



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 296/23

In the matter between:

GOLDEN CORE TRADE AND INVEST (PTY) LIMITED

Applicant

and

MERAFONG CITY LOCAL MUNICIPALITY

First Respondent

**MINISTER OF WATER AFFAIRS
AND SANITATION**

Second Respondent

Neutral citation: *Golden Core Trade and Invest (Pty) Ltd v Merafong City Local Municipality and Another* [2025] ZACC 27

Coram: Maya CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mhlantla J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J

Judgment: Tolmay AJ (unanimous)

Heard on: 7 November 2024

Decided on: 15 December 2025

Summary: Water Services Act 108 of 1997 — constitutionality of section 8(9) — administrative law review — delay — municipal water tariffs — reasonableness — time-restricted order — applicability of just and equitable remedy — constitutional law

ORDER

On application for leave to appeal and cross-appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. The applications for leave to appeal and cross-appeal are granted.
2. The appeal is upheld with costs, including the costs of three counsel.
3. The first respondent's cross-appeal is dismissed with costs, including the costs of three counsel.
4. The order of the Supreme Court of Appeal in Case No. 338/2022 is set aside and substituted with the following:
 - “(a) The first respondent's review application is dismissed with costs, including the costs of two counsel.
 - (b) It is declared that:
 - (i) The surcharge charged by the first respondent on the supply of water to the applicant for industrial use from the period 1 July 2004, and all subsequent surcharges in excess of the tariff charged to the first respondent by Rand Water from time to time and in contravention of the decision of the Minister of Water Affairs and Sanitation dated 18 July 2005, is unlawful.
 - (ii) The surcharge charged by the first respondent on the supply of water to the applicant for domestic use from the period 1 July 2004, in excess of the tariff charged to the first respondent by Rand Water from time to time and in contravention of the decision of the Minister of Water Affairs and Sanitation dated 18 July 2005, is unlawful.
 - (iii) The first respondent and the applicant are ordered to negotiate reasonable surcharges, if any, for water for domestic use and method of repayment or set-off within a

period of six months from the date of this judgment of the difference between:

- (1) the tariffs so levied by Rand Water from time to time, plus any agreed surcharge and the amount charged by the first respondent on the supply of water to the applicant for industrial use, from 1 July 2004.
 - (2) the tariffs so levied by Rand Water from time to time, plus any agreed surcharge and the amount charged by the first respondent on the supply of water to the applicant for domestic use, from 1 July 2004.
- (iv) The first respondent is ordered to pay interest on the respective amounts at the prescribed rate from 1 July 2004 to the date of payment.
 - (v) If the parties fail to come to an agreement within the six-month period, they must refer the matter to mediation before an independent, duly qualified mediator. If mediation fails, the mediator will report in writing to the parties that mediation is terminated.
 - (vi) The parties are in the event of failure of mediation ordered to file, within two months from the date of the mediator's report of termination of the mediation, with the High Court of South Africa, Gauteng Division, Pretoria (High Court) their respective repayment proposals together with a motivation thereof.
 - (vii) The High Court must consider the proposals and motivation and issue an order.
 - (viii) The first respondent is ordered to pay the applicant's costs including the costs of two counsel, in respect of the proceedings of the High Court in 2013 and in 2021 under

Case No. 23558/2011, in the Supreme Court of Appeal under Case No. 20265/14 in 2015 and Case No. 338/2022 in 2023.’

JUDGMENT

TOLMAY AJ (Maya CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mhlantla J, Seegobin J, Theron J and Tshiqi J concurring):

Introduction

[1] The applicant is Golden Core Trade and Invest (Pty) Limited, which was substituted for AngloGold Ashanti Limited (AngloGold) on 7 April 2021. The respondents are Merafong City Local Municipality (Merafong or the municipality) and the Minister of Water Affairs and Sanitation (the Minister). Two applications for leave to appeal against different aspects of the judgment and order of the Supreme Court of Appeal are before this Court. The main application by AngloGold is against the Supreme Court of Appeal’s judgment and order, insofar as that Court restricted its declaration of unlawfulness to one financial year. The application to cross-appeal, by Merafong, is against the Supreme Court of Appeal’s refusal to consider a constitutional challenge to section 8(9) of the Water Services Act¹ (WSA). Both AngloGold and the Minister oppose the cross-appeal.

Factual background

[2] The Tautona, Mponeng and Savuka mines of AngloGold, which are within the jurisdiction of Merafong, have produced gold since 1958. Rand Water² has always

¹ 108 of 1997.

² Rand Water is a water services provider, as defined below.

provided it with potable water in bulk which is used for mining.³ AngloGold built and maintained infrastructure for water distribution and sewage treatment facilities.

[3] The WSA came into operation on 19 December 1997. At the time, it was the primary legislative instrument for giving effect to the division of authority for water supply and services between the national and local governments established by the Constitution. It accordingly provided for the transfer of the authority to administer the supply of potable water from the Minister to municipalities. The WSA recognised the role of local government,⁴ and municipalities became water services authorities who must ensure that consumers within their jurisdictions have access to water services. The WSA distinguishes between a “water services authority”, insofar as it provides that it “means any municipality, including a district or rural council as defined in the Local Government Transition Act⁵ responsible for ensuring access to water services”, and a “water services provider” insofar as it provides that it “means any person who provides water services to consumers or to another water services institution, but does not include a water services intermediary”.⁶ The WSA introduced a significant feature for the purposes of this application for leave to appeal. It requires all users of water services who received water from a source other than one named by a water services authority to apply for approval to continue receiving the supply.⁷ On 11 February 2004, AngloGold and other mines were informed by Merafong that, as of 1 July 2003, it had become a water services authority. It also requested that they apply for approval to be provided with water for industrial use in terms of section 7 of the WSA.⁸ On

³ Potable water is water of such quality that it is fit for human consumption.

⁴ Part B of Schedule 4, read with sections 155(6)(a) and (7) of the Constitution.

⁵ 209 of 1993.

⁶ Section 1.

⁷ Section 6 read with section 7.

⁸ Section 7 provides:

“(1) Subject to subsection (3), no person may obtain water for industrial use from any source other than the distribution system of a water services provider nominated by the water services authority having jurisdiction in the area in question, without the approval of that water services authority.

6 April 2004, AngloGold applied to Merafong, requesting permission to continue receiving water from Rand Water for both industrial and domestic purposes at the then current Rand Water tariffs. This was the standard practice, as AngloGold had consistently obtained its water through Rand Water's reticulation infrastructure of pipelines and reservoirs.

[4] On 31 May 2004, Merafong gave permission that Rand Water may supply water directly to the mines, charge and collect water sales revenue, and manage water quality and other technical issues. Certain tariffs were announced for water used for domestic and industrial use. It also set significantly higher tariffs than those of Rand Water for water provided to the mines. It approved AngloGold's water supply application, with effect from 1 July 2004, under these conditions. Merafong also advised AngloGold of its right to appeal its decision to the Minister.

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- (2) Subject to subsection (3), no person may dispose of industrial effluent in any manner other than that approved by the water services provider nominated by the water services authority having jurisdiction in the area in question.
 - (3) A person who, at the commencement of this Act, obtains water for industrial use or disposes of industrial effluent from a source or in a manner requiring the approval of a water services authority under subsection (1) or (2), may continue to do so—
 - (a) for a period of 60 days after the relevant water services authority has requested the person to apply for approval; and
 - (b) if the person complies with a request in terms of paragraph (a) within the 60 day period, until—
 - (i) the application for approval is granted, after which the conditions of the approval will apply; or
 - (ii) the expiry of a reasonable period determined by the water services authority, if the application for approval is refused.
 - (4) No approval given by a water services authority under this section relieves anyone from complying with any other law relating to—
 - (a) the use and conservation of water and water resources; or
 - (b) the disposal of effluent.”

[5] Aggrieved by Merafong's tariffs, AngloGold lodged an appeal against Merafong's decision to the Minister, in accordance with section 8(4) of the WSA.⁹ Its main complaints were that—

- (a) Merafong's tariff was excessively higher than Rand Water's while it was not adding any value to, or assuming any responsibility for, any aspect of the water supply; and
- (b) Merafong failed to recognise AngloGold's role as a water services provider or make any attempt to understand its economic situation.

[6] The Minister, in accordance with section 8(9) of the WSA,¹⁰ upheld the appeal on 18 July 2005 and overturned Merafong's decision. The Minister concluded that, in respect of the tariff for industrial use, the premium for water for that use was unreasonable, because Merafong provided no value for the services given to AngloGold by Rand Water, and water for industrial use is not classified as a water supply service under section 1 of the WSA.¹¹ For the tariff for domestic use, the Minister directed the parties to negotiate a reasonable tariff.

[7] In September 2005, Merafong, through its attorney, informed the Minister of its view that she could not set rates or interfere with municipal tariff-setting, and such interference was void in law. Merafong's attorney requested the Minister to reverse her decision. Merafong made multiple unsuccessful attempts to meet with the Minister. In accordance with the Minister's 2005 appeal decision, Merafong conducted meetings with AngloGold and Rand Water during the period September 2005 to October 2007, regarding the tariffs for both industrial and domestic use, but no agreement was reached.

⁹ Section 8(4) reads: "[a] person who has made an application in terms of section 6 or 7 may appeal to the Minister against any decision, including any condition imposed, by that water services authority in respect of the application".

¹⁰ Section 8(9) reads: "[t]he Minister may on appeal confirm, vary or overturn any decision of the water services authority concerned".

¹¹ Section 1 reads: "[m]eans the abstraction, conveyance, treatment and distribution of potable water, water intended to be converted to potable water or water for commercial use but not water for industrial use".

[8] Merafong continued to enforce the tariffs it had set on AngloGold for the supply of water for industrial and domestic use. AngloGold responded by withholding the contested portion of the tariffs. In September 2007, Merafong demanded that AngloGold pay the arrears or face water supply cuts, which would affect mining operations severely. As a result, AngloGold complied with the demand and paid the disputed surcharge and arrears under protest and without prejudice to its rights.

[9] This matter has a long litigation history and this marks the second time these parties have come before this Court; the first was in *Merafong CC*.¹² Thus, it is necessary to examine the litigation history leading up to the current application in this Court.

Litigation history

High Court I

[10] During July 2011, AngloGold initiated motion proceedings in the High Court of South Africa, Gauteng Division, Pretoria (High Court I).¹³ It sought relief that would require Merafong to comply with the Minister's 2005 appeal decision. Merafong filed its opposition and conditional counter-application. In the counter-application Merafong's contention was that the WSA does not confer authority on the Minister to interfere with a tariff set and implemented by Merafong for water services provided in its area of jurisdiction. In the event of it being found that the WSA did confer power to the Minister in terms of section 8(9), Merafong sought an order that the provisions of section 8(9) of the WSA are to that extent unconstitutional and invalid.¹⁴ The High Court in High Court I granted AngloGold's application and dismissed Merafong's counter-application. The Court found that AngloGold legitimately applied to Merafong under sections 6 and 7 of the WSA and that the Minister lawfully exercised her appellate

¹² *Merafong City Local Municipality v AngloGold Ashanti* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC).

¹³ *AngloGold Ashanti Ltd v Merafong City Local Municipality* [2014] ZAGPPHC 85.

¹⁴ *Merafong City Local Municipality v AngloGold Ashanti* [2015] ZASCA 85, 2016 (2) SA 176 (SCA) (SCA I) at paras 16-18.

power under section 8 of the WSA. Even if the Minister's decision was impugnable, the Court said, it remained binding until overturned by a court.

Supreme Court of Appeal I

[11] The Supreme Court of Appeal upheld the decision of High Court I on appeal. It held that Merafong was required to seek judicial review of the Minister's decision and held that Merafong violated the principle of legality by simply ignoring it. The Supreme Court of Appeal further held that its failure to challenge the Minister's decision in judicial review proceedings, rather than attacking the empowering statutory provision, posed an insurmountable difficulty for it, and that a collateral challenge to the validity of an administrative act was not available to Merafong.

Constitutional Court I

[12] The majority of this Court disagreed with the Supreme Court of Appeal on the point that a collateral challenge to the validity of an administrative act was not available to Merafong and held that Merafong could bring a reactive challenge. This Court characterised the reactive challenge as Merafong's right to challenge the administrative act of the Minister's decision through a form of collateral challenge. This Court held that Merafong should either have accepted the Minister's decision as valid or challenged it in court by way of a review. By deciding not to comply with the Minister's decision, Merafong was engaged in self-help. This Court remitted the matter to the High Court to determine "the lawfulness of the Minister's decision of 18 July 2005, and, if necessary, what remedy is to be granted".¹⁵

High Court II

[13] By the time the matter was remitted to the High Court, AngloGold had sold its mining operations to Golden Core and AngloGold was substituted as a party in this

¹⁵ *Merafong CC* above n 12 at para 84.

matter.¹⁶ Ahead of the High Court hearing, in July 2017, Merafong added a prayer for the review and setting aside of the Minister’s 2005 appeal decision. Days before the hearing,¹⁷ in July 2021, Merafong further amended its papers to include a challenge to the constitutionality of section 8(9) of the WSA. The High Court considered three issues: first, Merafong’s review application of the Minister’s 2005 appeal decision and condonation for the delay in launching the review. Second, Merafong’s constitutional challenge to section 8(9) of the WSA. Third, AngloGold’s review of Merafong’s rates decisions.

[14] On the first issue, the High Court dealt with Merafong’s review application under the principle of legality.¹⁸ Accordingly, it considered Merafong’s almost 13-year delay (2005–2017) in instituting the review using the *Khumalo*¹⁹ two-leg condonation test, asking—

- (a) whether the delay is unreasonable; and
- (b) whether the court should exercise its discretion to overlook the delay and entertain the application.²⁰

[15] On the first leg, the High Court split Merafong’s 13-year delay into the six year period before it launched its counter-application and the seven year period after this, but before it added its review prayer.²¹ On the first period, despite “wrong legal advice”²² that Merafong could ignore the Minister’s decision and failed attempts to engage with the Minister before litigating,²³ the High Court found that Merafong knew

¹⁶ *Merafong City Local Municipality v Golden Core Trade and Invest (Pty) Ltd* [2021] ZAGPPHC 805 (High Court II) at para 4.

¹⁷ *Id* at para 150.

¹⁸ *Id* at para 45.

¹⁹ *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); 2014 (5) SA 579 (CC) at para 44.

²⁰ *Id* at para 47.

²¹ High Court II above n 16 at para 74.

²² *Id* at para 75.

²³ *Id* at para 81.

from 2006 that the Minister’s 2005 appeal decision could be set aside,²⁴ and its delay in launching its counter-application was “undue and unreasonable”.²⁵ The High Court found Merafong’s delay in the second period “acceptable”²⁶ as “the rights of the parties were in the hands of the courts” and Merafong could not be expected to amend its counter-application to include a review application at that stage.²⁷

[16] In considering the second leg of the condonation test, the High Court decided the merits of Merafong’s review of the Minister’s 2005 appeal decision. Merafong’s review grounds included that the Minister ignored Merafong’s section 229(1) constitutional power to impose surcharges on services provided, and thereby incorrectly found that Merafong was not entitled to levy a surcharge on water for industrial use; that by interfering with the surcharge the Minister acted *ultra vires* (beyond its powers) in terms of section 8(9) of the WSA, and was materially influenced by an error of law; and that the Minister misconstrued the factual circumstances that she was required to consider.²⁸

[17] The High Court interpreted the Minister’s section 8(9) power, which provides that “[t]he Minister may on appeal confirm, vary or overturn any decision of the water services authority concerned”, in the context of section 8 of the WSA. This section is clear that appeals concern municipalities’ approval of water use from sources other than a water services provider nominated by a municipality, including any conditions a municipality imposes as part of this approval, under sections 6 and 7 of the WSA.²⁹

[18] The High Court held that the appeal that AngloGold lodged with the Minister was about the “excessively higher” tariffs that Merafong imposed compared to Rand Water’s tariffs, but it had nothing to do with sections 6 and 7 of the WSA, as

²⁴ Id at para 75.

²⁵ Id at para 84.

²⁶ Id.

²⁷ Id at para 80.

²⁸ Id at para 90.

²⁹ Id at paras 95-101.

AngloGold was not going to use water or obtain water from a source other than a water service provider nominated by Merafong.³⁰ Accordingly, the Minister's 2005 appeal decision was beyond what section 8(9) empowered her to do, and the High Court declared the decision unlawful, invalid and reviewable.

[19] The High Court further held that the Minister's decision was unconstitutional, as section 229 of the Constitution read with the WSA entitles municipalities to levy surcharges on water services it provides, whether the water is for industrial or domestic use.³¹ Sections 155(7) and 229(2)(b) of the Constitution provide that national government has authority to regulate municipalities' exercise of their executive authority, and that municipalities' powers to impose surcharges on services provided may be regulated by national legislation. The High Court found that the Minister's 2005 appeal decision went beyond "mere 'monitoring' of the decisions of Merafong", as the Minister "effectively took over the authority of the municipality and replaced it with her own decision".³² The High Court found that, properly interpreted, section 8(9) of the WSA did not allow for this watering down of municipalities' constitutionally derived powers, and that the Minister's 2005 appeal decision was unconstitutional and invalid.³³

[20] Having largely found for Merafong on the merits of its review application, the High Court finally considered the condonation application for the delay of Merafong's application. It concluded that AngloGold would suffer no prejudice "apart from financial prejudice" if Merafong's delay was condoned. If Merafong had not delayed, AngloGold would anyway have had to pay Merafong's surcharges on water, whereas Merafong and its residents would suffer enormous prejudice and financial stress if

³⁰ Id at paras 107-8.

³¹ Id at paras 113-15.

³² Id at para 138.

³³ Id at paras 139-40.

condonation was not granted.³⁴ The High Court exercised its discretion to overlook Merafong's delay, granted condonation, reviewed and set aside the Minister's 2005 appeal decision, and declared it constitutionally invalid under section 172(1)(a) of the Constitution.³⁵ The Court found no reason to limit the retrospective effect of the declaration of invalidity.³⁶

[21] On Merafong's constitutional challenge to section 8(9) of the WSA, the High Court held that, in the light of its finding on the limited application of section 8(9), the constitutional challenge was unnecessary.³⁷ Further, that such a challenge would have had to "be raised pertinently, with full and proper motivation and demonstrating clearly why a declaration of unconstitutionality should be made", and that an applicant must "satisfy the court that the subsection cannot sensibly be interpreted in a manner consistent with the Constitution but must ineluctably be declared to be unconstitutional".³⁸

[22] Lastly, the High Court dismissed AngloGold's review application of Merafong's surcharge decisions since 2004/2005, holding that the municipality's decision to set rates could not be administrative action under the Promotion of Administrative Justice Act³⁹ (PAJA),⁴⁰ and that on the principle of legality, AngloGold did not explain its six or seven-year delay in launching the review.⁴¹ The Court held that, in any event, section 156(1) of the Constitution and section 11 of the Local Government: Municipal

³⁴ Id at para 143.

³⁵ Id at para 146.

³⁶ Id at paras 147-8.

³⁷ Id at para 149.

³⁸ Id at para 150.

³⁹ 3 of 2000.

⁴⁰ High Court II above n 16 at paras 154-5. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) at para 58 and section 1 of the PAJA.

⁴¹ High Court II above n 16 at para 156.

Systems Act⁴² (Systems Act) empower municipalities to impose surcharges.⁴³ The Court awarded Merafong its costs, made no costs order against the Minister, and made no costs order for the proceedings in the first High Court, the Supreme Court of Appeal and this Court.⁴⁴

Supreme Court of Appeal II

[23] AngloGold appealed to the Supreme Court of Appeal. The questions on appeal were whether the High Court erred in—

- (a) overlooking Merafong’s delay in its review application;
- (b) upholding Merafong’s review; and
- (c) dismissing AngloGold’s application for declaratory relief that Merafong’s rates decisions were unlawful.⁴⁵

The Supreme Court of Appeal accepted the High Court’s rejection of Merafong’s last-minute constitutional challenge of section 8(9) of the WSA.

[24] On Merafong’s review, the Supreme Court of Appeal noted Merafong’s 13-year delay. It noted that Merafong was required to explain its extended delay and to justify a court exercising its review powers in terms of the delay. It observed further that Merafong laboured under no misapprehension that it could, based on a legal opinion, merely ignore the Minister’s decision. It would have to go to court to overturn the Minister’s decision, and it would have to do so because an administrative action, once taken, is binding until it is set aside.⁴⁶

⁴² 32 of 2000.

⁴³ High Court II above n 16 at para 157.

⁴⁴ Id at para 164.

⁴⁵ *Golden Core Trade and Invest (Pty) Ltd v Merafong City Local Municipality* [2023] ZASCA 126; [2023] 4 All SA 589 (SCA) (Supreme Court of Appeal II) at para 2.

⁴⁶ Id at para 39.

[25] The Court explained that instead of Merafong launching review proceedings, it imposed the same tariffs on water for industrial and domestic use that the Minister had ruled upon in her decision on AngloGold, and that Merafong moved beyond this by threatening to disconnect AngloGold's water supply if it failed to pay the tariffs that the municipality had established.⁴⁷ The Supreme Court of Appeal held that Merafong abused its authority to demand payment following the Minister's decision. It held that in respect of the first period, there was no proper explanation for the failure by Merafong to review the Minister's decision.⁴⁸

[26] The Supreme Court of Appeal noted that Merafong's 2011 counter-application challenged the Minister's decision during the second period of delay. However, it stated that it did not do this as a recognition of its unconscionable actions before 2011. It did so to oppose the declaratory relief that AngloGold sought. Its lack of review of the Minister's decision was a calculated approach.⁴⁹ The Court stated that Merafong did not explain why it thought it could impose tariffs despite the Minister's decision that was not overturned. It noted that Merafong's case rested on the invalidity of the Minister's decision, but Merafong knew that it needed to overturn that decision. Merafong's delay was deemed unreasonable by the Supreme Court of Appeal, not solely due to the length of the delay, but also because Merafong failed to initiate the review when it was clearly aware that it was required to do so and subsequently resorted to self-help in response to the Minister's decision.⁵⁰

[27] The Supreme Court of Appeal then turned to whether the delay should have been overlooked, as the High Court did.⁵¹ It stated that the High Court interpreted the *Khumalo*⁵² two-stage condonation test as an invitation to determine the merits of

⁴⁷ Id at para 41.

⁴⁸ Id at para 43.

⁴⁹ Id at para 46.

⁵⁰ Id at para 48.

⁵¹ Id at para 49.

⁵² *Khumalo* above n 19 at para 44.

Merafong’s review.⁵³ The Court further noted that the High Court then revisited the prejudice to AngloGold and determined that the Minister’s decision was made *ultra vires*, and that AngloGold had paid the tariffs Merafong was entitled to levy, demonstrating that it had not suffered any prejudice.⁵⁴ The Supreme Court of Appeal ruled that the High Court’s reasoning was flawed and held that whether a delay should be overlooked does not entail a determination of the merits of the review.⁵⁵

[28] The Supreme Court of Appeal held further that this approach inevitably skewed the weighing of factors that *Khumalo* required.⁵⁶ It approached the merits differently, by considering the nature of the Minister’s 2005 appeal decision, finding that the decision was restricted to the tariffs of a limited period, namely from 2004/2005 until Merafong imposed a new tariff in the subsequent year. The Minister’s decision could not affect tariffs imposed after the appeal decision, as the Minister is not a precedent-setting “court of law”.⁵⁷ The Court held that the Minister’s decision was taken in the “distant past” as it set aside tariff charges for a limited time.⁵⁸ On this basis, the Supreme Court of Appeal dismissed the review with costs.⁵⁹ On this same, limited interpretation of the Minister’s decision, the Supreme Court of Appeal only declared unlawful Merafong’s imposed rates for water for domestic and industrial use for one financial year, being 2004/2005.

[29] The Supreme Court of Appeal thus upheld AngloGold’s appeal with costs, including the costs of two counsel, and set aside the High Court’s judgment. It also ordered the Municipality to pay AngloGold’s costs for all previous proceedings.⁶⁰

⁵³ Supreme Court of Appeal II above n 45 at para 24.

⁵⁴ *Id* at para 50.

⁵⁵ *Id* at para 51.

⁵⁶ *Id*.

⁵⁷ *Id* at para 60.

⁵⁸ *Id* at para 59.

⁵⁹ *Id* at para 65.

⁶⁰ *Id* at para 80.

In this Court

Applicant's submissions

Condonation

[30] The Supreme Court of Appeal's judgment was delivered on 29 September 2023, and the application for leave to appeal was due on 20 October 2023. AngloGold filed its application on 27 October 2023. The explanation for the delay is that it only received proof of service from the state attorney on 26 October 2023 as the relevant state attorney was on sick leave. It submits that no prejudice to the respondents or the administration of justice results from this short delay.

Jurisdiction and leave to appeal

[31] Before this Court, AngloGold challenges the Supreme Court of Appeal's declaratory finding that Merafong's tariff for the domestic and industrial use of water was unlawful for only one financial year, from 1 July 2004 until it imposed a new tariff for the 2005/2006 financial year. AngloGold submits that this finding was based on the Supreme Court of Appeal's unsustainable interpretation of AngloGold's appeal and the Minister's 2005 appeal decision. AngloGold submits that the Supreme Court of Appeal's interpretation engages this Court's constitutional jurisdiction, as it goes against the WSA's purpose, particularly read in the context of the Constitution's section 151(3) powers of national legislation to regulate a municipality's right to govern its community's local government affairs. Further, the order of the Supreme Court of Appeal fails to effectively vindicate the section 33 just administrative action right. There are reasonable prospects of success, and the nature of the constitutional issues raised in its appeal warrant the attention of this Court in the interests of justice.

Merits

[32] AngloGold seeks an order that the Supreme Court of Appeal's declaration of unlawfulness should not be restricted to one financial year. A supplementary order is

required declaring unlawful all subsequent tariffs Merafong imposed on it after the 2004/2005 year for water supply, for both industrial and domestic use.

[33] AngloGold submits that the Supreme Court of Appeal incorrectly characterised the scope of the Minister's 2005 appeal decision, which it argues determined not only the Supreme Court of Appeal's dismissal of Merafong's delayed review application, but also the declarations of unlawfulness against Merafong's conduct that it sought. It argues that its appeal to the Minister under section 8 of the WSA was not targeted at Merafong's 2004/2005 tariffs, but at "the conditions that Merafong sought to impose on the supply of water", which conditions "are not a specific tariff but the factors considered applicable to the determination of that tariff". The conditions entailed the fact that Merafong imposed a surcharge above Rand Water's tariff when Merafong "played no role in the supply of water to the mines".

[34] The WSA's norms and standards provisions empower the Minister to prescribe norms and standards for tariffs for water services,⁶¹ which municipalities and other water services institutions must comply with. Municipalities may not use a tariff which is substantially different from any prescribed norms and standards.⁶² The Minister prescribed norms and standards in 2001,⁶³ which require the differentiation of tariffs for water supplied to households and for industrial use.⁶⁴ AngloGold submits that contrary to the norms and standards, from July 2007 onwards Merafong introduced a uniform tariff rate to the water supply to AngloGold for both domestic and industrial use.

[35] AngloGold argues that the Minister's 2005 appeal decision entailed that it was unreasonable for Merafong to impose a surcharge on services provided where it added no value. In terms of section 1 of the WSA, a surcharge could not be imposed on water

⁶¹ Sections 9(3) and 10(1) of the WSA.

⁶² Sections 9(4) and 10(4) of the WSA.

⁶³ Norms and Standards in Respect of Tariffs for Water Services in terms of Section 10(1) of the Water Services Act (Act No. 108 of 1997), GN R652 GG 22472, 20 July 2001.

⁶⁴ Id at Item 4(1).

for industrial use. AngloGold contends that since all tariffs must comply with the norms and standards, all the tariffs after the 2004/2005 financial year were equally non-compliant. As the original decision was set aside, no valid decisions could subsequently have been taken. The effect of the Supreme Court of Appeal's restriction on its declaration of unlawfulness, says AngloGold, is that despite being "victorious in its long battle to enforce the Minister's decision", it is left with empty relief. AngloGold submits that it allows Merafong to benefit from its continued breach of its statutory and constitutional duties by keeping the proceeds of tariffs unlawfully imposed after the 2004/2005 financial year.

[36] Relying on section 33 of the Constitution and the PAJA, AngloGold contends that section 38 of the Constitution's appropriate relief provision must be construed purposively considering section 172(1)(b) of the Constitution and section 8(1) of the PAJA. These sections empower the Court to make any order that is just and equitable, including the payment of compensation. AngloGold submits that in terms of these sections, the Court is entitled to make a retrospective order that Merafong repays the unlawfully imposed surcharges of R126 million that it has paid. During argument, it was conceded on behalf of AngloGold that in granting a just and equitable remedy, this Court is empowered to consider the financial impact an order may have on Merafong's finances and its ability to deliver services to the community.

[37] AngloGold seems to accept that its interpretation of the scope of the Minister's 2005 appeal decision re-opens the question whether condonation should be granted for Merafong's delay in bringing its review application, and its reactive declaratory challenge on that decision. It, however, submits that Merafong's excessive delay, inadequate explanation and "bullying tactics" count against the granting of condonation. AngloGold further submits that Merafong's review application is in any event meritless, as the Minister's 2005 appeal decision was taken within the four corners of the WSA.

Merafong's submissions

[38] Merafong conceded that this Court's jurisdiction is engaged. This makes sense in the light of the cross-appeal that challenges the constitutionality of section 8(9) of the WSA.

[39] It submits that the Supreme Court of Appeal correctly limited the impugned decision to the 2004/2005 financial year. The argument is that every successive financial year's budget approval constitutes an independent executive and/or legislative act and it is common cause that AngloGold has not challenged either the section 8(9) appeals or other High Court review challenges. If Merafong does not prevail in its cross-appeal in this Court, it asks that the Supreme Court of Appeal's finding that the Minister's decision could only have set aside the water tariffs imposed by Merafong for the 2004/2005 financial year should stand.

[40] Merafong submits that AngloGold's argument ignores the statutory obligations imposed on a municipality in terms of the Constitution, the Systems Act and in particular the Local Government: Municipal Finance Management Act⁶⁵ (MFMA). The latter requires the annual approval, valid for one financial year of its capital and operational budget. This includes a formal council resolution determining any municipal tax imposed for the budget year, the setting of any municipal tariff for the budget year, the approval of measurable performance objectives for revenue, the approval of any changes to the municipality's Integrated Development Plan and the approval of any changes to the municipality's budget-related policies.⁶⁶

Cross-appeal: Merafong's submissions

[41] Merafong applies for a declaration of constitutional invalidity of section 8(9) of the WSA. Merafong contends that, when AngloGold sought enforcement of the

⁶⁵ 56 of 2003.

⁶⁶ Section 24(1) of the MFMA determines that the municipal council must at least 30 days before the start of the budget year consider approval of the annual budget. Section 24(2) determines that an annual budget must be approved before the start of the budget year is approved by the adoption by the council of a resolution referred to in section 17(3)(a)(i).

Minister's decision at the Court of first instance, it had already, albeit conditionally, raised the constitutional challenge. Merafong relies on the judgments of *Merafong CC*, stating that there the majority granted it an opportunity to raise the reactive challenge. It notes that the majority judgment held that the constitutional point should be decided only later. The minority judgment held that the enforcement of the Minister's decision was the core issue in the matter.

[42] The minority judgment determined that section 8(9) of the WSA impermissibly grants the Minister the authority to exercise a municipal power, in contravention of the Constitution. Consequently, Merafong submits that this Court is obliged to declare the section unconstitutional and invalid. Merafong contends that the Supreme Court of Appeal refused to entertain its constitutional challenge, while this relief was captured in the notice of motion before the High Court. In this regard, Merafong submits that the Supreme Court of Appeal erred in not entertaining the constitutional challenge.

[43] Merafong submits that the Minister has never made an issue of the way the constitutional point has been raised in any of the previous courts. If section 8(9) of the WSA is declared constitutionally invalid, Merafong contends that the declaration will have retrospective effect. The effect thereof will be as though the Minister's decision never existed and would consequently invalidate her 2005 appeal decision.

[44] Merafong notes that the demand for payment of the tariffs from AngloGold threatening water cuts was only sent in September 2007. It submits that this does not amount to unconscionable conduct, as the Supreme Court of Appeal had determined that the Minister only set aside the 2004/2005 water tariff, while the 2005/2006 and 2006/2007 water tariffs were raised lawfully. Hence, AngloGold was in arrears and Merafong was not only entitled, but statutorily obliged, to recover arrear water tariff charges. Merafong submits that the value thereof could have been challenged but not the fact that AngloGold was in arrears.

[45] If the constitutional challenge fails, Merafong contends that the Supreme Court of Appeal judgment was correct in limiting AngloGold's relief to the 2004/2005 financial year. It notes that the Supreme Court of Appeal's description of the water tariff as a "time bound tariff regime" is apposite. It contends that it has always sought an order declaring that the Minister's decision, in the event of it not being set aside, applies only to the water tariffs levied for the 2004/2005 financial year.

[46] AngloGold sought in both the High Court and the Supreme Court of Appeal relief that the Minister's decision applies to all subsequent years to date. Merafong submits that the practical implication that the Supreme Court of Appeal's order would have is the setting aside of water tariffs of approximately R500 000 per month, thus approximately R6 million per annum. The value of the water tariffs between 1 July 2005 and 2023 equates to not less than R108 million and this excludes all the subsequent annual tariff increases. Bearing in mind that Merafong has been substantially successful, it submits that it should not have been saddled with the costs order made by the Supreme Court of Appeal.

Cross-appeal: AngloGold's submissions

[47] AngloGold opposes Merafong's cross-appeal, submitting that the constitutional challenge was not properly raised in the High Court, and that Merafong has failed to deal with the impact on the remaining provisions of the WSA consequent to this declaration of invalidity of section 8(9). It takes issue with Merafong's interpretation of *Merafong CC* as requiring that its constitutional challenge is dealt with, and its reliance on the minority in *Merafong CC*. AngloGold contests Merafong's submission that its constitutional challenge is contained in its founding papers in the High Court and submits that this is not a case that Merafong can make on appeal. If Merafong were to succeed in its constitutional challenge, AngloGold submits it would create an internal tension within the WSA as there would be no statutory recourse for a consumer that suffers the imposition of an unreasonable tariff. AngloGold contends that Merafong "fails to explain how the impact of this striking down upon remaining provisions of the WSA is to be managed".

Cross-appeal: Minister's submissions

[48] The Minister does not align herself with any of the parties' contentions, but she submits that the Minister's 2005 appeal decision is constitutionally valid. In the Minister's affidavit before the High Court, she explained the nature of her decision and the powers that were exercised under the WSA in making the decision. The Minister explained, among others, that:

- (a) It is acknowledged that sections 8(7), 8(9) and 8(10) of the WSA, read together, may conflict with Merafong's exclusive powers under the Constitution.
- (b) Under section 156 and Schedule 4 Part B of the Constitution, municipalities have exclusive powers to provide "water and sanitation services limited to water supply systems and domestic waste — water and sewage disposal systems".
- (c) This case does not raise a constitutional issue because the Minister's ruling concerns clear, drinkable water for domestic use, not industrial use.
- (d) She only directed Merafong and AngloGold to negotiate a reasonable domestic water tariff; she did not overturn Merafong's decision to levy the surcharge under section 8(9) of the WSA.
- (e) She only ordered Merafong to negotiate, which could have led to an agreement to cancel, amend, or continue charging the surcharge for domestic use. The results were beyond her control.
- (f) Her ruling acknowledges that municipalities are solely responsible for providing domestic water and setting tariffs and surcharges.

[49] If her ruling is understood not to overturn Merafong's decision to levy surcharges in respect of water for domestic use, but to recommend that the parties should negotiate a reasonable tariff to be imposed, the Minister submits that the conclusion by the High Court that Merafong could not continue levying surcharges until the Minister's decision was set aside, was incorrect.

[50] The Minister submits that Merafong’s constitutional challenge is confined to the powers of the Minister to overturn the decision taken by Merafong in the exercise of its fiscal powers. The Minister refers to *Habitat*,⁶⁷ where this Court confirmed that the power of regulating, as set out in section 155(7) of the Constitution, means creating norms and guidelines for the exercise of a power or the performance of a function. The Minister submits that it does not mean the usurpation of the power or the performance of the function itself.

[51] The Minister contends that the provisions of section 8(9) of the WSA read on their own, and in the context of section 8 and the WSA as a whole, do not offend the principles established by the Constitution. Instead, she contends, the provision fulfils the purpose of section 155(7) of the Constitution, providing the national executive with the authority to ensure municipalities effectively perform Schedule 4 functions.⁶⁸ The Minister argues that section 8(9) of the WSA cannot be unconstitutional in respect of any power accorded to the Minister for water utilised for industrial or mining purposes. Schedule 4 Part B only grants exclusive authority to municipalities in respect of potable water supply systems. She submits that Merafong’s constitutional attack is overbroad. She contends that in the absence of exclusive authority accorded to municipalities, the right of appeal to the Minister in respect of any decision on these aspects cannot be said to be in contravention of the Constitution.

Issues to be determined

[52] The following issues need to be determined:

- (a) whether condonation for the late filing of the application for leave to appeal should be granted;

⁶⁷ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* [2014] ZACC 9; 2014 (4) SA 437 (CC); 2014 (5) BCLR 591 (CC) at para 22.

⁶⁸ Section 155(7) reads:

“The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).”

- (b) whether this Court's jurisdiction is engaged;
- (c) whether leave to appeal and cross-appeal should be granted;
- (d) whether Merafong's delay in bringing the review application was unreasonable;
- (e) whether the time-restricted order granted by the Supreme Court of Appeal should be upheld; and
- (f) whether the constitutional issue in relation to section 8(9) of the WSA should be determined and if so whether section 8(9) is unconstitutional.

Analysis

Condonation

[53] The opposition to the application for condonation for the late filing of the application for leave to appeal was not persisted with in argument. In any event, the delay was negligible and a reasonable explanation was provided. As a result, condonation is granted.

Jurisdiction and applications for leave to appeal and cross-appeal

[54] This Court's constitutional and general jurisdiction is engaged in terms of sections 167(3)(b)(i) and (ii) of the Constitution. This matter deals with the important interface between the powers of national and local government and the constitutionality of section 8(9) of the WSA, which engages this Court's constitutional jurisdiction. It also raises arguable points of law of general public importance, which ought to be considered by this Court in relation to the powers of the different spheres of government when setting tariffs for water use. The appeal and cross-appeal have reasonable prospects of success and it is in the interests of justice to grant leave. In addition, the nature of the constitutional issues raised concerning the remediation of unlawful conduct by an organ of state are of public importance and warrants the attention of this Court in the interests of justice. Therefore, this Court's jurisdiction is engaged and the applications for leave to appeal and cross-appeal should be granted.

Merits

The delay in launching the review

[55] Although the question about the delay may have been reopened by this appeal, the Supreme Court of Appeal cannot be faulted in its analysis and conclusion regarding the delay. It correctly held that the delay was unreasonable, not only by reason of the length of the delay, but also because Merafong failed to bring the review when it understood that it was required to do so. The Supreme Court of Appeal was also correct in finding that the High Court incorrectly interpreted the *Khumalo* two-stage condonation test as an invitation to determine the merits of Merafong’s review.⁶⁹ The Supreme Court of Appeal was thus correct in refusing condonation for the delay in bringing the review application and dismissing the review on this basis.

[56] The delay in bringing the review was inordinate. Merafong launched its review application on 26 July 2017 when it delivered its supplementary affidavit and notice of motion pursuant to this Court’s remittal order. That is slightly short of 13 years from the date of the Minister’s decision. Based on the legal advice of its attorney, Merafong was told as far back as 5 April 2006 that it had a case to ask the court to overturn the Minister’s decision, but it failed to approach the court to have it set aside. The Supreme Court of Appeal rightly characterised the delay as “unreasonable, and egregiously so”.⁷⁰ It cannot be faulted for holding that what further weighed heavily against Merafong was that “[Merafong] failed to bring the review, when it clearly understood that it was required to do so. And then resorted to self-help in the face of the Minister’s decision”.⁷¹

The time-restricted order

[57] The Supreme Court of Appeal’s time-restricted order was premised on an interpretation of the scope of the appeal power of the Minister in the WSA and the ambit

⁶⁹ Supreme Court of Appeal II above n 45 at para 24.

⁷⁰ Id at para 48.

⁷¹ Id.

of the Minister's appeal decision, which is the basis for its declaration of invalidity. AngloGold seeks leave to appeal only against the parts of the judgment of the Supreme Court of Appeal that limit the setting aside of the unlawful surcharges to (effectively) one financial year. The Supreme Court of Appeal held that the original tariff setting for the 2004/2005 financial year sought to extract surcharges for water for industrial use in excess of the charges made by Rand Water, and that the Minister's decision had rendered such excess unlawful.⁷² A similar conclusion was reached in respect of water for domestic use.⁷³

[58] The Minister's directive in her letter of 18 July 2005 was that no surcharges could be imposed on the supply of water for industrial use. She did not rule that Merafong was not entitled to impose a reasonable tariff, which would include a surcharge, on the supply of water for domestic use. She directed that Merafong, AngloGold and Rand Water should negotiate a reasonable tariff on the water for domestic use. The Supreme Court of Appeal correctly concluded that the Minister's decision rendered the tariffs for water for industrial use unlawful and that a similar conclusion is warranted regarding water for domestic use, even though she did not expressly set it aside. This was indeed the necessary implication of the requirement for negotiations.⁷⁴

[59] The Minister's 2005 appeal decision entailed that it was unreasonable for Merafong to impose a surcharge on services provided where it added no value. In terms of the definition of "water supply services" in section 1 of the Act, a surcharge could in any event not be imposed on water for industrial use. Because she determined that the charges levied on water for domestic use were unreasonable, given that Merafong added no value, she decided that the parties should negotiate a reasonable tariff for a surcharge for domestic use. The Minister's decision was disregarded and Merafong continued to levy surcharges in exactly the same way in subsequent years. The only logical

⁷² Supreme Court of Appeal II above n 45 at para 73.

⁷³ Id at para 74.

⁷⁴ Id at paras 74-5.

conclusion is that the tariffs, after the 2004/2005 financial year, were equally non-compliant. As the original decision was set aside, no valid decisions could subsequently have been taken by Merafong until the Minister's decision was reviewed and set aside. This does not detract from Merafong's constitutional entitlement to levy surcharges in subsequent years, but on the evidence before us, there is no indication whatsoever that in subsequent years Merafong added any value or that the surcharges were reasonable. The effect of the Supreme Court of Appeal's restriction on its declaration of unlawfulness is that Merafong is allowed to benefit from its continued breach of its statutory and constitutional duties by keeping the proceeds of tariffs unlawfully imposed after the 2004/2005 financial year.

[60] What happened in this matter is comparable with what occurred in *Lombardy Development*,⁷⁵ where the Supreme Court of Appeal considered the consequences of municipal property rates levied on the market value of immovable property in accordance with the Local Government: Municipal Property Rates Act⁷⁶ (MPRA). The MPRA requires that a municipality must prepare a valuation roll reflecting the valuations containing the market value of the individual properties, limited to the time for which it is valid.⁷⁷ The Court found that the regulatory procedures for compilation of a valuation roll are prerequisites for the power to collect rates. If the procedures were not followed, each consequent collection of rates premised on the valuation roll was invalid.⁷⁸

[61] The same reasoning should be followed here. The Minister's decision found that the surcharges levied were unreasonable because Merafong did not add any value. After all, AngloGold provided and maintained the infrastructure. The levies charged on industrial use fell outside the powers of Merafong and the levies charged on water for

⁷⁵ *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd* [2018] ZASCA 77; [2018] 3 All SA 605 (SCA).

⁷⁶ 6 of 2004.

⁷⁷ Id at section 3, as read with sections 32 and 48.

⁷⁸ Id at sections 21-3.

domestic use were unreasonable, therefore the Minister requested the parties to re-negotiate it. These negotiations came to naught, but that did not render the charges reasonable and it did not negate the decision of the Minister that they were unreasonable to begin with.

[62] A review and setting aside of the Minister's decision was still required by the municipality. The subsequent tariffs owed their existence to the original decision because each following year builds on the base of the original tariff setting. Merafong could not merely proceed to levy surcharges on the same basis in subsequent years considering the Minister's decision that it was unreasonable to do so. To first review and set aside the decision is in accordance with the principle established in *Oudekraal*⁷⁹ that if a party wishes to nullify or avert consequences that owe, or would owe, their existence to an initial unlawful administrative act, that initial act must be set aside.⁸⁰ On that principle, absent the setting aside of the administrative act (the Minister's appeal decision), it is inconceivable that Merafong could proceed to enforce substantially the same decision in consecutive years. The Supreme Court of Appeal did not consistently apply this principle in its judgment. Although it was acknowledged that an administrative act was valid until set aside, the principle was not applied to consecutive years.⁸¹

[63] The *Oudekraal* principle does not only apply to instances where there is a consequent act whose existence depends on an earlier unlawful act. It applies to any situation where an extant administrative act is being disregarded without first being set aside. In *Magnificent Mile*, this Court, quoting the statement of the majority in *Kirland*⁸² explained:

⁷⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA).

⁸⁰ *Magnificent Mile Trading 30 (Pty) Ltd v Celliers N.O.* [2019] ZACC 36; 2020 (1) BCLR 41 (CC); 2020 (4) SA 375 (CC) (*Magnificent Mile*) at para 43.

⁸¹ Supreme Court of Appeal II above n 45 at para 146.

⁸² *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC).

“The fundamental notion – that official conduct is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in *Welkom*—

‘[t]he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.’

For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help.”⁸³

[64] The Supreme Court of Appeal held that when the Minister set aside the tariffs that Merafong decided upon in 2004, her appeal jurisdiction could not and did not extend beyond the life of those tariffs.⁸⁴ And when Merafong introduced new tariffs in the 2005/2006 financial year, that decision was beyond the reach of the Minister’s appellate decision-making, because it was not before her.⁸⁵ The problem with this approach is that it allows Merafong, even though it has been determined that the manner in which surcharges were levied is unlawful, to continue to impose the surcharges on exactly the same basis. The underlying reasoning that supported the Minister’s decision was that given the fact that Merafong did not add any value, the surcharges levied were unreasonable. In the following years this did not change; therefore the basis of the Minister’s decision extended to subsequent years. To allow Merafong to continue with unlawful conduct, contrary to the established principles set out in all the authorities referred to above, would not be legally sound. There is a further unintended consequence that would result if this is allowed. Merafong could in the same manner levy surcharges each year. It would lead to uncertainty and continuous litigation, which would not be in the interests of justice, especially in circumstances where the litigation

⁸³ *Magnificent Mile* above n 80 at para 51, quoting *Kirland* id at para 103. See also *Head of Department, Department of Education, Free State Province v Welkom High School*; *Head of Department, Department of Education, Free State Province v Harmony High School* [2013] ZACC 25; 2014 (2) SA 228 (CC); 2013 (9) BCLR 989 (CC); at para 86.

⁸⁴ Supreme Court of Appeal II above n 45 at para 56.

⁸⁵ *Id.*

between the parties has already spanned over a period of more than 14 years. AngloGold is correct that the effect of restricting to a single year the consequence of Merafong's sustained failure to comply with the Minister's decision is that Merafong continues to enjoy a substantial benefit from unlawful conduct. The Supreme Court of Appeal thus erred when it held that the time restriction should apply to the tariffs.

A just and equitable remedy

[65] Just and equitable relief granted to a party which succeeds in the setting aside of unlawful administrative action must equally and axiomatically apply to a party that has succeeded in upholding a decision which constitutes administrative action. Factors that bear consideration in determining appropriate relief envisaged in section 172 of the Constitution include: what is fair and just in the circumstances of a particular case; the weighing up of the various interests that might be affected by the remedy, guided by the objective to address the wrong occasioned by the infringement; deterring future violations; the making of an order which can be complied with and which is fair to all those who might be affected by the relief; and the nature of the infringement which will provide guidance as to the appropriate relief.⁸⁶

[66] Courts must ensure that the remedy is appropriate and effective. Thus, in *Steenkamp*,⁸⁷ this Court held:

“The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and

⁸⁶ *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) at para 85.

⁸⁷ *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.”⁸⁸

[67] The prejudice that AngloGold has suffered, directly consequent upon Merafong’s refusal to comply with the Minister’s decision, is financial. AngloGold says that for the period from January 2009 to August 2017, the amount overpaid (excluding interest) is the undisputed sum of R126 462 558. This amount will have increased by now. AngloGold submitted that just and equitable relief requires Merafong to repay amounts unlawfully exacted, but during argument conceded that the financial implication of ordering such repayment may have calamitous financial implications for Merafong, which is constitutionally obliged to deliver services to the public. The remedy must furthermore provide for the fact that Merafong is entitled to have levied surcharges in subsequent years, but should have done so only after the decision of the Minister had been set aside and should have met the requirements for lawful administrative action as set out in the PAJA.

[68] Although repayment was not sought at the outset of the matter, AngloGold has brought such a claim in a later action. After delivery of the judgment in the High Court, AngloGold instituted an action on 26 June 2014 for the recovery of the surcharges unlawfully levied upon it and paid by it contrary to the Minister’s ruling, which at that stage amounted to R91 327 196.89, plus interest at the statutory rate. By agreement, the action was stayed pending the resolution of the appeal that had been brought by Merafong.⁸⁹

[69] AngloGold has always denied its liability for additional charges imposed by Merafong on the supply of water. When it withheld certain payments, Merafong threatened to limit the supply of water. This would have had highly detrimental consequences for AngloGold. Thus, AngloGold notified Merafong that it would resume payments under protest, without prejudice to its rights and without making any

⁸⁸ Id at para 29.

⁸⁹ High Court I above n 13.

concessions or admissions. AngloGold followed a time-honoured and recognised remedy of payment under protest. This approach avoided the risks inherent in litigation, whilst ensuring that its business could continue without interruption and the financial damage that could follow from that.

[70] In *Thaba Chweu Rural Forum*,⁹⁰ the municipality had for an extended period failed to differentiate rates for different categories of property and in accordance with the use of that property. On appeal to the Supreme Court of Appeal, the Court considered the request for a declaration of invalidity and a just and equitable order in terms of section 172(1)(b).⁹¹ It was held that the municipality's contraventions of the law were not once-off events, "such as the unlawful awarding of a tender, but [the respondents] were engaged in unlawful conduct repeatedly in every financial year from 2009 to 2017".⁹² The unlawful conduct continued despite the appellant's vociferous questioning of the illegality of the municipality's conduct.⁹³ The Court found that "the municipality cannot seriously argue that it is entitled to claim the spoils of unlawfully overcharging the ratepayers".⁹⁴ The Court set aside the rate notices, including resolutions of the municipal council on which all such rate notices were based, to the extent that they related to certain agricultural properties, and directed the municipality to credit the accounts of the appellants' members to the extent that the amounts were more than the legally permissible limit.⁹⁵ In my view, this approach is the only legally sound one that could be followed in this matter, but the financial implications that it will have for Merafong must be taken into account when crafting an appropriate remedy.

⁹⁰ *Thaba Chweu Rural Forum v The Thaba Chweu Local Municipality* [2023] ZASCA 25.

⁹¹ *Id* at paras 17-18.

⁹² *Id* at paras 30-3.

⁹³ *Id* at para 30(b).

⁹⁴ *Id* at para 34.

⁹⁵ *Id* at para 40.

[71] The need for flexibility in providing a remedy in terms of section 172(1)(b) is illustrated in *Casino Association*.⁹⁶ The applicants challenged the constitutional validity of various provisions of the North West Gambling Act.⁹⁷ It was held that:

“Just and equitable relief should generally be aimed at correcting or reversing the consequences of unconstitutional action. In *Allpay II*, this Court articulated what it referred to as the ‘corrective principle’ as follows: ‘Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed’.”⁹⁸

This Court can and should address the issue of repayment; not doing so will defeat the whole purpose of the litigation between the parties.

[72] The protracted litigation between the parties should ideally reach finality. But this Court cannot ignore the impact that a repayment order will have on the financial position of Merafong and its ability to provide services to the public. The remedy must also acknowledge the statutory entitlement of a municipality to level surcharges. An order will have to be structured in a way that ensures repayment but also ensures sustainable service delivery by Merafong to the public. Nothing has been placed before us to assist in the determination of reasonable surcharges in subsequent years or a viable repayment schedule by Merafong. During argument, the possibility of awarding credit to AngloGold was discussed, but no solution was proffered.

[73] Under these circumstances, the only viable option is to order negotiation of reasonable surcharges and repayment, but to give the parties the opportunity to agree on a repayment schedule within a period of six months, from date of this order. Failing which, they must resort to mediation by an independent mediator with the necessary financial background to consider viable repayment options. Rule 41A of the Uniform

⁹⁶ *Casino Association of South Africa v Member of the Executive Council for Economic Development, Environment, Conservation and Tourism* [2023] ZACC 39; 2024 (5) BCLR 611 (CC).

⁹⁷ 2 of 2001.

⁹⁸ *Casino Association* above n 96 at para 68.

Rules of Court, which envisages voluntary mediation, does not find application here, but nothing prevents this Court, when formulating a just and equitable remedy, to direct parties to participate in mediation in an attempt to prevent further litigation. This will serve the interests of justice and will be just and equitable. The right of access to a court of law envisaged in section 34 of the Constitution will not be encroached on because the parties may, if mediation fails, approach the High Court with their respective proposals for repayment, supported by their motivations for such proposals in writing. The High Court will then hear argument, consider the proposals and make an appropriate order.

The constitutional challenge

[74] Merafong's constitutional challenge to section 8(9), read with section 8(7) of the WSA, progressed as follows through the courts: Merafong's answering affidavit filed in AngloGold's enforcement application in the High Court attached a notice of conditional counter-application. The primary relief sought was based upon a proper interpretation of section 8(9), read with section 8(7) of the WSA, read with Chapter 7 of the Constitution and sections 4 and 11 of the Systems Act. Merafong's contention was that the WSA does not confer authority on the Minister to interfere with a tariff set and implemented by Merafong for water services provided in its area of jurisdiction. In the event of it being found that the WSA did confer power to the Minister in terms of section 8(9), Merafong sought an order that the provisions of section 8(9) of the WSA are to that extent unconstitutional and invalid.⁹⁹ The High Court dismissed the conditional counter-application for the reasons set out above.¹⁰⁰

[75] Merafong sought and was granted leave to appeal to the Supreme Court of Appeal against the whole judgment and order. The counter-application was not raised in argument before the Supreme Court of Appeal. Merafong's contention was that it was excused from taking the steps because of an entitlement to raise a collateral challenge to the validity of the administrative action.

⁹⁹ SCA I above n 14 at para 14.

¹⁰⁰ Above at [18].

The Court held that such a challenge was not available and dismissed the appeal, reasoning that Merafong's challenge was expressly limited to an administrative law challenge.

[76] The judgment of this Court in *Merafong CC* accorded the Municipality an opportunity to raise the constitutional point on remittal to the High Court, should it so desire. When the review was filed by Merafong, it sought no relief relating to the constitutionality of section 8(9) of the WSA, or any other section. One court day before the hearing commenced, Merafong gave notice that it intends to apply at the hearing for an order declaring section 8(9) of the WSA to be inconsistent with the Constitution, invalid and that it be set aside. This was not countenanced by the High Court and the finding was approved by the Supreme Court of Appeal.

[77] However, one thing is clear from the litigation, and that is at the heart of the litigation between the parties, there has always been tension between the functions and role of municipalities on the one hand, and, on the other hand, the authority of national government in terms of the WSA and the Constitution. It will be to put form over substance not to address this issue once and for all.

[78] The point of departure in the analysis of the constitutional challenge to section 8(9) of the WSA must be the role and function of local government in relation specifically to the supply of water services. The jurisprudence of this Court bears testimony to the important balancing act that is required to do justice to the role and function of each sphere of government.

[79] In *Outdoor Media*,¹⁰¹ the relationship between the different spheres of government was explained as follows:

¹⁰¹ *Cape Town City v Independent Outdoor Media (Pty) Ltd* [2023] ZACC 17; 2024 (1) SA 309 (CC); 2024 (4) BCLR 483 (CC).

“A municipality enjoys constitutionally entrenched powers in a co-operative government in terms of section 151(4) of the Constitution. The national and provincial spheres of government may not intrude on its terrain. This Court affirmed this position in *Robertson*:

‘The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, “inviolable and possesses the constitutional latitude within which to define and express its unique character” subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys “original” and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of a municipality is not always invalid only for the reason that no legislation authorises it. Its power may derive from the Constitution or from legislation of a competent authority or from its own laws.’”¹⁰²

[80] However, the powers conferred by the Constitution on local government are neither unlimited, nor unconstrained; they are subject to the constraints permissible under the Constitution.¹⁰³ The purpose of Schedules 4 and 5 to the Constitution is to itemise powers and functions allocated to each sphere of government, with some degree of autonomy for each sphere as contemplated by the Constitution. In *Outa*,¹⁰⁴ it was held:

“It is clear from the jurisprudence of this court as reflected in the cases discussed above that, in order to determine whether a piece of legislation falls within a particular functional area in either schedule 4 or schedule 5 of the Constitution, a court is required

¹⁰² Id at para 52, citing *City of Cape Town v Robertson* [2004] ZACC 21; 2005 (2) SA 323 (CC); 2005 (3) BCLR 199 (CC).

¹⁰³ *Robertson* id at para 60.

¹⁰⁴ *Organisation Undoing Tax Abuse v Minister of Transport* [2023] ZACC 24; 2023 (10) BCLR 1189 (CC); 2024 (1) SA 21 (CC) at para 82.

to determine the subject-matter of that legislation and then see within which sphere of government's functional area it falls. Determining the subject-matter of legislation entails considering its substance, purpose and effects. It entails determining what the legislation is about or determining its character.”¹⁰⁵

The functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments that remain distinct from one another.

[81] A municipality has the right to govern on its own initiative the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.¹⁰⁶ The national government has, subject to section 155(7),¹⁰⁷ the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of the matters listed in Schedules 4 and 5. This is accomplished by regulating the exercise by municipalities of their executive authority referred to in section 156(1).¹⁰⁸ A municipality has executive authority in respect of, and has the right to administer, among others, the local government matters listed in

¹⁰⁵ Id at para 87.

¹⁰⁶ Section 151 of the Constitution reads as follows:

- “(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
- (2) The executive and legislative authority of a municipality is vested in its Municipal Council.
- (3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
- (4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.”

¹⁰⁷ Section 155(7) reads as follows:

“The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).”

¹⁰⁸ Section 156(1) provides:

- “(1) A municipality has executive authority in respect of, and has the right to administer—
 - (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
 - (b) any other matter assigned to it by national or provincial legislation.”

Part B of Schedule 4. There is concurrent national and provincial legislative competence over the functional areas set out in Schedule 4 of the Constitution. In Part B, this competence extends to the matters set out in sections 155(6)(a) and (7), and this includes water and sanitation services limited to potable water supply systems and domestic waste-water and sewerage disposal systems.¹⁰⁹ The power of a municipality to impose, among others, surcharges on fees for services provided by or on its behalf, or other taxes, levies or duties may be regulated by national legislation.¹¹⁰

¹⁰⁹ Schedule 4 Part B provides:

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

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

¹¹⁰ Section 229 of the Constitution reads as follows:

- “(1) Subject to subsections (2), (3) and (4), a municipality may impose—
- (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
 - (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.
- (2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties—

[82] *Habitat*¹¹¹ dealt with the constitutionality of section 44 of the Land Use Planning Ordinance,¹¹² where it was held that all municipal planning decisions that encompass

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- (a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and
 - (b) may be regulated by national legislation.”

See *Independent Outdoor Media* above n 101 at paras 45-6.

¹¹¹ *Habitat* above n 67 at para 49.

¹¹² 15 of 1985. The Land Use Planning Ordinance (LUPO) is old-order provincial legislation enacted by the former Cape Province. Responsibility for its administration was assigned by presidential proclamation to the Western Cape provincial government (and to the Eastern Cape and Northern Cape governments, to the extent that it applies within those provinces) in June 1994. Section 44 of LUPO is headed “Appeal to Administrator” and provides:

- “(1) (a) An applicant in respect of an application to a council in terms of this Ordinance, and a person who has objected to the granting of such application in terms of this Ordinance, may appeal to the Administrator, in such manner and within such period as may be prescribed by regulation, against the refusal or granting or conditional granting of such application.
- (b) A person aggrieved by a decision of a council in terms of section 14(1), (2), (3), (4)(d) or (5) or section 16(2)(b) or 40(4)(c) may appeal to the Administrator in such manner and within such period as may be prescribed by regulation, against such decision.
- (c) A person aggrieved by a decision of a council in the application of section 18 may similarly appeal to the Administrator against such decision.
- (d) For the purposes of sections 15(3), 17(3) and 24(3) provision may be made by regulation therein referred to for a right of appeal to the Administrator in the manner prescribed by such regulation.
- (2) The Administrator may, after consultation with the council concerned, in his discretion dismiss an appeal contemplated in subsection (1)(a), (b), (c) or (d) or uphold it wholly or in part or make a decision in relation thereto which the council concerned could have made.
- (3) For the purposes of this Ordinance—
 - (a) an application referred to in subsection (1)(a) shall be deemed to have been granted or conditionally granted or refused by the council concerned in accordance with action taken by the Administrator under the provisions of subsection (2);
 - (b) a decision referred to in subsection (1)(b) or (c) shall be deemed to be a decision of the council concerned in accordance with action taken by the Administrator under the provisions of subsection (2); and
 - (c) a decision made by the Administrator under the provisions of subsection (2) shall be deemed to have been made by the council concerned.”

In terms of section 2 of LUPO “Administrator” means the competent authority to which the administration of LUPO has been assigned by the Premier of the Western Cape, namely the applicant provincial minister.

zoning and subdivision, lie within the competence of municipalities.¹¹³ The Constitution expressly envisages that national and provincial governments have legislative and executive authority to see to the effective performance by municipalities of their planning functions.¹¹⁴ This Court explained in *Habitat*:

“That constitutional vision of robust municipal powers has been expanded in the jurisprudence of this Court, and succinctly summarised by Mhlantla AJ in *Lagoonbay*:

‘This Court’s jurisprudence quite clearly establishes that: (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved; (c) while the Constitution confers planning responsibilities on each of the spheres of government, those are *different* planning responsibilities, based on “what is appropriate to each sphere”; (d) “‘planning’ in the context of municipal affairs is a term which has assumed a particular, well-established meaning *which includes the zoning of land and the establishment of townships*”; and (e) the provincial competence for “urban and rural development” is not wide enough to include powers that form part of “municipal planning”.’¹¹⁵ (Emphasis added.)

[83] There can be no doubt about the constitutionally entrenched powers of municipalities, but it is also important to acknowledge that certain constraints to their powers are permissible and even imperative as long as they are in line with the Constitution, and the limitations do not unjustifiably interfere with the role and function of local government. So, due deference must be paid to the roles of municipalities, but when tension arises between different spheres of government, the proper approach is to consider the relevant issue and the legislation involved within the broader context of the constitutional vision.

¹¹³ *Habitat* above n 67 at para 19.

¹¹⁴ *Id* at paras 19-20.

¹¹⁵ *Id* at para 19.

[84] The point of departure is to determine what the legislation envisages and that requires a determination of its character.¹¹⁶ The enquiry should be directed at the purpose for which the legislative instrument was enacted.¹¹⁷ The purpose of the WSA can be gleaned from its provisions. These are, amongst others, the duty on all spheres of government to—

- (a) ensure that water supply services and sanitation services are provided in a manner which is efficient, equitable and sustainable;¹¹⁸
- (b) strive to provide water supply services sufficient for subsistence and sustainable economic activity;¹¹⁹
- (c) recognise that the provision of water supply services must be undertaken in a manner consistent with the broader goals of water resource management, and that the interests of consumers and the broader goals of public policy must be promoted;¹²⁰
- (d) confirm the National Government's role as custodian of the nation's water resources;¹²¹
- (e) set national standards, and norms and standards for tariffs in respect of water services;¹²² and
- (f) provide a regulatory framework for water services institutions and water services intermediaries.¹²³

[85] National government's role as custodian of the country's water resources takes centre stage in the determination of the constitutional issue raised by Merafong. National government and the Minister's roles in that capacity run like a golden thread through

¹¹⁶ *Outa* above n 104 at para 87.

¹¹⁷ *Id* at para 49, quoting *Western Cape Provincial Government In Re: DVB Behuising (Pty) Limited v North West Provincial Government* [2000] ZACC 2; 2000 (4) BCLR 347 (CC); (1) SA 500 CC at para 37.

¹¹⁸ Preamble of the WSA.

¹¹⁹ *Id*.

¹²⁰ *Id*.

¹²¹ *Id*.

¹²² Section 2(b) of the WSA.

¹²³ Section 2(d) of the WSA.

the legislation. This is also illustrated by the power to monitor water services and intervention by the Minister or by the relevant province. However, the power of the Minister to monitor envisaged in section 62 should be approached with some circumspection.¹²⁴ In *Habitat*, this Court said the following in relation to this power:

“[T]he powers in section 155(7), this court has held, are ‘hands-off’. In the First Certification case the court described those powers thus:

‘In its various textual forms “monitor” corresponds to “observe”, “keep under review” and the like. In this sense it does not represent a substantial power in itself, certainly not a power to control [local government] affairs, but has reference to other, broader powers of supervision and control. . . . We do not interpret the monitoring power as bestowing additional or residual powers of provincial intrusion on the domain of [local government], beyond perhaps the power to measure or test at intervals [local government] compliance with national and provincial legislative directives or with the [Constitution] itself. What the [Constitution] seeks hereby to realise is a structure for [local government] that, on the one hand, reveals a concern for the autonomy and integrity of [local government] and prescribes a hands-off relationship between [local government] and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor [local government] functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy.’

¹²⁴ Section 62(1)(b) of the WSA provides:

“(1) The Minister and any relevant Province must monitor the performance of every water services institution in order to ensure-

- (a) compliance with all applicable national standards prescribed under this Act;
 - (b) compliance with all norms and standards for tariffs prescribed under this Act; and
 - (c) compliance with every applicable development plan, policy statement or business plan adopted in terms of this Act.
- (2) Every water services institution must-
- (a) furnish such information as may be required by the Minister after consultation with the Minister for Provincial Affairs and Constitutional Development; and
 - (b) allow the Minister access to its books, records and physical assets to the extent necessary for the Minister to carry out the monitoring functions contemplated in subsection (1).”

It follows that ‘regulating’ in section 155(7) means creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself. This is because the power of regulation is afforded to national and provincial governments in order ‘to see to the effective performance by municipalities of their functions’. The constitutional scheme does not envisage the province employing appellate power over municipalities’ exercise of their planning functions. This is so, even where the zoning, subdivision or land-use permission has province-wide implications.”¹²⁵

[86] In this instance we are dealing with national government’s role as custodian of water services, and this finds expression in the WSA which creates a system of regulation and oversight of conditions for water supply. This system includes the creation of norms and standards for tariffs relating to water supply services. This system includes a regulatory mechanism that imposes a duty on the Minister to monitor tariffs and to intervene on appeal at the instance of a consumer.¹²⁶

[87] In *Sembcorp*,¹²⁷ this Court considered a review decision of the Minister of Water and Sanitation to confirm a tariff imposed by a water board in respect of a bulk water consumer.¹²⁸ On the Minister’s role under the WSA, the majority of the Court referred to the national norms and standards in terms of section 9 of the WSA. It was concluded that different considerations may be considered by the Minister for differentiation on an equitable basis between different water users, and she may place limitations on surplus or profit. Reference was also made to section 10(4) of the WSA, which prohibits a water services institution using a tariff which is substantially different to any of the prescribed norms and standards.¹²⁹ In its analysis, this Court found no power

¹²⁵ *Habitat* above n 67 at paras 21-2.

¹²⁶ Sections 8(4) and (9) and 62(1)(b) of the WSA.

¹²⁷ *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd* [2021] ZACC 21; 2021 (10) BCLR 1152 (CC); 2023 (1) SA 1 (CC).

¹²⁸ *Id* at para 3.

¹²⁹ *Id* at paras 74-5.

within the WSA by which the Minister had to approve tariff increases, whether on an equal or differential basis, or at all.¹³⁰ This Court noted that the powers granted to the Minister in terms of the WSA are aimed at developing and implementing matters of national interest.¹³¹

[88] In this instance, the Minister was not required to, nor did she attempt to, approve the tariff increases. She was approached on appeal in terms of section 8(4) of the WSA to consider the reasonableness of the surcharges levied by Merafong. The Minister's 2005 appeal decision was that it was unreasonable for Merafong to impose a surcharge on services provided where it added no value. She concluded that in terms of section 1 of the Act, a surcharge could not be imposed on water for industrial use and she decided that the parties should negotiate reasonable tariffs for a surcharge for water for domestic use. The Minister's powers in terms of section 8(9) are in harmony with the WSA and the provisions of the Constitution, as contemplated in sections 155(7) and 229(2)(b).

[89] There is a further reason why striking down section 8(9) is not appropriate. Doing so would render the WSA ambiguous and would leave water consumers in an anomalous position. National government and the Minister's role are repeatedly referred to, starting with the long title where provision is specifically made for the monitoring, intervention and general powers of the Minister. The interconnectedness of all spheres of government in relation to the supply and management of water is repeatedly referred to in the preamble, where national government's role as custodian of water resources is emphasised. Section 8(4) grants a right of appeal to the Minister and that right then comes to fruition in section 8(9), where the Minister is given powers on appeal to confirm, vary or overturn any decision of the water authority. The right of appeal would be rather hollow without the accompanying powers to act on appeal.

¹³⁰ Id at paras 77-80.

¹³¹ Id at para 82.

[90] The role of the Minister continues to be defined in other sections of the WSA. Chapter II deals with standards and tariffs. Section 9 deals with standards and empowers the Minister to prescribe compulsory national standards. Section 10 gives the Minister the power to, with the concurrence of the Minister of Finance, prescribe norms and standards in respect of water services. Section 10(4) specifically states that no water services institution may use a tariff which is substantially different from any prescribed norms and standards.

[91] Chapter VIII deals with monitoring and intervention and section 62 empowers the Minister and the Provincial Government to monitor every water services institution and ensure, specifically in section 62(1)(c), compliance with the norms and standards for tariffs under the WSA.

[92] The whole scheme of the WSA is clearly drafted to provide national government, as custodian of water resources, with the powers oversee the management and provision of water services in the country. The powers of municipalities should be exercised in the context of the Constitution read with the WSA.

[93] From a consumer's perspective, the norms and standards imposed by the Minister for the regulation of water tariffs would continue to apply, but without any mechanism for its regulation. This would mean that the right of a consumer to pay no more than reasonable tariffs for the supply of water would depend solely on the optimistic hope that the municipality will closely comply with the norms and standards. The consumer is left with the Hobson's choice of either accepting a tariff contrary to the norms and standards or being cut-off from supply. For all these reasons, section 8(9) is not unconstitutional and the cross-appeal should be dismissed.

Order

The following order is made:

1. The applications for leave to appeal and cross-appeal are granted.
2. The appeal is upheld with costs, including the costs of three counsel.

3. The first respondent's cross-appeal is dismissed with costs, including the costs of three counsel.
4. The order of the Supreme Court of Appeal in Case No. 338/2022 is set aside and substituted with the following:
 - “(a) The first respondent's review application is dismissed with costs, including the costs of two counsel.
 - (b) It is declared that:
 - (i) The surcharge charged by the first respondent on the supply of water to the applicant for industrial use from the period 1 July 2004, and all subsequent surcharges in excess of the tariff charged to the first respondent by Rand Water from time to time and in contravention of the decision of the Minister of Water Affairs and Sanitation dated 18 July 2005, is unlawful.
 - (ii) The surcharge charged by the first respondent on the supply of water to the applicant for domestic use from the period 1 July 2004, in excess of the tariff charged to the first respondent by Rand Water from time to time and in contravention of the decision of the Minister of Water Affairs and Sanitation dated 18 July 2005, is unlawful.
 - (iii) The first respondent and the applicant are ordered to negotiate reasonable surcharges, if any, for water for domestic use and method of repayment or set-off within a period of six months from the date of this judgment of the difference between:
 - (1) the tariffs so levied by Rand Water from time to time, plus any agreed surcharge and the amount charged by the first respondent on the supply of water to the applicant for industrial use, from 1 July 2004.

- (2) the tariffs so levied by Rand Water from time to time, plus any agreed surcharge and the amount charged by the first respondent on the supply of water to the applicant for domestic use, from 1 July 2004.
- (iv) The first respondent is ordered to pay interest on the respective amounts at the prescribed rate from 1 July 2004 to the date of payment.
- (v) If the parties fail to come to an agreement within the six-month period, they must refer the matter to mediation before an independent duly qualified mediator. If mediation fails, the mediator will report in writing to the parties that mediation is terminated.
- (vi) The parties are in the event of failure of mediation ordered to file, within two months from the date of the mediator's report of termination of the mediation, with the High Court of South Africa, Gauteng Division, Pretoria (High Court) their respective repayment proposals together with a motivation thereof.
- (vii) The High Court must consider the proposals and motivation and issue an order.
- (viii) The first respondent is ordered to pay the applicant's costs including the costs of two counsel, in respect of the proceedings of the High Court in 2013 and in 2021 under Case No. 23558/2011, in the Supreme Court of Appeal under Case No. 20265/14 in 2015 and Case No. 338/2022 in 2023."

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