**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

Constitutional Court CASE NO: 106/2015
SCA CASE NO: 20265/14
Gauteng High Court CASE NO: 23558/11

In the matter between:

**MERAFONG CITY LOCAL MUNICIPALITY** Appellant

and

**ANGLOGOLD ASHANTI LIMITED** Respondent

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**APPELLANT'S HEADS OF ARGUMENT**

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INTRODUCTION

1. These heads of argument are filed in support of an application for leave to appeal against the whole of the order of Maya JA (Majiedt and Mbha JJA and Schoeman and Van der Merwe AJJA concurring) in the Supreme Court of Appeal ('SCA'). In the judgment the SCA upheld the decision of Kubushi J sitting in the Gauteng High Court and accordingly dismissed the appellant's appeal with costs.

2. The principal issue in this case is whether the appellant ('the Municipality') is entitled to charge the respondent ('the Company') in accordance with its standard tariff for the water *for industrial use* that it supplies through Rand Water to the Company.

2.1 The Company says that a ruling by the Minister of Water Affairs and Forestry ('the Minister') in an appeal brought by it under section 7 of the Water Services Act 108 of 1997 ('the WSA')[1] obliges the Municipality to charge for the water at a lesser rate, being the rate at which it is charged for the water by Rand Water.

2.2 Accordingly it characterizes the purpose of its application as being 'to enforce a ruling made by the Minister in terms of section 8(9) of the [WSA], in terms of [which] the Minister overturned the decision of the municipality to levy a surcharge on water used by [the Company] for industrial use.'[2]

3. The secondary issue is whether the Municipality is entitled to levy a surcharge on the Company for water supplied by it *for domestic purposes* prior to the conclusion of an agreement between the two parties regulating the rate at which the water is question is to be charged.[3] This, once again, is a right said to arise out of the decision on appeal to the Minister in which the Minister '[ruled] that the municipality, the mines and Rand Water should negotiate a reasonable tariff on the portion of water that the mines are using for domestic purposes'.[4]

4. The relief claimed by the Company, both originally and after the amendment of the Notice of Motion,[5] reflects the issues and articulates the claims.

[1] FA I par 14, 13; AA I 166 par 145.2; Judgment III 402 par 12.
[2] FA I par 8, 10.
[3] FA I par 8, 10.
[4] FA I par 16.8, 17, Annexure 'FA8' par 2.4, 58.
[5] Amended Notice of Motion IV, 395.

4.1 In paras 2 and 3 a direction supported by an interdict is sought designed to prevent a surcharge on water provided by the Municipality for industrial use.

4.2 In paras 4 and 5 a comparable direction supported by interdict is sought to prevent a surcharge on 'that portion of the water utilized by the [Company] for domestic purposes' 'pending an agreement being reached between the [Company], the [Municipality] and [Rand Water] on a reasonable tariff' for the water concerned.

5. The amount in issue in these proceedings, it should be mentioned, potentially runs into hundreds of millions of rand.

## FACTUAL MATRIX

### THE COMPANY'S REQUIREMENTS

6. The Company is the owner of the Tau Tone, Mponeng and Savuka mines situated in the jurisdictional area of competence of the Municipality. Its mining operations have been ongoing since the 1940's.[6]

7. In order to conduct its operations, the Company needs water for both industrial and domestic purposes.[7] Before 1997, when the Water Services Act 108 of 1997 ('WSA') came into operation,[8] the water was supplied by the Rand Water Board (now known as Rand Water) in terms of a series of agreements between them.[9] Illustrative of these agreements is the one concluded on 20 October 2003.[10] It regulates 'Water Supply Services', which are said to entail 'the distribution of

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[6] FA I par 5, 9; AA II 163; Judgment V par 11,402.
[7] FA I par 13,13; AA II par 145.2, 166; Judgment V par 11, 4-2.
[8] FA I, par 14, 13; AA II par 145.2, 166, Judgment V par 12, 402.
[9] AA II par 89, 147; Annexure 'EML2' II, 182.
[10] FA I, par 13, 13; Annexure 'FA2' I, 31-42; AA II par 145.2, 166; Judgment V par 11, 402.

potable water, including water for domestic use, commercial use and industrial use'.[11]

THE NEW TARIFFS AND THEIR IMPLEMENTATION

8. Rand Water remained contractually bound to supply water to the Company until 2004. In that year, the Municipality, exercising the constitutional and statutory powers with which it is vested, assumed legal responsibility for the supply of the water. Rand Water, appointed by the Municipality as a Water Service Provider, continued to effectuate the actual supply of the water to the Mine but now did so as a sub-contractor of the Municipality.

9. On 11 February 2004 the appellant informed the mining houses in its jurisdictional area (including the respondent) that it had been granted the powers and functions of a 'water services authority' for the area under its jurisdiction.[12] An exchange of views ensued that led to a meeting on 24 March 2004 at which the implications of the new WSA Act were discussed and tariffs to be charged were considered.[13]

10. On 6 April 2004 the Municipality advised the mining houses that new tariffs would come into operation from 1 July 2004.[14] The Company responded on 8 April by soliciting the Municipality's consent to continue obtaining water from Rand Water.

10.1 The consent requested by the Company was expressed to encompass water for domestic as well as industrial use, but – rather anomalously - only the jurisdiction in section 7 of the WSA[15] was invoked. Since section 7 governs only water for industrial use, consent to obtain water for domestic use direct

[11] Contract, Annexure 'FA2' I par 2.1.17, 33.
[12] AA II par 89, 147; Annexure 'EML2' II, 182, Judgment V par 12, 402; par 13, 402-403.
[13] AA I par 90, 147a; Judgment V par 13, 403.
[14] Letter Annexure 'EML3' II, 183.
[15] FA I par 16.1, 14; Annexure 'FA3' I, 43; AA II par 145.2, 166; Judgment V par 14, 403.

from a third party such as Rand Water could not be solicited under the provision, but should have been sought under section 6.

10.2 In the court of first instance, the Municipality made something of the anomaly, but Kubushi J rejected this argument. The learned Judge framed the issue as being 'whether the application for approval … was in terms of s 7 only or whether it was in terms of s 6 and 7 of the WSA.' She held that 'the application was in terms of both sections.'[16] Whatever the merits of this characterization of the issue, the Municipality accepts, for the purposes of these proceedings, that the Company did indeed solicit consent to obtain water direct from Rand Water for both forms of usage, that is, domestic as well as industrial purposes.

11. On 27 May 2004 the Municipality resolved to adopt its new tariff policy and on 31 May 2004 the Municipality formally notified the mining houses that the policy would come into operation with effect from 1 July 2004.[17] In common with the levying of rates generally, the new tariffs were expressed to operate over the upcoming financial year, that is, the year commencing on 1 July 2004. No provision was made for the tariffs in succeeding years.

12. The tariffs, which governed a range of services, included provision for tariffs for water used 'Mines: Domestic' and 'Mines: Operations.[18] They would be levied from the operative date since it would thenceforth be the titular supplier of the water. Rand Water, though appointed as 'Water Services Provider', would no longer supply users direct.[19] The notices constituted a refusal of the Company's request under section 7 for permission to source water direct from Rand Water and were rightly treated as such[20] since the unequivocal stance being taken by

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[16] Judgment V par 27, 407.
[17] AA II par 95, 148; Annexure 'EML4' III, 184-220.
[18] Resolution, Annexure 'EML4' III, 187.
[19] FA I par 16.2, 14-15; Annexures 'FA4.1' I, 44-45; Annexure 'FA4.2' I, 46-49; AA II, par 145.2, 166; Judgment V par 15, 403.
[20] Annexure 'FA5' I, 48.

the Municipality had already been put beyond doubt in a meeting with the mining houses on 21 April 2004.[21]

13. The implementation of the tariffs was effected by promulgation under sections 4 and 11(4) of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act') read with section 10G(7) of the Local Government Transition Act 2009 of 1993. This occurred on 22 and 23 June 2004 when the requisite notice was published in the Gauteng Provincial Gazette and the North West Provincial Gazette.[22] The notice stated that it was being given in terms of sections 4 and 11(3) and section 75(A) of the Systems Act read with section 10G(7) of the Local Government Transition Act 209 of 1993 and confirmed that the new charges would take effect from 1 July 2004.

14. So far as water supply was concerned, the effect of the new system was that Rand Water would continue to supply the water and collect the payments due. After appropriating the amount to which it was entitled, Rand Water would pay the balance – the surcharge, in effect – to the Municipality. Since no service directly bearing upon the supply of the water was being provided by the Municipality, the surcharge was, in effect, a means of funding general municipal services. As such, it was similar in effect to the rates levied by municipalities on property.

THE APPEAL TO THE MINISTER

15. In the circular of 31 May 2004 (describing the new supply and tariff regime), the mining houses were notified of their right to appeal against the new measures to the Minister of Water Affairs and Forestry ('the Minister').[23] On 11 June 2004

[21] AA II par 94, 148.
[22] AA II par 97, 149; Annexure 'EML5' III, 221-224; Judgment V par 18, 404.
[23] AA II par 96, 149; Judgment V par 15, 403.

the respondent lodged an appeal to the Minister in terms of section 8(4) of the WSA against the tariffs imposed by the appellant.[24]

15.1 In the letter in which the appeal was lodged, the Company recorded that on 11 February 2004 it had requested the Municipality's 'approval in terms of section 7 of the [WSA] to continue obtaining water from Rand Water for its mining operations and associated domestic applications at the tariff set by, and under the conditions imposed by Rand Water.'[25]

15.2 Among the grounds of appeal was an objection based on the fact that the new tariff 'is excessively higher than the equivalent Rand Water tariff while the Municipality is not adding any value to, or assuming any responsibility for any aspect of the water supply.'[26]

16. On 24 August 2004 the Minister asked the Company to provide her with further information concerning the appeal of the nature and it complied on 8 September 2004.[27] In the same letter, the Minister recorded that she had forwarded a copy of the notice of appeal to the Premier of Gauteng in order to give him the Provincial Government the opportunity to intervene in the appeal in terms of section 8(8) of the WSA.[28]

17. On 18 July 2005 the Minister made a ruling under section 8(9) of the WSA in the following terms:[29]

> 'In terms of the power vested on me by section 8(9) of the [WSA], I therefore overturn the decision of the [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.'

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[24] FA I par 16.4, 16; Annexure 'FA5' I, 50-51; Further correspondence was exchanged by the respondent and the Minister FA I par 16.5-16.8, 16; Annexure 'FA6' I, 52-53; Annexure 'FA7' I, 54-56; AA II par 145.2, 166; AA II par 98, 149; Judgment V par 17, 404.
[25] Annexure 'FA5' I par 1, 48.
[26] Annexure 'FA5' I par 1, 50.
[27] Letter, Annexure 'FA7' I, 54-56.
[28] Letter, Annexure 'FA6' I, 52-53.
[29] Annexure 'FA8' par 2.4, 58.

18. The ruling must be read carefully.

18.1 On its terms, it provides some support for the relief claimed by the Company in respect of water for industrial purposes, since the Minister pertinently purports to 'overturn the decision by the [Municipality] to levy a surcharge on water for industrial use'.

18.2 What the ruling does *not* do is prohibit the exaction of a surcharge on water *for domestic use* pending the conclusion of an agreement on a reasonable rate between the interested parties. In its terms it is silent about the rates to be charged while negotiations proceed or if they fail. The claim for an interdict pending the outcome – nay, the *successful* outcome - of such negotiations is wholly misconceived. For its part, the claim for an order directing the continuance of negotiations is too porous a form of relief to be granted. This issue is pursued under 'Remedy' below.

18.3 Given the terms of the ruling, we concentrate below on water supplied for industrial purposes. We do so in the knowledge that whatever we say will in any event apply *a fortiori* to water supplied for domestic use.

THE EVENTS FOLLOWING THE RULING

19. In the period after the ruling, negotiations ensued between the Chamber of Mines and the Municipality in an effort to reach a mutually acceptable agreement on the tariffs to be paid by mines for water for industrial use.[30] At much the same time, the Municipality obtained a legal opinion which concluded, correctly, that the ruling was *ultra vires*[31] the powers of the Minister.

20. The Municipality made efforts to meet the Minister in order to resolve the problems created by the ruling but without success.[32] Facing a brick wall, the Municipality declared a dispute with the Minister under the statutory regime that

[30] FA I par 17, 17; par 18, 17; AA II par 102, 150-151; par 104-110, 151-153; par 146, 166; see minutes of the meetings Annexure 'EML9' III, 239-260.
[31] FA I par 23, 19; AA II par 150, 168; par 111, 154.
[32] AA II par 1.1, 103; par 112, 154; par 113, 154-155; Judgment V par 18,404.

deprecates litigation between organs of state.[33] In response, the Minister proposed on 31 October 2005 that a meeting should be held, but the meeting never took place.[34]

21. By agreement dated 18 January 2007, the Municipality and Rand Water finalized the basis upon which water was being supplied. The Company was informed of the agreement during February 2007.[35] During July 2007 the appellant informed the respondent that a flat rate of R4.72/kl would apply to all water consumed by the Municipality.[36] No objection, it is important to note, was lodged against this decision.[37]

22. Initially the Company declined to pay the Municipality for the water supplied.[38] When, on 17 September 2007, the Municipality made a demand for payment,[39] the Company agreed to make the requisite payments under protest.[40] The Municipality, all along received what it wanted, took no further action but left it to the Company to pursue such remedies as it saw fit. The Company let matters slide until 24 May 2010 when it recorded that application would be launched to compel the municipality to comply with the Minister's ruling and to recover the surcharges.[41]

THE LITIGATION

23. On 19 April 2011 (seven years after the decision determining tariffs) the Company filed an application in the North Gauteng High Court in which it sought *inter* alia a declaratory order that the Municipality may not levy a surcharge on water for industrial or domestic use. In effect it sought to enforce

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[33] AA II par 113, 154-155.
[34] AA II par 113, 154-155; Annexure 'EML14' III, 283.
[35] FA I par 25, 19-20; AA II par 152, 169.
[36] FA I par 24, 19; par 29.2, 23; AA II par 151.1, 168; Judgment V par 18, 404.
[37] AA II par 117, 232.
[38] FA I par 30, 24; AA II par 156, 171.
[39] FA I par 30, 24; AA II par 156, 171.
[40] FA I par 30, 24; AA II par 156, 171; Judgment V par 19, 404.
[41] FA I par 33, 25; AA II par 159, 172.

the ruling of the Minister of 18 July 2005 made in terms of section 8(9) of the WSA.[42]

24. In response to allegations in the answering affidavit of the Municipality, the respondent moved an amendment to the relief sought in its notice of motion that,[43] despite opposition, was granted.[44] The Municipality, for its part, raised a conditional counter-application in which it sought a declarator that, under the Constitution, it has the exclusive authority to implement tariffs for water services and that, in consequence, the Minister does not have the authority in terms of section 8(9) of the WSA to interfere with the tariffs set by the appellant.

25. On 26 February 2014 Kubushi J, sitting in the court of first instance, ordered the appellant to comply with the Minister's ruling of 18 July 2005[45] and made a cost order against the appellant. The order sought by the appellant in terms of paragraph 7 of the amended notice of motion setting aside the imposition of the tariff imposed by the appellant, was dismissed.[46] The appellant's conditional counter application was dismissed, with costs.[47] On 28 May 2014 leave to appeal against the aforementioned judgment to the SCA was granted and, on 30 June 2014,[48] the Municipality filed its notice of appeal.

26. On 28 May 2015 the SCA dismissed the appellant's appeal with costs, holding that the Minister's ruling, even if invalid, cannot simply be treated as a nullity by the Municipality.[49] In coming to this conclusion, it invoked the judgment in *Kirland* which, in turn, is based on *Oudekraal*.

27. The Municipality, on 18 June 2015, applied to this Court for leave to appeal against the SCA judgment.[50] On 15 September 2015 the appellant received

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[42] Judgment V par 41, 412.
[43] Amended Notice of Motion IV, 395-398.
[44] AA II, 103-176.
[45] Judgment V, 425-426 and par 83, 427.
[46] Amended Notice of Motion IV, 395-398; Judgment V par 78 to par 80, 424-425.
[47] Judgment V par 82 and par 83(*d*), 425-426.
[48] Order V, 439.
[49] SCA Judgment V, 450-461.
[50] Appellant's application or leave to appeal V, 465-472.

directions from the Chief Justice that its application for leave to appeal has been set down for hearing on 18 February 2016.[51]

## THE CONSTITUTIONAL AND STATUTORY FRAMEWORK

### THE CONSTITUTION

### **General**

28. In *Johannesburg Municipality v Gauteng Development Tribunal*[52] this Court set out the constitutional scheme upon which the powers conferred on each sphere must be construed.

28.1 It stated that while the national and provincial spheres enjoy concurrent legislative authority over matters listed in part B of Schedule 4 to the Constitution neither of them can by legislation give itself the power to exercise executive municipal powers or the right to administer municipal affairs.

28.2 Each sphere must respect the status, power and functions of government in the other sphere and 'not assume any power or function except those conferred on it in terms of the Constitution'.[53] National and provincial spheres are not entitled to assume any powers or functions of the municipal sphere except in exceptional circumstances but then only temporary and in compliance with strict procedures.

29. The Constitution regulates the ambit of these spheres, so the starting point in an enquiry into the delineation of the powers, functions, rights and duties of a sphere of government is the Constitution itself.[54] In this case we are, of course, principally concerned with the local sphere of government and the manner in

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[51] Directions V, 474.
[52] 2010 (6) SA 182 (CC). See par 43, 44 and 59, 200 A – B and 204 B – D of the *Johannesburg Municipality* judgment.
[53] See section 41 of the Constitution provides in the relevant part 'all spheres of Government and all Organ of States within its sphere must …(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;'
[54] *City of Cape Town v Robertson and others* 2005 (2) SA 323 (CC) at par 61, 351.

which it articulates with Parliament (which enacted the enabling legislation) and the Executive (which purported to implement it). The Constitution teaches us that the object of local government includes the provision of services to communities in a sustainable manner and to promote economic development.[55] Local government seeks to achieve these goals through the municipal councils that, by means of the executive and legislative authority with which they are endowed,[56] govern the respective municipalities.

**Constitutional power over water supply**

30. Under part B of Schedule 4 as read with section 156(1)(*a),* a municipality has (1) the 'executive authority in respect of, and has the right to administer' (2) 'water and sanitation services limited to potable water (which includes water for domestic and commercial use) supply systems and domestic waste water and sewage disposal systems'.

31. Subsection (1)(*a*) of section 229 empowers a municipality to impose 'rates on property *and surcharges on fees for services provided by or on behalf of the municipality*'.[57] The subsection, which is in general terms, in no way qualifies the services on which surcharges can be levied. Nor does the balance of the section. It goes no further than to subject, by subsection (2)(*b*), the surcharges imposed by a municipality to control by operation of national legislation. The provision states that the power of a municipality to impose 'surcharges on fees for services provided by or on behalf of the municipality may be regulated by national legislation'.

**Constitutional power to tax, and so to levy surcharges**

32. Under section 151 of the Constitution, 'a municipality has the right to govern, on its own initiative, the local government affairs of its community.' The exercise of the power is made subject to national and provincial legislation' but

[55] AA II par 6.3, 107; section 152 of the Constitution.
[56] AA II par 6.2, 107; section 151 of the Constitution.
[57] AA II par 6.5, 108. Emphasis supplied.

the national and provincial governments 'may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.' Under section 153 'a municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.'

33. The general power to impose rates and taxes, of which a surcharge is but an example, was affirmed by the decision of this Court in *City of Cape Town and others v Robertson and others*.[58] In the course of upholding a challenge by ratepayers to the rates imposed on them by the municipality, the court of first instance had held that there was no legislation empowering the municipality 'to levy rates on property'.[59] In the course of overturning this decision, Moseneke J held that section 229(1)(*a*) of the Constitution 'expressly authorises a municipality to impose rates on property and section 229(2) adds that the power to impose rates on property may be regulated by national legislation'.[60]

34. Throughout the constitutional provisions, powers of scrutiny and control over municipalities are expressly vested in the national and provincial government. They must, however, be exercised with circumspection since the powers give to municipalities are 'original', not a derivative or delegated. So much has been made clear in a number of decisions.

34.1 In *CDA Boerdery (Edms) Beperk and others v Nelson Mandela Metropolitan Municipality*,[61] Cameron JA explained what original powers entail. The Constitution, explained the learned Judge, had enhanced the status of local government so that they no longer be said to enjoy only delegated powers.[62] The effect of this development was that a national or provincial government had no power to impede or compromise a

[58] 2005 (2) SA 323 (CC).
[59] *Robertson* Judgment par 52, 347.
[60] *Robertson* Judgment par 61, 351.
[61] 2007 (4) SA 276 (SCA).
[62] *CDA Boerdery* Judgment par 38.

municipality's right to exercise its powers or perform its functions.[63] In the new division of power, the domain of local government had, subject to permissible constitutional constraints, become inviolable.[64]

34.2 This Court in *Robertson* (above) held that, in levying rates, the municipality was exercising just such an original power'[65] and the power could be constrained by law only to the extent the Constitution permits.[66] In *Gerber v MEC for Development, Planning and Local Government, Gauteng*[67] the SCA came to the same conclusion.[68]

34.3 In *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others*,[69] rate payers challenged resolutions by the council making provision for certain levies on the basis that they were *ultra vires.* Chaskalson P found that the action of a municipal council in resolving to set rates, etc cannot *'be classed as administrative action'* as contemplated in section 24 of the Interim Constitution.[70] Such action is the exercise of 'a power that under our Constitution is a power peculiar to elected legislative bodies*'*.[71]

THE STATUTORY FRAMEWORK

35. At the operative time, 2004, the imposition of tariffs by a municipality was regulated by the following enactments:[72] the Local Government Transition Act - Second Amendment Act 97 of 1996 ('LGTA');[73] the Water Services Act; the

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[63] AA II par 6.2, 107; section 151(4) of the Constitution.
[64] *CDA Boerdery* par 38.
[65] *Robertson* Judgment par 62, 351.
[66] *Robertson* Judgment par 40, 351.
[67] 2003 (2) SA 344 (SCA).
[68] *Gerber* Judgement par 23, 353.
[69] 1999 (1) SA 374 (CC).
[70] *Fedsure* Judgment at par 45, 396, and par 46, 397.
[71] *Fedsure* Judgment at par 45, 396.
[72]The Municipal Fiscal Powers and Functions Act, No 12 of 2007 ('the Fiscal Powers Act') was not operative during 2004. It only became operative on 19 September 2007.
[73]The Local Government Transition Act, No 209 of 1993 was amended by the LGTA Second Amendment, No 97 of 1996. The author Craythorne, during 1997, wrote that the constitutional changes and reforms had a significant effect on municipal fiscal administration, both from the viewpoint of

Local Government - Municipal Structures Act 117 of 1998 ('the Structures Act'); the Local Government - Municipal Systems Act 32 of 2000 ('the Systems Act') and regulations.[74]

**The LGTA**

35.1 In the era before the Constitution, the imposition of tariffs was regulated by ordinances and the provisions of the LGTA which commenced in April 1994.[75] The interim Constitution of the Republic of South Africa, No 200 of 1993, required that the transitional phases of the restructuring of local government be done in terms of the LGTA.[76]

35.2 Section 10G(7)(*a*)(ii) of the LGTA, operative during 2004 when the appellant by resolution imposed tariffs on water services (including water for industrial use), states that a municipality may by resolution 'levy and recover levies, fees, taxes and tariffs in respect of any function or service of the municipality'.

35.3 Section 10G(7)(*c*)(iv) of the LGTA grants a right to any person who desires to object against a determination or an amendment of a tariff to do so in writing to the Municipal Manager of a municipality.

**Water Services Act**

36. One of the main objects of the WSA is to provide for 'the setting of national standards and norms and standards for tariffs in respect of water services.[77]

37. Section 4 of the WSA identifies the conditions set by a water services provider (such as Rand Water) for the provision of water services to a water services

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empowerment and release from the instructions in prior provincial ordinances – Craythorne, Municipal Administration: A Handbook, 4th ed, 1997, 341.

[74] By the Minister of Water Affairs and Forestry on Norms and Standards in respect of Tariffs for Water Services No R652 of the Government Gazette 22472 dated 20 July 2001.

[75] Bekink, B, Principles of South African Local Government Law, 2006, 31.

[76] Bekink, *op cit,* 31-32.

[77] Section 2(*b*) of the WSA.

institution (such as a municipality which is a water services authority). These conditions are not the conditions referred to in sections 6(2)(*b*)(1), 7(3)(*b*)(i), 8(1)(*b*) and 8(4) of the WSA.

38. Sections 6 and 7, which are especially relevant to this matter, regulate the application which a person may lodge in the event where it wishes to obtain water services or water for industrial use *from a source other than the provider nominated by the water services authority.*[78]

38.1 Section 6(1) of the WSA states that no person may use water services from a source other than a water services provider nominated by the water services authority without the approval of that water services authority.

38.2 Section 7(1) states that, unless otherwise authorized by the water services authority, no person may obtain water for industrial use from any other source other than the distribution system of the water services provider.[79]

39. Section 8 deals with the appeal process to the Minister where an application has not been approved or where the conditions accompanying the approval by a water services authority are challenged on the basis of being unreasonable.[80] In addition, section 10(1) entitles the Minister to prescribe norms and standards in respect of tariffs for water services.[81]

**The Structures Act**

39.1 Section 84(2) of the Structures Act reaffirms that a municipality has the functions and powers referred to in sections 156 and 229 of the Constitution. Section 84(1) includes in the list of functions and powers of a local authority, the bulk supply of water that affects a significant proportion of municipalities

[78] Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006) par 35.4, 709-710. Emphasis supplied.
[79] Thompson *op cit* 709-710.
[80] Section 8(4) of the WSA; Thompson, *op cit*, 710-711.
[81] Thompson, *op cit* 698-699.

in its district.[82] Under the Act, a district municipality has the power to impose levies in respect of the supply of water.[83]

**The Systems Act**

40. The Systems Act makes provision for the implementation of cryptic descriptions of the powers of a municipality as provided in the Constitution.[84]

41. Section 2(*a*) is based on the provisions of section 151 of the Constitution. Section 3(2) provides*, inter alia*, that the national and provincial spheres of government must exercise their executive and legislative authority 'in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative authority.[85]

42. Section 4(1)(c) of the Systems Act grants the right to 'finance the affairs of a municipality by charging fees for services; and *imposing surcharges on fees, rates and property* …'.[86] Section 11, in setting out the executive and legislative authority of a municipality, confirms the power to impose 'service fees and surcharges on fees'.

43. Section 74(1) places a duty on a municipal council to adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself. In terms of section 75(2)(*f*) provision must be made in appropriate circumstances in the tariff policy for a surcharge on the tariff for a service. In terms of section 75(3) a tariff policy may differentiate between different categories of users.

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[82] Section 84(1)(*b*) of the Structures Act.
[83] Section 84(1)(*p*) of the Structures Act.
[84] AA II par 6.7, 108-109.
[85] AA II par 6.7.2, 110.
[86] Emphasis supplied.

44. Section 75A, inserted in 2000,[87] enunciates and confirms the municipality's general power to levy and recover fees, charges and tariffs. Section 75A(1)(*a*) empowers a municipality to levy and recover fees, charges or tariffs in respect of 'any function or service of the municipality'. Such fees, charges or tariffs are levied by a municipality by resolution passed by the municipal council.[88]

**The Regulations**

45. Regulation 4(1) appears to be the only regulation relevant to these proceedings. It states that a water services institution, such as the appellant, 'must, when setting tariffs for water services provided to consumers and other users, differentiate, where applicable, between certain categories'. The categories identified in regulation 4(1) include amongst other 'water supply services to households'[89] and 'industrial use of water supplied through a water services work'.[90]

46. Regulation 8 states that '(a)ny tariff set by a water services institution for the supply of water services to a consumer may include a fixed charge'.

**The Fiscal Powers Act**

47. The Fiscal Powers Act became operative on 7 September 2007 and, as a result, cannot influence the outcome of this case. It provisions are worth noting, however.

48. One of the objects of the Fiscal Powers Act is to oversee the exercise of municipal fiscal powers and functions.[91] Section 3 makes the statute applicable to municipal surcharges and taxes referred to in section 229 of the Constitution.

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[87] Section 75A inserted by section 39 of Act No 51 of 2002. Section 75A deals with the *manner* in which fees, charges or tariffs are levied (see section 9(2) of the Systems Act).

[88] Section 75A(2) of the Systems Act.

[89] Regulation 4(1)(*a*).

[90] Regulation 4(1)(*b*).

[91] See section 2(*c*) of the Municipal Fiscal Powers Act; see also section 2(*d*) in which reference is made to section 229 of the Constitution.

A 'municipal surcharge' means 'a charge in excess of the municipal base tariff that a municipality may impose on fees for a municipal service provided by the municipality in terms of section 229(1)(*a*) of the Constitution'. Chapter 3 deals generally with municipal surcharges.

49. In terms of section 8(1) the Minister of Finance may prescribe 'compulsory national norms and standards for imposing municipal surcharges'. Section 9(1) requires from a municipality to comply with any norms and standards by the Minister of Finance when it is imposing a surcharge on fees for services provided by it or on its behalf.

CATEGORIES OF WATER SUPPLY, AND THE EFFECT OF THE DISTINCTIONS

50. The Minister reasoned that, since water for industrial use is not defined as a municipal service in terms of section 1(xxv) of the WSA, the Municipality had no power to raise funds by imposing a surcharge on it. This conclusion, which is completely misconceived, requires a proper consideration of the distinctions employed by the lawgiver and their effect in practice.[92]

51. Water, it is common cause, can have one of two qualities: potable or non-potable. Its supply, it is likewise common cause, can target one of two objects: domestic use and industrial use. There is an obvious overlap between the two since water for domestic use must always be potable. Water for industrial use can nevertheless be potable and, in fact, the water supplied by Rand Water to the Municipality is all potable.

52. As already noted, under part B of Schedule 4 as read with section 156(1)*(a),* a municipality has (1) the 'executive authority in respect of, and has the right to administer' (2) 'water and sanitation services limited to potable water supply systems and domestic waste water and sewage disposal systems'. 'Services' under Part B seems plainly to govern 'water' as well as 'sanitation', and the two limitations seem equally clearly to regulate the respective competencies to

[92] Ruling, Annexure 'FA8' I par 2.2, 57.

which they must relate. Thus the competency over water services seems plainly to be 'limited to potable water supply systems' and the competency over sanitation services seems just as plainly to be limited to 'domestic waste water and sewage disposal systems'.

53. On this reading the supply of non-potable water - that is, water whose use can only be 'industrial' in the narrow sense in which this expression is being used in the present context – is plainly not a constitutional municipal competency. It is, however, by no means so clear on a textual consideration of the provision that the supply of potable water for industrial use correspondingly falls beyond the scope of the constitutional power.

54. The legislature, it seems clear, believed that water for industrial use, potable or non-potable, falls outside the sphere of constitutional competence. Under the WSA, which was intended to give effect to the constitutional mandate with which we are concerned, every water services authority, defined in section 1 as a municipality responsible for ensuring access to water services, has a duty under section 11 'to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services'. 'Water services' is defined in section 1 as 'water supply services and sanitation services' and 'water supply services' are in turn defined to mean 'the abstraction, conveyance, treatment and distribution of potable water, water intended to be converted to potable water, and water for commercial use *but not water for industrial use*.' (Emphasis supplied.)

55. In this case the Company placed its case on the self-same footing. It framed the relief it claimed on the basis, not of the quality of the water being supplied, but of the intended use to which water was to be put. In pursuit of this distinction, it separately sought relief in respect of water supplied to it for industrial use and for water supplied to it for domestic use. In so doing, it echoed the stance adopted by the Minister, who felt free to distinguish between water for industrial use and water for domestic use.

56. The court of first instance considered the matter with care and came to the conclusion that 'the term "water" in part B of Schedule 4 of the Constitution refers to water for domestic use (potable water) and does not include industrial water'.[93] In consequence it said that it would, in the judgment 'deal separately with the two services, that is, domestic water and industrial use water.'[94] The conclusion, allowing for generality of expression, seems to be correct. The Municipality accepts, in consequence, that the constitutional and statutory power and obligation is to supply potable water to persons within its jurisdiction who will use it for domestic (including commercial) purposes but not industrial purposes.

57. In making this concession, we hasten to add, the Municipality in no way makes the concession that it has no right to supply water, potable or otherwise, to persons who wish to use it for industrial purposes. Quite the reverse. The WSA itself contemplates that a municipality may wish to supply water for industrial purposes and makes provision for the manner in which this is to be done. Section 21(3) states that 'a water services authority which 'provides water for industrial use' must make bylaws providing at least for the standards of service; the technical conditions of provision; the determination and structure of tariffs; the payment and collection of money due; and the circumstances under which the provision may be limited.[95]

58. The distinction between the two types of supply boils down, it is submitted, to this: The supply of water for domestic use - the municipal competence specifically encompassed in Part B of Schedule 4 - constitutes the exercise of a constitutional power that receives recognition in the WSA. In contrast, when a municipality supplies water for industrial use, it does so as a conventional supplier and not in the exercise of its public power. Its role as such is recognized by the WSA but only to the limited extent referred to in section 21(3) that is, as being subject to bylaws duly promulgated.

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[93] Judgment V par 52, 415.
[94] Judgment V par 52, 416.
[95] Judgment V par 56, 417.

59. In the absence of a concrete set of facts, the practical effects of the difference in the two regimes must be a matter for conjecture.

59.1 What seems to be true, however, is that the municipality, as water services authority, has a potentially exclusive power and duty to supply water for domestic purposes whereas it has no equivalent competence over water supplied for industrial purposes.

59.2 If a municipality wishes to create a monopoly on the supply of water for industrial purposes, it cannot do so by means of bylaws or other statutory instruments since the constitutional competence over such a service is vested in the provincial and national authorities. To achieve this end, therefore, it must proceed in the same way as every other supplier in the market – that is, by concluding contracts that serve the purpose by tying up supply.

59.3 Should it act in this way, its transactions will be subject to the same scrutiny, for instance under the abuse of dominance provisions in the Competition Act, as those of a private supplier.

60. But this is by the by. What is important to note is that, notwithstanding the Minister's conclusion, a municipality does indeed have the right to supply water for industrial purposes. In addition it has the right to levy charges for the water so supplied and they may of course be higher than the tariff at which the water is supplied by Rand Water.[96]

61. The Minister's notion[97] that a Water Services Authority, if it is to act reasonably, must 'add value to the services provided to a person or institution from another source' is in conflict with the fundamental principles under which goods and services are distributed within a market. Even if it were not, a municipality cannot be said to act unreasonably if it exacts a surcharge so as to enable it to

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[96] It is common cause between the parties that the water supplied by the Municipality to the Company, is potable water which is used by the Company for domestic and industrial purposes.
[97] Ruling, Annexure 'FA8' I par 2.1, 57.

supply the ratepayers and residents within its jurisdiction with a better service. Surcharges are recognized as a legitimate means by which a municipality can raise revenue, as the statutory provisions referred to above make clear.

## CC DIRECTIONS

### THE ISSUES TO BE ARGUED

62. In its directions, this Court has set out the issues to be argued in the following terms:

62.1 'Whether the Supreme Court of Appeal has correctly applied *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC);

62.2 'Whether Part B of Schedule 4 of the Constitution confers the power to supply water to industrial entities on the local sphere of government;

62.3 'If so, whether section 8(9) of the Water Services Act 108 of 1997 is invalid; and

62.4 'Whether it was competent for the High Court to order the applicant to comply with the Minister's appeal ruling of 18 July 2005.'

### THE IMPLICATIONS OF THESE DIRECTIONS

63. Latent in the first direction is the issue of whether the Minister's ruling is beyond jurisdiction, as the Municipality contends, or otherwise unlawful or unenforceable. If not, the substance of the Municipality's defence under this head evaporates. Otherwise the Municipality has a good defence to the Company's claim provided it can surmount the procedural obstacle potentially presented by the rule against collateral challenge enunciated in *Kirland* and

*Oudekraal*. In these heads of argument we describe this issue as the 'Exigibility of the Nullity Defence'.

64. The second direction, which in effect asks whether a municipality has the constitutional power to supply water for industrial purposes, is premised on an acceptance that municipalities have at least the power to supply water for domestic purposes. This conclusion is uncontroversial and so entirely warranted. The issue raised by this (the second) direction becomes relevant only if the Municipality's submissions in response to the first and second directions are rejected. This is because, being concerned with matters of constitutional compliance, it is not reached if the case can be disposed of on other grounds.[98]

65. The prefatory language of the third direction ('if so') shows that it is dependent on the second.

65.1 The linkage operates thus: (1) if municipalities have a Constitutional power to supply water for industrial purposes, then (2) is it so exclusive that the Legislature cannot by national legislation subject the power to scrutiny and control by a member of the executive arm of government (to wit, the Minister)?

65.2 In pursuit of the argument the Municipality manifestly cannot escape a consideration of whether the Minister might be endowed with controlling power for some purposes but not others.

66. In consequence of the linkage, we deal with the second and third issues in combination under a single heading – the 'Constitutionality Issue'. The final direction is concerned with matters of remedy and we deal with it under the heading 'Relief to be Granted'.

[98] Where it is possible to decide any case, whether civil or criminal, without raising a constitutional issue, this is the course which should be followed. *S v Mhlungu and others* 1995 (3) SA 867 (CC) at par [59]; 1995 (2) SACR 277; 1995 (7) BCLR 793; [1995] ZACC 4).

EXIGIBILITY OF THE NULLITY DEFENCE

**The structure of the question**

67. The first issue raised by the directions of this Court, it will be recalled, is: 'Whether the Supreme Court of Appeal has correctly applied *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC).'

68. As already explained, this question operates on the assumption that the defence, if properly dealt with, would have provided a good substantive answer to the claims mounted by the Company. This issue needs to be explored, if only briefly, before the question posed by the directions is reached.

**The flaws in the Minister's ruling**

69. Under section 6 of the WSA, a water user can apply for permission to obtain water from a third party, that is, a party other than a water service authority (appellant) and water service provider (Rand Water). In the present case, Rand Water is a Water Service Provider and appellant is a Water Service Authority. It follows that neither of these two bodies is a third party within the contemplation of section 6 of the WSA. No permission could be sought under the section and none could be granted. Section 6 was simply not applicable in the present case.[99]

70. The same reasoning applies *mutatis mutandis* to the appeal under section 7. Section 7(1), the supposedly enabling section, is in terms that are materially similar to section 6(1), though textually not identical to it. Since the request was to obtain water from a body, Rand Water that was already a water service provider, there was no third party in respect of which permission might be sought and obtained for the provision of water 'from any source other than a water service provider nominated by the water services authority [ie the Municipality].' The request for consent under the section was otiose and

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[99] Thompson *op cit* par 35.4, 709.

Minister's reliance upon the powers conferred by the section is simply inapposite.[100]

71. The court of first instance made something of the fact that 'at the time [the Company] applied for approval, the municipality had not yet appointed Rand Water as a water services provider or at least [the Company] was not aware of such appointment if ever it had already been made.'[101] The learned Judge felt able to conclude that, in consequence, 'Rand Water was a source other than the service provider nominated by the municipality' and so the Company was 'correct to say that it was at the time entitled to apply for the approval.'[102]

71.1 This reasoning is misconceived on the facts, for it is indisputable on the papers that Rand Water was the sole water services provider[103] and was being regarded as such by all concerned.[104] If there had as yet been no formal appointment of Rand Water as a water service provider, the Municipality was certainly giving it status as a water service provider *de facto* recognition.

71.2 The reasoning is also misconceived in law. The issue is not whether the Company was entitled to apply for consent but whether the Municipality was able to grant it. The operative date, therefore, is the date when the decision is taken, not the date when it is sought. At the date when the application for consent was rejected, the status of Rand Water as the water

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[100] Thompson, *op cit* par 35.4, 709-710; AA I par 111, 154; See legal opinion Annexure 'EML11' III par 4, 271; last paragraph, 275. The subsection reads as follows:

> 'Subject to subsection (3), no person may obtain water for industrial use from any source other than the distribution system of a water services provider nominated by the water services authority having jurisdiction in the area in question, without the approval of that water services authority.'

[101] Judgment V par 26, 410.

[102] Judgment V par 36, 410.

[103] FA I par 15, 14.

[104] See for instance Letter from the Company to the Municipality dated 8 April 2004, Annexure 'FA3' I par 3, 43, which confirms the Company's satisfaction with its 'long-standing relationship with Rand Water'.

service provider had been put beyond doubt in correspondence to which the Company was privy.[105]

72. For reasons that have never been fully canvassed on the papers, the Municipality by letter written early in 2004 expressly invited the Company to apply under section 7 for 'approval by the [Municipality] for the supply of water for industrial use.'[106] The Company used the invitation as a springboard to solicit consent the Municipality's consent 'in terms of Section 7 … to continue obtaining water from Rand Water for its mining operations and associated domestic applications at the tariff set by, and under the conditions imposed by Rand Water.' The request was hopelessly overbroad, since the Municipality had no power to consent under section 7 to the utilization of the tariff set by, and under the conditions imposed by Rand Water.

73. Under section 8 of the WSA a water user whose applications under sections 6 or 7 of the WSA have been refused may appeal against the refusal to the Minister. In the appeal in this case, made in terms of section 8(9) of the WSA, the Minister was asked to consider the rate the Company was to be charged for water for industrial purposes.[107] Under section 7, the Minister has no power to make such a decision. The most that she can do is grant permission to a user to obtain water from a source other than a service provider or authority. Since Rand Water, the continuing source of water supply, is a Water Service Provider and the Municipality is a Water Service Authority, the application under section 7 and the resulting appeal were empty, misguided and ultimately otiose. Neither process should ever have been invoked.

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[105] See par 2 of the circular of 31 May 2004 from the Municipality to the mining companies, Annexure 'FA4.2' I, 46-47.

[106] Letter dated 11 February 2004, Annexure 'EML2' II, 182. The addressee of the letter is not the Company, but it is common cause on the papers that Company received the equivalent letter at much the same time.

[107] Letter from the Minister, Annexure 'FA8' I par 2.4, 58.

74. To make this point is not to suggest that the Minister is powerless to control the level of fees charged for the supply of water. Under section 10 of the Act she is empowered 'with the concurrence of the Minister of Finance, from time to time, [to] prescribe norms and standards in respect of tariffs for water services.' This power is one of general surveillance and control, however, and cannot be invoked to determine a specific grievance such as the present one. The Company was right, therefore, not to invoke section 10 to deal with its peculiar complaint.

75. In the same vein, it is worth noting that –

75.1 When the council of the Municipality imposed the amended water tariff on 27 May 2004, it acted in terms of sections 4 and 11(3) of the Local Government: Municipal Systems Act, Act No. 32 of 2000 read with section 10G(7) of the Local Government Transition Act: Second Amendment Act, Act No. 209 of 1993 ('the LGTA').[108]

75.2 Section 10G(7)(*c*)(iv) of the LGTA grants a right to any person who desires to object against a determination or an amendment of a tariff to do so in writing to the Municipal Manager of a municipality. The Minister in considering the Company's appeal against the water tariff imposed by appellant in terms of section 8(4) and section 8(9) of the WSA, exceeded her powers.[109]

75.3 As stated above, the Municipality on 27 May 2004 resolved to adopt its new tariff policy and on 31 May 2004 the Municipality formally notified the mining houses that they policy would come into operation with effect from 1 July 2004.[110] The Company in paragraph 7 of its amended notice of motion[111] requested the High Court in the alternative to set the decisions of the Municipality, together with its resolution to amend the tariff of charges as promulgated in the Provincial Gazette of 22 June 2004 and subsequent

[108] AA I par 95, 148; Resolution on the tariff policy adopted by the Appellant, Annexure 'EML4' II, par (xii), 187; Annexure 'EML5' III, 223-224.
[109] Notice of Appeal V par 2.4, 442; par 2.8, 2.9 and 2.10, 442.
[110] AA II par 95, 148; Annexure 'EML4' III, 184-220.
[111] Amended Notice of Motion, Annexure 'RA1' IV par 7, 396-397.

resolutions imposing tariffs or surcharges on the supply of water for domestic and industrial purposes aside. This relief off course was not granted.[112] In the premises the aforementioned resolution by the Municipality and the implementation thereof are still valid, as it had not been objected to and/or reviewed.

76. In the present case, the Minister had no power under the section 7 of the WSA or indeed the statute as a whole, to make the decision that she did. What she was asked to determine was whether the Mine should be permitted to contract for the supply of water with Rand Water direct. She could enter upon a consideration of this question and make a pronouncement only if Rand Water was a body other than 'a water services provider nominated by the [Municipality]'. To her knowledge and to the knowledge of the Mine and the Municipality, Rand Water was a service provider who, having been so nominated, fell outside the category of bodies in question. Given this fact, the Minister had no jurisdictional power to exercise and so could not grant the permission requested. Since this fact was apparent on the face of her decision, her decision was manifestly *ultra vires.*

77. In its judgment, the SCA held that, whatever its status, the Minister's decision given must be treated as valid and effective whether or not it was *ultra vires* and so unlawful (as the Municipality contended) for so long as, it remained unchallenged in proceedings for its review on such grounds. In reaching this conclusion the SCA considered itself bound by the majority decision (per Cameron J) in *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute*[113] (**'***Kirland'*) which in turn followed the decision in *Oudekraal Estates (Pty) Limited v City of Cape Town and another ('Oudekraal')*.[114]

78. In contending that the SCA decision was wrong in law, the Municipality draws a

[112] Judgment V par 78 to 80, 424-425.
[113] 2014 (3) SA 481 (CC) par 64, 65 and 88.
[114] 2004 (6) SA 222 (SCA) par 40.

distinction between decisions that potentially fall within the scope of powers with which a public official is clothed and those that do not. Decisions that are impugnable on the grounds that they are vitiated by some flaw in the process (for example, ulterior purpose, unreasonableness, irrationality or want of due process) cannot simply be ignored but must, if contested, normally first be struck down by a reviewing court. In contrast, decisions that on their face fall beyond the ostensible scope of the powers conferred on a public officer have no validity and can, at least in appropriate circumstance, be treated as such in ensuing litigation even though they have yet to be set aside on review.

79. The legitimacy of the distinction has its roots in a synoptic passage in the very decision (*Kirland*) upon which the SCA relied in this case. Summarizing the conclusions of the majority, Cameron J took pains to frame the principle on a basis that revealed this distinction. He said (emphasis supplied):

> '[105] The approval communicated to Kirland was therefore, despite its vulnerability to challenge, a decision taken by the incumbent of the office *empowered to take it*, and remained effectual until properly set aside. It could not be ignored or withdrawn by internal administrative fiat.'

80. The italicized rider is located in the thematic approach taken by the learned judge. His concern was that to ignore administrative decisions on the basis of their unlawfulness would frustrate expectations engendered by their appearance of lawfulness. Reliance on ostensible validity was, the learned judge felt, the abiding principle. So much is clear from the following passage make clear (para 65, emphasis supplied, and see para 86).

> 'Generally, this means that government must apply formally to set aside the decision. *Once the subject has relied on a decision*, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed.'

81. The qualification – namely, that the 'incumbent of the office must be empowered to take' the decision – is no matter of form. It is central to the very principle that the majority in *Kirland* was enunciating. Were it absent, a decision by a maverick licensing officer to censor a film, impose a penalty on a cartel or conclude an international trade agreement would be valid and effective until set aside. The consequences of such a doctrine would, it need scarcely be said, be startling.

82. No real problem of procedure stands in the path of a defence based on collateral challenge. In our law there is no rule that requires a litigant who wishes to attack an administrative decision to employ review proceedings (ie Rule 53 process). If the litigant is a claimant, he or she can seek declaratory relief on motion if satisfied that the challenge requires no recourse to a record, and as respondent the litigant is entitled, as a matter of process, to raise the defence of nullity if this can be demonstrated on the uncontested facts. So much seems clear from such decisions as *Jockey Club of South Africa v Forbes*[115] and *Qaukeni Local Municipality v F V General Trading.* [116]

83. The real issue is whether permitting the Municipality to raise the defence of nullity would frustrate expectations that have been engendered or subvert the respect that decisions apparently taken in the exercise of public powers might deserve. The answer, it is submitted, is No.

83.1 In general, decisions that are, on their face, beyond the powers of the decision-maker, can generate no proper expectations and, if ignored, in no sense undermine the structures of certainty and respect so fundamental to the good governance of society.

[115] 1993 (1) SA 649 (A).
[116] [2009] ZASCA 66 2010 (1) SA 356 (SCA).

83.2 This consideration is especially apt when the decision contended to be beyond jurisdiction is being relied upon to create a cause of action in a civil suit. In such a case, it is submitted, it is certainly enough for the potential defendant to dispel such expectations as might be harboured by notifying the plaintiff of the illegality.

83.3 Whether the plaintiff then elects to sue and, if so, to rely upon the Minister's decision in pleading its case are matters that can then be left to the interplay of the contending forces in the judicial process. Anything more than this is simply to pile the Pelion of one set of litigation on the Ossa of a second.

84. These submissions are borne out by a study of comparative law, a matter to which we now turn.

**Comparative law**

85. In preparing these heads of argument, we have sought to discern the approach taken to collateral challenges in the United Kingdom, Canada, the United States of America, Australia, New Zealand and India. In none of these jurisdictions, so far as we could discover, have the courts completely renounced the notion that a challenge to a decision based on invalidity can competently be mounted without formally setting the decision aside.

86. In Canadian law, espousing principles that are perhaps the most fluid of all, treats the issue as one of statutory interpretation.

86.1 In *R v Consolidated Maybrun Mines Ltd*,[117] the Supreme Court set down the principle in the following terms:[118]

> 'the question of whether a penal court may determine the validity of an administrative order on a collateral basis depends on the statute under which

[117] [1998] 1 SCR 706.
[118] The quotation is taken from the headnote at 707. See too *Canada (Attorney General) v Telezone Inc* 2010 SCC 62 [2010] 3 SCR 585.

> the order was made. The best way to decide this question, taking both the integrity of the administrative process and the interests of the litigants into account, is to focus the analysis on the legislature's intention as to the appropriate forum. In doing this, it must be presumed that the legislature did not intend to deprive a person to whom an order is directed of an opportunity to assert his or her rights.'

86.2 The factors to be considered were described thus –

> 'The wording of the statute from which the power to issue the order derives, the purpose of the legislation, the availability of an appeal, the nature of the collateral attack taking into account the appeal tribunal's expertise and *raison d'etre* and the penalty on conviction for failing to comply with the order are all important, but not exhaustive.'

87. The case arose out of a criminal conviction based on non-compliance with an administrative order contended to be illegal and this, no doubt, is an important factor in favour of permitting the accused to mount a collateral attack. The judgment stresses, however, that the determination of the legislative intent in every case depends on a consideration of all the relevant factors.[119] In disallowing the collateral attack in the case before it, the court placed great weight on the fact that the legislature had established a specialist tribunal to decide the matters at hand; 'permitting a penal court to answer [questions concerning the impact of the applicable environmental legislation] in lieu of the Environmental Appeal Board, which was established precisely for this purpose, would undermine the scheme set up by the Act.'[120]

88. In Canadian law, the capacity to mount a collateral challenge in civil proceedings is put beyond doubt in *Canada (Attorney General) v Telezone Inc.*[121] At issue in the case was the legitimacy of a claim in contract, negligence and unjust enrichment arising from a decision rejecting an application for a

[119] See the decision of the Supreme Court in *Canada (Attorney General) v McArthur* 2010 SCC 63 [2010] 3 SCR 626.
[120] Headnote at 708.
[121] 2010 SCC 62 [2010] 3 SCR 585. See too *Manuge v Canada* 2010 SCC 67.

telecommunications licence. The court held that the claim could be brought even though the claimant had not challenged the official decision on review. It characterized the case as 'fundamentally about access to justice'.[122] According to the court,

> 'People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary costs and complexity.'

89. The court *a quo* in *Maybrun* treated as dispositive the fact that, much as in the present case, the challenge was based on the decision-maker's complete lack of jurisdiction *ab initio*. The Supreme Court, while acknowledging that this was an important distinguishing feature, declined to accept the factor as determinative. In principle it saw no conceptual distinction between absence of jurisdiction from the outset and loss of jurisdiction in consequence of the manner in which it is exercised. Making the issue turn on the distinction would, moreover, present problems of practical sort since the characterization was not an easy one to make.

90. In the United States of America the courts have had no such qualms. There, it seems clear, a decision void on its face for want of jurisdiction can always be collaterally attacked.

90.1 Following a comprehensive examination of the domestic and comparative law on point, the court in *S v Herschberger*[123] concluded that an administrative order 'is immune from collateral attack unless the order is void because it was issued without, or in excess of, statutory power.'[124]

[122] See *Strickland v Canada* (*Attorney General)* 2015 SCC 37, *Canada (Attorney General) v McArthu*r 2010 SCC 63.
[123] [2014 Wis App].
[124] At par 15.

90.2 In the same spirit, the court in *Wabash County v Illinois Municipal Retirement Fund et al*[125] stated that 'a decision rendered by an administrative agency that lacks jurisdiction over the parties or the subject matter, or a decision that is beyond the statutory authority of the administrative agency, is void and can be collaterally attacked in any court, at any time.'[126]

90.3 On the problems, both conceptual and practical, that making the distinction might present, the court in *Business Professional People for the Public Interest v Illinois Commerce Comm'n*[127] had the following to say:

> 'We acknowledge that, theoretically, anytime an agency makes an erroneous decision, it acts without statutory authority because the legislature and the statutes do not give an agency the power to make erroneous decisions…. We are confident, however, that a reviewing court can make the appropriate distinction between an erroneous decision and one which lacks statutory authority.'

91. In India the same approach seems to be taken. In *Cochin College v Kumar & others*[128] the Judge, in the course of considering both local and international decisions, held that the its courts 'have mostly approached the issue on the premise of *ultra vires* and voidness and have consistently held that anything *ultra vires* and void *ab initio* can be challenged collaterally.'[129] Extensive reliance was place on English law, of which *Boddington v British Transport Police*[130] is the exemplar.

92. In *Boddington*, which arose out the contravention on non-smoking regulations that were arguably invalid, the House of Lords took up a stance that echoes that of the Canadian courts.

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[125] 408 Ill App 3d (2011).
[126] See too *Village of Vernon Hills* [2104 Ill App (2d)].
[127] 136 Ill 2d 192 (1989) at 243-5, cited with approval in *Board of Education v Board of Trustees* 395 Ill App 3d 735 (2009).
[128] [WA 1645 (2010)]
[129] At par 81.
[130] [1998] UKHL 13; [1999] 2 AC 143; [1998] 2 All ER 203; [1998] 2 WLR 639.

92.1 Lord Irvine of Lairg LC set out the conclusion thus:

> '[T]he question of the extent to which public law defences may be deployed in criminal proceedings requires consideration of fundamental principle concerning the promotion of the rule of law and fairness to defendants having a reasonable opportunity to defend themselves. However, sometimes the public interest in orderly administration means that the scope for challenging unlawful conduct by public bodies may be circumscribed.
>
> Where there is a tension between these competing interests and principles, the balance between them is ordinarily to be struck by Parliament. Thus whether a public law defence may be mounted to a criminal charge requires scrutiny of the particular statutory context in which the criminal defence is defined and of other relevant statutory provisions.'

92.2 In an effort to provide a concrete understanding of these principles, Smith, Woolf and Jowell *Principles of Judicial Review*[131] summarized the law in a passage cited with approval in the Indian case referred to above.[132] The learned authors say that the presumption of regularity seems not to extend to decisions that are clearly invalid on their face. In the excerpt, stress is placed on the need to avoid the 'cumbrous duplicity of proceedings' that would result from staying the pending proceedings so that a separate application for review can be brought. Ultimately the learned authors capture the reluctance to permit collateral challenges in the following terms:

> 'In some situations collateral challenge may not be permitted on the ground that the particular proceedings are inappropriate to decide the matter in question (for example, where evidence is needed to substantiate the claim, or where the decision-maker is not a party to the proceedings, or where the claimant has not suffered any direct prejudice as a result of the alleged invalidity).'

[131] (1999) at 129.
[132] At par 78.

93. In Australia these principles seem to be applied by the courts in pursuit of the doctrinal approach enunciated in *Boddington.*

93.1 In *Jacobs v Onesteel Manufacturing Pty Ltd*[133] the Supreme Court of South Australia held that a collateral attack on subordinate legislation was competent regardless of whether the relevant error was substantive rather than procedural or latent rather than patent and regardless of whether the attack was mounted in a superior or inferior court. The approach is to consider all the circumstances of the case in order to decide what, as a matter of process, most happily reconciles considerations of fairness and expedition.[134]

93.2 The most concrete, though not by any means least controversial, rendition of the law seems to be the one in *Hinton Demolitions Pty Ltd v Lower (No 2) supra.* In that case, Wells J said:

> 'Except for those cases where what is claimed to be an administrative act has not even the colour of lawful authority, or where an authority or public official, who is a party to a civil action, pleads, and relies on his own administrative act, an allegedly unlawful administrative act cannot be collaterally impeached in any cause or matter, civil or criminal, unless an Act of Parliament or a valid regulation unequivocally authorises such impeachment. The only correct way of attacking an allegedly unlawful administrative act is by means of a separate proceeding appropriate for the purpose.'[135]

94. Within and across jurisdictions the emphasis shifts, but not dramatically. All jurisdictions, recognizing that the discountenancing of collateral challenges is ultimately an issue of process, are at pains to retain a flexibility of approach that gives the courts latitude to obviate failures of substantive justice. *Kirland* has

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[133] [2006] SASC 32.

[134] Generally see *Hinton Demolitions Pty Ltd v Lower (No 2) (*1971) 1 SASR 512; *Bishop Irinej Dobrijevic & Anor v Free Serbian Orthodox Church, Diocese for Australia & New Zealand Property Trust & Ors* [2015] NSWSC 637; *Zweck v Town of Gawler* [2015] SAERDC 16*; Krulow v Glamorgan Spring Bay Council* [2013] TASFC 11; *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582; *Selby v Pennings* (1998) 19 WAR 520; *Robinson v Vanston* [1999] VSC 541; *Gray v Woollahra Municipal Council* [2004] NSWSC 112.

[135] At 549.

some powerful and emphatic language that encouraged the SCA to believe that our law on point is decidedly less fluid, but the opposite is demonstrated upon a proper parsing of the text (see above). The SCA decision on this issue is mechanical and simply wrong.

THE CONSTITUTIONALITY ISSUE

95. The second and third issues, which we take together for reasons already explained, are –

95.1 ‘Whether Part B of Schedule 4 of the Constitution confers the power to supply water to industrial entities on the local sphere of government;

95.2 If so, whether section 8(9) of the Water Services Act 108 of 1997 is invalid;’

96. The answer to the first question has already been tendered. The Municipality concedes that Part B of Schedule 4 excludes the supply of water for industrial purposes from the scope of the original powers it confers. It follows that the answer to the second question, being made to depend on the answer to the first, must be in the negative. The formulation aside, the powers conferred on the Minister would in any event not be unconstitutional since, as we have explained, the supply of water for industrial purposes could competently be subjected to ministerial scrutiny. Being essentially a matter of triangular contract involving Rand Water (which commits to supply users within the municipal jurisdiction exclusively through and at the instance of the Municipality), the Municipality (which commits to supply the consumer) and the consumer itself. Nothing in the Constitution exempts such a relationship from scrutiny by an appropriate representative of government.

97. There is, however, an issue pregnant in these questions that does arise in this context. The Company was previously receiving water for industrial purposes from Rand Water. In the implementation of the new scheme, the Municipality

became the party legally liable to supply the water, but the water continued to be supplied by Rand Water.

97.1 When the Company lodged the appeal with the Minister, its object was not to receive water that differed in its content by reason of its divergent source. It was to obtain the same water from the same source but at a lower rate. This was the reason it requested permission to 'continue obtaining water from Rand Water for its mining operations and associated domestic applications *at the tariff set by, and under the conditions imposed by Rand Water.*'[136]

97.2 The Minister did not grant permission upon these terms. She did not, we stress, grant the Company permission to continue obtaining water from Rand Water, still less did she authorize the Company to demand the supply of water for industrial purposes from Rand Water at its prevailing rates and on its prevailing conditions. Instead she purported to overturn 'the decision of the … Municipality to levy a surcharge on water for industrial use.'[137] Since this was not the decision she was requested to make, it was not one she could embody in her ruling. The ruling must be taken as flawed on this ground as well.

98. There is, however, a deeper issue at work here. The new regime was introduced and the new tariffs (including surcharge) were set in the process of a resolution of the Council under which rates and taxes were set for the upcoming year. The central issue, therefore, is whether the Minister, operating under section 8, could 'overturn' a resolution of this nature duly passed in Council to the extent that it set tariffs for the supply of water for industrial purposes.

98.1 The power to levy rates and taxes and otherwise impose imposts and surcharges is one that vests in municipalities under the constitutional provisions and the statutes referred to above. The legislature, so the primary

[136] Annexure 'FA5' I par 1, 48.
[137] Annexure 'FA8' I par 2.4, 58.

argument goes, could never have contemplated that the Minister would enjoy a power to overturn such a resolution under section 8. The Minister, in purporting to exercise this power, strayed beyond the scope of the section and, in the process, obtruded on the domain of original powers entrusted to municipal councils. This produces a constitutional breach deserving of correction in this appeal.

98.2 The secondary argument is that, if the Minister properly exercised her powers under the section, the section itself must be unconstitutional. If the concept of original powers has any meaning, it must contemplate the latitude to set levels for rates, taxes, imposts and surcharges that, in the exercise of the democratic process are regarded as legitimate.

98.3 This challenge, if sound, takes the present case out of the sphere of administrative law. So much is clear. In *Mazibuko v City of Johannesburg,*[138] just one of a number of judgments on this point, O'Regan J stated that '(w)here a decision is taken by a municipal council in pursuance of its legislative and executive functions, therefore, that decision will not ordinarily be administrative in character'. She further stated that PAJA[139] 'expressly excludes the executive or legislative powers or functions of a municipal council.'[140]

99. The point is an important one if the rules deprecating collateral challenges operate only within the sphere of administrative law and leave constitutional challenges unaffected. In our law the issue of whether this is a proper distinction has yet to be decided. There is a strong case, it must be said, for giving parties the right to challenge constitutional infringements without the strictures of procedural compliance contemplated by the collateral challenge rules.

REMEDY

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[138] 2010 (4) SA 1 (CC).
[139] *Mazibuko* Judgment par 130, 44.
[140] *Mazibuko* Judgment par 130, 44 and see the definition of 'administrative action' in section 1 of PAJA.

100. The fourth issue concerns matters of remedy, ie, 'whether it was competent for the High Court to order the Municipality to comply with the Minister's appeal ruling of 18 July 2005.' The submissions under this head naturally proceed on the supposition that the first three questions have been answered in a manner favourable to the Company. The question would otherwise be redundant.

101. The surcharge imposed by the Municipality is contained in tariffs intended, and expressed, to last only for the ensuing financial year. It was, in consequence, of limited duration and the ministerial ruling, which was directed at overturning the surcharge, could operate only for the same period. If an order is granted in favour of the Company, therefore, it must be expressed to have a scope of operation extending only to 30 June 2005, when the financial year in question ended.

102. The relief sought is declaratory in nature, and its avowed object is to lay a basis for the recovery of the surcharges paid under protest. This approach is a violation of the principle that claims should be mounted 'once and for all'. Today, we accept, the courts are somewhat more willing to relax the operation of the rule if a good case is made out for the exercise of such a discretion. If this discretion is exercised in the Company's favour, however, this Court must take pains to ensure that defences to the anticipated suit for recovery of overpayments, such as one based on prescription, are not compromised. The relief granted should do no more than stipulate that the Municipality is bound by the ministerial ruling unless and until it is set aside.

103. As has already been explained, the ministerial ruling governing surcharges on water for domestic use places no express prohibition on the exaction of surcharges pending the outcome of the negotiations. As a result, no order should be made prohibiting the Municipality from retaining these payments. That is a good enough defence to the relief sought on this front, but even if it were not, the relief should still be refused. Orders compelling parties to negotiate, and *a fortiori* to reach a settlement acceptable to both sides in the negotiations, are generally considered to be too porous to impose and too difficult to police.

104. This point ushers in a broader one. Declaratory and interdictory relief of the sort being claimed is itself discretionary.[141] In the present case, an outcome favourable to the Company will, at best for it, be based on the facts that the ministerial ruling, though unlawful, has yet to be set aside and so, by operation of the principles governing collateral challenges, must be taken to stand. To sanction a recovery of many millions of rand otherwise properly due on the grounds of this procedural deficiency would, it is submitted, be unconscionable. In consequence it is submitted that this Court should, in the exercise of its discretion, decline to grant the relief being sought by the Company.

105. Ultimately, of course, the Municipality submits that its appeal should succeed on the merits and the order granted to the Company should be set aside. In consequence this Court is requested to grant leave to appeal and substitute the decision of the SCA with an order in the following terms:

105.1 The appeal is upheld with costs including the costs of two counsel

105.2 The order of Kubushi J is replaced with an order in the following terms: "the application by AngloGold Ashanti Limited is dismissed with costs including the costs of two counsel."

105.3 Anglogold Ashanti is to pay the costs of the application for leave to appeal to this court including the costs of two counsel.

**M S M Brassey SC**
**E S J Van Graan SC**
**JA Motepe**

**APPELLANT'S COUNSEL**

**16 November 2015**

[141] *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) at par 31 and cases there cited.