CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 106/15

In the matter between:

MERAFONG CITY LOCAL MUNICIPALITY	Applicant
and	
ANGLOGOLD ASHANTI LTD	Respondent

OPPOSING AFFIDAVIT

I, the undersigned,

IAN VARGA LINDSAY

declare on oath that:

1. I am an attorney, practising as a Director in the firm Knowles Husain Lindsay Inc, the attorneys of record of the respondent, Anglogold Ashanti Limited ("**AGA**").

2. I am duly authorised to depose to this affidavit on behalf of AGA, and to oppose this application on its behalf.

3. The contents of this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true and correct.

4. I have read the notice of application for leave to appeal and the accompanying statement filed on behalf of the respondent municipality ("**Merafong**").

5. Merafong seeks leave to appeal in terms of Rule 19 of the Court's rules against the judgment of the Supreme Court of Appeal of 28 May 2015.

6. AGA opposes the application. Though the proposed appeal raises a constitutional matter, it has no prospects of success and it is not in the interests of justice for the Court to hear the appeal.

BACKGROUND TO THE SUPREME COURT OF APPEAL'S JUDGMENT

7. On 18 July 2005, the Minister of Water Affairs and Forestry made a ruling overturning a decision of Merafong. The ruling was made on an appeal brought by AGA in terms of section 8(4) of the Water Services Act 108 of 1997.[1]

8. In the operative paragraph of the letter informing the parties of her ruling, the Minister said *"In terms of the power vested on me by section 8(9) of the Water Services Act, 1997, I therefore overturn the decision of the Merafong City Local Municipality to levy a surcharge on water for industrial use and rule that the Municipality, the Mines and Rand Water should negotiate a reasonable tariff on the portion of the water that the mines are using for domestic purposes"*.[2]

9. Merafong was opposed to this decision. It obtained an opinion from its attorneys which advised it that the Minister had acted beyond the powers of national government in relation to a function that was within the exclusive competence of a municipality. Merafong was advised by its attorneys to engage the Minister with a view to getting her to withdraw the decision.

10. Merafong attempted to do so, but its efforts did not bear fruit. It proceeded, evidently having formed the view that the Minister's decision was void and that it could simply be disregarded, to impose surcharges

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

[2] Section 8(9) of the Water Service Act: "The Minister may on appeal confirm, vary or overturn any decision of the water services authority concerned".

and its own tariffs on water supplied to AGA's mines by Rand Water. This was in direct conflict with the Minister's ruling. When AGA objected and said that it would withhold payment of the portion of the charges prohibited by the Minister's ruling, Merafong threatened to cut off the supply of water to the mines. Since then and to date, AGA has paid the additional charges under protest. The resultant overpayment made by AGA amounts to tens of millions of rand.

11. Once it was evident that Merafong intended to ignore the Minister's ruling, AGA applied for declaratory relief enforcing it. Rand Water and the Minister were, respectively, the second and third respondents in this application. Rand Water initially delivered a notice to oppose AGA's application, but ultimately withdrew its opposition without filing papers. The Minister did not oppose the application.

12. At paragraph 8 of the founding affidavit in its application, AGA said that "*The purpose of this application is to enforce a ruling made by the Minister in terms of section 8(9) of the Water Services Act*".

13. In its answering affidavit, Merafong responded to this allegation as follows: "*...section 8(9) of the Water Services Act, on which the Applicant relies, in as much as it authorises the Third Respondent to exercise the power 'to vary or overturn any decision of the Water Services Authority concerned on appeal' should be read in light of the restrictions imposed on national legislation elsewhere in the Constitution, for example section 155(6) and (7) insofar as national legislation deals with function[al] areas in Schedule 4B and 5B.*"

14. This captures the essence of Merafong's case. At considerable length, the municipality elaborated on its contention that the Constitution's allocation of the right to administer the affairs of its community in respect of the matters listed in part B of Schedules 4 and 5 of the Constitution conferred

on it plenary power in respect of the provision of water services within its area of jurisdiction. On the strength of this interpretation of the Constitution, Merafong said that the Minister did not have the power to make a ruling that interferes with an exercise of the executive authority of a municipality by overturning its tariff and surcharge for water services. It said that the Act should not be read to confer such a power. If it was found that the Act did confer such a power, the municipality conditionally counter-applied for a declaration of invalidity of section 8(9).

15. What Merafong did not do in its answering affidavit was to challenge the validity, as a matter of administrative law, of the Minister's exercise of the powers conferred on her by the Act. This meant that if the municipality's constitutional case failed, the Minister's ruling remained valid and binding on it.

16. The High Court ruled against the municipality on the constitutional contentions. It also said that contentions that had been raised in argument concerning the validity of the Minister's decision were without merit and, in any event, since the Municipality had never challenged that decision, this was precluded by the operation of the *Oudekraal* principle. The Minister's decision, which had never been challenged by Merafong, stood until set aside by a court of law. I submit, for the reasons set out further below, that the High Court judgment is relevant to the consideration of this application for leave to appeal and I annex a copy of it as "**A**".

17. The High Court's decision in this regard is unassailable and was correctly, I submit, upheld by the Supreme Court of Appeal. Though it did not find it necessary to say so, the High Court might additionally have held that Merafong was precluded from raising, in argument, an attack on the lawfulness of the Minister's decision that it had not raised in its answering

affidavit. The effect of this omission was that the Minister had no opportunity to answer the attack on her decision.

18. Merafong did not pursue its constitutional case on appeal. Instead it argued, as it does in this application, solely that the Minister was not authorised by section 8(9) to make a decision on the rate at which AGA was to be charged for water. Though Merafong quite deliberately avoids saying so, this is a challenge based on the ground listed in section 6(2)(a)(i) of the Promotion of Administrative Justice Act 2 of 2000 ("**PAJA**"): "*the administrator who took ...[an administrative action] ... was not authorised to do so under the empowering provision*".

19. The Supreme Court of Appeal held that "*Merafong's failure to challenge the Minister's ruling in judicial review proceedings, rather than the constitutional attack it launched against the empowering statutory provisions, poses an insuperable difficulty for its case*".[3] It held that, whether unlawful or not, "*the Minister's ruling existed in fact and had legal consequences. Merafong could, therefore, not simply treat it as though it did not exist and act in the very manner that it sought to prevent*".[4]

20. Merafong's proposed appeal seeks to avoid this "*insuperable difficulty*" by contending that the principle established in *Kirland* does not apply to a decision that "*lacks the facial imprimatur of lawfulness*".[5] This qualification of the principle is said to be contained in paragraph [105] of the Constitutional Court's judgment.[6] Since the Minister had no

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[3] Judgment, [15].
[4] Citing *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) [64], [65] and [88].
[5] Merafong's statement, p 5, para 8.3.
[6] Merafong's statement, p 4-6, para 8.

jurisdictional power to exercise, so the argument goes, her decision, *"being manifestly ultra vires, could simply be ignored"*.[7]

21. On the strength of these arguments, Merafong alleges that the proposed appeal raises *"an issue of law of considerable importance that as yet is not settled"*.[8] For this reason, it says, the Constitutional Court ought to grant leave to appeal.

THE PROPOSED APPEAL HAS NO PROSPECTS OF SUCCESS

22. I submit, to the contrary, that the issue of law identified by Merafong as the sole basis on which it seeks leave to appeal, was authoritatively settled by this Court in *Kirland*. The single paragraph relied upon by the applicant to establish the distinction contended for, read in the context of the decision as a whole, does not in fact create such a distinction.

23. *Kirland* authoritatively holds that a contention that an exercise of public power is outside the jurisdiction of an administrator must, like any other challenge to the lawfulness, procedural fairness or reasonableness of administrative action, be tested by a court in judicial review proceedings. Administrative action cannot be ignored and treated as a nullity by an organ of state simply because that organ of state takes the view that the administrator who took it acted ultra vires.

24. Merafong's reading of paragraph [105] of *Kirland* is a good example of the impermissible interpretative practice of *"excessive peering at the language to be interpreted without sufficient attention to the contextual scene"*.[9] In the proper context of the judgment as a whole, it is quite clear that the words *"empowered to take it"* that Merafong relies on, do not

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[7] Merafong's statement, p 6, para 9.
[8] Merafong's statement, p 7, para 14.
[9] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 664G – H.

create an exception to the principle in respect of administrative action that is alleged to be ultra vires.

25. Properly interpreted, I submit that *Kirland* holds that:

25.1. Administrators cannot disregard administrative actions. To allow otherwise would be contrary to the rule of law, would be a licence to self-help, and would undermine the court's supervision of the administration.[10]

25.2. The concept of administrative action includes unjust administrative action, ie, decisions that are unlawful, procedurally unfair or unreasonable in breach of any of the review grounds listed in the PAJA and therefore invalid.[11]

25.3. It also includes decisions that are unlawful because they are outside the jurisdiction of the decision-maker.[12] Administrative action is not a nullity because it is unlawful. It means only that it is reviewable on the grounds of lawfulness.[13]

26. Because unjust administrative action is not a nullity but valid until reviewed and set aside, it follows that an organ of state cannot escape the effect of this principle by the simple device of alleging that a particular exercise of administrative action is particularly or obviously or egregiously unjust. Yet this is precisely what Merafong seeks to do by contending that the Minister's decision is "*manifestly ultra vires*". This amounts to no more than saying that it is, in Merafong's opinion, an obvious breach of section 6(2)(a)(i) of the PAJA. To permit an organ of state to disregard administrative action in this manner would, I submit, fatally undermine the principle established in *Kirland*.

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[10] *Kirland* (above) [89].
[11] Ibid [93].
[12] Ibid [98]. See paragraph [16] of the SCA judgment.
[13] *Kirland* (above) [99].

27. In any event, even if an allegation that a decision is "*manifestly ultra vires*" is sufficient to permit an organ of state to disregard it, the Minister's decision can hardly be said to fall into this category. Merafong's attack on the validity of the Minister's decision outlined at paragraph 9 of its statement was considered by the High Court and was rejected by it.[14] The Minister's decision thus cannot be said to be so obviously flawed as to wear its invalidity on its face, as Merafong contends. The hypothetical examples of maverick licensing officers concluding international trade agreements given at paragraph 8.4 of the statement bear no resemblance to the case at hand. They are an inappropriate analogue when dealing with the ministerial performance of a statutory duty.

28. I submit, for the reasons given by the High Court, that Merafong's administrative-law attack rests on a misconception of the basis of AGA's appeal and of the scope of the Minister's powers on appeal in terms of section 8(9) of the Act. As to the latter, the High Court held that:

28.1. Before Merafong took over as the water services authority in respect of its area of jurisdiction, all mines including AGA were supplied with water for both industrial and domestic use directly by Rand Water;[15]

28.2. When Merafong assumed this responsibility the mining houses were afforded the choice of being supplied with water by Merafong, or by another water services institution[16] (which would include a Water Board). The High Court rightly pointed out that in the instant case Merafong was unable to supply water itself, hence the appointment of Rand Water as its water services provider.[17]

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[14] Paragraphs [28]-[40] of the High Court judgment.
[15] Paragraph [32] of the High Court judgment.
[16] Ibid [33].
[17] Ibid [34].

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28.3. The WSA permits consumers to be supplied water directly from a different water services institution other than the water services authority in that area, but to do so approval from the water services authority must be obtained. Sections 6(2) and 7(3) of the Act permits a consumer who at the commencement of the Act was obtaining domestic or industrial water from another source, to apply for approval to continue so doing.[18]

28.4. Merafong acted correctly in informing the mining houses of their need to apply for approval in terms of section 7 of the WSA, although they should also have been invited to do so in respect of section 6.[19]

28.5. At the time that AGA made its application, Merafong had not yet appointed Rand Water as a water services provider, and at that time Rand Water was a source other than a service provider nominated by the municipality.[20]

29. Seen in this light, Merafong's letter to AGA on 31 May 2004, described at paragraph [7] of the SCA's judgment, may either be regarded as the nomination by Merafong of Rand Water as Water Services Provider in terms of section 6(1) and section 7(1), alternatively may be regarded as the approval by Merafong for AGA to continue obtaining water from Rand Water in terms of s6(2)(b)(i) for domestic water and s7(3)(b)(i) for industrial water. In either event the conditions of nomination, alternatively approval were susceptible to an appeal in accordance with section 8(4) of the Water Services Act, as was held by the High Court.[21]

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[18] Ibid [33].
[19] As held in para [27] of the High Court judgment, AGA applied in terms of both sections 6 and 7.
[20] Ibid [36].
[21] Ibid [68].

30. Merafong's case in this Court is that the Minister's decision was so obviously and unarguably outside the scope of her powers that it constitutes an exception to the rule established in *Oudekraal* and *Kirland* and that the municipality need not approach a Court to confirm its opinion. This is not so. Merafong's argument concerning the lawfulness of the Minister's decision must be decided by the Courts in review proceedings and not by the municipality itself in what amounts to an exercise of self-help.

CONCLUSION

31. For the reasons given above, I submit that the proposed appeal has no prospects of success. AGA requests the Court to dismiss the application with costs.

IAN VARGA LINDSAY

The Deponent has acknowledged that he knows and understands the contents of this affidavit/declaration, which was signed and sworn to before me at SANDTON on this the 30th day of ~~December 2009~~ JUNE 2015, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

1. Full first names and surname:
2. Office held:
3. Full street address

Matshepo Senatle
Commissioner Of Oaths
Practicing Attorney - RSA
12th Floor, The Forum Sandton Square
No. 2 Maude Street
Sandton 2196