



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 11908/2015

In the matter between:

SEMBACORP SIZA WATER
(PROPRIETARY) LTD

APPLICANT

and

UMGENI WATER

FIRST RESPONDENT

MINISTER OF WATER & SANITATION

SECOND RESPONDENT

ILEMBE DISTRICT MUNICIPALITY

THIRD RESPONDENT

JUDGMENT

Delivered: 13 September 2017

MNGUNI J

[1] Water is critical for sustainable development, including environmental integrity and the alleviation of poverty and hunger, and is indispensable for human health and wellbeing.¹ Section 155(7) of the Constitution of the Republic of South Africa, 1996 gives the national government, subject to s 44 of the Constitution, the legislative and executive authority to ensure effective performance by municipalities of their

¹ United Nation Resolution adopted by the General Assembly on the report of the Second Committee (A/58/485) 58/217. International Decade for Action, "Water for Life", 2005-2015.

functions in respect of matters listed in schedules 4 and 5 of the Constitution. Schedule 4 Part B of the Constitution lists water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems as one of the municipal functions that are subject to national government's legislative and executive authority.

[2] The second respondent (the Minister) is the authority entrusted in terms of s 155(7) of the Constitution, with the authority to ensure that municipalities effectively perform the functions listed in schedules 4 and 5, in particular, functions in respect of water services. The Minister plays an active role as the custodian of the country's water resources and as an overall policy maker and regulator. To this end the Minister oversees the activities of all water sector institutions, is responsible for national resource planning and allocation, licenses water uses and ultimately manages water resources infrastructure.

[3] The Water Services Act 108 of 1997 (the Act) was promulgated to give content to the Minister's executive authority contemplated in s 155(7) of the Constitution. The Act provides a detailed account of the legislative and executive authority of the Minister to regulate the entire water value chain.

[4] The main objects of the Act are to provide for inter alia, (a) rights of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or wellbeing; (b) the setting of national standards and norms and standards in respect of water services; (c) the preparation and adoption of water services development plans by water services

authorities; (d) a regulatory framework for water services institutions and water services intermediaries; (e) the establishment and disestablishment of water boards and water services committees and their duties and powers; (f) the monitoring of water services and intervention by the Minister or by the relevant Province; and (g) financial assistance to water services institutions.

[5] In terms of s 10(1) and (2) of the Act, the Minister with the concurrence of the Minister of Finance, may from time to time prescribe norms and standards in respect of tariffs for water services which may (a) differentiate on an equitable basis between:- (i) different users of water services, (ii) different types of water services, and (iii) different geographic areas, taking into account, among other factors, the socio-economic and physical attributes of each area.

[6] The first respondent (Umgeni Water) is a public statutory water utility established in terms of the Act, and, is a regulatory authority established with its primary activity being to provide water services to other water services institutions within its services areas. Umgeni Water has authority to apply for the increase of water tariffs which is subject to approval by the Minister. The third respondent (the Ilembe) is a water services authority with an obligation to all customers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.²

[7] In terms of s 19(1)(a) and (b)(i) and (ii) of the Act, the Ilembe may perform the functions of a water services provider itself, and may enter into a written agreement

² Section 11(1) of the Act.

with a water services provider or form a joint venture with another water services institution to provide water services.

[8] On 29 January 1999, the applicant concluded a concession contract with the then Dolphin Coast Transitional Local Council (the DCTL), which at the time was the municipality having jurisdiction over the concession area defined in the concession contract to include an area lying roughly between the urban areas of Zimbali, Ballito, Umhlali, Shakaskraal, Chaka's Rock, Salt Rock, Sheffield Beach, Tinley Manor and several areas given over for housing of less affluent communities including some informal settlements. The concession contract is for a period of 30 years and is capable of renewal for a further period.

[9] The concession contract was entered into pursuant to the DCTL putting out for public tender the right to provide water services to the resident population in the concession area. At that time the DCTL was the water services authority for the concession area. The applicant was awarded the tender. The concession contract was the means whereby the applicant was appointed as the water services provider for purposes of delivering water services to the resident population.

[10] The applicant has therefore been the water services provider for purposes of the Act throughout the concession area since the inception of the concession contract and has continued to perform those services under the concession contract. The applicant's functions under the concession contract which would have been carried out by the Ilembe but for the concession contract include, inter alia, supplying water to individual consumers, metering, billing and recovering charges from the

individual users, maintaining the existing water distribution system from the bulk supplier to the individual users, and, extending the existing supply infrastructure so as to supply new water users.

[11] In December 2000 a new dispensation for the local government was introduced resulting in the DCTLG being disestablished. All the functions of the DCTLG were transferred and assigned, depending on the nature of the function, to either the KwaDukuza Local Municipality or to the Ilembe as the district municipality. In terms of ss 83 and 84 of the Local Government: Municipal Structures Act 117 of 1998 (the MSA) the provision of water services was one of the functions allocated to the district municipalities. The Ilembe became the successor to the DCTLG as the water services authority and inherited the rights and obligations of the DCTLG as set out in the concession contract.

[12] The Ilembe remains the water services provider for the remainder of the areas falling outside the concession area. These areas include the Northern and Inland portions consisting mainly of KwaDukuza Town, Groutville, Blythedale Beach, Prince's Grant, Zinkwazi Beach, Darnall, Mandini and the inland municipality areas of Indwedwe and KwaMaphumulo.

[13] On 7 August 2000, Umgeni Water as the supplier, the applicant as the customer and the Ilembe, separately concluded a tripartite bulk water service agreement (the tripartite agreement) in terms of which Umgeni Water, with the Ilembe acting as guarantor for the obligations of the applicant to Umgeni Water, undertook to supply potable water to the applicant. The Minister was not a party to

the concession contract or the tripartite agreement. Clause 10.1 of the tripartite agreement includes provision for the payment of the purchase price for the bulk supply of water made available to the applicant by Umgeni Water according to a tariff. This clause also contemplates the adjustment of the tariff from time to time. What is clear from this clause is that any adjustments of the tariff are subject to the decision by the Umgeni Water board and does not envisage the adjustment of the tariff by the agreement except that the applicant must be consulted.

[14] It is common cause that over the past ten years, the increases for the bulk water services to the municipalities and the applicant were below 10 per cent for each of those years, and were imposed uniformly within an area covering the Ilembe and municipalities serviced by the same supply system of the Ilembe.

[15] According to the applicant there is an interplay between the tariff charged by Umgeni Water and what the applicant charges its individual water consumers in the concession area. The applicant asserts that it is obliged to negotiate with the Ilembe, for any increases in the tariff in accordance with the concession contract which has detailed provisions and schedules dealing with the setting of the tariff including the timing of negotiations. The applicant is contractually guaranteed a minimum rate of return to ensure that it remains viable as a water services provider and has no authority or legislative power to fix its own tariff, whereas the Ilembe has the power to do so in terms of the Act and ss 83 and 84 of the MSA.

[16] According to the applicant, the Ilembe will generally approve a tariff only if the tariff accords with its budget and is considered realistic, taking into account the

impact the tariff will have on consumers in the concession area. In this regard the cost to the indigent and middle class end user in the concession area as against the cost to similar users in the remainder of the Ilembe area is an important factor to be considered.

[17] On 12 November 2014 the applicant's representatives and those of Umgeni Water held a meeting concerning the proposed tariff increase for the financial year commencing 1 July 2015. In that meeting Umgeni Water's representatives informed those of the applicant that Umgeni Water was contemplating an increase of 40 per cent in the tariff for the ensuing financial year.³ Two reasons were advanced in substantiation of such increase. The first was the determination that Umgeni Water will no longer allow a cross-subsidy on price of bulk water supplied to the applicant. The second was the determination that since the applicant is not a municipality, it must not be allowed to make a profit because its profits will not be ploughed back into the service delivery system.

[18] The applicant's representatives were taken aback and raised an objection on what they considered to be an unreasonable stance adopted by Umgeni Water on the issue. The applicant's representatives requested Umgeni Water to reconsider its stance. They also pointed out the impact which such an increase will have on the applicant and ultimately on the applicant's customers. However, Umgeni Water remained unmoved. Subsequently, there was an exchange of correspondence between the applicant and Umgeni Water. Two of the letters dated 5 January 2015

³ At this meeting Umgeni Water's representatives presented a PowerPoint display of facts and figures on which the contemplated increase was said to be based.

and 16 January 2015 bear mentioning. The letter of 5 January 2015 was addressed to the applicant by Umgeni Water and recorded, inter alia, that:

- (a) Umgeni Water as a policy position strives to break even with all its customers within its area of supply. The applicant only draws water from the Hazelmere system, whilst other customers who draw water from the same system, also draw water from other systems which on average make their overall cost per customer lower when aggregated. With the applicant there are no other cheaper systems against which the losses incurred whilst supplying it from the Hazelmere system can be netted off against;
- (b) the municipal customers are related parties to Umgeni Water as part of the intergovernmental structure who operate to break even and not to profit, whereby any margins made are ploughed back into the service delivery system. On that premise Umgeni Water therefore strives to break even with the applicant supply by achieving a break even tariff in the area of supply of the applicant which is currently on Hazelmere system through the North Coast Pipeline and
- (c) the applicant draws bulk water from the Avondale reservoir and the Honolulu reservoir. The tariff increases levied by Umgeni Water have always been invested in capital expenditure incurred for the benefit of its customers and more specifically to the applicant is the Hazelmere to Bifurcation pipeline commissioned in 2013 at a cost of approximately

R70m and the construction of the dedicated Avondale Pump Station to supply Avondale Reservoir at the Hazelmere Waterworks is planned to be commissioned early next year 2015. The cost to date on this project is R35m. Furthermore, the Lower Thukela bulk water supply scheme, as well as this system when commissioned in 2016 and the commissioning of the expansion of Hazelmere Water Works would significantly contribute to reliable and constant water supply to the applicant's distribution points.

[19] In the letter of 16 January 2015 addressed to Umgeni Water, the applicant contended that the determination of the tariff was irrational in that Umgeni Water did not consider:

- (a) That the applicant was simply the mandatory of the Ilembe for the purposes of providing water services in the concession area and that its tariff of charges to end consumers is controlled by the Ilembe, which has to approve any changes to the tariff on an annual basis, both on a contractual basis and in its capacity as water services authority.
- (b) There is nothing in the Act to suggest that a water board is empowered or has any discretion to discriminate between its customers on the basis now postulated by Umgeni Water.
- (c) The tariff increase by Umgeni Water for the past years has been slightly higher than the consumer price index inflation. The increase from 2013/2014 to 2014/2015 was approximately 8,7 per cent. For

Umgeni Water to now propose a punitive tariff increase of 41,4 per cent on the applicant for the 2015/2016 year induces a sense of shock especially as all other bulk water consumers on the North Coast Pipelines are only being asked to pay an increase of approximately 8,3 per cent.

- (d) There is no basis in law or logic for the applicant, as the smallest bulk water customer and effectively standing in the shoes of the Ilembe in the discharge of this public function, to be singled out and made to pay substantially more than all of Umgeni Water's other bulk water consumers on the North Coast Pipelines.

[20] The engagement between the applicant and Umgeni Water did not yield positive results especially for the applicant. On 23 January 2015 Umgeni Water addressed a letter to the Minister in accordance with the prescripts of s 42 of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA) read with s 31 (2) (b) of the Act wherein Umgeni Water gave the factual background of the matter, the status of the engagement between the parties, the proposed increases and the reasons in support of such proposed increase for the financial year commencing on 1 July 2015. It further requested the Minister to approve an increase of 8,2 per cent to all the customers of Umgeni Water who are municipal entities and an increase of 38,5 per cent to the applicant.

[21] The Minister endorsed the methodology applied by Umgeni Water in the determination of a tariff increase, and by way of letter dated 20 May 2015, informed Umgeni Water of the approval of a tariff increase of 7,8 per cent for the municipal entities and 37,9 per cent for the applicant. Aggrieved by this decision, the applicant

brought this application seeking an order to review and set aside the decision of Umgeni Water made on 12 November 2014, proposing to impose a tariff increase of 38,5 per cent on the cost of supply of bulk water to the applicant for the financial year commencing on 1 July 2015 and the subsequent approval thereof by the Minister on 20 May 2015. The applicant relies on the grounds set out in s 6(2)(d), 6(2)(e)(i), 6(2)(f)(i) and (ii), 6(2)(h) and 6 (2) (i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively, that both Umgeni Water and the Minister's decision offends the principle of legality on the ground that the decision is unlawful and irrational.

[22] The applicant joined the Ilembe by reason of the interest the Ilembe has in these proceedings but does not claim any relief against it. Umgeni Water and the Minister are opposing the application. Umgeni Water contends that it has made its decision and that the decision stands until it is set aside, especially given the ministerial seal of approval. The Ilembe has not participated in these proceedings. Consequently, I shall refer to Umgeni Water and the Minister collectively as the respondents.

[23] Notwithstanding the vigour of the respondents' denial that in taking the impugned decisions the applicant was singled out and treated differently from Umgeni Water's other customers on this increase, the record of the proceedings lodged by Umgeni Water says otherwise.

[24] The question confronting this court is, whether it was rational and lawful for the respondents to increase the tariff for bulk water supplied for provision to the

Ilembe residents whose water is channelled through the Ilembe, compared to those whose water is channelled through the applicant, due regard being had to the fact that the applicant performs an in line function in the delivery of bulk water from Umgeni Water to the consumers in the concession area on the basis postulated by the respondents.

[25] With this prelude I turn to deal with the explanation given by the respondents for such increase. Umgeni Water runs eight schemes in total and each of these schemes has sub-systems through which Umgeni Water supplies bulk water to its customers.⁴ All of Umgeni Water's customers are municipal entities except the applicant, which falls within the Hazelmere system situated in the area of the Ilembe. A significant majority of the schemes receive bulk water supply through various sub-systems. The applicant receives supply of bulk water from Umgeni Water through the North Coast Pipeline system whose only asset in that area is the Avondale to Honolulu Pipeline commissioned in December 2009.

[26] According to Umgeni Water, historically, the Hazelmere system, which the Ilembe and the applicant are part of, has always experienced lower revenues and high operating costs of water supply when compared to other schemes. Umgeni Water asserts that it maintains the records of both the revenue and operating costs for each customer receiving bulk water.⁵ The record makes it plain that the cost of running these schemes is more than the revenue they generate. Umgeni Water

⁴ (a) Midmar, (b) D V Harris, (c) Ixopo, (d) Durban Heights, (e) Hazelmere, (f) Wiggins (g) Amanzimtoti and (h) Umzinto.

⁵ The extent to which each customer, including the applicant, falls short is reflected in a summary in the Annual Review. The actual costs of supplying bulk water to Umgeni Water's customers, including the applicant, calculated on a per kilolitre basis per customer as well as the revenue made by each customer appears from the monthly records covering the period between 2015/2016 which have been produced.

asserts that in order to keep schemes with higher costs and lower revenue afloat, it has, over the years, relied on what in business parlance has become known as cross-subsidisation, in terms of which municipalities make profits in their schemes which sustains Umgeni Water's profitability.

[27] According to Umgeni Water, this situation has always caused unhappiness amongst the profit-making schemes who have contended that increasing tariffs on a flat basis across the board and on the same percentage with non-profitable or loss making municipal customers operates inequitably. The profitable municipal customers have also called upon Umgeni Water to require its customers to pay for operational costs associated with each customer's services and have taken issue with Umgeni Water's practice of 'cross-subsidising' non-profit water services providers at the expense of profit-making consumers who should be receiving more services and infrastructure.

[28] In order to ensure that tariffs are determined in a transparent manner, Umgeni Water adopted a pricing policy in line with s 34 of the Act to strive for financial viability by ensuring that the costs recovery measures are put in place to fund its capital expenditure, operational and maintenance costs as well as providing for future capital expenditure and expansion costs. Item 9 of the pricing policy requires that Umgeni Water's various bulk water schemes be defined for purposes of pricing. The schemes have been categorised into two categories, namely: 'economic schemes' which are required to achieve full costs recovery through tariffs, and 'social schemes' which are not expected to achieve full costs recovery through tariffs, i.e the sales from the customers in the area are not sufficient to cover the cost of

implementation and ongoing operation and maintenance of the scheme. The social schemes are supported by grants.

[29] The pricing policy requires Umgeni Water to ensure that its costs are fully recovered through the tariffs by either setting a single tariff for its entire area of supply or by separating the tariffs for each bulk system, thereby differentiating tariffs on the basis of the type and level of service provided, geographical area and customer profile. Umgeni Water points out that in terms of clauses 5.1 and 5.2 of the Bulk Supply Agreement, Umgeni Water is required to establish a five year forecast for the applicant's bulk water requirements which was modelled on the twenty year cash flow model for loan repayment. The costs forecast for the applicant's requirements indicated a rise in costs of (a) 12,7 per cent in energy requirements mainly due to NERSA's announcements that cost of energy from Eskom will increase in the long term, (b) 9,2 per cent to 10,5 per cent in chemical costs due to the increase in the price of chemicals in the projected period, (c) 17,8 per cent in the maintenance costs and (d) 11,1 per cent for raw water costs.

[30] The water supplied to the applicant by Umgeni Water is sourced mainly from the Hazelmere Dam, from whence it is transferred to the Hazelmere Waterworks for treatment. Once treated, the water is transferred to the North Coast Pipeline. At paras 60 and 61 of its founding affidavit, Umgeni Water gives a detailed computation of the costs recovery measures to fund its capital expenditure, operational and maintenance costs as well as providing for the future capital expenditure and expansion costs.

[31] Umgeni Water further asserts that the applicant's requirements must be viewed against the backdrop of Umgeni Water's overall commitment to the capital cash flow projections of (a) R6.9 billion for the years 2015 to 2020 (five projections), and (b) R19.2 billion for the thirty year capital expenditure total projections. Umgeni Water maintains that the applicant was informed during the price review consultation phase that Umgeni Water's constraints in countenancing loss making schemes was due to the effects of drought in the province which required Umgeni Water to invest in infrastructural projects whose overall object is to assist in reducing water disruptions to bulk water customers and users and to mitigate the drought factors in the short term. As a result of that there has been an increase in the funding requirements of Umgeni Water by R261 million, necessitating Umgeni Water to raise a loan of at least R1.45 billion. Consequently, Umgeni Water adopted a costing model to enable it to accurately allocate costs to specific areas within each system and to facilitate a more accurate costs allocation for each customer drawing from these systems.

[32] It is settled that a cause of action for the judicial review of administrative action now ordinarily arises from the grounds set out in the provisions of s 6 of PAJA and not directly from the right to just administrative action in s 33 of the Constitution.⁶ 'The section gives legislative expression to the fundamental right to administrative action "that is lawful, reasonable and procedurally fair" under s 33 of the Constitution.'⁷

⁶See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & others* 2004 (4) SA 490 (CC) paras 25-26; *Mazibuko & others v City of Johannesburg & others* 2010 (4) SA (1) (CC) para 73.

⁷See *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency, & others* 2014 (1) SA 604 (CC) para 42.

[33] In *Pharmaceutical Manufacturers Association of SA & another: In Re Ex Parte President of the Republic of South Africa & others* Chaskalson P said:

'It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must at least comply with this requirement. If it does not, it falls short of the standards demanded by our Constitutional for such action.⁸

[34] In *Albutt v Centre for the Study of Violence and Reconciliation, & others*⁹ the President had announced a special pardoning dispensation for offenders convicted of politically motivated crimes, who did not participate in the Truth and Reconciliation process without affording a hearing to the victims of the offences Ngcobo CJ said:

'The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution. This is true of the exercise of the power to pardon under s 84(2) (j).'

[35] In *Minster of Home Affairs & others v Scalabrini Centre & others* 2013 (6) 421 (SCA) Nugent JA at para 69 said that the process by which a decision is taken, in

⁸ 2000 (2) SA 674 (CC) para 85

⁹ 2010 (3) SA 293 (CC) at para 51

contradistinction to the merits of the decision, might be 'impeached for want of rationality'. In *Democratic Alliance v President of the Republic of South Africa & others*¹⁰ Yacoob ADCJ said:

'It follows that both the process by which a decision is made and the decision itself must be rational. *Albutt* is authority for the same proposition.'

(Footnote omitted)

And at para 36 he said:

'The means for achieving the purpose for which the power was conferred must include everything that is done to achieve that purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.'

[36] I turn now to deal with the parties' submissions relating to the first reason. Applicant's counsel contends that the respondents' reliance on the Umgeni Water pricing policy and on the norms and standards document for the purported determination relating to cross-subsidisation is misplaced as none of the documents reflects a policy decision prohibiting cross-subsidisation or justifies the imposition of an irrational increase on a single customer. The gravamen of his reasoning is that the norms and standards document does not deal with the question of cross-subsidisation at all or any determination that non-municipal entities must not be permitted to make a profit. He argued that the pricing policy does not aim to require every water services provider to break even with Umgeni Water as Umgeni Water

¹⁰ 2013 (1) SA 248 (CC) para 34

seeks to assert, but that its aim is to ensure that Umgeni Water breaks even on an overall basis. In support of this submission he expressed a view that the categorisation of the entities by Umgeni Water into economic and social schemes in the pricing policy was meant to involve the cross-subsidisation between the schemes.

[37] Dealing with item 21 of the pricing policy,¹¹ his submission was that this aspect is not a requirement but a goal and does not validate the singling out of the applicant for an increase almost four times more than any other customer of Umgeni Water. Counsel correctly observed that the deponent to the affidavit on behalf of the Minister has made it clear that cross-subsidisation is an ongoing feature of water services provision and that there is no general policy to end cross-subsidisation across the various schemes and municipalities who obtain water from Umgeni Water.

[38] Applicant's counsel submitted that the irrationality of the respondents' approach in approving the tariff is illustrated by the fact that the determination of capital unit charges is based on the entire system tariffing and development of water resources that allows for adequate capacity required to supply all customers within Umgeni Water operational area, and yet, the respondents require the applicant to cross-subsidise other water services providers on these charges, on the basis that the capital projects to which the capital unit charges relate benefit the system as a whole, notwithstanding that there is no benefit to the applicant.

¹¹ Item 21 provides: Umgeni Water will strive to be financially viable which means that it will seek as far as is practical to recover its costs from tariffs and fees in accordance with s 34 of the Act.

[39] Counsel urged this court to reject the purported justification by the respondents for the decision to impose a 37,9 per cent tariff increase on the basis of a policy against cross-subsidisation as irrational and unlawful. The action was materially influenced by an error of law; the action was taken for a reason not authorised by the empowering provision; the action itself was not authorised by the empowering provision; the action was irrational; and the decision is otherwise unconstitutional and unlawful and is a decision which no reasonable decision maker could have taken.

[40] Not so, argued counsel for the respondents. Whilst conceding that the norms and standards and the pricing policy documents do not deal with the question of cross-subsidisation and the determination that non-municipal entities must not be permitted to make a profit, they contended that the decision to accurately allocate costs to specific areas within each system and to facilitate a more accurate cost allocation for each customer was taken by Umgeni Water to ensure that the applicant breaks even. They submitted that Umgeni Water took a policy decision to end the cross-subsidisation of the costs of its supply of bulk water to the applicant, not because of the norms and standards document or pricing policy but the decision to end the cross-subsidisation was taken within the framework of the prescribed norms and standards and the pricing policy.

[41] They argued that item 2 of the norms and standards also allows a water service institution, when determining its revenue requirement on which tariffs for water services are based, to take into account, inter alia, the need to recover costs of water purchases, recover overheads, operational and maintenance costs and to

recover the cost of capital not financed through any grant. Consequently counsel argued that the tariff increase came as a result of policy decision taken within the framework of the norms and standards and the pricing policy. They submitted that the relevance of the norms and standards lies in the means chosen by the respondents when setting tariffs to differentiate between water users, as set out in item 4(1)(c) of the norms and standards and then to follow a methodology set out in item 2 of the norms and standards to determine Umgeni Water's revenue requirements. They argued that this rationale for a higher tariff on the applicant is connected with the objective of striking a balance of achieving fairness and equity amongst Umgeni Water's customers, whilst at the same time ensuring recovery of operational costs.

[42] Counsel for the Minister submitted that nowhere in the applicant's founding affidavit or in the applicant's heads of argument is it contended, for example, that the decision to cease the cross-subsidisation of the cost of supply of bulk water to the applicant is not rationally connected to the purpose for which it was taken or to the purpose of empowering provisions. It is also not contended that the decision to discontinue cross-subsidisation was not rationally connected to the information before the Umgeni Board or the Minister.

[43] As I see it, the hurdle besetting Umgeni Water and the Minister is that the water services contract between the applicant and the Ilembe came about as a result of the decision of the Ilembe in considering how best to serve its residents in the concession area and this arrangement is allowed by s 19 of the Act. It follows from this that once it is accepted (as I do) that the applicant performs an in line function in

the delivery of bulk water from Umgeni Water to the Ilembe and to the water consumers of the concession area, the fact that the applicant is interposed in that chain of delivery is an irrelevant consideration in deciding on such increase and that cannot serve to justify the imposition of a different tariff by Umgeni Water.

[44] In my view, the fundamental tenet which lies at the heart of this application is that the Ilembe is the guarantor of all debts owed by the applicant to Umgeni Water, which is a committal of public funds and is only valid because the applicant has stepped into the shoes of the Ilembe and acts as a public service provider instead of the Ilembe to fulfil the Ilembe's constitutional and statutory role as water services provider within the concession areas which form part of its jurisdiction. In the circumstances, it seems opportunistic on the part of the respondents to consider the applicant's identity as a commercial entity warranting an imposition of a different tariff from the municipal entities.

[45] I now turn to deal with the parties' submissions relating to the second reason. Counsel for the applicant submitted that the plough back versus private gain proposition was a general assumption and was devoid of any actual content in the particular context of this matter. He submitted that the interposition of a private entity, whether for gain or not by the municipality in such flow chain, whether before, parallel or after the municipal location therein, simply cannot serve to premise different tariffs imposed by Umgeni Water.

[46] The fundament of his reasoning is that these agreements clearly contemplate that the tariff determined in terms of the Act will apply and will be similar, otherwise

the Ilembe's guarantee will be unlawful and open ended. He submitted that there is no provision in the empowering legislative framework which authorises discrimination between municipal and non-municipal water services provider on this basis and that any attempt to penalise the applicant for its efficiency and its ability to generate a profit would be irrational. He pointed out that the applicant pays into the Ilembe the agreed fee and that what the applicant charges is controlled through the Ilembe's approval.

[47] However, even accepting that the determination of the applicant as not a municipality entity and therefore must not be allowed to make a profit for the reasons advanced by the respondents, I am not persuaded that the respondents considered that the applicant is acting in the stead of the Ilembe in discharging the Ilembe's constitutional and statutory obligation to provide water to residents in the concession area. Importantly, the record does not seem to indicate that the respondents that they considered the reality of the impact of the increase on the consumers in the concession area and that any steps were considered to mitigate such the impact thereof. What in my view tends to diminish the force of the profit making proposition is that it is not anchored on the record and there appears to be no evidence in support of it. The other difficulty which arises is that there appears to be no evidence from the record that the Minister considered the price increase authorised by the Ilembe before the Minister's approval of the impugned increase. In the circumstances the interplay of the tariff between the applicant and the Ilembe was never considered.

[48] Some argument was advanced by applicant's counsel that in singling out the applicant for a 37,9 per cent increase, the respondents failed to live up to the requirements of s 7(2) of the Constitution and the right to administrative justice enshrined in s 33 of the Constitution, as given effect to by PAJA, because the impugned decision discriminated against the applicant in violation of s 9 of the Constitution. The strength of this argument is that such unequal treatment of a single consumer cannot be justified on the basis that the consumer purportedly earns a private profit.

[49] Counsel for the respondents disagreed. They contend that because the applicant draws its sales volumes from the North Coast Pipeline only, based on an increase of 8,3 per cent, the cross-subsidy would be R1,534/KL. To reduce the cross-subsidy to nil, the required tariff to the applicant would be R6,552/KL and resulted in a proposed increase of 41,4 per cent which was subsequently reduced to 37,9 per cent. Counsel for Umgeni Water submitted further that the drought had a devastating impact which necessitated additional investment by Umgeni Water and thus, the adoption of the increase of 37,9 per cent. They submitted that Umgeni Water needed to invest in projects aimed at reducing water disruptions to bulk water customers and to mitigate the drought factors. It was emphasised on behalf of the Minister that the decision to approve the tariff increase of 37,9 per cent was based on the submission by Umgeni Water that it strives to break even in respect of the costs associated with its supply of bulk water to the applicant and that on the facts and given the empowering legal instrument, the approval of the tariff cannot be said to have been illogical, ill-advised or injudicious.

[50] Whilst correctly pointing out that s 9 of the Constitution does not outlaw every discrimination but proscribes an unjustifiable, unfair one, they contend that the interrogation of the relationship between rational connection and legitimate government purpose, involves firstly the identification of a legitimate purpose and secondly a rational connection between differentiation and the purpose. They submitted that although s 9 requires that the purpose and scheme be examined in its proper context, it does not require an analysis of the impact of the impugned action or of the policy choice made but merely requires the respondents to have a defensive purpose, together with reasons for its actions that bear some relationship to the State purpose.

[51] Lastly, Umgeni Water asserts that imposing higher tariffs for the applicant is reasonable and justifiable because the quality of services provided by Umgeni Water to the applicant is higher compared to the service level of municipal customers falling outside of the concession area. Umgeni Water asserts that in terms of the Bulk Water Supply Agreement it concluded in 1999 with the applicant, it agreed to provide the applicant with a minimum of 1.5 times the daily average draw of the peak period month. According to Umgeni Water, with the growth of the concession area, the applicant approached it with a request to increase the service level. This resulted in it concluding an agreement with the applicant on 29 June 2012 in terms of which it agreed to provide the applicant with a minimum of five mega litres of storage capacity at the Avondale Zone to reticulate to its customers and to enable the applicant to operate the Avondale water pump station to accommodate operations when reservoirs exceed 25 per cent capacity.

[52] Umgeni Water and the applicant further agreed that Umgeni Water would reserve a further three mega litres of water in the reservoirs at Honolulu for the exclusive supply of an area falling within the concession area. Umgeni Water asserts further that on 28 May 2013, the applicant requested and Umgeni Water agreed to increase the minimum supply of five mega litres agreed to in 2012 to six mega litres as storage capacity for the applicant to reticulate to consumers in the Avondale Zone.

[53] Umgeni Water asserts that in order to comply with the increased demands for water supply in the concession area, the upgrade of the pipelines became necessary. Consequently Umgeni Water invested capital expenditure of approximately R200 million for the benefit of the applicant's customers and it commissioned a Hazelmere bifurcation pipeline and constructed a dedicated Avondale Pump Station to supply Avondale reservoirs at the Hazelmere Waterworks.

[54] There is a dispute of fact between Umgeni Water and the applicant on this issue. The applicant asserts that it is not the only water services provider which utilises the North Coast Pipeline. The applicant asserts that the pipeline services the Ilembe and eThekwin King Shaka International Airport, Dube Trade Port and other strategic developments on the North Coast. The applicant asserts that the upgrade to the pipeline was planned and built with the future development in mind. The applicant also asserts that although the capital costs of the upgrades were high, the schemes will revert to making a profit when the future planned North Coast developments take off and the customer base increases.

[55] According to the applicant, it has five water connections off the North Coast Pipeline out of the approximately thirty connections which it has from Umgeni Water. The applicant asserts that the majority of its connections are from the original infrastructure that previously serviced the DCTLG and not on the North Coast Pipeline. The DCTLG paid for the refurbishment of the Honolulu and Avondale reservoirs off the North Coast Pipeline and therefore these costs should not play any part in capital recoveries by Umgeni Water. The applicant denies that the quality of service provided by Umgeni Water to the applicant is higher compared to the service level of municipal customers falling outside the concession area. The applicant makes the point that Umgeni Water's sole function that is relevant to the calculation of tariffs is to deliver bulk treated water to specified reservoirs and the quantity of water to be provided has nothing to do with the quality of services rendered, only quantity. In light of the conclusion I have come to, I find it is not necessary for me to make a decision one way or the other on this dispute.

[56] There remains one point in limine which was raised by the respondents. They contend that an administrative review is not available to the applicant in the context of this matter as the relationship between the applicant, Umgeni Water and the Ilembe is regulated by the tripartite agreement, which requires under clause 12.1, that the disputes between the parties be arbitrated upon. Their contention is that the decision to set conditions for bulk water supply to the applicant and all of Umgeni Water's municipal customers for the financial year commencing 2015 includes the setting of increased tariffs in accordance with the provision of clause 10 of the Bulk Water Supply Agreement read with s 31(2) of the Act. I do not agree with this submission. The hurdle besetting this submission is that the Minister who took the

final decision to approve the impugned tariff and whose decision is sought to be reviewed is not a party to the Bulk Water Supply Agreement. In the circumstances the dispute and the relief which the applicant is seeking falls outside the ambit of the arbitration clause. In my view, this point in limine is nothing but a diversion without merit.

In the circumstances the following order shall issue:

Order

- (a) The decision of Umgeni Water proposing to impose a tariff increase of 38,5 per cent on the cost of supply of bulk water to the applicant on 12 November 2014 for the financial year commencing 1 July 2015 and the subsequent approval of a tariff increase of 37,9 per cent by the Minister is hereby reviewed and set aside.
- (b) The Umgeni Water and the Minister are directed to pay the costs of this application jointly and severally, the one paying the other to be absolved, such costs to include the costs occasioned by employment of two counsel.

Mnguni J

Appearances

Heard: 03 March 2017

Delivered: 13 September 2017

FOR THE APPLICANT: Adv. K J Kemp SC
 ASSISTED BY:
 INSTRUCTED BY: Garlicke and Bousfield Inc.
 c/o Venns Attorneys
 REF.: RSH/Gwen/26154292
 TEL.: 031- 794 81 11

FOR THE FIRST RESPONDENT: Adv. T G Madonsela SC
 ASSISTED BY: Adv. S Mahabeer and Adv. C Sibiya
 INSTRUCTED BY: Straus Daly
 REF: UMG8.12A/Khoza/DD/tt
 TEL: 031 – 570 56 00

FOR THE SECOND RESPONDENT: Adv. K Moroka SC
 ASSISTED BY: Adv. H A Mpshe and Adv. M P Moropa
 INSTRUCTED BY: The State Attorney, KZN
 REF: 8824/2015/Z17/hm
 TEL: ...