

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No: CCT300/19

SCA Case Nos: 358/2018 and 497/2018

KZP Case No: 11908/2015

In matter between:

MINISTER OF WATER AND SANITATION

Applicant

and

SEMBCORP SIZA WATER (PTY) LTD

First Respondent

UMGENI WATER

Second Respondent

**FIRST RESPONDENT'S FILING NOTICE – HEADS OF ARGUMENT AND LIST
OF AUTHORITIES**

TAKE NOTICE THAT the First Respondent hereby serves and files its Heads of Argument and List of Authorities as per the directions received from the above Honourable Court dated 20th August 2020.



FIRST RESPONDENT'S ATTORNEYS

GARLICKE & BOUSFIELD INC.

7 Torsvale Crescent

La Lucia Ridge

Durban

c/o STEPHANIE APROSKIE ATTORNEYS

4 Napoleon Avenue,

Bordeaux

Randburg

Johannesburg

Tel: 011 326 1354

Fax: 086 689 3267

(Ref: S Aproskie)

TO: **THE REGISTRAR OF THE CONSTITUTIONAL COURT**
BRAAMFONTEIN

AND TO: **STRAUSS DALY INC.**
Applicant's Attorneys (on behalf of Umgeni Water)
9th Floor, Strauss Daly Place
41 Richefond Circle
Ridgeside Office Park
Umhlanga
Ref: UMG8.12/AKhoza/DDeeplal
SERVICE VIA EMAIL: DDeeplal@straussdaly.co.za
C/O STRAUSS DALY INC
Unit 801
8th Floor Illovo Point
68 Melville Road
Illovo
Sandton
2146
REF UMG8.12/CPillay/AHiralal)

And to: **State Attorney (Pretoria)**
Applicant's attorneys (on behalf of the Minister of Water and Sanitation)
Salu Building
316 Thabo Sehume Street
Cnr Francis Baard Street
Pretoria
Ref: WMotsepe 8824/2015/z17/hm
SERVICE VIA EMAIL: WMotsepe@justice.gov.za

Stephanie Aproskie

From: Stephanie Aproskie <stephanie@aproskieattorneys.co.za>
Sent: 06 October 2020 13:49
To: 'DDeeplal@straussdaly.co.za'
Cc: 'Andani Matenzhe'
Subject: SA0268 - SEMBCORP SIZA WATER (PTY) LTD // UMGENI WATER & 2 OTHERS
Attachments: Document 1.pdf; Document 2.pdf

Dear Sirs

Please find attached our clients First Respondent`s Filing Notice and Heads of Arguments and List of Authorities herewith presented for service.

Kind regards,

Stephanie

Stephanie Aproskie

This email contains confidential information. It may also be legally privileged. Interception of this email is illegal. The information contained in this email is only for the use of the intended recipient. If you are not the intended recipient, any disclosure, copying and/or distribution of the content of this email, or the taking of any action in reliance thereon, or pursuant thereto, is strictly prohibited. Should you have received this email in error, please notify us immediately by return email. Stephanie Aproskie Attorneys shall not be liable if any variation is effected to any document or correspondence emailed unless that variation has been approved in writing by the attorney dealing with the matter. Please note that we will not advise you of a change in our banking details unless supported by a letter from our bankers, in which event you are kindly requested to contact us immediately to confirm the authenticity thereof. Should you fail to do so, we will not be held liable for any loss that may be suffered as a result of payments made to an incorrect account.

Stephanie Aproskie

From: Stephanie Aproskie <stephanie@aproskieattorneys.co.za>
Sent: 06 October 2020 13:51
To: 'wmotsepe@justice.gov.za'
Cc: 'Andani Matenzhe'
Subject: SA0268 - SEMBCORP SIZA WATER (PTY) LTD // UMGENI WATER & 2 OTHERS
Attachments: Document 1.pdf; Document 2.pdf

Dear Sirs

Please find attached our clients First Respondent's Filing Notice and Heads of Arguments and List of Authorities herewith presented for service.

Kind regards,

Stephanie



This email contains confidential information. It may also be legally privileged. Interception of this email is illegal. The information contained in this email is only for the use of the intended recipient. If you are not the intended recipient, any disclosure, copying and/or distribution of the content of this email, or the taking of any action in reliance thereon, or pursuant thereto, is strictly prohibited. Should you have received this email in error, please notify us immediately by return email. Stephanie Aproskie Attorneys shall not be liable if any variation is effected to any document or correspondence emailed unless that variation has been approved in writing by the attorney dealing with the matter. Please note that we will not advise you of a change in our banking details unless supported by a letter from our bankers, in which event you are kindly requested to contact us immediately to confirm the authenticity thereof. Should you fail to do so, we will not be held liable for any loss that may be suffered as a result of payments made to an incorrect account.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No: CCT300/19

SCA Case Nos: 358/2018 and 497/2018

KZP Case No: 11908/2015

In matter between:

MINISTER OF WATER AND SANITATION

Applicant

and

SEMBCORP SIZA WATER (PTY) LTD

First Respondent

UMGENI WATER

Second Respondent

FIRST RESPONDENT'S LIST OF AUTHORITIES

1. *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at paras 40-41;
2. *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A); [1977] 4 All SA 600 (A) (*Firestone*) at 306F-G. This authority has been quoted with approval in cases such as *Minister of Justice v Ntuli* [1997] ZACC 7 [1997] ZACC 7; ; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) (*Ntuli*) at para 22; and *Ex Parte Minister of Social Development* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) at para 30;
3. *Van der Walt v Metcash Trading Limited* (CCT37/01) [2002] ZACC 4; 2002 (4) SA 317; 2002 (5) BCLR 454 (11 April 2002);
4. *Van der Walt v Metcash* at para 1;

5. *Van der Walt v Metcash* at para 11;
 6. *Van der Walt v Metcash* at para 19;
 7. *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC) at para 17;
 8. *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* (CCT195/19) [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) (24 March 2020);
 9. *Normandien* at para 41;
 10. *Normandien* at para 43;
 11. *Normandien* at para 46;
 12. *Normandien* at para 47;
 13. *Normandien* at para 51;
 14. *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC) at para 11;
 15. *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC) paras 5 to 6.
-

16. In **Mbatha v University of Zululand**, 2014 (2) BCLR 123 (CC), Madlanga J (in a concurring judgment) found at para 222 that "what is in essence a factual issue" may not "morph into a constitutional issue through the simple facility of clothing it in constitutional garb";
17. **Mankayi v AngloGold Ashanti Ltd** 2011 (3) SA 237 (CC) at para 12; with reference to **S v Boesak** 2001 (1) SA 912 (CC) at para 15; **Phoebus Apollo Aviation CC v Minister of Safety and Security** 2003 (2) SA 34 (CC) at para 9; **Van der Walt v Metcash Trading Ltd** 2002 (4) SA 317 (CC). See also **S v Thebus** 2003 (6) SA 505 (CC) at para 46
18. **S v Marais** 2011 (1) SA 502 (CC);
19. **Fraser v Absa Bank Ltd** 2007 (3) SA 484 (CC) at paras 36-40
20. **AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another** 2007 (1) SA 343 (CC) at paras 40-41;
21. **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)** 2014 (4) SA 179 (CC) at para 54;
22. **Black Sash Trust v Minister of Social Development and Others**_[2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017);
23. **Allpay (2)** at para 55;

24. *Minister of Defence v Xulu* [2018] ZASCA 65; 2018 (6) SA 460 (SCA) paras 47-50;
 25. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (40 SA 490 (CC) at para 48; Umgeni Water's Heads of Argument, para 28, p. 16; Minister's Heads of Argument, para 67, p. 27;
 26. *Minister of Defence and Military Veterans v Motau and Others* (CCT 133/13) [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) (10 June 2014) at footnote 85;
 27. *National Lotteries Board v South African Education and Environment Project 2012 (4) SA 504 (SCA)* at para 27;
 28. *Lesapo v North West Agricultural Bank 2000 (1) SA 409 (CC)* at para 17;
 29. *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] 4 All SA 719 (SCA) at para [59];
 30. *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at paras [47] and [69]. See too *Mohamed v President of the RSA* 2001 (3) SA 893 (CC);
 31. *Allpay Consolidated Investment Holdings (Pty) Ltd. and Others v Chief Executive Officer, South African Social security Agency and Others* 2014 (4) SA 179 (CC);
 32. *National Lotteries Board v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA).
-

33. Mohamed v President of the RSA 2001 (3) SA 893 (CC).

KJ KEMP SC
S PUDIFIN-JONES

2 November 2018.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No: CCT300/19

SCA Case Nos: 358/2018 and 497/2018

KZP Case No: 11908/2015

In matter between:

MINISTER OF WATER AND SANITATION

Applicant

and

SEMBCORP SIZA WATER (PTY) LTD

First Respondent

UMGENI WATER

Second Respondent

FIRST RESPONDENT'S WRITTEN SUBMISSIONS

INTRODUCTION AND SYNOPSIS OF OPPOSITION.....	2
THE APPLICATION IS MOOT.....	6
Mootness – the legal principles.....	6
Facts demonstrating mootness	8
NOT IN THE INTERESTS OF JUSTICE TO GRANT LEAVE TO APPEAL: THE FINDINGS OF THE HIGH COURT AND SUPREME COURT OF APPEAL ARE FACT- BOUND.....	10
The belated attempt to “constitutionalise” the issues.....	11
OPPOSITION ON THE MERITS	14
The parties and their relationship.....	14
THE TEST ON REVIEW	21

THE JUSTIFICATIONS.....	23
The “cross-subsidisation” argument.....	25
The “plough-back” argument.....	31
The “not a municipality” justification.....	33
Equality	35
CONCLUSION ON THE JUSTIFICATIONS	36
THE GROUNDS OF APPEAL BEFORE THIS COURT AND WHY THEY HAVE NO MERIT	38
The “pillars”	38
CONCLUSION	41

INTRODUCTION AND SYNOPSIS OF OPPOSITION

1. Before the High Court, the First Respondent (“*Siza*”) applied to review and set aside the decision of the Minister dated 20 May 2015 in respect of the 2015/2016 tariff for bulk water supply. That decision irrationally and arbitrarily singled out Siza amongst all the water service providers under the Applicant’s (“*Minister’s*”) authority by imposing an increase of **37,9%** on the cost to Siza of bulk supplies of water delivered to Siza by the Second Respondent (“*Umgeni Water*”) for the year 2015/2016. All of the other customers of Umgeni Water were levied an increase of 7,9% for the same period.

2. The High Court upheld Siza's review.¹ Mnguni J found that there was no rational basis for the discrimination. In circumstances where Siza performs an in-line function in the delivery of bulk water from Umgeni Water to Ilembe and the water consumers of the concession area,² it was "*opportunistic*" on the part of the Minister and Umgeni Water to consider Siza's identity as a commercial entity warranting the imposition of a different (and higher) tariff from the municipal entities performing the same service.³
3. Both the Minister and Umgeni Water appealed to the Supreme Court of Appeal ("SCA"). The SCA dismissed the appeals.⁴ Before the SCA, Umgeni Water and the Minister conceded that in performing the functions of a water service provider under the Concession Agreement between Siza, Ilembe Municipality and Umgeni Water, Siza took upon itself all of the rights and obligations of Ilembe.⁵ The function performed by Siza pursuant to the Concession and Tripartite Agreements is the function of delivering basic services to residents and businesses within the concession area. It is, accordingly, an "*organ of state*" as defined in section 239 of the Constitution.⁶
4. The SCA found that, in these circumstances, singling Siza out for a five-fold increase in tariff was irrational and contrary to the law. The SCA held that "*No provision in the empowering legislation justifies this type of discrimination between municipal and*

¹ Record, vol. 5, p. 442.

² High Court Judgment, para 43, Record p. 434.

³ High Court Judgment, para 44, Record p. 434.

⁴ Record, vol. 10, p. 1025/1026.

⁵ SCA Judgment, para 47, Record vol 10, Record p 1020/1021

⁶ See *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at paras 40-41.

*non-municipal water services providers, more particularly when they are both performing a municipal function. Penalising Siza for its ability to generate a profit through its efficiency would be irrational.”*⁷

5. The Minister and Umgeni Water both applied for leave to appeal to this Court against the SCA’s judgment and order. The Minister’s application was set down for hearing; Umgeni Water’s application for leave to appeal was dismissed with costs on the basis that it had no prospects of success. Notwithstanding that this Court has finally pronounced on its application,⁸ Umgeni Water has once again sought to “enter the fray” and implored this Court to reconsider its dismissal of its application. This conduct is regrettable.

6. In *Van der Walt v Metcash*,⁹ this Court (per Goldstone J) dealt with a situation where the SCA had made contrary orders in cases which were materially identical – one granting and one refusing leave to appeal. The Applicant (who had been refused leave) approached this Court alleging that these orders constituted a violation of his rights under the Constitution.¹⁰ This Court held that, while it may be that the different outcomes in the matters was “*unfortunate*”,¹¹ it could not be said that the result was unfair, because the granting of leave to appeal rested on the discretion of the judges

⁷ SCA Judgment, para 38, Record vol 10, Record p 1017.

⁸ *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A); [1977] 4 All SA 600 (A) (*Firestone*) at 306F-G. This authority has been quoted with approval in cases such as *Minister of Justice v Ntuli* [1997] ZACC 7 [1997] ZACC 7; ; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) (*Ntuli*) at para 22; and *Ex Parte Minister of Social Development* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) at para 30.

⁹ *Van der Walt v Metcash Trading Limited* (CCT37/01) [2002] ZACC 4; 2002 (4) SA 317; 2002 (5) BCLR 454 (11 April 2002).

¹⁰ *Van der Walt v Metcash* at para 1.

¹¹ *Van der Walt v Metcash* at para 11.

concerned, and that “*reasonable minds may well differ on the correct outcome of similar or even identical cases*”.¹² In what follows, we accordingly address only the Minister’s application for leave to appeal (in which Umgeni Water is in any event cited as a respondent), which is the only application before this Court.

7. There is one further critical fact that is relevant to this Court’s determination of the application. On 3 June 2020 Siza and Umgeni concluded a settlement agreement (“*the settlement*”) which finally settled the dispute between them, including the payment of funds that had been held in Trust pending the outcome of the litigation and the payment of the costs associated with the Court proceedings. As set out in the section which follows, that settlement renders the application before this Court moot.
8. Having set out the background to this application, we turn now to Siza’s opposition to the application. We deal first with the question of mootness; thereafter we deal with the fact that it is not in the interests of justice to grant leave to appeal (or uphold the appeal), and the opposition on the merits. Finally, we deal with the question of relief and costs.

¹² *Van der Walt v Metcash* at para 19.

THE APPLICATION IS MOOT

Mootness – the legal principles

9. A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.¹³
10. This Court has recently restated the legal principles relevant to an assessment of mootness in *Normandien*.¹⁴ In that application, the applicant applied to set aside a mineral exploration right on judicial review. However, by the time the application reached the Constitutional Court events had overtaken the litigation, and the application for an exploration right had been withdrawn.
11. The applicant (Normandien) nevertheless argued that, even if the application was moot, this Court had a duty to adjudicate the matter in order to correct the judgment of the Supreme Court of Appeal; to right the costs order against it; and to ensure that the relevant role-players conduct themselves appropriately in future matters and to clarify the general public's rights.¹⁵ The respondent (Rhino) – the party which had withdrawn the exploration right application – argued that the issues raised by Normandien had become wholly academic and that it was not in the interests of justice

¹³ *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC) at para 17.

¹⁴ *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* (CCT195/19) [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) (24 March 2020).

¹⁵ *Normandien* at para 41.

for this Court to determine issues with no practical effect. It argued further that “*any issue on costs cannot cloak a moot matter as a live one*”.¹⁶

12. This Court held that it was clear from the facts that the matter was moot.¹⁷ The doctrine of mootness, the Court continued: “*is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are “abstract, academic or hypothetical”*”.¹⁸

13. In considering whether it was nevertheless in the interests of justice to hear the application, the Court held that, relevant factors to be considered by a court include: whether there are two conflicting judgments by different courts; whether any order which it may make will have some practical effect either on the parties or on others; the nature and extent of the practical effect that any possible order might have; the importance of the issue; the complexity of the issue; and the fullness or otherwise of the arguments advanced.¹⁹ It held that none of these factors tipped the interests of justice towards the court determining the application, and dismissed the matter on the ground of mootness with a punitive costs order against Normandien.

14. A consideration of these factors in the present case similarly militates *against* hearing the matter, and it would not be in the interests of justice for this Court to embark on a

¹⁶ *Normandien* at para 43.

¹⁷ *Normandien* at para 46.

¹⁸ *Normandien* at para 47.

¹⁹ *Normandien* at para 51.

full hearing of the merits of this application, which is moot and of academic interest only.

Facts demonstrating mootness

15. The settlement between Umgeni Water and Siza means that there is no longer any live controversy between the parties: the dispute has been finally settled. The matter is classically moot.
16. Moreover, it is not in the interests of justice for this Court to hear the application for the following reasons
 - 16.1. There are no conflicting judgments by different courts – on the contrary both the High Court and the SCA found in Siza’s favour in well-reasoned judgments which apply the established law to the facts;
 - 16.2. Any Order which this Court makes would have no practical effect either on the parties or on others;
 - 16.3. The issues raised are not of significant importance. They related to a one-off increase and, since the High Court judgment, the Minister has imposed the same increases in respect of Siza and the municipalities. The law is clear and the facts are undisputed.
17. None of these factors tip the interests of justice towards the court determining the application.

18. Umgeni Water's latest affidavit (filed on 24 September 2020) seeks for the first time an order from this Court setting aside the settlement agreement.²⁰ This is inappropriate in at least three respects:
- 18.1. First, because this Court is loath to sit as a court of first and last instance;²¹
 - 18.2. Secondly, because Umgeni Water offers no reason as to *why* it says the settlement agreement should be set aside (other than the fact that it is now suffering from settlers' remorse); and
 - 18.3. Thirdly, because Umgeni Water entered into the settlement agreement in full knowledge of the fact that the Minister had launched an application before this Court, which application had not been dismissed. To the extent that Umgeni now says that it did not know of the Minister's application (which is denied for the reasons set out in Siza's affidavit of 6 October 2020), it ought to have known.
19. For all of these reasons, we submit that the matter is moot and that it is not in the interests of justice for this Court to pronounce on the issues raised herein, which are academic and in any event apply only to the specific facts in this application – a submission which we expand upon in the following section. The Minister accepted, in the SCA, that the Umgeni Water decision for the comparatively enormous hike of the water tariff from 2015/16 confined to bulk supplies for Sembcorp Siza Water (“Siza”), is a clear link in her approval and indeed the targetted link (the approval

²⁰ See Umgeni Water's Notice of Motion, para 3.

²¹ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC) at para 11.

letter itself raises questions, the weak link in the chain of decision is the Umgeni Water decision).

NOT IN THE INTERESTS OF JUSTICE TO GRANT LEAVE TO APPEAL: THE FINDINGS OF THE HIGH COURT AND SUPREME COURT OF APPEAL ARE FACT-BOUND

20. The effect of both the High Court and Supreme Court of Appeal's judgment was that Siza's review application against the imposition of a tariff increase of **37,9%** for the 2014/2015 financial year was upheld, and the tariff set aside.
21. While the application squarely concerned a review of the exercise of public power, the application did not raise novel or untested legal issues: rather, both the High Court and Supreme Court of Appeal judgments constitute the application of established legal principles to a particular set of facts.
22. Although decided within the context of section 27 of the Constitution, this case is not about access to water. There is no question that Siza's customers would receive water: the only issue at stake was whether the decision by Umgeni Water and the Minister to single out Siza for an increase almost *five times* that of any other customer of Umgeni Water was lawful. Both the High Court and the Supreme Court of Appeal found that it was not.
23. The matter distils down simply to whether the Minister's decision can be justified on the *facts* before the decision maker. Both the High Court and Supreme Court of

Appeal have considered the merits in that regard, and produced judgments that are well-reasoned and unassailable, on the application of the established principles.

24. Nor do the Applicants assert that the wrong test was applied. There are thus no reasonable prospects of this Court coming to a different decision.

The belated attempt to “constitutionalise” the issues

25. The Minister attempts before this Court to reframe its case as one raising primary constitutional issues, when no such issues were raised before the High Court, or the Supreme Court of Appeal. This is confirmed by the fact that no Rule 16A Notice was filed by Umgeni Water or the Minister before the High Court or Supreme Court of Appeal. And the Minister has not demonstrated any exceptional circumstances that would permit it to raise these constitutional issues for the first time on appeal before this Court,²² and none exist.
26. The issues at stake in this application, from the outset, and again before this Court, concern the application of *established* legal principles, which have already been determined by this Court and the Supreme Court of Appeal, in respect of a *particular* set of facts. The Minister and Umgeni Water disagree with the judgments of Mnguni J and the Supreme Court of Appeal, but that does not turn the matter into a constitutional one.²³ This Court emphasised in *Mankayi* that it has consistently

²² *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC) paras 5 to 6.

²³ In *Mbatha v University of Zululand*, 2014 (2) BCLR 123 (CC), Madlanga J (in a concurring judgment) found at para 222 that “what is in essence a factual issue” may not “morph into a constitutional issue through the simple facility of clothing it in constitutional garb”.

*“refused to entertain appeals that seek to challenge only factual findings or incorrect application of the law by the lower courts”.*²⁴

27. This Court dealt in *S v Marais*²⁵ with an attempt by a litigant to dress up its dissatisfaction with the factual findings of the trial court in legal garb in order to raise a constitutional matter. The Court’s response is firm:

*“We have rehearsed the “legal rules” that the applicant says have been breached by the trial court. They seem to relate to the caution a trial court should observe when it makes factual findings. However, aside from the trappings of “legal rules”, the pith of her complaint is no more than that the factual determinations of the High Court on the battered woman defence are incorrect. The high watermark of her case is no more than that the High Court was wrong on the facts. Her complaint is simply that the trial court misdirected itself in the manner in which it evaluated and made factual determinations. On this reasoning it was mistaken in rejecting her evidence that she had arranged for her husband to be killed because she was a battered woman. Her dissatisfaction is over a factual finding that stabs at the heart of her defence. But even so, in itself, the dissatisfaction with the finding does not constitute a constitutional issue”.*²⁶

28. The same is true in relation to this matter.

²⁴ *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC) at para 12; with reference to *S v Boesak* 2001 (1) SA 912 (CC) at para 15; *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC) at para 9; *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC). See also *S v Thebus* 2003 (6) SA 505 (CC) at para 46.

²⁵ *S v Marais* 2011 (1) SA 502 (CC).

²⁶ At para 15, my emphasis.

29. At their essence, both the Minister and Umgeni Water seek to challenge the decisions of Mnguni J and the Supreme Court of Appeal by claiming that they reached the wrong conclusions on the facts. But in *Fraser*, this Court reiterated:²⁷

“While the conception of a constitutional matter is broad, the term is of course not completely open. The fact that s 167(3)(b) of the Constitution limits this Court's jurisdiction to constitutional matters presupposes that a meaningful line must be drawn between constitutional and non-constitutional matters and it is the responsibility of this Court to do so. ...

***A contention that a lower Court reached an incorrect decision is not, without more, a constitutional matter.** Moreover, this Court will not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal is couched in constitutional terms. It is incumbent upon an applicant to demonstrate the existence of a bona fide constitutional question.”²⁸*

30. In the premises, this matter does not raise a constitutional issue which is worthy of this Court's consideration. Since *Fraser*, this Court's appeal jurisdiction has been extended, but it still remains a preserve with a high threshold, which is not met in this case. On this ground alone, the application for leave to appeal falls to be refused.

²⁷ *Fraser v Absa Bank Ltd* 2007 (3) SA 484 (CC) at paras 36-40

²⁸ Emphasis added.

31. In the section which follows (and to the extent that the preliminary question of mootness is not upheld and that leave to appeal is granted) we deal with Siza's opposition to the Minister's application on the merits.

OPPOSITION ON THE MERITS

The parties and their relationship

32. Umgeni Water is a water board, established in terms of the Water Services Act 108 of 1997 ("*Water Services Act*").²⁹ Its primary duty is "to provide water services to other water services institutions within its service area".³⁰
33. Umgeni Water has a number of customers, all of whom are municipalities but for Siza, which is a private entity appointed by Ilembe to perform the functions of a water service provider in its stead.³¹ These customers purchase bulk water from Umgeni Water and supply it to end-users.³² They add on a percentage, in Siza's case, such margin is limited by Ilembe.
34. Subject to the approval of the Minister, Umgeni Water sets and determines tariffs for the supply of water within KwaZulu-Natal,³³ including the tariff at which Umgeni Water sells bulk water to its customers. This power is conferred by section 42 of the

²⁹ Founding Affidavit, para 4, Record p. 7 and para 51, Record p. 27.

³⁰ Water Services Act, s 29.

³¹ Umgeni Water's Answering Affidavit, para 43, Record p. 148. There are some other customers but their consumption is negligible and not relevant to the issue.

³² Founding Affidavit, para 51, Record p. 28.

³³ Founding Affidavit, para 42, Record p. 25.

Local Government: Municipal Finance Management Act 56 of 2003 (“*MFMA*”)³⁴ read with section 31(2) (b) of the Water Services Act.³⁵

35. *The constitutional obligation on Ilembe to provide sufficient water*

The right of access to sufficient water is accorded to everyone in s 27(1)(b) of the Constitution, which states that “*everyone has the right to have access to sufficient water*”. Section 27(2) requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right.

36. In 1999, Ilembe’s predecessor (Dolphin Coast Transitional Local Municipality), following a public tender process, appointed Siza to give effect to its constitutional and statutory obligation to provide water services within the concession area.³⁶ The rights and obligations of the parties pursuant to that appointment are set out in the Concession Contract.³⁷

37. The Tripartite Bulk Water Supply Agreement entered into between Siza, Umgeni Water and Ilembe in 2000,³⁸ recognises and records that pursuant to the Concession Contract Siza was appointed as a water service provider under section 19 of the Water

³⁴ The relevant extract of the MFMA is quoted in the papers at Record, p. 89.

³⁵ The relevant extract of the Water Services Act is quoted in the papers at Record, p. 90. These issues and the dispute are concisely also summarised in the Siza complaint about the increase, Record, p. 77 – p. 79.

³⁶ The function of Ilembe, the water services authority, is to ensure “*access to water services*” (Water Services Act, definition section).

³⁷ Concession Agreement, Supplementary Bundle, p. 670.

³⁸ Tripartite Agreement, Record, p. 43.

Services Act with the obligation to supply potable water to a portion of the Ilembe area for a period of 30 years on behalf of Ilembe, the relevant water service authority.³⁹

38. Clause 10.1 of the Tripartite Agreement provides: *“Siza shall pay Umgeni Water for bulk water supplied in terms of this agreement in accordance with the tariff determined by the Board of Umgeni Water, in terms of the Act, as amended from time to time. Umgeni Water shall consult with Siza annually in regard to any adjustments to the tariff...”*⁴⁰
39. In terms of the Tripartite Agreement read with the Water Services Act and the Local Government: Municipal Finance Management Act,⁴¹ Siza purchases its water from Umgeni Water (the relevant Water Board) at tariffs determined by Umgeni Water and approved by the Minister, and distributes this water within the concession area to end users.
40. Before the SCA, Umgeni Water and the Minister conceded that in performing the functions of a water service provider under the Concession Agreement between Siza, Ilembe Municipality and Umgeni Water, the effect was to assign all of Ilembe’s rights

³⁹ Clause 1.5 of the Tripartite Agreement provides: *“Umgeni Water and DCM wish to terminate the prior agreement and to replace it with this agreement entered into in accordance with the provisions of sections 32 and 33 of the Water Services Act 106 of 1997. In terms of which Umgeni Water will agree to provide bulk water on the terms and conditions stated herein to Siza Water Company (Proprietary) Limited (“Siza”). Siza has been appointed by DCM as a Water service provider in accordance with the Act and the concession agreement (“the concession agreement”) for an initial period of 30 years from 1 April 1999, and for such further periods as may be agreed from time to time. Siza will supply potable water to consumers in terms of the concession agreement.”* Record, p. 47. The area and the residents are described in the letter at Record, p. 77 – p. 79.

⁴⁰ Tripartite Agreement, clause 10.1, Record, p. 54.

⁴¹ Act 56 of 2003.

and obligations to Siza.⁴² But for Siza providing water to end customers, Ilembe would be obliged to do so, and indeed Ilembe is guarantor of Siza's obligations: clause 1.8 of the Tripartite Bulk Water Supply Agreement between Umgeni Water, Siza and the Dolphin Coast Municipality (which was the predecessor in title to Ilembe) specifically states "*DCM has agreed to guarantee the obligations of Siza to Umgeni Water in terms of this agreement, acting in terms of its statutory powers contained in section 10D(1)(c) of the Local Government Transition Act No. 209.*"⁴³

41. *The effect of Siza performing the public function*

Much emphasis was placed by Umgeni Water and the Minister on the role of Siza, before the High Court, the Supreme Court of Appeal and again before this Court. Umgeni Water and the Minister seek to argue that Siza can be treated differently from other customers of Umgeni Water simply because it is not a municipality, but is a private entity that is providing a municipal service.

42. This argument is made notwithstanding that the service which Umgeni Water provides to Siza is the *same* as the service which is provided to its municipal customers: namely the delivery of bulk treated water to specified reservoirs. All that happens in this case is that, instead of Ilembe providing the water to the customers which Siza services directly, in the Concession Area Siza does it as Ilembe's mandatory – it provides the service that Ilembe would otherwise have to provide. Outside the concession area, Ilembe provides precisely the same service. But, in terms of the impugned decision,

⁴² SCA Judgment, para 47, Record vol 10, Record p 1020 – 1021.

⁴³ Bulk Water Supply Agreement between Umgeni Water, Dolphin Coast Municipality and Siza Water, clause 1.8, Record p. 48.

the price of water supplied to Ilembe would be significantly lower than that provided to Siza.

43. Moreover, before the Supreme Court of Appeal, Umgeni Water *accepted* that when Siza distributes water, it acts as a “*municipality*”.⁴⁴ Umgeni Water further accepted that the effect of the Concession Agreement was “*to assign all of [Ilembe’s] rights and obligations to Siza*”. The Minister accepted and concurred in Umgeni Water’s concession in this regard.
44. Section 239 of the Constitution defines an ‘organ of state’ as:
- “(a) *any department of state or administration in the national, provincial or local sphere of government; or*
 - (b) *any other functionary or institution-*
 - (i) *exercising a public power or performing a public function in terms of the Constitution or a provincial constitution; or*
 - (ii) *exercising a public power or performing a public function in terms of any legislation...*
45. The function performed by Siza pursuant to the Concession and Tripartite Agreements is the function of delivering basic services to residents and businesses within the

⁴⁴ SCA judgment, para 8.

concession area. It is, accordingly, an “*organ of state*” as defined in section 239 of the Constitution.⁴⁵

46. This concession by Umgeni Water and the Minister was correctly made: but for Siza’s involvement, the municipal function to distribute water within the Ilembe concession area would be performed by Ilembe.
47. In *Allpay 2*,⁴⁶ this Court held that when a private entity performs a public function, they step into the shoes of the relevant organ of state. The determinative factor in this regard is the function that the private entity performs (rather than the functionary that performs it). In *Allpay 2*, this Court held that the obligations of Cash Paymaster Services – which had assumed the country-wide administration of the payment of social grants – were fundamentally public in nature.⁴⁷ Cash Paymaster Services was “*not only the face, but also the operational arm of the national sphere of government*” *insofar as the payment of social grants is concerned.*”⁴⁸
48. In the case of Siza, both the High Court and the Supreme Court of Appeal found that there was no rational basis for the discrimination that Umgeni Water and the Minister had applied in respect of Siza’s tariffs as against the tariffs of all its other customers. In the circumstances, it was “*opportunistic*” and irrational on the part of the Minister

⁴⁵ See too *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at paras 40-41.

⁴⁶ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) at para 54.

⁴⁷ See too *Black Sash Trust v Minister of Social Development and Others*, [2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017).

⁴⁸ *Allpay (2)* at para 55.

and Umgeni Water to consider Siza's identity as a commercial entity warranting an imposition of a different tariff from the municipal entities performing the same service. The tariff will obviously impact directly on the actual water users in the area concerned.

49. That Siza is performing a municipal function is common cause on the facts, despite the Minister's (and Umgeni Water's) attempts to row away from the concession. This is clear from clause 1.8 of the Tripartite Bulk Water Supply Agreement between Umgeni Water, Siza and the Dolphin Coast Municipality (which was the predecessor in title to Ilembe) specifically states "*DCM has agreed to guarantee the obligations of Siza to Umgeni Water in terms of this agreement, acting in terms of its statutory powers contained in section 10D(1)(c) of the Local Government Transition Act No. 209.*"
50. This wording is clear and unambiguous: In terms of the Tripartite Agreement, Ilembe is the guarantor of Siza's obligations to Umgeni Water. In having been appointed by Ilembe to distribute water within the Ilembe municipal area, Umgeni Water is performing an "*in line function*" which, but for Siza performing under that agreement, Ilembe would be obliged to perform.
51. The Supreme Court of Appeal explained the relationship as follows:

"Siza is... performing the identical functions to those that Ilembe would otherwise have to perform. If Siza stops supplying those water services, or the concession agreement is terminated, Ilembe (which is also the guarantor) must supply the end users with water

it has obtained from Umgeni Water. In the result, Siza is discharging a constitutional obligation resting upon Ilembe in the same manner and in terms of the same constitutional and statutory obligations as those resting on Ilembe. Its obligations are no different from those of the municipalities to which Umgeni Water supplies bulk water".⁴⁹

52. Once it was accepted (as all parties did before the Supreme Court of Appeal) that Siza is to be treated as a municipality for the purposes of analysing the decision, the upholding of Siza's review flowed as a matter of course.

THE TEST ON REVIEW

53. The Minister's decision to impose an increase of 37.9% on Siza's tariff is an administrative one subject to the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"), and was challenged by Siza on the grounds that the decision was unlawful and irrational in violation of sections 6(2)(a)(i), (b), (c), (d), (e)(i), (iii), (iv) and (vi); (h) and (i) of *PAJA*.⁵⁰
54. Yet before the High Court and SCA, and again before this Court, neither Umgeni Water nor the Minister dealt at all with *PAJA* and instead both organs of state sought to defend the impugned decision against a pure legality challenge. The SCA held that this approach was wrong. It stated (with reference to *Minister of Defence v Xulu*)⁵¹:

⁴⁹ Supreme Court of Appeal judgment at para 10, Record p. 1002.

⁵⁰ Founding Affidavit, para 76, Record p. 36.

⁵¹ *Minister of Defence v Xulu* [2018] ZASCA 65; 2018 (6) SA 460 (SCA) paras 47-50.

‘Siza’s approach was correct. The decision was one of an administrative nature under an empowering provision taken by an organ of State, when exercising a public power in terms of legislation. It had a direct external legal effect and adversely affected the rights of Siza and Siza’s customers. As such it was administrative action and it must be reviewed under PAJA.’

55. Once again before this Court, the Minister bases its application for leave to appeal, as well as its heads of argument, solely on threshold of rationality under the rule of law.⁵² Under PAJA, however, more is required than base rationality and procedural fairness; yet none of the other grounds of review are considered.
56. The lodestar of the Minister’s case appears to be the low bar for rationality and the question of deference. Yet neither of these principles arises. The Minister quotes the well-known paragraph 48 of ***Bato Star*** in his heads of argument;⁵³ however does so selectively. The paragraph in question ends with the following salutation:

“This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.”

⁵² See para 40 and following of the Minister’s heads of argument.

⁵³ ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*** 2004 (40 SA 490 (CC) at para 48; Umgeni Water’s Heads of Argument, para 28, p. 16; Minister’s Heads of Argument, para 67, p. 27.

57. We turn now to consider the justifications put forward by the Minister for the impugned decision, and why these justifications do not pass constitutional muster.

THE JUSTIFICATIONS

58. There was no dispute before the High Court (and remains no dispute) that in taking the impugned decision Siza was singled out and “*treated differently from the other customers of [Umgeni Water]*”⁵⁴ in respect of this increase, or that the Minister / Umgeni Water imposed an increase of **7.8%** in respect of the same financial years for all other customers of Umgeni Water including Ilembe.⁵⁵

59. The reason for the differentiation given at the time of the decision, was captured in the letter from Umgeni Water to the Minister which contained a detailed submission regarding the proposed increases in tariff to be applied to the cost of water.⁵⁶ The letter records, regarding the increase to Siza:

“The rationale (sic) for a separate meeting and proposed increase to Siza Water is on the basis that Umgeni water cannot continuously cross subsidize losses incurred in the water supply to Siza Water which is a private entity that continuously make (sic) profit on its water supply operation. In that meeting the UW delegation

⁵⁴ Umgeni Water’s Answering Affidavit, para 8.4, Record p. 120.

⁵⁵ Supplementary Founding Affidavit, para 6, Record p. 101, Letter from Minister of Water and Sanitation dated 20 May 2015, Record p. 107. Umgeni Water’s other customers include: eThekweni Metropolitan Municipality, Msundusi Local Municipality, UMgungundlovu District Municipality, Ugu District Municipality, Harry Gwala District Municipality and some minor retail customers.

⁵⁶ Founding Affidavit, para 28 Record p. 21.

presented to Siza Water the same rationale behind a proposed tariff increase of 38.5% (including CUC) as attached in Annexure 5... ”⁵⁷

60. Similarly, in Umgeni Water’s pricing review,⁵⁸ it stated:

“Siza Water did express their unhappiness with the increase of their tariff by 38.5% including CUC. There has been exchange of letters between UW and Siza Water which are attached in Annexure 6.1. Umgeni Water remains off (sic) the view that ‘as far as supply of water to Siza Water is concerned; (sic) UW has to at least break even since Siza Water as private entity all the profits it makes from supplying water does not necessarily get ploughed back into service delivery in a similar manner as in other municipal entities.’ ”

61. This Court has made it clear⁵⁹ that an administrator is bound by the reasons given at the time the decision was made, and cannot engage in “*ex post facto rationalisation of a bad decision*”.⁶⁰

62. Distilled to their elements, these contemporaneous reasons constitute two purported justifications for the impugned decision.⁶¹

62.1. the determination that Umgeni Water will no longer allow a cross-subsidy on price of bulk water granted to Siza (“*the cross-subsidisation argument*”); and

⁵⁷ Umgeni Water’s Letter to the Minister, Record, p. 69.

⁵⁸ Umgeni Water’s Pricing Review, Record p. 69.

⁵⁹ *Minister of Defence and Military Veterans v Motau and Others* (CCT 133/13) [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) (10 June 2014) at footnote 85:

⁶⁰ *National Lotteries Board v South African Education and Environment Project 2012 (4) SA 504 (SCA)* at para 27

⁶¹ Replying Affidavit, para 7, Paginated Bundle p. 280.

- 62.2. the determination that because Siza is not a municipality, it should not be allowed to make a profit because its profits would not be ploughed back into the service delivery system (“*the plough-back argument*”).
63. The cross-subsidisation and plough-back justifications were the only two reasons which Umgeni Water gave at the time that the decision was made, and which were evident from the record, and the High Court and SCA were correct in refusing to entertain any further additional *ex post facto* justifications which Umgeni Water attempted to introduce when it realised that its contemporaneous reasons did not pass muster. The additional arguments around achieving equity among its customers, ensuring financial viability and putting in place cost recovery measures were (on Umgeni Water’s own version) raised for the first time in its Answering Affidavit, and were not contemporaneous reasons for the imposition of the 37.9% increase.⁶² They constitute an impermissible evolution of thinking.
64. We turn now to consider the two reasons put forward for the decision; and the further reason dealt with by the SCA, namely that Siza is “*not a municipality*”.

The “cross-subsidisation” argument

65. Umgeni Water and the Minister rely for the purported “*determination*” relating to cross-subsidisation on the Norms and Standards Document⁶³ published by the Minister and Umgeni Water’s “*Pricing Policy*”.⁶⁴

⁶² Umgeni Water's Founding Affidavit in the Application for Leave to Appeal, para 39.3.

⁶³ Norms and Standards, Record, p. 335.

⁶⁴ Pricing Policy, Record, p. 189.

66. This reliance is misplaced: neither document reflects a policy decision to prohibit cross-subsidisation (to Siza specifically or in general) and neither document justifies the imposition of an irrational tariff increase on a single customer:
- 66.1. The Norms and Standards document⁶⁵ does not deal at all with the question of cross-subsidisation or any determination that non-municipal entities should not be permitted to make a profit; and
- 66.2. The Pricing Policy does not aim to require “*every water service provider to break even with it*” as Umgeni Water originally sought to suggest.⁶⁶ If anything, it aims to ensure that Umgeni Water breaks even on an overall basis and does not justify a decision that each water service provider customer of Umgeni Water (or specifically Siza) must break even.⁶⁷ Indeed, the very categorisation of the entities into “*economic*” and “*social*” schemes in the Pricing Policy involves cross-subsidisation between the economic and social schemes.⁶⁸
67. Item 21 of the Pricing Policy records that “*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 section 34 of the Water Services Act.⁶⁹ This is not a requirement, but a goal,⁷⁰ and does not validate or reflect any policy decision

⁶⁵ Norms and Standards, Record, p. 335.

⁶⁶ Umgeni Water’s Answering Affidavit para 23.1, Record p. 134.

⁶⁷ Replying Affidavit, para 63, Record p. 298.

⁶⁸ Replying Affidavit, para 68, Record p. 299. See too item 24 of the Pricing Policy which refers to “*the acceptable cross-subsidy band*”. Record p. 197.

⁶⁹ Pricing Policy, Record, p. 189.

⁷⁰ Replying Affidavit, para 88, Record p. 305.

taken by Umgeni Water singling out Siza for an increase four and a half times greater than any other customer of Umgeni Water.

68. Moreover, the Minister's affidavit makes it clear that cross-subsidisation is an ongoing feature of water service provision, stating *"the remaining schemes are cross subsidised by the schemes contribution to the revenue. The Hazelmere, Ilembe and Maphumulo schemes contribute to a major portion of the shortfall and thus requiring cross-subsidisation"*.⁷¹
69. There is accordingly no general policy to end cross-subsidisation across the various schemes and municipalities who obtain water from Umgeni Water; only an irrational and unlawful decision to single out Siza to end purported cross-subsidisation in favour of Siza.
70. In respect of the cross-subsidisation argument, the Supreme Court of Appeal held that Umgeni Water appeared to have misunderstood the meaning of *"cross-subsidisation"*. When Umgeni Water speaks of cross-subsidisation, it does not intend it to be understood in any conventional way, but merely as an indication that some suppliers of bulk water generate profits and others losses, and the latter are offset by the former. Umgeni Water explained before the Supreme Court of Appeal that what it meant by *"cross-subsidisation"* was that it wishes to take away the profits of profitable entities.⁷²

⁷¹ Minister's Answering Affidavit, para 8.8.11, Record p. 242.

⁷² Supreme Court of Appeal judgment, para 25, Record vol 10, Record p 1010.

71. But, as the Supreme Court of Appeal made clear, this explanation is irrational on the facts of this case since, on Umgeni Water's own version there are a number of profitable schemes (including eThekweni and Msunduzi) and unprofitable schemes, but only Siza was singled out for the tariff increase. Prior to the increase to Siza, Umgeni Water has applied a uniform tariff across all areas of supply.
72. Moreover, the Pricing Policy does not require (or even permit) Umgeni Water to differentiate between its customers on this basis. On the contrary, the Pricing Policy provides that (in respect of the *existing* schemes) a uniform bulk tariff would be formulated and applicable to all bulk water customers similar situated. This would allow for cross-subsidisation of social schemes and maintain Umgeni Water's financial viability.
73. Other than the Pricing Policy, neither Umgeni Water nor the Minister could point to anything else that suggested the alleged goal of eliminating "*cross-subsidisation*". No provision in the empowering legislation justifies this type of discrimination between municipal and non-municipal water services providers; more particularly where they are both performing a municipal function.⁷³
74. Moreover, as the Supreme Court of Appeal continued:

⁷³ Supreme Court of Appeal judgment, para 38, Record vol 10, Record p 1017.

*“Penalising Siza for its ability to generate a profit through its efficiency would be irrational. Siza pays the revenue it collects on behalf of Ilembe into Ilembe’s coffers. These fees and the tariff Siza charges are controlled by Ilembe. The rationale behind entering into a contract with a private water services provider under s 19(2) is that it will undertake the function of supplying water services more efficiently than the water services authority is able to do. There is no question of excessive profits being earned because the Minister is entitled to impose conditions concerning the overall profitability of the private water services provider.”*⁷⁴

75. The Supreme Court of Appeal also emphasised that, before the Bulk Water Services Agreement was entered into, in terms of section 19(5) of the Act, the Minister was required to ensure (and had in fact ensured) that the contract was *“fair and equitable to all parties”*.⁷⁵
76. In the premises, the Supreme Court of Appeal found that the discrimination of Siza as set out above *“is neither reasonable nor rational and proceeds on an incorrect factual premise.”*⁷⁶
77. Before this Court, the Minister is constrained to argue not that a decision has been taken to end cross-subsidisation *per se*, but that it took a *“decision to end cross-subsidisation on the cost of water supply to Sembcorp”*.⁷⁷ Yet, there is no policy, and

⁷⁴ Supreme Court of Appeal judgment, para 39, Record vol 10, Record p 1017.

⁷⁵ Supreme Court of Appeal judgment, para 39, Record vol 10, Record p 1018.

⁷⁶ Supreme Court of Appeal judgment, para 39.

⁷⁷ Minister’s Heads of Argument, para 10, p. 4 & 5.

no justification whatever put forward for the decision to end cross-subsidisation in respect of Siza and not any other customer.

78. The point is that if Siza stops water services tomorrow, Ilembe must supply these customers and will purchase the water from Umgeni at its current tariff. The irrational outcome is obvious and seemingly punishes efficiency.
79. For all these reasons, the purported justification by the Minister and Umgeni Water of the decision to impose a 37.9% increase on Siza on the basis of a policy against cross-subsidisation was correctly rejected by the High Court and the SCA as irrational and unlawful, in violation of sections 6(2)(d) of PAJA (in that the action was materially influenced by an error of law); 6(2)(e)(i) of PAJA (in that the action was taken for a reason not authorised by the empowering provision); 6(2)(f)(i) of PAJA (in that the action itself was not authorised by the empowering provision); 6(2)(f)(ii) of PAJA (in that the action was irrational); and 6(2)(h) and (i) of PAJA (in that the decision is otherwise unconstitutional and unlawful and in any event is a decision which no reasonable decision-maker could have taken).
80. The Minister contends (Written submissions, paras 10.2 – 10.4) that all profits generated by SIZA are for the pockets of its shareholders. This statement is an inadequate reflection of the factual matrix. SIZA must pay Ilembe Municipality amounts premised on its water supply to customers resident in the Ilembe Municipality in its sub-area. The Minister and Umgeni Water have not dealt with such “gross” profit adjustment. Any advantages and savings for Ilembe Municipality

arising from its in the stead, arrangements with SIZA, promotes Ilembe infrastructure. Ilembe has not complained about such loss of profit, well satisfied no doubt of the benefit of its current arrangement.

81. Indeed, the rationale invoked by Umgeni Water begs the question: Do the comparable Municipalities (obviously not Ethekwini) indeed make a real profit on the on-supply to residents of bulk water bought from Umgeni? There is no attempt by Umgeni Water to demonstrate this assumption.
82. There is no support for the contention that Umgeni Water would, through the 37.9% increase, simply be pocketing what funds would otherwise have ended up in the Ilembe treasury.
83. It is also not so that the policy to have no “cross-subsidisation” is carried into universal application. It is evident that after the SIZA hike, there remained “cross-subsidisation” of other Municipal entities as complained of by, example Ethekwini, in respect of subsequent years.

The “plough-back” argument

84. The second argument put forward by Umgeni Water and the Minister to justify the impugned decision is that, because Siza is not a municipality, it should not be allowed

to make a profit because its profits would not be “*ploughed back*” into the service delivery system.”⁷⁸ This argument is similarly irrational, unlawful and unjustified.

85. There is no provision in the empowering legislative framework which authorises discrimination between municipal and non-municipal water service providers on this basis, and any attempt to penalise Siza for its efficiency (including its efficiency in collecting payment from its customers for water supplied) and its ability to generate a profit would be irrational.⁷⁹
86. Indeed, Siza pays into Ilembe’s coffers the agreed fees and what Siza charges, is controlled through Ilembe’s approval. It is thus not true that the Siza arrangement does not benefit or plough back monies in so far as that is appropriate.
87. In any event, the powers of Umgeni Water and / or the Minister do not extend to determining who is and who is not authorised to make a profit. Umgeni Water can do no more than recover the cost of operation of the scheme from each water service provider.⁸⁰
88. On this ground too, the impugned decision is reviewable in that it violates sections 6(2)(d), 6(2)(e)(i), 6(2)(f)(i), 6(2)(f)(ii), 6(2)(h) and 6(2)(i) of PAJA, is irrational and unlawful.

⁷⁸ Minister’s Answering Affidavit para 8.8.14, Record p. 243.

⁷⁹ Replying Affidavit, paras 83 and 86, Record p. 304 and 305.

⁸⁰ Replying Affidavit, para 84, Record p. 304.

The “not a municipality” justification

89. The SCA held that the only other reason put forward by Umgeni Water and the Minister as justification for the impugned decision at the time that the decision was taken was the submission that Siza can be charged higher rates because Siza is a private entity not a municipality. Indeed, this reason “*lay at the heart of Umgeni Water’s determination of a differential tariff for Siza as opposed to its municipal customers*”. This rationale was “*a theme struck in every presentation leading up to the tariff determination*”.⁸¹

90. After analysing these various presentations and reasons given, the SCA held:

“The conclusion is inevitable that Umgeni Water drew a distinction between Siza and its other customers on the basis that Siza was a private sector company with a profit motive, while the municipalities were public entities that ploughed any surplus from the provision of water to consumers back into service delivery”.⁸²

91. In analysing whether that distinction was valid or not, the Supreme Court of Appeal held that it was not, because Siza “*performs exactly the same function as every other municipal customer purchasing bulk water from Umgeni Water. It is like them a water services provider subject to the same constitutional and statutory obligations as the municipalities. The fact that it is a private entity is irrelevant. It does not alter in any*

⁸¹ Supreme Court of Appeal judgment, para 40. Record p. 1018.

⁸² Supreme Court of Appeal judgment, para 44. Record p. 1020

way its obligations in respect of the supply of water in fulfilment of the constitutional guarantee referred to at the outset of this judgment.”⁸³

92. Under this heading, the Supreme Court of Appeal also made reference to “*the elephant in the room*” – namely the fact that Ilembe was treated differently from Siza. The Ilembe municipal area is divided into two portions: the Concession Area (supplied with water by Siza), and the remainder of Ilembe (which is supplied by Ilembe directly). Thus, Ilembe is in precisely the same situation as Siza.⁸⁴
93. One would have expected, the Supreme Court of Appeal continued, that under these circumstances Umgeni Water would provide a clear explanation for the differentiation. Yet, “*it did nothing of the sort*”.⁸⁵
94. Ilembe was treated in the same way as the other municipalities in respect of its own purchases of bulk water. Siza was not. Siza was discharging Ilembe’s functions, constitutional and statutory, in the concession area, yet Umgeni Water was requiring it to do so on the basis that it should pay considerably more than Ilembe for its bulk water. This differentiation, the Supreme Court of Appeal held was irrational. The Court concluded:

“[50] Umgeni Water was therefore caught on the horns of a dilemma. When it sought to rely on an explanation based on eliminating cross-subsidisation it was unable to furnish any

⁸³ Supreme Court of Appeal judgment, para 46, Record p. 1020.

⁸⁴ Supreme Court of Appeal judgment, para 49, Record p. 1022.

⁸⁵ Supreme Court of Appeal, judgment, para 48, Record p. 1021.

coherent explanation for treating Siza differently from Ilembe or the other municipalities that purchase bulk water from Umgeni Water at less than the cost of supplying them. When this led to the conclusion by Siza, accepted by the judge in the high court, that the true explanation was simply that Siza is a private entity not a municipality, it had no answer to the proposition that this was 'an artificial and contrived conclusion'. On either basis the reasons given by Umgeni Water in the pricing review document for seeking an increase in the tariff payable by Siza by 41.4%, as opposed to 8,2% for its other customers lacked any rational basis. They were founded on clear errors of fact and have unreasonable results. In consequence the tariff increase fell to be set aside in terms of ss 6(2)(e)(iii), 6(2)(f)(ii) and 6(h) of PAJA."

Equality

95. In addition to failing the standards under PAJA, the impugned decision also violates the principle of equality. The courts have a duty *"to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power"*.⁸⁶ Siza has a right to be treated fairly and to insist that the exercise of public power by the Minister and Umgeni Water is constrained by the Constitution and the law.⁸⁷
96. In singling out Siza for a 37,9% increase, Umgeni Water and the Minister have failed to live up to the requirements of section 7(2) of the Constitution, which requires organs of state *"respect, protect, promote and fulfil the rights in the Bill of Rights"*.

⁸⁶ *Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) at para 17.

⁸⁷ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others*, [2015] 4 All SA 719 (SCA) at para [59].

Section 33(1) of the Constitution gives a right to administrative action that is “*lawful, reasonable and procedurally fair.*”⁸⁸

97. On the papers, the rationale of a concern for Ilembe’s loss of profit and thus funding of infrastructure, is a contrived irrelevance. The chilling effect of this rationale on Municipalities effectively discharging through permitted in the stead arrangements with competent service delivery entities, their constitutional obligations of water supply, is obvious.

CONCLUSION ON THE JUSTIFICATIONS

98. The application for leave to appeal before this Court is based on a fundamental misconception by Umgeni Water and the Minister, which was *conceded* in the Supreme Court of Appeal: namely the idea that because Umgeni Water was a private entity, it could be treated differently from municipal customers. This is a misunderstanding of the correct legal position, which was clearly set out by this Court in *Allpay 2*.⁸⁹ that a private entity performing a public function steps into the shoes of the organ of state concerned. And, despite their attempts before this Court to row away from their concession, both Umgeni Water and the Minister accepted this in the Supreme Court of Appeal.

⁸⁸ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at paras [47] and [69]. See too *Mohamed v President of the RSA* 2001 (3) SA 893 (CC).

⁸⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd. and Others v Chief Executive Officer, South African Social security Agency and Others* 2014 (4) SA 179 (CC).

99. In the result, the Supreme Court of Appeal correctly found that “*there was no rational connection between the purpose for which the power to fix a tariff was conferred and the exercise of that discretion. The decisions fixing the tariff were correctly set aside by the court a quo*”.⁹⁰
100. Accordingly, the Supreme Court of Appeal correctly dismissed the appeal.
101. The issue in this case is not whether a water service authority may impose different sets of rates for different customers. That is not the issue nor can such an abstract question receive a rule of thumb answer. The question was simply if the specific differentiation was sound. The contention at [88] of the Minister’s heads seeks to deflect the enquiry and is a transmogrification of what the case was and is about.
102. The Minister contends for a limitation of the rationality requirement which accepts a subject matter connection as sufficient. Hence any approval of any increase in water tariff is rational and incapable of being challenged as irrational. That is not so. Nor does the SCA judgment constrain powers of determining water tariffs; the decision makers never had the power to make irrational determinations.

⁹⁰ Supreme Court of Appeal judgment, para 54 Record p. 1025.

THE GROUNDS OF APPEAL BEFORE THIS COURT AND WHY THEY HAVE NO MERIT

103. As Umgeni Water set out in its application for leave to appeal to this Court, the SCA found against the appeal on seven grounds.⁹¹ Just one of the grounds would be sufficient to have dismissed the appeal. Accordingly, Umgeni Water is constrained to argue that the Supreme Court of Appeal reached the wrong decision on *each one* of these “pillars”. This suggestion is unsustainable.

104. Before the Supreme Court of Appeal, the Minister conceded that it had no independent grounds of defence in respect of the impugned decision and that if Umgeni Water had acted improperly then the Minister’s decision too must fall. The Minister has to a large extent ridden on Umgeni Water’s coat tails in this litigation and accordingly, and to the extent necessary, we deal with the seven grounds raised in Umgeni Water’s application for leave to appeal.

The “pillars”

105. First pillar: Umgeni Water alleges that the Supreme Court of Appeal erred in finding that discrimination was not justified in terms of the Pricing Policy. Yet, even before this Court, nowhere in its excursus on this issue can Umgeni Water or the Minister point to a single provision of the Pricing Policy that authorises discrimination against schemes on the basis whether the municipal water distribution function is provided “*in-house*” by the municipality; or whether it is a public private partnership.

⁹¹ Umgeni Water’s Application for leave to appeal at para 17.

106. Second pillar: Umgeni water alleges that the Supreme Court of Appeal erred in finding that the alleged aim to “*eliminate cross-subsidisation*” did not justify the impugned decision. Umgeni Water accuses the Supreme Court of Appeal of “*plying on semantics*” and placing form above substance.⁹² Yet, an analysis of the Supreme Court of Appeal’s decision reveals that there was no such error. The Supreme Court of Appeal correctly held that the requirement of “*financial viability*” in the Pricing Policy related to Umgeni Water as a whole, and that clause 21 thereof “*provides a model in terms of which, on an overall basis, from tariffs charged on all its suppliers of bulk water, Umgeni will recover its costs which is a statutory requirement*”. In any event, it is not correct that the Supreme Court of Appeal placed “*form above substance*” in respect of the definition of “*cross-subsidisation*”. The Supreme Court of Appeal pertinently (and generously) utilised the term in the sense that Umgeni Water had intended it (rather than the generally understood meaning).⁹³
107. Third pillar: Umgeni Water asserts that the Supreme Court of Appeal erred in finding that the Pricing Policy espoused an “*average bulk water tariff*”. Yet Umgeni Water is unable to point to a contrary provision in the Pricing Policy.
108. Fourth pillar: Umgeni Water argues that the Supreme Court of Appeal erred in finding that “*nothing else suggested that UW had a goal of eliminating ‘cross-subsidisation’.*” The SCA made this finding because it was clear from the evidence before it that *no*

⁹² Umgeni Water’s Application for leave to appeal at para 33.

⁹³ Supreme Court of Appeal judgment, para 27.

- other* water service authority had been treated in the same way as Siza, and Umgeni Water cannot point to any such instance even before this Court. Indeed, Siza contributes to the costs of other water infrastructure from which it receives no benefit.
109. Fifth pillar: Umgeni Water asserts that the Supreme Court of Appeal erred in finding that singling out Siza for an increase almost five-fold that of all other water service authorities was not fair to Siza and its customers. Before this Court, Umgeni Water provides no justification for fairness other than claiming that Ilembe's tariffs only apply to reticulation services. But that is what Siza is to do with the bulk water. The cost price of the water supplied to Siza is set by Umgeni Water, and it is unfair to discriminate against Siza.
110. Sixth pillar: Umgeni Water submits that the SCA erred in finding that Siza, through the Tripartite Agreement, performs the same constitutional obligations and functions of Ilembe, which are not different from those performed by other municipal customers. Umgeni Water's attempts to avoid this Court's established jurisprudence in *Allpay 2* (dealt with above) are unavailing. Nor does Umgeni Water reference its own concession (recorded in the SCA judgment) that Siza was performing the constitutionally-mandated municipal functions of Ilembe. Given this concession by Umgeni Water itself, there was no need for the Supreme Court of Appeal to engage in a detailed analysis of the Concession Agreement. Moreover, even before this Court, Umgeni Water is quick to criticise the Supreme Court of Appeal's reasoning, but cannot point to a single feature of the Concession Agreement which would differentiate the function performed by Siza as different from the function that would

be performed by Ilembe in the absence of the Concession Agreement. Indeed, there is no such basis. As set out above, Ilembe is the guarantor of the Siza's obligations.

111. Seventh pillar: the final pillar of Umgeni Water's argument is the allegation that the Supreme Court of Appeal erred in finding that Umgeni Water had sought during the course of the proceedings to provide further and better reasons, but that it was bound to the original reasons as at the time of the decision. I am advised that the principle that a decision-maker is bound by the reasons given at the time the decision is taken, and may not retro-fit its reasons *ex post facto* is well-established.⁹⁴

112. On none of the "pillars" has Umgeni Water or the Minister succeeded in showing that the Supreme Court of Appeal erred, or that there is a reasonable prospect of this Court coming to a different decision.

CONCLUSION

113. In sum, the application is moot. There are no reasonable prospects of success on appeal. The application does not raise constitutional issues warranting the attention of this Court. Nor are there issues of public importance to be decided. The case turns on its specific factual matrix.

114. Accordingly, the Minister's application falls to be dismissed with costs.

⁹⁴ *National Lotteries Board v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA).

KJ KEMP SC

S PUDIFIN-JONES

Chambers, Durban

5 October 2020.