REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

26/2/2014 DATE

SIGNATURE

CASE NO: 23558/2011

26/2/2014

In the matter between:

ANGLOGOLD ASHANTI LTD **APPLICANT**

and

MERAFONG CITY LOCAL MUNICIPALITY **FIRST RESPONDENT**

RAND WATER **SECOND RESPONDENT**

MINISTER OF WATER AFFAIRS AND FORESTRY **THIRD RESPONDENT**

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] The responsibility for ensuring access to water lies in terms of the Water Services Act No 108 of 1997 (the WSA) with what the WSA refers to as the water services authorities. Water services authorities are defined in the WSA as, any municipality, including a district or rural council as defined in the Local Government Transition Act, 1993 (Act No. 209 of 1993), responsible for ensuring access to water. Section 11 (1) of the WSA provides that every water services authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services. A municipality established as a water services authority in terms of the WSA thus has a responsibility to ensure access to water in respect of water services, water for commercial and for industrial use, within its respective municipal area of jurisdiction.

[2] The WSA authorises a water services authority to supply the consumers or potential consumers within its area of jurisdiction with access to water services and/or water for industrial use. The term "water services" is defined in the WSA as water supply services and sanitation; "water supply services" is described as 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. "Industrial use" according to the WSA is the use of water for mining, manufacturing, generating electricity, land-based transport, construction or any related purpose. I shall for purposes of this judgment refer to water services as domestic water or water for domestic use.

[3] Where a water services authority is unable to provide water to the consumers within its area of jurisdiction it may nominate another person or entity as a water services provider in its stead. A water services provider is in terms of the WSA any person who provides water services to consumers or to another water services institution. Therefore in terms of the WSA a water services authority may undertake to provide communities within its area of jurisdiction with access to water and/or contract an external water services provider to undertake these services on its behalf in terms of a service delivery agreement.

[4] The Minister of Water Affairs and Forestry (the minister) is responsible for the WSA. In terms of the WSA the minister has established what is called Water Boards whose primary activity is to provide water services to other water services institutions within its service area. Water services authorities are also designated as water services institutions. A Water Board is thus a water services provider for purposes of the WSA. A Water Board may with the approval and on behalf of the water services authority having jurisdiction in the area supply water directly to consumers for industrial use and act as a direct supplier of domestic water to consumers (section 30 (1) (d) of the Act).

[5] The consumers who want to obtain water directly from a water services provider may do so with the approval of the water services authority in that area. For example, a water consumer who wants to use domestic water from a source other than a water services provider nominated by a water services authority may in terms of section 6 of the WSA apply for approval for such use from the water services authority having jurisdiction in the area in question. And a consumer may, in accordance with section 7 of the WSA, apply to the water services authority for approval to obtain water for industrial use from a source other than the distribution system of a water services provider nominated by the water services authority having jurisdiction in the area in question.

[6] A person who applied in terms of section 6 or 7 of the WSA may appeal any decision, including any condition imposed, by that water services authority in respect of that application to the Minister. (Section 8 (4) of the WSA).

[7] The applicant in this instance is AngloGold, a mining house which is the owner of certain mines known as Tautona, Mponeng and Suvuka Mines situated in the jurisdictional area of the first respondent. AngloGold is a water consumer and uses water for two primary purposes. Firstly, for industrial purposes such as dust allaying during drilling and rock handling, as a cooling medium, as transport medium and as a solvent in the metallurgical process; and secondly for domestic purposes, the water is used by AngloGold's employees housed on the mines premises.

[8] The first respondent (the municipality) is a category B municipality as provided for in section 2 of the Systems Act, and was established pursuant to the provisions of section 12 (1), 14 (2) and 90 (2) of the Structures Act read together with Government Gazette Notice 6769 of 2000. The first respondent has in terms of the WSA been established as a water services authority.

[9] The second respondent (Rand Water formerly Rand Water Board), was established under the previous provincial legislation and is now established as a water board in terms of the WSA.

[10] The third respondent is the Minister of Water Affairs and Forestry (the minister).

BACKGROUND

[11] Before dealing with the issues in this application, I propose to set out the salient facts upon which this application is based. At all times before the WSA came into operation and before the municipality was established as a water services authority, AngloGold, together with the other mining houses in the municipality's area of jurisdiction, were in terms of a series of agreements supplied water by Rand Water on an agreed tariff.

[12] The WSA came into operation on 19 December 1997 but the actual responsibility of the water services authorities was only passed to the respective municipalities in July 2003. The municipality in this instance was also established as a water services authority at that time. The municipality was however, unable to provide water services and water for industrial use to the consumer or potential consumers in its area of jurisdiction, and thus appointed Rand Water as its water services provider.

[13] By a letter dated 11 February 2004, the municipality sent notices to all mining houses within its area of jurisdiction, including AngloGold, notifying the said mining houses that with effect from 1 July 2003 it (the municipality) has been accorded the

powers and functions of a water services authority for the area within its jurisdiction. The mining houses were invited in that letter to apply, in terms of section 7 of the WSA, for approval from the municipality for the supply of water for industrial use. In a meeting convened by the municipality on 24 March 2004, the mining houses were advised about the implications of the WSA, the role of the water services authority as well as the proposed tariffs that the municipality intended to levy with effect from the beginning of the next financial year.

[14] On 8 April 2004, AngloGold applied to the municipality for approval to continue to be provided water directly by Rand Water for its mining operations and associated domestic applications at the tariff set, and under the conditions imposed by Rand Water.

[15] In a letter dated 31 May 2004 the mining houses, including AngloGold were notified that, the municipality as a water services authority, was taking over the responsibility for the direct supply of water to the mines in its area of jurisdiction. The effect of such notice was that the municipality would with effect from 1 July 2004 set the tariffs for water to be supplied to the mines. The letter further notified the mining houses that in order to ensure that the mining operations are not adversely affected by the new arrangements, the municipality appointed Rand Water to supply the mines with water as an agent and water services provider to the municipality. In terms of such appointment Rand Water was to directly supply the mines as an agent of the municipality with water, bill and collect water sales revenue and assume responsibility for water quality and other technical aspects of water supply to the mines. The mining houses were also notified about the tariff charges for the supply of water to the mines in respect of domestic and operations use, as approved by the municipality. The mining houses were also notified that in terms of section 7 of the Water Services Act the abovementioned were the conditions under which the municipality is approving their supply of water with effect from 1 July 2004. They were notified of their right to appeal the municipality's decision to the Minister of Water Affairs and Forestry within 21 days by lodging a written notice of appeal with the minister and the municipality.

[16] The tariffs set by the municipality are the same tariffs which Rand Water would have charged AngloGold should the municipality have agreed that AngloGold be supplied water directly by Rand Water. However, over and above the set tariffs the municipality also imposed a surcharge for such services.

[17] In response to the decision taken by the municipality, AngloGold lodged an appeal with the minister in terms of section 8 (4) of the WSA. The appeal was against the tariffs, in particular the surcharge imposed by the municipality. The Minister acting in terms of section 8 (9) of the WSA, upheld the appeal. She varied the municipality's decision and ruled that the municipality may not impose a surcharge on water for industrial use; and directed the municipality, AngloGold and Rand Water to negotiate a reasonable tariff on the portion of water that the mines are using for domestic purposes.

[18] Following the minister's ruling there were attempted negotiations by the parties which fell through. The municipality, on the strength of a legal opinion which advised it that the minister's ruling was invalid, ignored that ruling. It adopted an attitude that the minister's ruling is invalid and unlawful and has refused and/or failed to enforce it. In the meanwhile it proceeded to levy the surcharge, increasing over time, on water used by AngloGold for both domestic and industrial purposes. At a later date the municipality introduced a flat rate tariff for both the industrial use and domestic water.

[19] AngloGold's approach is that the minister's ruling is valid and binding on the municipality, and as such the municipality's subsequent failure to give effect to the ruling is unlawful. It continues to pay the surcharge imposed on it by the municipality under protest in the face of a threat by the municipality to cut off its water supply. But it is no longer willing to continue doing so. According to AngloGold it is this random conduct of the municipality which prompted it to launch this application.

[20] AngloGold approached this court in terms of a notice of motion which was later amended for an order:

'1. declaring that the municipality may not levy surcharge on water for industrial and domestic use;

2. for the municipality to comply with the minister's ruling of 18 July 2005, the municipality may not levy surcharge on water for industrial use;

3. interdicting the municipality from charging water for industrial use at a price greater than the unit cost of water charged by Rand Water.

4. interdicting and restraining the municipality from charging more than the unit cost of water charged by Rand Water pending an agreement being reached as a reasonable tariff for domestic use.

5. for the municipality to commence negotiations with AngloGold within 21 days of the order;

6. granting leave to AngloGold to approach the court on these papers duly supplemented in the event of no agreement being reached on domestic water, within 90 days from the date of the order for further direction.

7. alternatively reviewing and setting aside in terms of PAJA and/or principle of legality the decisions of the municipality made on 31 May 2004 together with the resolution to amend the tariff of charges.

8. the municipality to pay costs.'

[21] In essence what is sought by AngloGold in these papers is the enforcement of the findings and directives of the minister which was made in 2005 and never implemented by the municipality.

[22] Rand Water initially filed a notice of opposition but filed no papers. By notice served on 15 May 2013 Rand Water withdrew its opposition and indicated that it would abide the decision of the court. The minister was joined as a party to the proceedings but no specific relief was sought against her. The minister did not file any papers.

[23] The municipality is resisting the application and in its answering affidavit raised several defences which included points *in limine*. It in addition launched a conditional counter-application. However, at the hearing of the application counsel for the municipality condensed the defences, the points *in limine* and the counter-application into one main defence. I shall therefore address myself to this main defence in this judgment.

[24] The municipality's main challenge to AngloGold's application is that the municipality has the exclusive executive authority and right to set and impose tariffs and surcharges on fees in relation to the use of water for both industrial and domestic use by AngloGold. The minister is thus not entitled to interfere with this right in terms of the provisions of section 8 (9) or section 10 of the WSA as alleged by AngloGold.

[25] Both parties in their respective submissions relied on numerous provisions of the following legislations: the Constitution of the Republic of South Africa, No. 108 of 1996 (the Constitution); the Water Services Act (above); the Local Government: Municipal Structures Act, No. 117 of 1998 (the Structures Act); the Local Government: Municipal Systems Act, No. 32 of 2000 (the Systems Act); and the Municipal Fiscal Powers and Functions Act, No. 12 of 2000 (the Fiscal Powers Act). The parties' counsel also referred me to a number of judgments in support of their respective arguments.

[26] At the hearing of the application counsel for the municipality raised a preliminary issue which I want to deal with first before tackling the main issue. It is the contention by counsel for the municipality that the determination of this issue may settle the matter once and for all. The preliminary issue is that the application for approval in terms of sections 6 and 7 of the WSA and consequently the appeal in terms of section 8 (4) of the WSA by AngloGold were ill conceived.

Was Anglogold's Application in terms of Section 7 or both Sections 6 and 7?

[27] Before I deal with the preliminary issue raised by the municipality, I want to deal with a contentious issue that arose during argument. The issue is whether the application for approval by AngloGold to the municipality was in terms of section 7 only, or whether it was in terms of section 6 and 7 of the WSA. My view is that the application was in terms of both sections. To my mind, when the municipality invited the mining houses to apply for approval, it misdirected itself by referring only to section 7 in its invitation. As a water services authority, a municipality is responsible to provide water for both domestic and industrial use to its customers. The application for approval in respect of domestic water is in terms of section 6 and for industrial use is in terms of section 7 of the WSA. It was therefore a misnomer for the municipality to invite the mines to apply only in terms of section 7 of the WSA. The anomaly was rightly corrected by AngloGold when in its application it referred to both water for its mining operations (section 7) and associated domestic applications (section 6). AngloGold's application refers to '*continue obtaining water from Rand Water for its mining operations and associated domestic applications*'. My ruling on this point therefore is that AngloGold's application was in terms of both section 6 and 7 of the WSA.

THE PRELIMINARY ISSUE

[28] The municipality's counsel submits that the application for approval by AngloGold was ill-conceived. Counsel's argument is that prior to the minister's decision AngloGold obtained water from Rand Water. This situation continued even after 2004 when the municipality took over. The supply of water by Rand Water was never discontinued. There was thus no need for an application. When the municipal manager invited AngloGold and other mining houses to apply for approval, he misdirected himself. AngloGold also misconstrued the invite and applied. Consequently, the minister misdirected herself as well by considering the appeal. According to counsel for the municipality, the application in terms of section 6 of the WSA can only be lodged if the applicant wants to be supplied water services from a source other than a water services provider nominated by the municipality; and the application in terms of section 7 of the Act can only be lodged if the applicant wants to obtain water for industrial use from the source other than

the distribution system of a water services provider nominated by the municipality. There was no need for AngloGold to apply either in terms of section 6 or 7 of the WSA because the same water services provider was involved. If there was no need to apply, whether invited or not, then the ruling of the minister cannot be lawful because the ruling which she considered did not by implication originate from sections 6 and 7 of the Act. The application was brought under a misnomer and was thus unlawful because the approval was unnecessary and unjustified. Consequently there could be no ruling from the minister, so he argued.

[29] AngloGold's contention on this point is that it was entitled to apply for approval because at the time of the application the municipality had not as yet appointed a water services provider. Its further contention is that even if it can be found that the application for approval was misconceived however, the ruling of the minister still stands unless set aside by a competent court of law.

[30] The relevant sections of the WSA read:

> Section 6. **Access to water services through nominated water services providers:-** (1) Subject to subsection (2), no person may use water services from a source other than a water services provider nominated by the water services authority having jurisdiction in the area in question, without the approval of the water services authority.
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> and
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> Section 7. **Industrial use of waters:-** (1) Subject to subsection (3), no person may obtain water for industrial use from a 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.

[31] My view is that the application for approval and consequently the appeal to the minister by AngloGold was not ill-conceived as suggested by counsel for the municipality.

[32] It is indeed so that at all times before the municipality took over as the water services authority in respect of its area of jurisdiction all the mines in that area including AngloGold were supplied water for both industrial use and water services (domestic) directly by Rand Water. It is also not in dispute that once the municipality took over the responsibility it, in a letter dated 11 February 2004, invited AngloGold, together with other mining houses, to apply for approval for the supply of water for industrial use in terms of section 7 of the WSA. AngloGold, as one of the mining houses, applied to the municipality to continue obtaining water from Rand Water for its mining operations (in terms of section 7) and associated domestic applications (in terms of section 6) at the tariff set, and under the conditions imposed by Rand Water.

[33] It is my view that once the municipality took over the responsibility it became apparent that the municipality would then be the direct supplier of water to the consumers within its area of jurisdiction. The mining houses were however, entitled in terms of the WSA to decide whether they would want to be supplied water by the municipality or by a different water supply institution. The WSA allows consumers to be supplied water directly by a different water services institution other than the water services authority in the area. However, in order to be so supplied the consumers must get approval from the water services authority. Sections 6 (2) and 7 (3) of WSA permits a consumer who at the commencement of the WSA obtained domestic water or industrial use of water from another source other than the water services provider nominated by the water services authority to continue to do so subject to application for approval and subsequent approval by the water services authority. Therefore the municipality acted correctly, in my opinion, to inform the mining houses to apply for approval in terms of section 7 even though I am of the view that they should also have done so in respect of section 6. AngloGold wanted Rand Water to continue supplying it with water. Consequently, it was correct for AngloGold to have applied for approval as invited

to by the municipality. It even went further and applied in terms of section 6 as well.

[34] In terms of section 19 of the WSA a water services authority, in this instance the municipality, may perform the functions of a water services provider itself and may to the extent that it is unable to perform such services appoint a water services provider to perform those duties. The municipality in this instance was unable to supply the required water and as such appointed Rand Water as its water services provider. The result being that the water supply for industrial purposes to the mining houses and domestic water for its employees were to be obtained from the distribution system of a water services provider nominated by the municipality, namely Rand Water.

[35] It is common cause that all the mining houses, including AngloGold were notified about this appointment as early as 31 May 2004. The municipality notified AngloGold and other mining houses that it was now taking over the responsibility for the direct supply of water to the mines in its area of jurisdiction and that it has appointed Rand Water as a water services provider with the responsibility to directly supply the mines with water as an agent of the municipality. The municipality also notified the mining houses of the tariffs and service charges it has approved and which it intended to levy.

[36] It is thus apparent from this evidence that at the time AngloGold applied for approval the municipality had not yet appointed Rand Water as a water services provider or at the least AngloGold was not aware of such appointment if ever it had already been made. My view, therefore, is that, at that time Rand Water was a source other than the service provider nominated by the municipality. AngloGold is therefore correct to say that it was at that time entitled to apply for the approval.

[37] The parties seem to suggest that AngloGold's application to the municipality was approved (para 16.3 of founding affidavit and para 5.16 of the municipality's heads of argument). I disagree. The notice of 31 May 2004 by the municipality is in contra-distinction to what AngloGold applied for. AngloGold in its letter to the municipality applied for approval to be supplied water directly by Rand Water under the conditions set by and the tariffs imposed by Rand Water. To my mind, by this notice of 31 May 2004, the municipality refused to allow AngloGold to be supplied water directly by Rand Water in that it informed AngloGold that water will be supplied to it by Rand Water 'as an agent and water services provider of the municipality'. The municipality also refused to accept the conditions and the tariffs agreed to between AngloGold and Rand Water and set its own conditions and imposed its own tariffs and by implication, it means therefore that the municipality refused AngloGold's application.

[38] AngloGold was aggrieved by the municipality's decision and in a letter dated 11 June 2004 it lodged an appeal in terms of section 8 (4) of the WSA against the decision of the municipality, to the Minister. It specifically appealed against the conditions set by the municipality, in particular, the municipality's decision to impose a surcharge on the set tariffs. The only inference to be made from this conduct of AngloGold is that it accepted the ruling of the municipality to be provided water by Rand Water as an agent and service provider of the municipality, and only wanted the minister to intervene in respect of the conditions the municipality imposed for such services. This is so because AngloGold did not appeal the municipality's decision to be supplied water by Rand Water as an agent and water services provider to the municipality. AngloGold in its notice of appeal contained in a letter to the minister dated 11 June 2004 confirms that it does not dispute the statutory rights of the municipality in respect of water supply in its area of jurisdiction.

[39] Section 8 (4) of the WSA reads

> **8. Appeals and appeal:-** (4) 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.

[40] In terms of this provision the minister may only consider an appeal where the person in question initially applied in terms of either section 6 or 7 of the WSA. I have already made a finding that AngloGold applied for approval in terms of sections 6 and 7 of WSA. Therefore, in my opinion, the minister is correct to have considered the appeal.

THE EXECUTIVE POWER OF THE MUNICIPALITY TO IMPOSE SURCHARGES

[41] It is common cause that AngloGold in its notice of motion seeks the enforcement of the minister's ruling made in terms of section 8 (9) of the WSA.

[42] The municipality's main challenge to the application is that it has the exclusive executive authority and right to set and impose tariffs and surcharges on fees in relation to the use of water for both industrial and domestic use by AngloGold. Accordingly, the minister is not entitled to interfere with this right in terms of the provisions of section 8 (9) or section 10 of the WSA as alleged by AngloGold. It contends that such interference is not valid in law.

[43] Although counsel for both parties argued broadly on the powers and functions of the local government/municipality, I shall however for purposes of this judgment confine myself to the narrow issue of a municipality's powers to impose surcharges on fees for services provided by or on behalf of the municipality. It is my view that this is the crisp issue that requires determination. AngloGold's appeal was specifically about the imposed surcharges and the minister's findings pertain to the surcharges as well.

[44] When considering the appeal the minister made the following findings:

> '2.1 ... Where a Water Services Authority adds no value to the services provided to a person or institution from another source it would be unreasonable to impose a fee, charge surcharge or levy on the services provided.
>
> 2.2 Since water for industrial use is not defined as a municipal service in terms of section 1 (xxv) of the Water Services Act, 1997 no surcharge can therefore be levied on water for industrial use. Surcharges may only be levied on the portion of water that the mines are using for domestic purposes.
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> 2.3 The Merafong City Local Municipality is of the view that it appropriately consulted with the mines and also considered the mines economic assessment presented by the Chamber of Mines on behalf of the mines. Based on the appeal submitted to me, it is debatable whether the mines support the view that appropriate consultation has taken place. When considering the merits of the appeals, I am not convinced that the Municipality has provided a reasonable opportunity for the mines to present themselves.'

[45] Consequently in terms of the power vested in her by section 8 (9) of the Water Services Act, 1997, the minister overturned the decision of the Merafong City Local Municipality to levy surcharges on water for industrial use and ruled that the Municipality, the Mines and Rand Water should negotiate a reasonable tariff on the portion of water that the mines are using for domestic purposes.

[46] I am aware that at the time of the minister's ruling, the Fiscal Powers Act was not yet in operation. The definition section of that Act succinctly sets out the meaning of 'base tariff' and 'surcharge'. Section 1 of thereof provides that:

> a. 'municipal base tariff' means the fees necessary to cover the actual cost associated with rendering a municipal service.

b. 'municipal surcharge' means a charge in excess of the municipal base tariff that a municipality may impose on fees for a municipal service provided by or on behalf of a municipality.

Tariffs would in my view therefore be the total sum of both the base tariff and the surcharge. It is common cause that the tariff set by the municipality in this instance is inclusive of a surcharge.

[47] The Constitution provides for services which a municipality may provide to a community within its area of jurisdiction. The services are enunciated in section 156 (1) (a) of the Constitution. In terms of this subsection, a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. Matters relevant for purposes of this judgment are listed in Part B of Schedule 4 as "water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems".

[48] The municipality also has a Constitutional authority to impose surcharges on fees for the provision of domestic water by and on behalf of the municipality. The authority in this respect is derived from section 229 (1) (a) read with section 229 (2) (b) of the Constitution.

Does The Term 'Water' Include Both Water For Industrial And Domestic Use?

[49] Before proceeding further with this judgment I want to pause at this stage and consider the controversial issue of whether the term 'water' in Part B of Schedule 4 of the Constitution incorporates water for domestic and industrial use. This issue arose in the papers and was argued by both counsel before me.

[50] The municipality's contention, based on its argument that the minster is not entitled to interfere with the municipality's powers to impose surcharges, is that a municipality's authority and right to set and impose tariffs and surcharges on fees for water is in relation to the use of water for both industrial and domestic use. In its answering affidavit the municipality states that the term 'water' in Part B of Schedule 4 of the Constitution refers to all the water, namely, water for domestic, commercial and industrial use. This was also confirmed by the municipality's counsel in his argument that the term 'water' refers to both water for domestic and industrial use. In trying to explain the difference between water for industrial and domestic use the municipality's counsel differentiated between two categories of water, namely, water that is provided, that is, going to the party using it; and water removed from the user of water. According to him, the word potable does not describe "water" as contained in the schedule but it only describes sanitation services of potable water. The only distinction made between industrial and domestic water, according to counsel, is in respect of sections 6 and 7 of the WSA.

[51] AngloGold's argument is that the municipality's powers to levy surcharges do not relate to services provided for water for industrial use. The powers are only in respect of potable water (water for domestic use). This was further argued by AngloGold's counsel in his submission that the term 'water' in Part B of Schedule 4 of the Constitution refers only to potable water which is water for domestic use.

[52] I seem to be in agreement with AngloGold's argument that the term "water" in part B of schedule 4 of the Constitution refers to water for domestic use (potable water) and does not include industrial water. The proper reading in my opinion should be 'water services' which is more in line with the definition in the WSA. I have already set out the definition of water services in paragraph [2] of this judgment. Industrial use water is specifically excluded in that definition. The definition of industrial use is also in paragraph [2] of this judgment. The submission by the municipality's counsel about the two categories of water is completely wrong. The definition he gives to the word 'potable' means 'water borne'. The term 'potable' as it is known means water safe for human consumption. Water and sanitation services are services required for domestic use and when read together do indicate

that it was not intended to include industrial water therein. Even if read in its every day ordinary meaning, the word would not make sense in the context in which it is used therein because water for industrial use cannot be limited to potable water supply. It is also evident from the WSA, the two services have been provided for separately. Examples of the said provisions is in respect of sections 6 and 7 and sub-sections 21 (1) and 21 (3). I shall therefore in this judgment deal separately with the two services, that is, domestic water and industrial use water.

Is The Municipality's Power To Impose Tariffs Exclusive?

[53] Counsel for AngloGold submits that the powers of a municipality to impose surcharges are not absolute but are constrained by the Constitution which provides that the right of a municipality to govern local government affairs of its community is subject to national legislation. In this respect AngloGold's counsel referred me to the judgments in *Ex Parte President of the RSA: Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) and *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) para [61].

[54] Referring to the same judgment in *Robertson* above, counsel for the municipality contends that the original powers of a municipality can only be constrained by law to the extent the Constitution permits. However, the municipality's contention is that national legislation does not allow the minister to deprive the municipality of its executive power to levy surcharges. According to the municipality's counsel, the municipality has the executive and original power in respect of water and such power cannot be legally interfered with.

[55] My view is that the municipality's powers to impose surcharges on fees for the supply of both water for domestic and industrial use is not absolute and that the minister has the power to interfere with such authority. See *Ex Parte President of the RSA: Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) at para [61] and *Robertson* above at paras [54] to [62].

[56] Unlike water for domestic use, industrial water is not a right given to a municipality by the Constitution. In my conclusion in paragraph [52] of this judgment I excluded water for industrial use from the term 'water'. It means therefore that water for industrial use falls under national government as the custodian of the nation's water resources. National government has, however, in terms of the WSA entrusted some municipalities with the responsibility to provide communities within their respective areas of jurisdiction with water for industrial use. The municipality in this instance is one of the municipalities entrusted with that responsibility. A municipality that supplies water for industrial use to its community is empowered by the WSA to impose tariffs on the supply of water for industrial use. Section 21 (3) of the WSA which deals with industrial use water, empowers a water services authority which provides water for industrial use to make by-laws providing for, amongst others, at least the determination and structure of tariffs. In terms of section 4 of the Systems Act, the council of a municipality has the right to exercise the municipality's executive and legislative authority, and to do so without improper interference and to finance the affairs of the municipality by charging fees for services and imposing surcharges on fees. It is thus clear that a municipality has the executive right to make decisions without improper interference to levy surcharges and can also promulgate by-laws for the determination and structure of tariffs in respect of water for industrial use. It is therefore my view that where a municipality would set a tariff that does not comply with the determination and structure of tariffs as set out in its by-laws and where it is proper to do so, the minister would be entitled to intervene.

[57] It is also my view that in the circumstances of this matter the minister was entitled to interfere on the basis that the imposed tariffs were unreasonable. It is common cause that AngloGold was not satisfied with the tariffs set by the municipality in that they were inclusive of surcharges. Therefore, when considering the appeal the minister made a finding that where a water services authority, the municipality, adds no value to the services provided to a person or institution from another source it would be unreasonable to impose a fee, charge surcharge or levy on the services provided. Therefore based on the unreasonable tariff charged by the municipality and the fact that water for industrial use is not defined as a municipal service in terms of section 1 (xxv) of the WSA she overturned the municipality's

decision to charge surcharges on water for industrial use and made a ruling that no surcharge should be levied on such water. To my mind, an unreasonable tariff entitles the minister to intervene and it was proper for her to do so.

[58] With regard to water for domestic use, the authority of a municipality to impose surcharges on fees for the supply of water for domestic use provided by or on behalf of a municipality emanates from the Constitution itself. This, as already stated, is provided for in section 229 (1) (a) read with section 229 (2) of the Constitution. The parties are agreed that in terms of the Constitution a municipality has the original legislative and executive powers to impose tariffs and surcharges on fees for services provided by or on behalf of the municipality in respect of the supply of domestic water to members of the community within its area of jurisdiction. See *Fedsure Life Assurance v Greater Johannesburg* TMC 1999 (1) SA 374 (CC) para [39].

[59] In this instance, it is common cause that the municipality imposed tariffs and surcharges in respect of water supplied for domestic use to AngloGold. It is also common cause that AngloGold was not satisfied with the municipality's decision to impose the surcharges on these services and appealed to the minister in respect thereof. When considering the appeal the minister made a finding that where a water services authority adds no value to the services provided to a person or institution from another source it would be unreasonable to impose a fee, charge surcharge or levy on the services provided. Based on the appeal submitted to her, the minister was not convinced that the municipality provided a reasonable opportunity for the mines (including AngloGold) to present themselves. This in my view resulted in an unreasonable tariff being set by the municipality. And as a result the minister ruled that the municipality the Mines and Rand Water should negotiate a reasonable tariff on the portion of water that the mines are using for domestic purposes.

[60] As already stated the power to impose the surcharges on fees for the supply of water for domestic use is subject to national legislation. The WSA is the regulatory framework by which the minister assumes responsibility to regulate the exercise of the executive municipal power for water for domestic use.

[61] AngloGold in its founding affidavit sets out three mechanisms which it alleges are in the Constitution and by which national government can regulate or constrain the authority of the municipality. The first mechanism is in terms of section 10 (1) of the WSA in which the minister prescribes norms and standard that a municipality must comply with when setting tariffs in respect of the supply of water services. The two other mechanisms can be conflated into one because in my view, they both find expression in section 8 (1) and (4) to (10) of the WSA. The said subsections provide for the appeal procedure to the minister against a decision or condition imposed by a water services authority/municipality.

Norms and Standards:

[62] According to AngloGold's counsel the Constitutional Court in the First Certification judgment recognised the autonomy of local government and the requirement that higher levels of government should monitor local government functioning and intervene where such functioning is deficient or defective and to provide a regulatory framework for the exercise of local government powers. It is in accordance with that regulatory framework that section 10 of the WSA permits the minister to prescribe norms and standards in respect of tariffs for water services. The norms and standards promulgated in terms of that section requires a municipality when setting tariffs for water services to differentiate, where applicable between the water supply to households and industrial use of water. According to AngloGold it is apparent that the flat rate imposed by the municipality in July 2007, although it increases annually, it does however not differentiate between water users. Therefore the municipality does not comply with this statutory requirement for differentiation and the minister should intervene, so the argument went.

[63] It is indeed so that section 10 (1) of the WSA authorises the minister, with the concurrence of the Minister of Finance, to prescribe norms and standards in respect of tariffs for water services. And that no water services institution may use a tariff which is substantially different from any prescribed norms and standards. The minister should monitor the performance of every water services authority to ensure compliance with the prescribed norms and standards. My view therefore is that where a municipality uses a tariff which is substantially different from any prescribed norms and standards the WSA entitles the minister to intervene.

[64] However, in this instance, AngloGold chose a wrong example to indicate that section 10 (1) is a mechanism which the minister may use to intervene. The minister promulgated the Norms and Standards in respect of Tariffs for Water Services in Terms of Section 10 (1) of the WSA under Government Notice No. R652 of 20 July 2001 (the Norms and Standards). In accordance with the said Norms and Standards the minister has set out categories of water services which a water services institution must, when setting tariffs for water services supplied to consumers and other users within its area of jurisdiction, differentiate between. Amongst the categories that must be differentiated is at least, water supply services to households and industrial use of water supplied through a water services work.

[65] The challenge is that clause 4 (1) of the prescribed Norms and Standard provides differently from its empowering statute, that is, section 10 (2) of the WSA. The clause stipulates that a water services institution must, when setting tariffs for water services provided to consumers and other users within its area of jurisdiction differentiate, where applicable, between categories of water and services supplied. On the contrary, section 10 (2) of the WSA stipulates that the norms and standards may differentiate on an equitable basis between different users of water services. In terms of section 156 (3) of the Constitution a by-law that conflicts with national legislation is invalid. As such clause 4 (1) of the Norms and Standards is invalid as it is in conflict with section 10 (2) of the WSA. AngloGold is therefore wrong to rely on this clause as a mechanism for the minister's intervention. Even if the clause was correct in that the word 'may' instead of 'must' was used, AngloGold could still not rely on either section 10 (2) of the WSA or clause 4 (1) of the Norms and Standard as

a mechanism for the minister's intervention because the provisions thereof are not imperative but merely directory in nature. The municipality is thus not compelled to differentiate between different users of water services. Without having to consider the issue raised by the municipality that tariffs are not included in the conditions imposed in terms of section 8 (4) of the WSA, I am of the view that for that reason, only, I agree with the municipality that section 10 of the WSA did not entitle the minister to intervene. It is indeed so that the minister cannot compel parties or place obligatory duties on them if not empowered to do so by section 10 of the WSA.

The Appeal Process as a Mechanism for the Minister's Intervention:

[66] The municipality's contention is that section 8 of the WSA does not deal with tariffs and that the function of the minister in terms of section 10 is merely to prescribe the norms and standards in respect of tariffs for water services and not to set tariffs. As such the minister has no power to prescribe a specific tariff or to interfere with the municipality's function to set tariffs. According to the municipality's counsel the minister's interference in terms of section 8 (9) of the WSA cannot allow the minister the right to deprive the municipality its right to exercise its executive powers. Therefore, the argument is that the minister acted unlawfully by interfering in the municipality's decision to impose surcharges.

[67] The appeal process in terms of section 8 of the WSA is a mechanism set in place by national government to monitor the performance of the municipality and by so doing regulate the exercise of the municipality's powers to impose surcharges. The starting point is section 4 (1) of the WSA which provides that water services must be provided in terms of conditions set by a water services provider. The said conditions must in terms of section 4 (2) (c) (ii) provide for the determination and structure of tariffs.

[68] The appeal procedure to the minister of a department is commonly used as a regulatory framework to enable the minister to intervene. In this instance, the WSA is a regulatory framework that is in place to enable the minister to intervene. For

example, in terms of section 8 (1) thereof, the minister is entitled to intervene where a municipality imposes unreasonable conditions, as is the case in this instance, or where the municipality has unreasonably withheld its approval. Section 8 (4) of the WSA provides the procedure which a dissatisfied water consumer may follow in order to get the minister to intervene. It is therefore my opinion that this section entitles the minister to intervene where a consumer who applied in terms of section 6 or 7 of the WSA and has lodged an appeal and the minister finds that the municipality withheld its approval unreasonably or imposed unreasonable conditions. In terms of section 8 (9) of the WSA having made such adverse findings the minister may on appeal confirm, vary or overturn such decision. The minister was in this instance therefore entitled to intervene with the conditions imposed by the municipality because they were unreasonable.

THE DECISION OF THE MINISTER IS BINDING

[69] Even if my findings as stated above are wrong, my view is that the decision of the minister is still valid until set aside by a competent court of law.

[70] It is trite that an unlawful decision exists in fact and it has legal consequences that cannot be overlooked until it is set aside by a court in proceedings for judicial review. Our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for as long as the unlawful act is not set aside. See *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA) para [26] and the unreported judgment of Phatudi J in *Blyvooruitzicht Gold Mining Company Ltd & Another v Merafong City Local Municipality & Another* Case no 47282/2007 delivered on 20 May 2011, the findings of which are apposite in this instance.

[71] However, the contention by the municipality's counsel is that the *Oudekraal* principle which AngloGold relies on for the validity of the minister's decision should be qualified. His submission is that a public action that is unlawful can be set aside by review or when challenged by reason of its validity. The public authority is entitled to raise a defence that the act is unlawful. In this respect he referred me to

the judgment in *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) paras [49] to [50] and *City of Tshwane Metropolitan v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) at para [15].

[72] I am in agreement with the submission of AngloGold's counsel on this point. A collateral challenge is not available to a public authority. The defence is meant to be raised where a party is threatened by a public authority with coercive action. The defence is meant to prevent the power of a state to bear on a citizen and as such a public authority like a municipality cannot use this defence. See *City of Tshwane Metropolitan v Cable City (Pty) Ltd* above.

[73] The municipality has not in its papers sought to review or overturn the minister's decision and thus based on the *Oudekraal* principle the minister's decision stands until set aside by a court of law. The decision is therefore binding and enforceable and the municipality should abide by it.

THE MUNICIPALITY'S COUNTER APPLICATION

[74] The municipality applied in its conditional counter application for declaratory orders, first, relating to its exclusive authority to set the tariffs relating to the provision of water; and, secondly, that section 8(9) of the WSA does not confer authority on the minister to interfere with the tariff set by the municipality. In the alternative to the above prayers (if it is found that the minister is given the power to overturn a decision of the municipality relating to the setting of tariffs for water services and the municipality is directed to negotiate an agreement with AngloGold) that it be declared that the provisions of sections 8 (9) of the WSA are to that extent unconstitutional and invalid.

[75] Counsel for the municipality submitted in argument that if the main application is dismissed with costs it would not be necessary to deal with the counter application. However, if the application is granted I should make a finding in respect of the orders prayed for in terms of the counter application.

[76] On the same basis of my finding that the powers of the municipality to impose tariffs and surcharges is not constrained because it is subject to national legislation, I can therefore not declare that the provisions of section 8 (9) of the WSA are unconstitutional and invalid. In order to make a finding of unconstitutionality I should have found that the section was in conflict with the Constitution. To the contrary I concluded that the minister was acting in terms of national legislation as directed by the Constitution itself.

[77] Consequently, the municipality's counter claim ought to be dismissed.

ANGLOGOLDS NOTICE OF MOTION

[78] My understanding of the application before me is that AngloGold seeks to enforce the minister's ruling of 18 July 2005. However, the notice of motion incorporates other relief which is not part of the minister's ruling, for example, prayer 1 and 3 of the notice of motion. It is my view that it would not be competent for this court to grant these prayers based on the following: in respect of prayer 1: firstly, because the minister has already made a finding that the municipality should not levy surcharges on industrial water; secondly on the basis that in terms of section 229 (1) of the Constitution read with Part B of Schedule 4 of the Constitution a municipality has the original and executive power to impose surcharges on water services it supplies to its community.

[79] As regards prayer 3, the minister made a finding that where a water services authority adds no value to the services provided to a person or institution from another service, it would be unreasonable to impose a fee, charge surcharges or levy on the services provided. This finding to me means that the municipality can set a tariff for services provided even if that tariff is more than the unit cost of water charged by Rand Water. The ruling is only against the imposition of a surcharge in such circumstances because it is unreasonable.

[80] It should be noted that this judgment does not seek to delve into the correctness or otherwise of the minister's decision. I also avoided dealing with issues raised in the papers which goes to the root of the minister's decision as that would appropriately be the work of the review court. I only gave specific attention to the issue of whether the minister is entitled to intervene with the decision of the municipality to impose surcharges on the supply of water for domestic use and/or industrial use and other ancillary issues relating thereto. Since I concluded that the minister was entitled to do so, it was thus not necessary to consider the other issues raised.

COSTS

[81] AngloGold is the successful party in the main application and is therefore entitled to its costs of litigation. An order for costs of two counsel sought by AngloGold's counsel is also justified in the circumstances of this matter and should be granted.

[82] Similarly in the counter application AngloGold is the successful party and is entitled to its costs as well. The order for the costs of two counsel in similarly justified and should be granted.

ORDER

[83] In the premises are make the following order that:

a. the first respondent must comply with the minister's ruling of 18 July 2005, in that:

(i) the first respondent may not levy surcharge on water for industrial use;

(ii) the first respondent may not levy surcharge on water for domestic use pending an agreement being reached by the first respondent, the applicant and the second respondent for a reasonable tariff; and

(iii) the first respondent must commence negotiations with the applicant and the second respondent within 21 days of the order.

b. The applicant is granted leave to approach the court on these papers duly supplemented in the event of no agreement being reached on domestic water, within 90 days from the date of the order for further direction.

c. The first respondent must pay costs of litigation in the main application including costs of two counsel.

d. the first respondent's conditional counter application is dismissed with costs which costs shall include costs of two counsel.

EM KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE	**:22 AUGUST 2013**
DATE OF JUDGMENT	**: 26 FEBRUARY 2014**
APPLICANTS COUNSEL	**: ADV A. GRAVES SC**
	ADV I. CURRIE
APPLICANTS ATTORNEYS	**: KNOWLES HUSAIN LINDSAY INC**
FIRST RESPONDENT'S COUNSEL	**: ADV E. VAN GRAAM SC**
	ADV P. KIRSTEN
FIRST RESPONDENT'S ATTORNEY	**: DE SWARDT VOGEL MYAMBO**