swathe of public servants at local government level (those who are not municipal managers and those directly accountable to them). I have demonstrated in the cases of the City of Tshwane and the municipality of Knysna, that the unaffected public servants could include those who wield significant administrative power. They are not subject to any mechanism or limitation in how they reconcile their political aspirations with the duties they are required to perform for their employer. If it remains unaddressed it may continue to have unsatisfactory consequences for the system of local government across the country.

[185] The option of the narrow limitation, useful as it is, does not adequately address politicisation. In particular, it draws an unwarranted distinction between the upper and lower echelons of management and employees, suggesting that power is only located in the upper echelon when in truth and reality it is more likely diffusely spread across the administration, albeit at different levels. Additionally, the narrow limitation does not address the relational aspect of politicisation. This occurs when the hierarchical relationship between two or more members in the political party is inverted in the administration. This may result in blurred lines of accountability, or what De Visser refers to as the rewiring of the municipality. The legislature has chosen the wider limitation to address these concerns. The test is not whether this is the right choice, but whether the choice is reasonable and justifiable. My view is that it is.

[186] The limitation, viewed holistically, constitutes less restrictive means when compared to the converse, for example, a total and outright prohibition on all members of political parties from being employed in local government. Such a limitation could undermine the rights in section 19, leaving very little to salvage and little residual rights to make political participation possible and meaningful. And so to that extent it does represent means that are less restrictive than this alternative, even though they may well be more restrictive than the narrow limitation.

Conclusion

[187] It is for the above reasons that I have no hesitation in concluding that the respondents have provided more than a sufficient basis to demonstrate that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[188] If I had commanded the majority, I would have refused to confirm the declaration of constitutional invalidity by the Labour Court and dismissed the application by SAMWU.

[189] Since, in my judgment, SAMWU would have failed in its challenge to section 71B, I would have granted it protection from an adverse costs order in accordance with the principle in *Biowatch*.¹¹⁴ Thus, I would have ordered the parties to bear their own costs in this Court and the Labour Court.

¹¹⁴ *Biowatch* above n 39.

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