IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 23558/2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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SIGNATURE **DATE**

In the matter between:

MERAFONG CITY LOCAL MUNICIPALITY APPLICANT

and

GOLDEN CORE TRADE INVESTMENTS (PTY) LTD FIRST RESPONDENT

THE MINISTER OF WATER AFFAIRS AND SANITATION SECOND RESPONDENT

JUDGMENT

STRYDOM J

INTRODUCTION

[1] This matter has come full circle. It started in the Gauteng High Court where judgment was delivered. From there it went to the Supreme Court of Appeal and ultimately the Constitutional Court where the majority of that Court set aside the decision of the High Court and the Supreme Court of Appeal and made an order.[1]

PARTIES

[2] The applicant in this review application pertaining to the lawfulness of the Minister's decision of 18 July 2005 is Merafong City Local Municipality (Merafong).

[3] The first respondent is Golden Core Trade and Investment (Pty) Ltd. (Golden Core).

[4] After the Constitutional Court judgment was delivered, AngloGold Ashanti Limited (AngloGold) sold its mining operations to Golden Core. As a result of this, Golden Core substituted AngloGold as a party in this matter. Nothing turns on this but for the sake of convenience, more particularly as all previous documentation

[1] See *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC):

"1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the High Court of South Africa, Gauteng Division, Pretoria and the Supreme Court of Appeal are set aside.
4. In their stead, the matter is remitted to the High Court to determine, after the lodging of further affidavits as the applicant, Merafong City Local Municipality, and the Minister of Water Affairs and Forestry may consider appropriate, on the lawfulness of the Minister's decision of 18 July 2005, and, if necessary, what remedy is to be granted.
5. The Minister is to lodge the record of the decision by 4 November 2016.
6. The further affidavits, if any, by the applicant are to be lodged by 18 November 2016 and by the Minister by 25 November 2016.
7. The respondent, AngloGold Ashanti Limited, may lodge its affidavits, if any, by 6 December 2016.
8. Costs are reserved for consideration by the High Court."

referred to AngloGold, the court will still refer to AngloGold when reference is made to the first respondent.

[5] The second respondent is the Minister of Human Settlements, Water and Sanitation (the Minister).

[6] In the original application dated July 2011 AngloGold applied for a declarator that the decision of the Minister dated 18 July 2005 was still operative, Merafong was cited as first respondent, Rand Water as the second respondent and the Minister as the third respondent. Despite the orders of the High Court and Supreme Court of Appeal being set aside, this original application of AngloGold, in its amended form, is still alive. To that extent, AngloGold remains an applicant before this court. Merafong became an applicant in its conditional counter-application which now has taken the form of a review application. In the review application Merafong will be referred to as the applicant as this was how the Constitutional Court referred the matter back to this court for consideration.

[7] The court will first deal with Merafong's delay to bring the review application. Part of this enquiry would entail a consideration of the merits of the matter. If the delay is condoned the court will further consider the lawfulness of the Minister's decision and whether it should be reviewed and set aside. Depending on this finding the court will then deal with the original application of AngloGold.

[8] In the original application, Merafong filed a reactive challenge in the form of a conditional counterclaim against AngloGold's attempt to enforce the Minister's ruling which it alleged was still binding on the parties. This counterclaim did not seek the setting aside of the Minister's ruling but sought a declarator to the effect that the Minister had no statutory or constitutional power to have made the decision.

[9] One of the reasons stated by the Constitutional Court for remitting the matter back to the High Court was for Merafong, who accepted that the Minister's ruling amounted to administrative action, to apply for the setting aside of the Minister's decision either under the Promotion of Administrative Justice Act[2] (PAJA) or as a

[2] 3 of 2000.

legality review. Merafong was afforded an opportunity to explain its delay in instituting its review. An explanation was required as a delay can preclude a review of a challenged decision.

[10] Merafong was given an opportunity to explain its delay in bringing its counter-application, albeit, that such conditional counter-application was to obtain declaratory relief that the provisions of the Water Services Act[3] (the Act) did 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. As was stated by the Constitutional Court the order which was sought by Merafong did not seek the setting-aside of the Minister's ruling, but a declaration only that she had no statutory or constitutional power to take it. To that extent Merafong has joined issue with AngloGold.[4] In effect it was a constitutional challenge based on legality.[5]

[11] This conditional counter-claim was filed during or about July 2011.

[12] After the Constitutional Court decision that Merafong was entitled to raise a collateral challenge against a decision of another state organ the court found that a proper process would be for the High Court to have before it the Minister's record of decision. The parties were allowed to file supplementary affidavits wherein Merafong could explain its delay in launching a review and for AngloGold to respond to the allegations. The delay should be explained before a court could make a finding in a review application. The Constitutional Court found that only thereafter the validity of the Minister's decision, based on anything arising pertinently from the record, in its statutory and constitutional setting, may be considered.[6]

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[3] 108 of 1997.
[4] *Merafong supra* at para 66.
[5] Prayer 2 of the conditional counter-claim reads as follows:

> "2. declaring that on a proper interpretation of section 8(9) read with section 8(7) of the Water Services Act, 108, 1997 (hereinafter referred to as 'the Water Services Act') read with the provisions of chapter 7 of the Constitution and sections 4 and 11 of the Local Government : Municipal Systems Act 32, 2002 (hereinafter referred to as the 'Systems Act'), the provisions of the Water Services Act do not confer authority on the third respondent to interfere with a tariff set and implemented by the Merafong City Municipality for water services provided in its area of jurisdiction;"

[6] *Merafong supra* at para 79.

[13] Pursuant to the order of the Constitutional Court, Merafong, AngloGold and the Minister filed supplementary affidavits. Merafong further took the lead from the Constitutional Court and on or about 12 July 2017 amended its conditional counter-claim by inserting a prayer for the review and setting aside the decision of the Minister and applied for condonation for the lateness of its review. Merafong, on or about 26 July 2021, further amended its notice of motion in its counter-claim. [7]

[14] Prayer 3 of the amended notice of motion now made it clear that there is a constitutional challenge against the validity of section 8(9) of the Act which Merafong asks to be declared invalid and to be set aside.

[15] AngloGold also amended its notice of motion in its original application to the High Court wherein it expanded the relief it was seeking.[8] In paragraph 8 it included a legality review of Merafong's decisions to impose tariffs and surcharges.

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[7] The relief Merafong now seeks reads as follows:

"1. An order condoning the late institution of Merafong's counterapplication and/or the extension of the 180 day period referred to in section 7 of PAJA;
2. An order reviewing and setting aside the Minister's decision of 18 July 2005;
3. It is declared that section 8(9) of the Water Services Act, Act 108 of 1997, as amended,
is inconsistent with the Constitution, invalid and set aside;
4. In the alternative to paragraph 2 and 3 above and in the event of the Minister's decision
not being set aside (but not otherwise), an order declaring that the Minister's decision applies only to the water tariffs levied for the 2004/2005 financial year;
5. An order dismissing the main application instituted by Golden Core;
6. An order directing Golden Core and the Minister to pay Merafong's costs of the main application and the counter-application, jointly and severally, including the costs consequent upon the employment of two counsel; and
7. Lastly, only in the alternative, an order granting such further and/or alternative relief as
the Honourable Court may deem meet."

[8] AngloGold is now seeking the following relief:

"1. Declaring that Merafong may not levy a surcharge on water for industrial and domestic
use, supplied to AngloGold by Rand Water.
2. Directing Merafong to comply with the ruling of the Minister given on 18 July 2005 in terms of which Merafong may not levy a surcharge on water supplied to AngloGold for
industrial use.
3. Interdicting Merafong from charging AngloGold for water for industrial use at a price greater than the unit cost of water charged to Merafong by Rand Water.
4. Pending an agreement being reached by AngloGold and Merafong and Rand Water on
a reasonable tariff for that portion of the water utilised by AngloGold for domestic purposes, Merafong be interdicted and restrained from charging AngloGold any more than the unit cost of water charged to it by Rand Water.
5. Directing Merafong and Rand Water, within 21 days from date of this order, to

[16] AngloGold further sought costs orders in the proceedings before the High Court, Supreme Court of Appeal and the Constitutional Court.

ISSUES TO BE DETERMINED

[17] The following need to be determined by this court:

17.1 The relief sought by AngloGold in its notice of motion;

17.2 Whether the court should condone the late institution of Merafong's review application brought in terms of PAJA, alternatively, the legality review;

17.3 Whether the Minister's decision should be reviewed and set aside;

17.4 In the event that the Minister's decision is not reviewed and set aside –

17.4.1 whether the Minister's decision only pertains to the water

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commence negotiations with AngloGold and reaching agreement on a tariff for the water used by AngloGold for domestic purposes, in accordance with the Minister's ruling.

6. Granting AngloGold leave to approach this court on these papers, duly supplemented,

in the event of no agreement being reached on a domestic tariff, within 90 (ninety) days from date of this order, for further direction by this Honourable Court.

7. Regarding the above relief AngloGold contends as follows:

7.1 The parties have not agreed on the appropriate tariff for domestic water since the Minister's decision in 2005;

7.2 Merafong has caused a delay of 15 years from the date of the Minister' decision, exclusively because it refused to seek the appropriate relief, namely a judicial review;

7.3 Rand Water has filed a notice to abide the decision of the court;

7.4 AngloGold has been burdened by the increased cost of water due to unlawful surcharges over the entire period;

7.5 Merafong should be precluded from imposing a surcharge on water supplied both for industrial and domestic purposes.

8. Alternatively to paragraphs 2 to 5 above, reviewing and setting aside in terms of section

6(2)(e)(i) and/or (f) and/or (i) of the Promotion of Administrative Justice Act 3 of 2000 and/or the principle of legality, the decisions of Merafong made on or about 31st May 2004, together with its resolution to amend the tariff of charges for water as promulgated in the provincial gazette of 22 June 2004 and all such resolutions subsequent to that to the extent that they impose tariffs or surcharges on the supply of water used by AngloGold for industrial and domestic purposes in addition to the tariffs charged to Merafong by Rand Water.

9. Directing Merafong to pay the costs of this review application including the costs of two

counsel."

tariffs levied for the 2004/2005 financial years;

17.4.2 Merafong's constitution challenge to section 8(9) of the Act;

17.5 Costs orders according to the relief granted.

[18] Paramount to the decision in this matter is the lawfulness of the decision of the Minister dated 18 June 2005 which, decision as per the majority decision by the Constitutional Court, still stands and has effect until it is set aside by a court. [9]

[19] Merafong attacks the decision of the Minister by way of a PAJA review and/or a legality review. First, the question of delay should be decided either in terms of PAJA or in the framework of a legality challenge.

[20] Before dealing with the delay and the review, the starting point should be to consider the relevant facts.

RELEVANT FACTS

[21] On 11 February 2004, Merafong addressed a letter to the Mine Manager of the respective mines within its area of jurisdiction, notifying them that with effect from 1 July 2003, it has been accorded the powers and functions of a water services authority for the area under its jurisdiction. The Act was in place which, *inter alia,* provided a framework for the provision of water services. To this end, Merafong indicated that as a water services authority, it required mines, including AngloGold, to apply for approval for the supply of water for industrial use. It was stated that the request was made in terms of section 7 of the Act.[10]

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[9] The court followed the decisions in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) (*Oudekraal*) and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) 547 (*Kirland*). The Constitutional Court found in para 41 of *Merafong supra* fn 1 as follows: "The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside."

[10] 7. **Industrial Use of Water –**

(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."

[22] On or about 8 April 2004, AngloGold replied in writing to Merafong explaining that AngloGold has been receiving its water from Rand Water at a certain rate and that it therefore requested the approval of Merafong, in terms of section 7 of the Act, to continue obtaining water from Rand Water for its mining operations and associated domestic applications at the tariff set by, and under the conditions imposed by, Rand Water.

[23] Before dealing with subsequent correspondence, it should be noted at this juncture already that Merafong informed AngloGold that it would be the water services authority and water service provider for purposes of water supply services to AngloGold. This was in respect of water for industrial use. There could have been no doubt in the mind of AngloGold that the source of the water would still remain Rand Water and no other institution. So much is clear as AngloGold asked to continue to be directly supplied with water from Rand Water. AngloGold knew what the intentions of Merafong were, being that Rand Water would still have acted as a water service provider but would have provided water on behalf of Merafong, as the water service authority. The reference to section 7 by Merafong in its letter dated 11 February 2004, asking AngloGold to give an indication of its needs had nothing to do with "*water for industrial use from any source other than the distribution system of a water services provider nominated by the water services authority"* as contemplated in the Act.

[24] Merafong should not have referred to section 7 in its letter as this section deals with a different situation i.e. for permission to receive water from a different source than the *distribution system of a water services provider nominated by* Merafong. Merafong never had a distribution system and would at all relevant times been reliant on Rand Water as a service provider. This AngloGold knew all along. Consequently, if Merafong wanted to refer to section 7 it should have informed AngloGold that it will provide water for industrial use through its service provider, Rand Water, and if AngloGold wanted to receive water from another source it could have applied therefor in terms of section 7.

[25] Things went awry from here going forward as AngloGold, with reference to section 7, asked from Merafong whether it could still obtain water directly from Rand Water for its mining operations and associated domestic applications. This would be in terms of its existing agreement with Rand Water meaning that the tariffs therein stipulated would still apply. Merafong would have been left out of the loop.

[26] In my view, AngloGold's request was not to obtain water for industrial use from any source other than the distribution system of a water services provider nominated by the water services authority. What AngloGold requested was to be provided with water from the same water service provider (Rand Water) already nominated by the water services authority (Merafong), or in the process of being nominated, with the approval of Merafong. The same source would have been the water service provider and therefore the reference by Merafong and subsequently by AngloGold to section 7 was, in my view, misplaced.

[27] AngloGold's request was further defective as it asked Merafong for approval to be supplied with water for domestic directly from Rand Water without reference being made to section 6, which in any event would not have been applicable as section 6 also pertains to the use of water services from another source other than a water service provider nominated by the water services authority.

[28] In reply to AngloGold's letter dated 8 April 2004, Merafong replied in a letter headed "*Approval to be supplied with water*". In this letter it notified AngloGold that it is appointing Rand Water to supply AngloGold with water as a service provider to Merafong. Further in this letter, Merafong explained that in terms of this appointment, Rand Water will directly supply water to AngloGold as agent of Merafong and that Rand Water will bill and collect water services revenue. To add to the wrong direction this matter took Merafong in the same letter advised AngloGold of the tariff charges that would have been applicable in respect of the supply of water to it for the 2004/5 years. The letter stipulated that the tariff applicable in respect of water supplied for operational (industrial) use would be R4.18 per kilolitre and water supplied for domestic use would be R3.91 per kilolitre.

[29] This letter then concluded as follows:

> "In terms of section 7 of the Water Service Act these are the conditions under which the Merafong City Local Municipality is approving your supply of water with effect from 1 July 2004.
>
> You have a right to appeal the decision to the Minister of Water Affairs and Forestry within 21 days by lodging a written notice of appeal with:
>
> 1. The Minister; and
> 2. The Merafong City Local Municipality."

[30] The wording of this letter perpetuated the wrong direction this matter was heading into and still, wrongly in my view, made reference to section 7. At this stage, however, there could not have been any misapprehension that Rand Water would continue to be the water services provider. No other source was applicable.

[31] Pursuant to the wrong interpretation of the applicability of section 7 Merafong informed AngloGold of its right to appeal Merafong's decision (which can only be a reference to a decision to provide water to AngloGold via Merafong's agent, Rand Water, at a specified tariff), AngloGold lodged an appeal to the Minister. In this written appeal AngloGold bemoans the tariff established by Merafong, being excessively higher than the equivalent Rand Water tariff, while Merafong is not adding any value to or assuming any responsibility for any aspect of the water supply. The appeal was purportedly lodged with the Minister in terms of section 8(1) and (4) of the Act.[11]

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[11] "8 **Approvals and appeals -**

(1) A water services authority whose approval is required in terms of section 6 or 7 -

(a) may not unreasonably withhold the approval; and

(b) may give the approval subject to reasonable conditions.

…

(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 service authority in respect of the application.

…

(6) A person who has made an application in terms of section 6 or 7 may appeal to the Minister if the water service authority in question fails to take a decision on the application within a reasonable time.

…

(9) The Minister may on appeal confirm, vary or overturn any decision of the water service authority concerned."

[32] On 24 August 2004, the Minister wrote back to AngloGold and requested, *inter alia*, additional information for the purpose of considering the appeal. AngloGold responded to the Minister's request on 8 September 2004.

[33] On 18 July 2005, the Minister upheld AngloGold's appeal and ruled in the following terms:

> "2.1 I differ with the conditions imposed by Merafong City Local Municipality when approving the application. I regard a tariff increase of 62% with no value added as unreasonable. Water service authorities are required to exercise their rights in a manner that is fair, equitable and reasonable, and support national fiscal and economic policy. Where a water service authority adds no value to this service 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 a portion of water that the mines are using for domestic purposes.
>
> 2.3 The Merafong City Local Municipality is of the view that it appropriately consulted with the mines and also considered the mine's economic assessment presented by the Chambers of Mines on behalf of the mines. Based on the appeal submitted to me, it is debatable whether the mines supported 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.
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> 2.4 In terms of the power vested on me by section 8(9) of the Water Services Act, 1997, I therefore overturn the decision of the Merafong City Local Municipality to levy a surcharge on water for industrial use and rule 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." ("the Minister's decision")

[34] In my view, the request for consent under section 7 was otiose and the Minister's reliance upon the powers conferred by the section was inapposite as will be more fully dealt with later in this judgment.

RELIEF SOUGHT BY MERAFONG

[35] Merafong is seeking to review the Minister's decision in terms of PAJA and/or on grounds of legality. Condonation is sought for its delay in bringing the review application. The standard to be applied in assessing delay under both PAJA and legality is whether the delay was unreasonable.[12] Section 7 of PAJA provides that judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date when the person affected became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of the action and the reasons. Section 9 of PAJA provides a court with a discretion to extend the period where the interest of justice so requires. The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to section 7 of PAJA.[13] Consequently, the court must first decide whether to deal with the review as a PAJA review or a legality review or both.

LEGALITY AND/OR PAJA REVIEW

[36] Merafong in its answering affidavit in support of its conditional counter-application focussed on the legality of the Minister's decision. This legality challenge was again referred to in its supplementary affidavit and extensively referred to in its heads of argument and during argument before this court.

[37] Merafong is an organ of state and seeks to review a decision of another organ of state which is the Minister. This is not a case referred to as a self-review where an organ of state reviews its own decision. In such a case PAJA would not be applicable and a legality review would be the available legal route to take.[14] In this case both a PAJA and legality review would be available to Merafong as it is not only

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[12] See *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at para 49 *(Buffalo City)*.
[13] *Buffalo City supra* at para 50.
[14] See *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 CC *(Gijima)*.

acting on its own behalf as an organ of state who, allegedly, suffered usurpation of its constitutionally ordained powers at the hands of the Minister, but it also acts on behalf of its citizens.[15] It has been decided in a recent unreported decision[16] that an organ of state that wants to review the decision of another organ of state should follow the legality review route as such an organ of state does not have to rely on PAJA.

[38] What a legality challenge entails has been explained by the Constitutional Court (hereinafter referred to as the "CC") in various matters.

[39] The first matter I will refer to is the matter of *Affordable Medicines Trust and Others v Minister of Health of RSA and Another.*[17] Dealing with circumstances where the Minister exceeded the powers conferred by empowering provisions of the Medicines and Related Substances Act,[18] the Court found as follows:

> "[50] In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts ultra vires (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid."

[40] Next, it is apposite to refer to the judgment of *Pharmaceutical Manufacturers Association of South Africa and Others; In Re: Ex Parte Application of President of the Republic of South Africa and Others*[19] where Chaskalson J remarked as follows:

> "[20] The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law… The finding that he acted ultra vires is a finding that he acted in a manner that was inconsistent with the Constitution."

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[15] *Municipal Manager: Quakeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 SCA at para 23–26.
[16] *South African Broadcasting Corporation SOC Limited and Another v Mott Macdonald SA (Pty) Ltd* [2020] ZAGPJHC 425 at paras 22 and 23.
[17] 2006 (3) SA 247 (CC) (*Affordable Medicines Trust)*.
[18] 101 of 1965.
[19] 2000 (2) SA 674 (CC).

[41] In *Affordable Medicines Trust*, the Court also dealt with the doctrine of legality and legislation and/or conduct inconsistent with the Constitution, being unlawful and invalid. In this case, the following was stated:

> "The doctrine of legality, which is an incident of the rule of law is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principles that they may exercise no power and perform no function beyond that conferred upon them by law'."[20]

[42] Reference can also be made to *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*[21] (*Treatment Action Campaign and Innovative Medicines SA as Amici Curiae*) from which it is evident that functionaries exercising powers are confined to the powers vested in them by the empowering legislation as they may not exceed such power at all. If they do, such actions are unlawful and invalid.

[43] A PAJA review under section 6(1) can also consider the legality of an impugned decision. Section 6(2)(d) refers to "*the action was materially influenced by an error of law:"* Section 6(2)(f) deals with action which "*contravenes a law or is not authorised by the empowering provision;"* and sub-section (i) provides for "*the action is otherwise unconstitutional or unlawful".* These grounds for review can equally be grounds for review in a legality challenge without reliance being placed on PAJA.

[44] In my view Merafong pertinently relied on legality as a ground of review.[22]

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[20] *Affordable Medicines Trust supra* at para 49. See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58.
[21] 2006 (1) BCLR 1 (CC).
[22] In paragraph 4.8 of Merafong's supplementary affidavit it stated as follows: "*It is Merafong's contention that the Minister's decision was and still is invalid because it falls foul of the principle of legality, as it intruded on an exclusive constitutional competence which section 156(1) of the Constitution confers on Merafong, as ordained constitutional entity."* Also the following was stated in para 3.4: "*By setting aside the tariffs, the Minister unlawfully usurped Merafong's powers, thereby rendering her aforesaid decision unlawful and constitutionally impugnable."*

[45] I intend to consider the review and the delay in the context of a legality review first. Depending on this decision the need to consider the PAJA review may become superfluous.

MERAFONG'S LONG DELAY IN LAUNCHING THE REVIEW APPLICATION

[46] I will start this enquiry with whether condonation should be granted or whether the delay should be overlooked by stating the legal position.

[47] The Supreme Court of Appeal and Constitutional Court in various decisions[23] confirmed the following test for assessing undue delay in bringing a legality review:

47.1 First, it must be determined whether the delay is unreasonable or

undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter and the explanation proffered. Where the delay can be explained and justified, then the delay is reasonable and the merits of the review can be considered.

47.2 Second, if the delay is unreasonable, the question is whether the

court's discretion should nevertheless be exercised to overlook the delay to entertain the application.[24]

[48] In considering the first part of the test, the following was found in *Buffalo City:*

48.1 The standard to be applied in assessing delay is whether the delay was unreasonable.[25]

48.2 The proverbial clock starts to run from the date that the applicant

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[23] See *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA); *Khumalo and Another v MEC for Education: KwaZulu-Natal* 2014 (5) SA 579 (CC); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC); and *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC).
[24] *Buffalo City supra* at para 49.
[25] See *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at para 37.

became aware or reasonably ought to have come aware of the action taken. [26]

48.3 If there is an explanation for the delay the explanation must cover

the entire period of the delay.[27] Where there is no explanation for the delay, the delay will necessarily be unreasonable.

[49] The next leg of the test is whether the delay ought to be overlooked.

49.1 The court has the power in a legality review to refuse an application where there is an undue delay in initiating proceedings, or a discretion to overlook the delay.

49.2 There must however be a basis for a court to exercise its discretion to overlook the delay. To this end the basis must be gleaned from the facts made available or the objectively available factors.[28]

49.3 This then entails a legal evaluation considering several factors.[29]

49.3.1 The potential prejudice to affected parties as well as possible consequences of setting aside the impugned decision.[30]

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[26] *Buffalo City supra* at para 49.
[27] *Ibid* at para 52.
[28] *Ibid* at paras 52 – 53.
[29] *Ibid* at para 54.
[30] *Buffalo City supra* at para 54*:*

> "The potential prejudice to affected parties and the consequences of declaring conduct unlawful may in certain circumstances be ameliorated by this court's power to grant a just and equitable remedy and this ought to be taken into account. The interrelationship between prejudice and delay was explained by Kampepe J in *Tasima 1*:
>
> > 'But what is the prejudice suffered by Tasima in overlooking the delay? Condoning the delay does not prevent them from enforcing the court orders that have been granted in their favour. In addition, the contract extension itself has already expired. Setting aside the extension at this point should not, therefore, impact negatively on Tasima going forward. It is also a factor that this court may rely on its s 172(1)(b) powers to ameliorate the prejudice suffered. It bears repeating that Tasima has, in addition, benefitted greatly from the extension. In my view, the prejudice suffered is minimal, particularly in comparison to the prejudice to be suffered by the

49.3.2 The nature of the impugned decision. This requires a consideration of the merits of the legal challenge against that decision.[31]

49.3.3 The conduct of the applicant.[32]

49.3.4 Even where there is no basis for a court to overlook an unreasonable delay, a court may nevertheless be constitutionally compelled to declare the state's conduct unlawful. This is so because section 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution.[33]

[50] Against this synopsis of the legal principles, the court will consider the reasons advanced by Merafong for its delay in approaching the court to review the Minister's decision. First, the court will refer to the chronology of events.

[51] On 18 July 2005, the Minister wrote to Merafong detailing the decision relating to the appeals lodged by AngloGold in terms of section 8 of the Act. In this letter the Minister upheld the appeal and set aside the surcharge raised in the water tariff for industrial use and, further, upheld the appeal and ordered Merafong, the mines and Rand Water to negotiate a reasonable tariff on the portion of water that mines used for domestic purposes.

[52] On 8 September 2005, Merafong obtained a legal opinion from attorney Mr. Nalane. Mr. Nalane advised that the function of the Minister in relation to the setting of standards is merely to prescribe norms and standards in respect of tariffs for water services. The Minister has no power to prescribe a specific tariff or to interfere in the

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Department and the Corporation if the counter-application is not condoned. This is consonant with the dicta in Khumalo that "consequences and potential prejudice … ought not in general, favour the court non-suiting an applicant in the face of the delay".

[31] *Buffalo City supra* at para 58.
[32] *Ibid at* para 59.
[33] *Buffalo City* supra at paras 63 – 71.

tariff setting functions of a municipality. Any action on the part of the Minister to seek to interfere with the tariff setting function of a municipality is beyond the powers of the Minister and is void in law. He further stated that the Minister has encroached on the powers of Merafong as a local sphere of government and the power of the municipality to set tariffs is beyond doubt and is established in other pieces of legislation, including the Constitution as well as the Municipal Structures Act. After references to various sections of the Constitution he concluded that nowhere in the Act is the Minister given the power to set aside, review or challenge any tariff set by a water services authority. He recommended that Merafong should engage the Minister further and point out that both Merafong and the Minister have misconstrued their positions in law as regards the setting of water tariffs and accordingly that the Minister must withdraw the decision to set aside the decision of Merafong to levy tariffs on the mines.

[53] In this opinion, Mr. Nalane did not advise Merafong that it should review the decision of the Minister and that the decision of the Minister will remain in force until set aside by a court of law.

[54] On 23 September 2005, Mr. Nalane wrote a letter to the Minister submitting the legal opinion and requesting a meeting with the Minister.

[55] Consonant to Mr. Nalane's view that the Minister acted *ultra vires* her powers Merafong wrote to the Minister on 5 April 2006 in which it was stated "*It has become imperative for us to resolve this matter decisively. As a result we have obtained an opinion to the effect that we have a case to make in court to overturn your decision".*

[56] Merafong from this time onwards until the filing of its answering affidavit and conditional counter-claim opposing AngloGold's application during August 2011 held the position that based on the legal advice provided that the Minister's decision could be "*ignored to the extent of such invalidity*", it took no further steps to set aside the Minister's decision.

[57] From 8 December 2005 to 18 July 2006, various letters were written to engage with the Minister and to set up a meeting to discuss the decision.

[58] On 16 April 2007, Mr. Nalane captured the factual circumstances and stated as follows:

> "The Minister prevailed on Merafong, which was ready to take action at that stage, not to proceed with legal action, and to [give] negotiations a chance."

[59] It should be noted that by April 2006, the 180-day period referred to in PAJA would have expired. Once Merafong invoiced AngloGold on its tariff scales, AngloGold stopped paying. This culminated in a letter written by Merafong to AngloGold dated 17 September 2007 requiring payment, failing which a restriction of water supply would be commenced with. AngloGold subsequently paid the arrears and has since then paid for its water supply as per invoices received from Merafong.

[60] The answering affidavit of Merafong was filed on 3 August 2011 incorporating a conditional counter-application. This counter-application was for a declarator that Merafong has exclusive executive authority to set, adopt and implement tariffs on the provision of water services in its jurisdiction, including surcharges. Merafong also sought a declarator that section 8 of the Act did not confer authority on the Minister, "*to interfere with a tariff set and implemented"* by it for water services provided in its area of jurisdiction. In the alternative, Merafong sought to strike down the provisions allowing appeals to the Minister in terms of section 8(9) as unconstitutional and invalid. This counter-application had all the characteristics of a legality challenge but did not include a prayer for the review and setting aside of the Minister's decision.

[61] The High Court granted AngloGold's application and dismissed Merafong's counter-application. The High Court found that the Minister's decision, even if impugnable, was in any event binding on the municipality until set aside. The High Court relied on the case of *Oudekraal* for its finding.

[62] Merafong, dissatisfied with this decision, took the matter on appeal. The Supreme Court of Appeal found that Merafong's failure to challenge the Minister's

ruling in judicial review proceedings was fatal for its case. It found that without setting aside the Minister's decision the constitutional attack it launched against the empowering statutory provisions posed "*an insuperable difficulty for its case".*[34] Further, that a collateral challenge to the invalidity of an administrative action is a remedy available only to an individual threatened by a public authority with coercive action and not available to an organ of state.

[63] The judgment in the High Court was delivered on 26 February 2014 and judgment by the Supreme Court of Appeal was delivered on 28 May 2015. The matter went to the Constitutional Court and judgment was delivered on 24 October 2016. Merafong's reactive defence was not disqualified because it is an organ of state. Merafong was permitted to raise a challenge to the Minister's decision, "*but on appropriate terms that call for it to explain properly its delay in challenging that decision."*[35]

[64] Merafong amended its notice of motion during July 2017 to incorporate the prayer for a review and setting aside of the Minister's decision. This is a date approximately 13 years after the Minister's decision. For the first six years the parties were not engaged in legal proceedings but for the remainder of the 13-year period, the parties were in the process of litigation.

MERAFONG'S EXPLANATION FOR THE DELAY

[65] Merafong was advised by Mr. Nalane that the Minister's decision on appeal was wrong in law. It alleges that it fully accepted and adopted such advice. This advice was followed until the filing of the answering affidavit in August 2011 wherein it was stated on behalf of Merafong that it was of the view that it could "*ignore it to the extent of such invalidity"* with reference to the Minister's decision.

[66] Merafong further explained that after it received the advice of Mr. Nalane it followed his advice that it should engage with the Minister further and point out to her that both Merafong and she misconstrued their positions in law as regarding the setting of water tariffs. The Minister was requested to withdraw the decision in which

[34] *Merafong City Local Municipality v AngloGold Ashanti Limited* 2016 (2) SA 176 (SCA) at para 15.
[35] *Merafong supra* at para 83.

she overruled the tariffs determined by Merafong to be applicable to water supplied to the mines. This advice was followed and during the period from 8 December 2005 to 18 July 2006, various attempts were made to engage with the Minister. This came to naught, except for the Minister advising that Merafong, which was apparently ready to take action, not to proceed with legal action and to give negotiations a chance.

[67] Merafong contended that it engaged with the Minister as is required in terms of section 40(1) of the Inter-Governmental Relations Framework Act,[36] which has its foundation in section 41(3) of the Constitution,[37] in a *bona fide* manner and that this, to some extent, explained why it did not institute legal proceedings sooner.

[68] A further reason advanced for the delay is said to be that there was no continuity within the management at Merafong during the relevant period. Various Municipal Managers dealt with the matter. Mr. Nalane also left his attorneys firm to pursue a career at the Johannesburg Bar. This also, according to Merafong, left a certain *lacuna*.

[69] It also stated that Merafong acted in a *bona fide* manner in its engagement with AngloGold in its attempt to resolve the position.

[70] This engagement with AngloGold resulted in an agreement which was reached whereby the implementation date for the new water tariff would have been 1

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[36] 13 of 2005.
Section 40(1) provides –

> "**40 Duty to avoid intergovernmental disputes —**
>
> (1) All organs of state must make every reasonable effort-
>
> *(a)* to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and
>
> *(b)* to settle intergovernmental disputes without resorting to judicial proceeding/s."

[37] Section 41(3) of the Constitution provides –

> "**41. Principles of co-operative government and inter-governmental relations. —**
>
> …
> …
> …
>
> (3) An organ of state involved in an inter-governmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."

July 2006. It was argued that at that stage Merafong could reasonably have considered the matter to have been resolved. As such, there was no motivation for Merafong to have instituted a review application at that stage.

[71] Merafong also explained that another mine, Blyvooruitzicht Gold Mining Company Limited, during the course of 2007 instituted an application against Merafong in relation to the enforcement of the Minister's decision. When this happened there was no need at the time to proceed with a separate application with the specific relief being aimed at reviewing and setting aside the Minister's decision.

[72] The further factor argued which explains Merafong's delay was the complexity and relative uncertainty of the legal position and positive duty of state functions, especially at that time, to institute review proceedings by one organ of state dissatisfied with the decision of another organ of state.

[73] It was submitted on behalf of Merafong that all of the aforementioned circumstances contributed in one way or another to the failure of Merafong to institute a review application timeously. It could, so the argument went, in no manner be concluded that Merafong acted recklessly or in deliberate disregard and/or in contravention of the principle of legality.

WAS THE DELAY UNDUE AND UNREASONABLE?

[74] In my view, the delay of six years before Merafong eventually launched its counter-application was unduly long. The further delay for a period of 6 to 7 years before Merafong amended its counter-application prayer for the review and setting aside of the Minister's decision caused an unreasonable delay although this period is of lesser significance than the first period.

[75] Considering the reasons advanced by Merafong, it appears that Merafong followed the advice of Mr. Nalane blindly and was prepared to ignore the decision of the Minister which it perceived to be illegal and invalid. Merafong thought it was entitled to do that. This reason, together with the legal uncertainty as to the available remedies to challenge the decision of another organ of state and the request of the

Minister to give negotiations a chance, appear to be the main reasons why Merafong for the first few years failed to review the Minister's decision. Merafong wanted the Minister to withdraw her decision and was of the view that it could settle the matter with AngloGold and thereby render the Minister's decision of no consequence. All of this was based on the wrong legal advice. To get the Minister to cooperate with Merafong the letter of 6 April 2006 was addressed to the Minister by Merafong. It should be noted that it was stated in this letter that Merafong *"have a case to make in court to overturn the decision".* In this letter Merafong referred to the Inter-Governmental Relations Framework Act and stated that both it and the Minister are under a duty to follow chapter 4 of this Act. A dispute with the Minister was declared. It was argued that although Merafong was aware that it could have made out a case to overturn the decision in court it could not do so as it was legally obliged to liaise with the Minister to settle the dispute.

[76] It is clear that Merafong decided that it was duty bound to engage with the Minister and to give negotiations a chance. But what was stated in the letter is also indicative of the knowledge which Merafong had pertaining to the availability of legal proceedings to set aside the Minister's decision, not necessarily by way of a review application. The reference to "*overturn the decision"* could be a reference to declare the decision of the Minister as unconstitutional and invalid. This will be in line with what relief Merafong initially sought by way of its counter-application. At some stage during 2006 to 2007 it must have become clear that the Minister was not going to cooperate and was not going to review, or withdraw, her own decision.

[77] In my view the reason alleged, which stands out why Merafong failed to take legal action, is the wrong advice it received which was caused by the legal uncertainty of how to deal with the matter. This court is, however, not persuaded by the argument that Merafong was convinced that it should not at some stage approach a court to set aside the Minister's decision, albeit, only after negotiations failed. Merafong itself stated that it had a case to be made out for setting aside the Minister's decision.

[78] If this was the main reasons for the failure to review the Minister's decision the other reasons advanced could not assist Merafong. Why would it have reviewed a decision if it believed that it was not necessary to do so?

[79] The time period when Merafong attempted to engage with the Minister can only explain a short period of the delay but the wrong belief extends over a longer period. The reason for the engagement was for the Minister to withdraw her decision. This engagement in itself was ill-advised as the Minister was not legally entitled to vary or amend her decision as she would have been *functus officio* to do so.

[80] In my view the court should be more concerned with the first 6-year period before the litigation started between the parties. It is understandable that during the next 6 to 7 year period the rights of the parties were in the hands of the courts and it could not have been expected of Merafong to amend its counter-application to incorporate a review application at that stage. This issue for determination by the courts was, *inter alia,* whether the advice of Mr. Nalane, which was followed all along, was correct. It is understandable that the amendment to review the decision only came about after the the CC had made a ruling in this regard. It should be noted that the CC did not find that the existing counter-application was not a review in some form. The CC only ordered that the record of decision should be provided and that an explanation for the delay was required.

[81] In my view Merafong failed to provide an explanation for the delay for the full initial 6-year period not to approach a court to set aside the Minister's decision or at least for some form of declaratory relief as was subsequently sought by way of conditional counterclaim. Merafong was aware that a legal challenge to set aside the Minister's decision was a remedy available to it but after the negotiations with AngloGold and the Minister came to naught it failed to take legal steps from about 2007 until 2011 when it counter-claimed the application of AngloGold. To some extent the wrong advice, to ignore the invalid decision of the Minister, can explain why Merafong, after the negotiations and interaction with AngloGold and with the Minister came to naught, failed to approach a court for relief. Why it waited for

AngloGold to approach the court before it reacted was not fully explained. If it was so convinced of the view that the Minister's decision was invalid and could be ignored one would not have expected a counter-application but rather that this defence would have been put forward.

[82] After the High Court decision in which it was found that the decision of the Minister would have stood until it was set aside by a court Merafong still waited many years before it amended its relief by incorporating a prayer for a review. It may be argued that Merafong should have done so after the judgment. At the stage when Merafong instituted its conditional counterclaim the legal position was not altogether clear as to which specific legal remedy should have been invoked. *Oudekraal* was reported in the year 2004. The principle established in *Oudekraal* that an invalid administrative act is binding as long as it is not set aside by a competent court has now become established law and was made clear and followed in *Kirland.* In my view, after the decision in *Oudekraal* there still could have been legal uncertainty particularly considering the unique set of facts which were present in that matter. The court in *Oudekraal* dealt with consecutive administrative acts. The CC in *Merafong* per Jafta J, in his minority judgment, limits the scope of this decision to the specific facts of that matter.[38] The minority found "*that Oudekraal is not authority for the proposition that an invalid administrative act is binding as long as it is not set aside by a competent court."* The minority then concluded that if a decision is invalid it is void from the outset and that it was not necessary to approach a court to review the illegal action.[39]

[83] The point of all this is that it in my mind it appears reasonable for Merafong, acting on the advice of Mr. Nalane, to have concluded at that stage not to institute review proceedings as opposed to the declaratory relief it was seeking in its conditional counterclaim. If a contrary and strong view is held by constitutional Judges as to the legal correctness of *Oudekraal* it is quite understandable that Merafong could have believed that it was not necessary for it to review the Minister's decision at that stage.

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[38] See *Merafong supra* at paras 116 –127.
[39] *Merafong supra* at para 150.

[84] Despite the acceptable reason for not instituting review proceedings during the second period after 2011 the explanation for the delay for the period from about 2007 to 2011 not to take any legal action is porous and not totally convincing. Accordingly, the court is of the view that the delay of 6 years before the counterclaim was filed was undue and unreasonable. It was expected of Merafong to explain the full period of the delay as, on its own version it was aware of its right to set aside the Minister's decision, which it failed to do.

[85] This is however not the end of the enquiry as the question remains whether the court should nevertheless exercise a discretion to overlook the delay and to entertain the application.

[86] As has been stated hereinbefore there must be a basis for the court to exercise its discretion to overlook the delay. The court will also have to consider prejudice suffered by affected parties as well as consequences of setting aside the impugned decision. Also, the nature of the decision and the prospects of success have to be considered. [40] Further, the conduct of the applicant also has to be considered. Lastly, even where there is no basis for the court to overlook the unreasonable delay, the court may nevertheless be constitutionally compelled to declare the Minister's decision unlawful and apply section 172(1) of the Constitution dealing with an appropriate remedy.

[87] That the prospects of success are a relevant consideration when a court considers whether to overlook an unreasonable delay has been found by our courts. In *Buffalo City* the court referred to *Khumalo* and stated as follows: "*In the context of a legality review, in Khumalo, Skweyiya J writing for the majority explained that 'an additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. Skweyiya J added that this entails analysing the impugned decision and considering the merits of the legal challenge made against the decision.'*"[41]

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[40] *Altech Radio Holdings (Pty) Ltd and Others v Tswhane City* 2021 (3) SA 25 (SCA) at para 53.
[41] *Buffalo City supra* at para 56. *See also South African National Roads Agency Ltd v City of Cape Town* 2017 (1) SA 468 (SCA) *(SANRAL); Khumalo supra* at para 57 and *City of Cape Town v Aurecon South Africa (Pty) Ltd Limited* 2017 (4) SA 233 (CC).

[88] Before prejudice to the affected parties and the other criteria is considered the court will first consider the merits of the review as the strength or weakness of Merafong's case to set aside the Minister's decision can impact on the discretion this court exercises to set aside the decision despite the unreasonable delay.

MERITS OF THE REVIEW

[89] The question is whether the Minister's decision was made in terms of the empowering provisions of the Act and consonant to the terms of the Constitution dealing with the powers and functions of municipalities.

[90] The grounds of review relied upon by Merafong are that:

90.1 The Minister overlooked the fiscal power conferred on municipalities by section 229(1) of the Constitution regarding surcharges on services;[42]

90.2 The Minister was incorrect in finding that Merafong was not entitled to levy a surcharge on water for industrial use, because section 229 of the Constitution authorises such a surcharge;

90.3 The Minister had no power under section 8(9) of the Act or the instrument as a whole to interfere with the tariffs determined by Merafong, and in so doing she acted *ultra vires* and was materially influenced by an error of law; and

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[42] Section 229(1) of the Constitution provides –

"**229. Municipal fiscal powers and functions. —**

(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."

90.4 The Minister misconstrued the factual circumstances that she was required to consider and in particular because her jurisdiction to interfere with Merafong's decision was limited to the provision of water by a body other than a water services provider nominated by Merafong.

[91] Merafong also raised a constitutional challenge to section 8(9) of the Act. This challenge will be further dealt with hereinbelow.

[92] On behalf of AngloGold, it was argued that the Act is national legislation providing for a regulatory framework for the exercise of the fiscal powers of municipalities and their executive authority in respect of water and sanitation services. Such a framework is envisaged by sections 151(3), 155(7) and 229(2)(b) of the Constitution, and by the principles of cooperative government. AngloGold contended that the regulatory framework exercised, *inter alia*, through the setting of norms and standards for tariffs in respect of water services in terms of section 2(b)[43] read with section 10 of the Act is expressly authorised by sections 44(1)(a) and 85(2) of the Constitution. The appeal jurisdiction afforded to the Minister in section 8(9) of the Act is entirely consonant with the Constitution. It was argued that section 8(9) is part and parcel of the regulatory framework and that the Minister may on appeal confirm, vary or overturn any decision of the Water Services Authority concerned. This "any" decision would also pertain to a decision taken by Merafong in relation to levying of tariffs and surcharges for the provision of water to water users.

[93] The court will deal with the review aimed against the Minister's decision with reference to the empowering provisions of the Act first before dealing with the decision in relation to the constitutional framework.

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[43] Section 2(b) provides that the main objects of the Act are to provide for –

"…

(b) the setting of national standards and norms and standards for tariffs in respect of water services;"

[94] The empowering provision in the Act which the Minister relied upon for her decision was section 8(9).[44] To decide what section 8(9) empowers the relevant terms of the Act should be considered.

[95] An appeal only lies against decisions made in terms of section 6[45] and 7.[46] So much is clear if the wording of the entire section 8 is considered together with section 8(9).

[96] Subsection 8(1) of the Act proceeds with a reference to sections 6 or 7 and provides as follows:

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[44] "The Minister may on appeal confirm, vary, or overturn any decision of the water services authority concerned."

[45] "**6 Access to water services through nominated water services provider –**

(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 that water services authority.

(2) A person who, at the commencement of this Act, was using water services from a source other than one nominated by the relevant water services authority, 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."

[46] "**7 Industrial use of water –**

(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.

(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."

> "A water service authority whose approval is required in terms of section 6 or 7 –
>
> (a) may not unreasonable withhold approval; and
>
> (b) may give approval subject to reasonable conditions."

[97] The first observation is that the reference to "*conditions*" is a reference to conditions of an approval when such approval is granted to use water services from a source other than a water service provider nominated by the service authority. (See section 6(2)(b)(i)).

[98] The same applies to section 7(3)(b)(i) where there is a reference to *"conditions*".

[99] The reference to "*reasonable conditions*" in section 8(1)(b) in my view does not refer to the conditions mentioned in section 4 of the Act.

[100] Section 8(4) provides further as follows:

> "A person who has made an application in terms of section 6 or 7 may appeal to the Minister against any decision, including any conditions imposed, by that water services authority in respect of the application."

[101] Again, it is clear that an appeal lies to the Minister against the decision made in terms of section 6 or 7 of the Act. That is why the words "*in respect of the application"* is used. This is further made clear when section 8(6) is considered which reads:

> "A person who has made an application in terms of section 6 or 7 may appeal to the Minister if the water service authority in question fails to take a decision on the application within a reasonable time."

[102] It is within this context that section 8(9) must be interpreted. Section 8(9) provides that the Minister *"may on appeal confirm vary or overturn any decision of the water service authority concerned"*. The entire section refers to an appeal pursuant to a decision in terms of sections 6 and 7 and in my view, does not provide the Minister with authority to confirm, vary or overturn a decision outside the ambit of

sections 6 and 7. It should again be mentioned that sections 6 and 7 deal with the use of water services or to obtain water for industrial use, from any source other than the distribution system of a water services provider nominated by the water services authority.

[103] As indicated hereinbefore the entire process took a wrong direction when Merafong asked AngloGold to apply for approval for the supply of water for industrial use in terms of section 7 of the Act. This was followed by a request from AngloGold to continue obtaining water from Rand Water for its mining operations and associated domestic applications at the tariff set by, and under the conditions imposed by Rand Water. Then, after Merafong informed AngloGold that Rand Water would be providing water to it but as agent for Merafong at certain tariffs, Merafong informed AngloGold that it has a right of appeal pursuant to section 8(4) of the Act.

[104] In my view, sections 6 and 7 have nothing to do with the determination of tariffs, levies and surcharges imposed on the supply of water outside the scope of receiving water from another source than the nominated service provider. Section 7(3)(b), for instance, deals with a situation when approval has been requested to continue to receive water from another source than the distribution system of a water services provider nominated by the water service authority. The water services authority can give such permission subject to *conditions*.

[105] The conditions referred to in sections 6 and 7 in my view also have nothing to do with the conditions for provision of water services as contemplated in section 4 of the Act.[47] This section deals with water services provided by a water services

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[47] "**4 Conditions for provision of water services —**
(1) Water services must be provided in terms of conditions set by the water services provider.
(2) These conditions must-
(a) be accessible to the public;
(b) accord with conditions for the provision of water services contained in bylaws made by the water services authority having jurisdiction in the area in question; and
(c) provide for-
(i) the technical conditions of existing or proposed extensions of supply;
(ii) the determination and structure of tariffs;
(iii) the conditions for payment;
(iv) the circumstances under which water services may be limited or discontinued;
(v) procedures for limiting or discontinuing water services; and

provider, such as Rand Water, and must be in accordance with conditions for the provision of water services contained in by-laws made by the water services authority, such as Merafong.

[106] In the case of section 7(3)(b) the conditions are the conditions of the water services authority (Merafong) which grant permission to obtain water from another source. In the case of section 4 the conditions, which must comply with the by-laws of the water services authority (Merafong), are imposed by the water services provider, such as Rand Water.

[107] The appeal lodged with the Minister had nothing to do with the supply of water from a source other than a water services provider nominated by the water services authority. The appeal was aimed at the tariffs established by Merafong, being excessively higher than the equivalent Rand Water tariff, this whilst, according to the Minister, Merafong is not adding any value or assuming any responsibility for any aspect of the water supply. The Minister then decided that no surcharge can be levied on water for industrial use and ruled that Merafong should negotiate a reasonable tariff with the mines for the supply of water for domestic use.

[108] Fact is, that AngloGold was not going to use water or obtain water from a source other than a water service provider nominated by Merafong.

(vi) measures to promote water conservation and demand management.

(3) Procedures for the limitation or discontinuation of water services must-

(a) be fair and equitable;

(b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless-

(i) other consumers would be prejudiced;

(ii) there is an emergency situation; or

(iii) the consumer has interfered with a limited or discontinued service; and

(c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.

(4) Every person who uses water services provided by a water services provider does so subject to any applicable condition set by that water services provider.

(5) Where one water services institution provides water services to another water services institution, it may not limit or discontinue those services for reasons of non-payment, unless it has given at least 30 days' notice in writing of its intention to limit water services or 60 days' notice in writing of its intention to discontinue those water services to-

(a) the other water services institution;

(b) the relevant Province; and

(c) the Minister."

[109] In my view, the Minister exceeded the boundaries of the empowerment which vested in her in terms of section 8(9) of the Act. The illegality principle applies and such conduct is unlawful and invalid, albeit, that it still has legal affect until set aside by a court of law. Consequent upon this finding the decision of the Minister falls to be set aside.

[110] If I am wrong in my finding of unlawfulness of the Minister's decision with reference to the ambit of section 8(9) of the Act it should then be considered whether the decision of the Minister complied with the terms of the Constitution. For this purpose the decision of the Minister should be tested against the Constitution.

[111] During argument before this court it was argued on behalf of AngloGold, and conceded by Merafong in its affidavits and heads of argument, that for purposes of considering whether the Minister's decision was constitutionally valid a distinction should be drawn between potable water for domestic use and water for industrial use. All water Merafong supplied to AngloGold is potable water but the Act defined "*water supply services"* to mean "*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."*

[112] Schedule 4 Part B of the Constitution refers to services which falls within the executive authority of a municipality to administer and includes '*water and sanitation services limited to potable water supply systems …."*. This matter was argued on the basis that the "*services"* should be interpreted to exclude water supplied by Merafong for industrial use. During the course of argument before this court the legal representatives of Merafong started to doubt their concession of the legal position in this regard. I do not intend to decide the correctness of this interpretation and will decide the matter by accepting that the reference to potable water is a reference to water for domestic use only.

[113] The source of the power for Merafong to impose tariffs is section 229 of the Constitution. This was succinctly set out by the Constitutional Court in the minority judgment.[48] The relevant portion of this section provides as follows:

> "(1). Subject to subsections (2), (3) and (4), a municipality may impose –
>
> (a) rates on property and surcharges on fees for the services provided by or on behalf of the municipality; and
>
> …
>
> (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 and duties –
>
> (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."

[114] On a reading of this section, it is clear that municipalities are entitled to levy surcharges on water services it provides, regardless whether the water is destined for use for industrial, domestic or commercial purposes. It is also clear that national legislation may regulate the power of a municipality to impose surcharges on fees for services provided. The question will be how far these regulatory powers stretch and more particularly whether section 8(9) of the Act falls within such power to regulate.

[115] In terms of section 6 of the Act a municipality is provided with the exclusive right to provide water services through a nominated water services provider, in relation to potable water, to persons within its jurisdiction unless the municipality determines otherwise. Section 7 has the same effect with reference to water for industrial use. As far as water services are concerned section 4 of the Act provides that conditions must be set for such provision. These conditions must provide for, *inter alia,* the "*determination and structure of tariffs".* Section 4 refers to "*water services"* which is defined in the Act to mean "*water supply services",* which is also defined to mean potable water but excluding water for industrial use. Thus, section 4 only pertains to potable water. Section 21(3) deals with water used for industrial

[48] *Merafong supra* at paras 154 – 156.

purposes and determines that a water services authority which provides water for industrial use must make bylaws providing for, *inter alia,* the determination and structure of tariffs. It can accordingly not be disputed that Merafong had the right to provide potable water and water for industrial use to AngloGold.

[116] Section 11 of the Local Government: Municipal Systems Act [49] determines the extent of a municipality's executive and legislative authority by giving it the power to provide municipal services to the local community[50] and to impose and recover rates, taxes, levies, duties, service fees and surcharges on fees, including setting and implementing tariff, rates, and tax and debt collection policies.[51] This power is not unlimited as section 74[52] of this Act provides for the adoption and implementation of a tariff policy on the levying of fees for municipal services provided by a municipality.

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[49] 32 of 2000.
[50] Section 11 (f) of Local Government: Municipal Systems Act.
[51] Section 11 (i) of Local Government: Municipal Systems Act.
[52] "**74 Tariff policy –**

(1) A municipal council must adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself or by way of service delivery agreements, and which complies with the provisions of this Act, the Municipal Finance Management Act and any other applicable legislation.

(2) A tariff policy must reflect at least the following principles, namely that-

(a) users of municipal services should be treated equitably in the application of tariffs

(b the amount individual users pay for services should generally be in proportion to their use of that service;

(c) poor households must have access to at least basic services through-

(i) tariffs that cover only operating and maintenance costs,

(ii) special tariffs or life line tariffs for low levels of use or consumption of services or for basic levels of service; or

(iii) any other direct or indirect method of subsidisation of tariffs for poor households;

(d) tariffs must reflect the costs reasonably associated with rendering the service, including capital, operating, maintenance, administration and replacement costs, and interest charges;

(e) tariffs must be set at levels that facilitate the financial sustainability of the service, taking into account subsidisation from sources other than the service concerned;

(f) provision may be made in appropriate circumstances for a surcharge on the tariff for a service;

(g) provision may be made for the promotion of local economic development through special tariffs for categories of commercial and industrial users;

(h) the economical, efficient and effective use of resources, the recycling of waste, and other appropriate environmental objectives must be encouraged;

(i) the extent of subsidisation of tariffs for poor households and other categories of users should be fully disclosed.

(3) A tariff policy may differentiate between different categories of users, debtors, service providers, services, service standards, geographical areas and other matters as long as the differentiation does not amount to unfair discrimination."

[117] Having established the right of Merafong to provide potable water and water for industrial use to AngloGold and to levy tariffs and surcharges the question which remains is to what extent the Minister could have, through the empowering provision of section 8(9) of the Act, interfered with the determinations of Merafong to levy surcharges on the supply of water for domestic and industrial use.

[118] Section 229(2)(b) of the Constitution provides that the power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality may be regulated by national legislation.

[119] On behalf of AngloGold it was argued that this section affords the Minister the power to regulate Merafong's imposition of surcharges on fees. Ancillary to this regulatory power must be the ability to vary or to overturn Merafong's determination regarding the imposition of surcharges on water for industrial and domestic use. In doing so, it was argued, the Minister acted within the powers conferred by the Constitution. The regulatory scheme contained in the Act is constitutionally authorised, does not impermissibly intrude upon the fiscal powers conferred upon municipalities by section 229 and the Minister did not act *ultra vires* in overturning the decision of Merafong regarding the imposition of surcharges.

[120] In *City of Cape Town and Another v Robertson and Another*[53] the Court found as follows:

> "[60] 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

[53] 2005 (2) SA 323 (CC).

> may derive from the Constitution or from legislation of a competent authority or from its own laws.
>
> [61] It is indeed trite that when a court is seized with the delineation of the powers, functions, rights and duties of a sphere of government conceived and entrenched under the Constitution, the proper starting point of the enquiry must be the Constitution itself. The nub of the challenge before the High Court was the constitutionality of the conduct of the City in valuing property and raising property rates. In that event, the inescapable point of departure must certainly be whether the Constitution contemplates municipal fiscal powers and functions. It does. Chapter 7 of the Constitution read with s 229(1)(a) are in this context of great import. Subsection 229(1)(a) of the Constitution expressly authorises a municipality to impose rates on property and s 229(2)(b) adds that the power to impose rates on property may be regulated by national legislation. The High Court disposed of the matter without any reference to the Constitution in this context.
>
> [62] In conclusion, I am satisfied that the City, being a municipality established under Ch 7 of the Constitution read with the Structures Act derives, in the first instance, its power to value property and impose rates on property from subsection 229(1) of the Constitution."

[121] In the minority judgment in *Merafong*, the CC, with reference to the court *a quo's* decision that the power to impose the surcharges on fees for the supply of water for domestic use is subject to national legislation and that the Act is the regulatory framework by which the Minister assumes responsibility to regulate the exercise of the executive power for water for domestic use, found as follows:

> "171 The fundamental flaw in this conclusion lies in the fact that the court overlooked the principle of separation of powers that applies amongst the spheres of government. This court has proclaimed in a long line of cases that municipalities enjoy exclusive powers in relation to competencies allocated to them by the Constitution. In those cases this court held that national and provincial spheres of government may not arrogate to themselves the power to exercise municipal competencies, by simply passing legislation authorising the exercise of municipal powers."

[122] To interpret section 8(9) of the Act to provide the Minister with the *regulatory power* to vary and overturn any decision of Merafong pertaining to the levying of

surcharges opens the door for the Minister to completely usurp the powers of a municipality to make a determination as to the imposition and extent of surcharges. If such powers are afforded to the Minister it, in my view, goes beyond mere regulation and is not sanctioned by the Constitution. The decision of the Minister, pertaining to water for industrial use, that no surcharge can be levied and that "(*s)urcharges may only be levied on the portion of water that the mines are using for domestic purposes"* is in conflict of section 229(1)(a) of the Constitution as this section provides Merafong with the power to impose surcharges for fees on services provided by or on behalf of a municipality.

[123] Similarly by ruling that "*the Mines and Rand Water should negotiate a reasonable tariff on the portion of water that the mines are using for domestic purposes*" the Minister effectively interfered with a tariff set by Merafong which power in terms of the Constitution vested in Merafong.

[124] The argument advanced on behalf of the Minister that pending the negotiations the determination of Merafong pertaining to the tariff for the supply of water for domestic use remained intact is not without merit but what is questioned is the very existence of such power to make such a decision. In my view, this is not a regulatory power but rather an attempt by the Minister to require from the parties to sort out their differences without having regard to the scope of legislation and the Constitutional framework. Such approach ignored the legislative framework and was destined to failure, as it turned out to be, as no party could be forced into submission.

[125] The court will now consider the other relevant sections pertaining to the authority of municipalities to perform their constitutionally ordained original functions. Section 41 of the Constitution provides that all spheres of government within each sphere must respect the constitutional status, institutions, powers and functions of government in the other spheres and should not assume any power or function except those conferred on them in terms of the Constitution.[54] Section 41 in my view

[54] "**41. Principles of co-operative government and inter-governmental relations. —**
(1) All spheres of government and all organs of state within each sphere must—
(*a*) preserve the peace, national unity and the indivisibility of the Republic;

underpins the doctrine of separation of powers and does not mean that that all differences can be resolved by co-operative government. Once an administrative decision is made by a Minister such decision can only be set aside by a court and not through other avenues. The dispute concerning the Minister's decision was not only a dispute between two organs of state but also involved AngloGold.

[126] On behalf of AngloGold, reliance was placed on section 44 of the Constitution, the relevant portion of which reads as follows:

> "The national legislative authority as vested in parliament –
>
> (a) confers on the National Assembly the power
>
> (i) …
>
> (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in schedule 4, but excluding, subject to subsection 2, a matter within a functional area listed in schedule 5."

(*b*) secure the well-being of the people of the Republic;
(*c*) provide effective, transparent, accountable and coherent government for the Republic as a whole;
(*d*) be loyal to the Constitution, the Republic and its people;
(*e*) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(*f*) not assume any power or function except those conferred on them in terms of the Constitution;
(*g*) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
(*h*) co-operate with one another in mutual trust and good faith by—
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.

(2) An Act of Parliament must—
(*a*) establish or provide for structures and institutions to promote and facilitate inter-governmental relations; and
(*b*) provide for appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes.

(3) An organ of state involved in an inter-governmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved."

[127] It is argued that the right of appeal conferred on the Minister in terms of section 8(9) is sanctioned by section 44 of the Constitution.

[128] Sections 156(1) and 156(2) of the Constitution read as follows:

> "156(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.
>
> (2) A municipality may make and administer bylaws for the effective administration of the matters which it has the right to administer."

[129] When this section is read in conjunction with Schedule 4 (Part B) and Schedule 5 (Part B),[55] it is apparent that municipalities have certain original constitutional powers and are directly responsible for the provision of potable water services to their communities. Municipalities can make and administer bylaws for the purpose set out in section 156(2) above. This is in keeping with the right of municipalities to self-govern the affairs of their communities in terms of sections 151(2) and 151(3) of the Constitution.[56]

[130] It was argued on behalf of AngloGold that the proviso contained in section 151(3), "*subject to national and provincial legislation"* should be read with the preamble of the Act which reads "*to provide for the monitoring of water services and the intervention by the Minister..".* It was further argued that section 155(7)[57]

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[55] "Water and sanitation services limited to potable water supply systems and domestic waste-water and sewerage disposal systems."

[56] "(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 the municipal council.
(3) A municipality has a right to govern, on its own initiative, the local government affairs of the community, subject to the national and provincial legislation, as provided for in the Constitution.
(4) The national provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

[57] "**155. Establishment of municipalities. —**

…

(7) The national government, subject to section 44, and the provincial governments

provides that national government has 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 the executive authority referred to in section 156(1).* It was argued that these sections should be read as encapsulating both monitoring and regulatory powers by national government. If this is so interpreted national government forms, as it were, a parallel tier of executive authority which does not serve as the primary policy driver, but permits a constitutionally approved degree of oversight and regulation.

[131] The sections in the Constitution referred to curtail the authority of the municipalities by determining the national government may regulate these powers by way of regulation. It should now be considered as to how far such regulatory power stretches.

[132] In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*[58] *(City of Johannesburg),* the Constitutional Court set out the constitutional scheme upon which the powers conferred on each sphere of government must be construed. It stated that, while the national and provincial spheres enjoyed concurrent legislative authority over matters listed in Part B of schedule 4 to the Constitution, neither of them can by legislation give themselves the power to exercise executive municipal powers or the right to administer municipal affairs. Each sphere of government must respect the status, power and functions of government in the other sphere and *"not assume any power or functions except those conferred on it in terms of the Constitution*".[59]

[133] The question then arises as to how far provincial and national spheres of government may go in order to exercise their regulatory power in terms of section 155(7) of the Constitution.[60]

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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)."

[58] 2010 (6) SA 182 (CC) at paras 43, 44 and 59.

[59] See section 41 of the Constitution which provides in relevant part: "All spheres of government and all organs of state within its sphere must … (e) respect the constitutional status, institutions, powers and functions of government in the other spheres."

[60] Section 155(7) provides:

[134] In *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* it was found as follows:[61]

> "34. At first blush this provision may be read as authorising the national and provincial spheres to exercise their executive authority of municipalities. But when carefully read it does not. What s 155(7) means is that the national and provincial spheres may exercise their legislative and executive powers to enable municipalities to exercise their own powers and perform their own functions. Therefore, the exercise of legislative and executive authority by these spheres is limited to capacitating municipalities to manage their own affairs and regulating how this must be done. It does not mean that the national sphere may itself take over and exercise the executive authority of a municipality.
>
> The question thus arises as to how far provincial and national spheres may go in order to exercise the regulatory powers in terms of s 155(7) of the Constitution in the performance by municipalities of their functions'. The constitutional scheme does not envisage the province employing appellate power over the municipality's exercise of their planning functions. This is so even where the zoning, subdivision or land-use permission has province-wide implications."

[135] In City of *Johannesburg* the Court found as follows at paragraphs 49 and 50:

> "[49] In *Department of Land Affairs and others v Goodgelegen Tropical Fruits (Pty) Ltd*, this court reiterated that the Constitution must be interpreted purposively. In the context of the schedule 4 and 5 functional areas, this court has held that the purposive interpretation must be conducted in a manner that will allow the spheres of government to exercise their powers 'fully and effectively'.
>
> [50] The purpose of these schedules is to itemise the powers and functions allocated to each sphere of government. As stated earlier, our Constitution contemplates such degree of autonomy for such spheres. This autonomy cannot be achieved if the functional areas itemised in the schedules are

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> "The national government, subject to s 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)."

[61] 2018 (5) SA 1 (CC)at para 34.

> construed in a manner that failed to give effect to the constitutional vision of distinct spheres of government."[62]

[136] In the matter of *Johannesburg Metropolitan Municipality*[63] the Court found with reference to section 155(7) as follows:

> "[33] Section 155(7) goes further to confer legislative authority upon the national and provincial spheres. It 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).'
>
> [34] At first blush this provision may be read as authorising the national and provincial spheres to exercise the executive authority of municipalities. But when carefully read it does not. What s 155(7) means is that the national and provincial spheres may exercise their legislative and executive powers to enable municipalities to exercise their own powers and perform their own functions. Therefore, the exercise of legislative and executive authority by these spheres is limited to capacitating municipalities to manage their own affairs and regulating how this must be done. It does not mean that the national sphere may itself take over and exercise the executive authority of a municipality."

[137] In the matter of *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others*[64] the Court found that the Western Cape Land Use Planning Ordinance was unconstitutional because it impermissibly usurped the power of local authorities to manage municipal planning, thereby intruding on the autonomous sphere of authority which the Constitution affords to municipalities. During the course of the judgment the extent and ambit of section 155(7) of the Constitution was analysed, particularly with reference to monitoring and regulatory powers of national and provincial governments. The Court then found as follows:

> "[22] It follows that 'regulating' in s 155(7) means creating norms and guidelines for the exercise of a power or the performance of a function. It does

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[62] *City of Johannesburg supra* at paras 49 – 50.
[63] *Supra* at paras 33-4.
[64] 2014 (4) SA 437 (CC).

> 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 government 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."

[138] AngloGold argued that "regulating" in section 155(7) is not only restricted to the creation of norms and guidelines for the performance of a function. It argued that the power to "regulate" and to "see to" in section 155(7) should be understood to contemplate a broad managing or controlling function which would include the creation of norms and guidelines but would not be restricted to this function. In my view, this submission should not be sustained. As in this case, the decision of the Minister went beyond mere "monitoring" of the decisions of Merafong. The Minister effectively took over the authority of the municipality and replaced it with her own decision.

[139] I am in agreement with the argument on behalf of Merafong that the constitutional jurisprudence shows that the national and provincial spheres of government should not be afforded "regulatory" powers that exceed the provision of norms and guidelines for the exercise of municipal powers. These higher spheres of government should be entitled to institute minimum and maximum requirements or create similar legislative determined oversight but should not enjoy appellate powers with final say over decisions that are patently original powers of the municipality. To allow *monitorin*g, as suggested on behalf of AngloGold, would lead to an open brief to national government where the limitation of this function would be unclear. The powers of a municipality would become watered down which would be in conflict with the constitutional derived powers of municipalities.

[140] This would certainly be in relation to services under Part B of schedule 4 read with section 156(1)(a) but would also be applicable where municipalities are empowered in terms of section 229(1)(a) to impose "*rates and on property and surcharges on fees for services provided by or on behalf of the municipality".*

[141] I am accordingly of the view that the Minister's purported power to confirm, vary or overturn any decision of the Act, if section 8(9) could so widely be interpreted, which in my view it cannot, is unlawful and invalid in terms of the Constitution. The Minister intruded into the constitutionally determined terrain of Merafong and overturned a decision taken by it in the exercise of its executive authority and its municipal fiscal powers. In my view the Minister, in making a decision, *micro managed* the determination of surcharges on fees for services and went beyond her powers.

[142] As stated hereinbefore the court had to consider the merits of the matter as it is a relevant factor which may guide the court in deciding whether the undue delay to institute the review application should be overseen. Apart from the merits there are further factors which need consideration. The court should consider the potential prejudice to the affected parties as well as the possible consequences of setting aside the impugned decision. The court will consider the conduct of the applicant and finally the court can decide whether the unlawful and invalid decision of the Minister should in any event be set aside having regard to section 172(1)(a) of the Constitution.[65]

[143] The prejudice, apart from financial prejudice, which AngloGold will suffer should the delay be overlooked and the decision of the Minister be set aside is not apparent. If the invalid decision was set aside shortly after the decision was taken, as it should have been done, AngloGold would have been obliged to pay for the supply of water, for domestic or industrial use, at the rates determined by Merafong. This is what transpired in any event. Had AngloGold not paid, or was in arrears, a court would have ordered it to pay whatever was outstanding. The delay has, consequently, not prejudiced AngloGold. The prejudice for Merafong if the decision is not set aside would be enormous. The possibility that the municipality is then ordered to refund the surcharges becomes real. Merafong has been operating under

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[65] "**172. Powers of courts in constitutional matters.** —
(1) When deciding a constitutional matter within its power, a court—
(*a*) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;"

significant financial stress partly caused by its constitutional duty to provide municipal services to all residence within its jurisdiction. These residence includes thousands of employees of AngloGold who live outside the housing provided by AngloGold. The prejudice which Merafong and residents living within its municipal boundaries would suffer if the review is not considered far outweighs the prejudice that AngloGold will suffer if the delay to bring the review is not overseen. The prejudice of AngloGold is financial. Despite paying the surcharges AngloGold has weathered the storm and its survival is not dependant on the outcome of this review.

[144] The court has considered the fact that Merafong has acted illegally for many years by enforcing payment of its tariffs for water supply without setting aside the Minister's decision but in my mind the finding of this court on the merits of the review application will trump this factor counting against Merafong. The illegality has been explained to some extent. Merafong was advised that it could ignore the Minister's decision.

[145] The court is, consequently, of the view that if all factors are considered, including the reasons for the delay provided by Merafong, (which were not totally devoid of merit and fell just short of establishing a reasonable explanation for the delay), the potential prejudice to the parties, the consequences of setting aside the impugned decision, the nature of the decision, the conduct of the parties and particularly the merits of the legal challenge, that the delay in bringing the review application should be overseen. Having found that the decision of the Minister was unlawfully taken and invalid the Minister's decision dated 18 July 2005 should be reviewed and set aside.

[146] Moreover, pursuant to this court's finding this court is constitutionally compelled in terms of section 172(1)(a) to declare the Minister's decision invalid. The consequences of this declaration of invalidity may be ameliorated by a finding of a just and equitable remedy.

REMEDY

[147] The consequence of the declaration of invalidity will be to turn the clock back as if the Minister's decision never existed. Merafong's determination of its water tariffs, including surcharges, will consequently remain in place from the time of the promulgation and implementation thereof unless the court as part of a just and equitable remedy orders otherwise.

[148] This court finds no reason to order any other remedy as would ordinarily follow upon the consequences of setting aside the invalid decision. The payments which were made under protest would stand as the payments which were due and payable.

THE CONSTITUTIONAL CHALLENGE

[149] Considering this court's finding that section 8(9) of the Act has limited application pertaining to decisions taken by a water service authority with reference to section 6 and 7 and that this section did not provide the Minister with the power to confirm, vary or overturn any decision outside the ambit of decisions made in terms of these sections, the court finds that there is no need to consider the constitutionality of section 8(9). It is my view that section 8(9) provided no authority for the Minister to interfere with the power of Merafong to determine tariffs, including surcharges, to supply water to AngloGold. It was only the wrong interpretation and application of this section by all role players which brought the constitutionality of section 8(9) into the equation. The incorrect assumption that section 8(9) was applicable opened up the door for a constitutional challenge against the validity of this section. Merafong and AngloGold did not argue the constitutionality of this section if narrowly interpreted, as was done by this court.

[150] I am in agreement with the submission on behalf of AngloGold that if a serious challenge to the constitutionality of an ct of Parliament is to be made, then this must be raised pertinently, with full and proper motivation and demonstrating clearly why a declaration of unconstitutionality should be made. The constitutional challenge raised by Merafong was more in the context of a legality challenge aimed against the decision of the Minister which was made in conflict of the Constitution. The burden of an applicant who wants to attack the constitutionality of an Act of Parliament will

include satisfying the court that the subsection cannot sensibly be interpreted in a manner consistent with the Constitution but must ineluctably be declared to be unconstitutional. Moreover, a prayer for a declaration of constitutional invalidity of section 8(9) was only inserted days before this application was heard by this court.

ANGLOGOLD'S REVIEW APPLICATION

[151] The conclusion reached by this court hereinabove would mean that prayers 1 to 7[66] of AngloGold's amended notice of motion should be dismissed. Only the alternative relief as contained in prayer 8 should be considered.

[152] In this prayer AngloGold is seeking an order reviewing and setting aside the decision of Merafong in terms of which it determined its tariffs during 2004/5 and during subsequent years. For this relief AngloGold relies on section 6(2)(e)(i), 6(2)(f) and 6(2)(i) of PAJA and/or on the principle of legality to review and set aside the decisions of Merafong made on 31 May 2004, together with its resolutions to amend the tariff of charges for water as promulgated in the Provincial Gazette of 22 June 2004 and all such resolutions subsequent to, to the extent that they impose tariffs or surcharges on the supply of water used by AngloGold for industrial and domestic purposes, in addition to tariffs charged to Merafong by Rand Water.

[153] On 27 May 2004, Merafong resolved to adopt its new water tariffs. This resolution formed part of the annual budget process and the water tariff was promulgated in terms of sections 4 and 11(3) of the Local Government: Municipal Systems Act read with section 10G(7) of the Local Government Transition Act.[67]

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[66] See fn 8 above.

[67] 209 of 1993.

Section 4 of the Local Government: Municipal Systems Act provides –

"**4 Rights and duties of municipal councils –**

(1) The council of a municipality has the right to-

(a) govern on its own initiative the local government affairs of the local community;

(b) exercise the municipality's executive and legislative authority, and to do so without improper interference; and

(c) finance the affairs of the municipality by-

(i) charging fees for services; and

(ii) imposing surcharges on fees, rates on property and, to the extent authorised by national legislation, other taxes, levies and duties.

(2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to-

(a) exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community;
(b) provide, without favour or prejudice, democratic and accountable government;
(c) encourage the involvement of the local community;
(d) strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;
(e) consult the local community about-
(i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and
(ii) the available options for service delivery;
(f) give members of the local community equitable access to the municipal services to which they are entitled;
(g) promote and undertake development in the municipality;
(h) promote gender equity in the exercise of the municipality's executive and legislative authority;
(i) promote a safe and healthy environment in the municipality; and
(j) contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.

(3) A municipality must in the exercise of its executive and legislative authority respect the rights of citizens and those of other persons protected by the Bill of Rights."

Section 11(3) of the Local Government: Municipal Systems Act provides –

"**11 Executive and legislative authority –**

(3) A municipality exercises its legislative or executive authority by-
(a) developing and adopting policies, plans, strategies and programmes, including setting targets for delivery;
(b) promoting and undertaking development;
(c) establishing and maintaining an administration;
(d) administering and regulating its internal affairs and the local government affairs of the local community;
(e) implementing applicable national and provincial legislation and its by-laws;
(f) providing municipal services to the local community, or appointing appropriate service providers in accordance with the criteria and process set out in section 78;
(g) monitoring and, where appropriate, regulating municipal services where those services are provided by service providers other than the municipality;
(h) preparing, approving and implementing its budgets;
(i) imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees, including setting and implementing tariff, rates and tax and debt collection policies;
(j) monitoring the impact and effectiveness of any services, policies, programmes or plans;
(k) establishing and implementing performance management systems;
(l) promoting a safe and healthy environment;
(m) passing by-laws and taking decisions on any of the above-mentioned matters; and
(n) doing anything else within its legislative and executive competence."

Section 10G(7) of the Local Government Transition Act provides –

"(7) (*a*) (i) A local council, metropolitan local council and rural council may by resolution, levy and recover property rates in respect of immovable property in the area of jurisdiction of the council concerned: Provided that a common rating system as determined by the metropolitan council shall be applicable within the area of jurisdiction of that metropolitan council: Provided further that the council concerned shall in levying rates take into account the levy referred to in item 1 (*c*) of Schedule 2: Provided further that this subparagraph shall apply to a district council in so far as such council is responsible for the levying and recovery of property rates in respect of immovable property within a remaining area or in the area of jurisdiction of a representative council.

[154] In *Fedsure,*[68] rate payers challenged resolutions by the Council making provision for certain levies on the basis that they were *ultra vires.* Chaskalson P found that the action of a municipal council in resolving to set rates, and other resolutions of that ilk, cannot "*be classed as administrative action"* as contemplated in section 24 of the Interim Constitution.[69] Such action is the exercise of "*a power that under our Constitution is a power peculiar to elected legislative bodies."*[70]

(ii) A municipality may by resolution supported by a majority of the members of the council levy and recover levies, fees, taxes and tariffs in respect of any function or service of the municipality.

(*b*) In determining property rates, levies, fees, taxes and tariffs (hereinafter referred to as charges) under paragraph (*a*), a municipality may—

(i) differentiate between different categories of users or property on such grounds as it may deem reasonable;

(ii) in respect of charges referred to in paragraph (*a*) (ii), from time to time by resolution amend or withdraw such determination and determine a date, not earlier than 30 days from the date of the resolution, on which such determination, amendment or withdrawal shall come into operation; and

(iii) recover any charges so determined or amended, including interest on any outstanding amount.

(*c*) After a resolution as contemplated in paragraph (*a*) has been passed, the chief executive officer of the municipality shall forthwith cause to be conspicuously displayed at a place installed for this purpose at the offices of the municipality as well as at such other places within the area of jurisdiction of the municipality as may be determined by the chief executive officer, a notice stating—

(i) the general purport of the resolution;

(ii) the date on which the determination or amendment shall come into operation;

(iii) the date on which the notice is first displayed; and

(iv) that any person who desires to object to such determination or amendment shall do so in writing within 14 days after the date on which the notice is first displayed.

(*d*) Where—

(i) no objection is lodged within the period referred to in paragraph (*c*) (iv), the determination or amendment shall come into operation as contemplated in paragraph (*b*) (ii);

(ii) an objection is lodged within the period referred to in paragraph (*c*) (iv), the municipality shall consider every objection and may amend or withdraw the determination or amendment and may determine a date other than the date contemplated in paragraph (*b*) (ii) on which the determination or amendment shall come into operation, whereupon paragraph (*c*) (i) shall with the necessary changes apply.

(*e*) The chief executive officer shall forthwith send a copy of the notice referred to in paragraph (*c*) to the MEC and cause a copy thereof to be published in the manner determined by the council.

(*f*) Nothing in this section contained shall derogate from section 9 of the Electricity Act, 1987 (Act No. 41 of 1987)."

[68] *Fedsure supra* fn 20.

[69] *Fedsure* at para 45 and 46.

[70] *Ibid* at para 45.

[155] Section 1 of PAJA defines “administrative action” and specifically excludes in subsection (cc) “the executive powers or functions of a municipal council” and in subsection (dd) “the legislative functions of Parliament, a provincial legislator or a municipal council”. A PAJA review is consequently not available to AngloGold.

[156] Thus the only challenge available for AngloGold would be a legality challenge. AngloGold has not made out case to explain its delay of approximately 6 -7 years before it launched its PAJA review and even longer for its legality review. No case was made out for this court to overlook the delay. The reason for the delay may seem obvious, being the decision of the Minister which was in place, but it was still expected of AngloGold to provide a full explanation in this regard. After the Constitutional Court afforded Merafong an opportunity to address its delay in bringing its review AngloGold should have been well aware that its own alternative relief setting aside the decisions of Merafong would require a similar explanation.

[157] Even if the delay is overlooked this court has pointed out that the provisions of section 156(1) of the Constitution provide that a municipality has executive authority in respect of, and has the right to administer local government matters listed in Part B of Schedule 4, and that in terms of section151 it has the right to govern, on its own initiative, the local government affairs of its own community.

[158] Merafong derived its powers form section 11 of the Systems Act. More specifically from subsection 1 which provides that “The executive and legislative authority of a municipality is exercised by the council of the municipality, and the council takes all the decisions of the municipality subject to section 59”. Also section 11(3) provides authority with reference to subsection (f), (h) and (i).[71] The latter subsection specifically provides for “imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees, including setting and implementing tariffs, and implementing tariffs, rates and tax and debit collection policies.”

[159] AngloGold’s review should not be upheld.

COSTS

[71] See fn 51 above.

[160] Costs should follow the result. As far as the main application and counter-application before this court are concerned Merafong should be awarded its costs, including the cost of two counsel. The Minister's position in this application was the she abided the decision of the court. The court considered the fact that Merafong wrongly indicated to AngloGold that it had a right of appeal to the Minister in terms of section 8(4) of the Act. As a result of this the Minister became involved. Consequently, no cost order should be made against the Minister.

[161] Pertaining to cost orders previously made, but set aside in terms of the order of the Constitutional Court, and the cost order reserved by the apex court, this court will have to consider the various findings and whether these findings are affected by this court's findings.

[162] Merafong was bound by the decision of the Minister until it was set aside. AngloGold was entitled to launch an application in the High Court to enforce the Minister's decision. Ultimately, however, Merafong was successful in its counter-application, albeit, that it changed from declaratory relief to a review application. This resulted in the main application not being granted. In my view no cost order should be made in favour of any party concerning the proceedings in the High Court instituted during 2011. The same will apply to the cost of the hearing in the Supreme Court of Appeal. The review of Merafong could still not have been heard as it was not properly before the court and Merafong was acting in defiance of the Minister's decision. In the Constitutional Court Merafong was successful on the question whether it could bring a reactive challenge against the decision of another organ of state. But its reactive challenge could not be heard and the Constitutional Court effectively provided Merafong with an indulgence to explain its delay in bringing its review application. AngloGold persisted in its view that the Minister acted within her powers to set aside the determinations of Merafong. In my view each party should pay their own costs in the Constitutional Court.

[163] For purposes of the court's order the court will refer to the first respondent as Golden Core and no longer as AngloGold.

ORDER

[164] The following order is made:

63.1 Golden Core's application in this court is dismissed with costs, including the cost of two counsel.

163.2 Merafong's late filing of its counter-application for review is condoned.

163.3 Merafong's counter-application for the review of the Minister's decision dated 18 May 2004 is upheld with costs, including the cost of two counsel, and the Minister's decision is set aside.

163.4 No cost order is made in the proceedings in the High Court of first instance, the Supreme Court of Appeal and the Constitutional Court.

163.5 No cost order is made against the Minister.

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RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 November 2021.

APPEARANCES

For the Applicant:	Adv. J. A. Motepe SC
	Mr A. D. De Swardt
Instructed by:	De Swart Myambo
For the First Respondent:	Adv. N. J. Graves SC
	Adv. I. Phalane
Instructed by:	Knowles Hussain Lindsay Inc.
For the Second Respondent:	Adv. C. Erasmus SC
	Adv. H. Mpshe
Instructed by:	The State Attorney
Date of Hearing:	29 and 30 July 2021
Date of Judgment:	22 November 2021