IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO:
SCA CASE NO: 20265/14

In the matter between:

MERAFONG CITY LOCAL MUNICIPALITY Applicant

and

ANGLOGOLD ASHANTI LIMITED Respondent

STATEMENT IN SUPPORT OF APPLICANT'S APPLICATION FOR LEAVE TO APPEAL IN TERMS OF RULE 19 OF THE RULES OF THE CONSTITUTIONAL COURT

I, the undersigned,

ANTON DEON DE SWARDT

hereby state as follows:

THE PARTIES

1. The applicant is MERAFONG CITY LOCAL MUNICIPALITY, a local government authority duly established in terms of section 12 of the Local Government : Municipal Structures Act, No 117 of 1998, with main place of business situated at Main Municipal Building, 3 Halite Street, Carletonville, Gauteng.

2. The respondent is ANGLOGOLD ASHANTI LIMITED, a public company duly registered and incorporated in terms of the company laws of the Republic of South Africa, a mining company, with its principle place of business situated at Turbine Square, 76 Jeppe Stree, Johannesburg.

3. I am an adult male and practice as an attorney under the name of De Swardt Vogel and Myambo, 941 Shoba Street, Cnr Jan Shoba/Mackenzie Streets, Brooklyn, Pretoria. I am the attorney of record of Merafong City Local Municipality ('the Municipality') and I am empowered in terms of rule 19(2) of the Rules of the Constitutional Court to lodge this application for leave to appeal on behalf of the applicant.

THIS APPLICATION FOR LEAVE TO APPEAL

4. This is an application for leave to appeal to the Constitutional Court of South Africa –

4.1. in terms of rule 19 of the Rules of the Constitutional Court ('the Rules') and the Practice Directive dated 17 March 2015

4.2. against the whole of the judgment by Maya JA in the Supreme Court of Appeal ('SCA'), with whom Majiedt and Mbha JJA and Schoeman and Van der Merwe AJJA concurred, in the matter between Merafong City Local Municipality v Anglogold Ashanti Limited

4.3. delivered on 28 May 2015 under case number JS 20265/14 (hereinafter referred to as 'the Judgment'), a copy of which is attached hereto and marked as annexure **'ADS1'.**

ESSENCE OF THE CASE

5. In the Judgment, the Supreme Court of Appeal held that

5.1. a decision given by the Minister of Water Affairs and Forestry ('the Minister') must be treated as valid and effective

5.2. whether or not it was *ultra vires* and so unlawful (as the Municipality contended)

5.3. for so long as, it remained unchallenged in proceedings for its review on such grounds.

6. In reaching this conclusion the SCA considered itself bound by the majority decision (per Cameron J) in *MEC for Health, Eastern Cape a.o v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute*[1] ('*Kirland*') which in turn followed the decision in *Oudekraal Estates (Pty) Limited v City of Cape*

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1 2014 (3) SA 481 (CC) at para 64, 65 and 88

Town a.o.[2] The Merafong Municipality submits that the SCA fundamentally misconceived the import of *Kirland* and, in consequence, reached a decision that was wholly erroneous in law. The error, it is further submitted, is one of constitutional consequence alternatively of significant public concern and so warrants consideration and correction by this court.

7. In contending that the decision was wrong in law, Merafong Municipality draws a 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 simply be ignored even when they have yet to be set aside on review.

8. The distinction has its roots in a synoptic passage in the very decision (*Kirland*) upon which the SCA relied in this case.

8.1. 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):

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2 2004 (6) SA 222 (SCA) at par 40

'[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.'

8.2. The qualification is rooted in the thematic approach taken by the learned judge.

8.2.1. 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: (para 65, emphasis supplied, and cf 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.'

8.3. Where a decision lacks the facial imprimatur of lawfulness, as one beyond statutory power does, no reliance can competently be placed on it. In consequence, it is submitted, it can be ignored without more.

8.4. 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.

9. In the present case, the Minister had no power under the section (s 7 of the Water Services Act 108 of 1997 ('the Act') remained), 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, being manifestly *ultra vires,* could simply be ignored.

THE FACTS

10. The facts are accurately recorded in the SCA Judgment at paras 2-14. Little if anything would be achieved by repeating them here.

JURISDICTION OF THE CONSTITUTIONAL COURT

11. The applicant submits that this court has the necessary jurisdiction in terms of section 167(*a*)(and (*b*)(i) of the Constitution to entertain this application for leave to appeal against the aforementioned decision of the court *a quo* (paragraph 2.1 above).

12. The issue in this case is whether and to what a decision by a repository of power (and in particular a state official) that is manifestly beyond jurisdictional competence must nevertheless be treated as valid and effective unless set aside on review.

13. Since it implicates the scope and consequence of the exercise of state power in the circumstances postulated, the point is manifestly a question of a constitutional nature.

14. Being an issue of law of considerable importance that as yet is not settled, it would be in the interests of the public were this court to consider and determine it.

15. As between the parties, moreover, it has a significance that is profound, since several hundred million rand by way of water levies under the promulgated tariff turn on it.

16. The Municipality submits that the prospects of success are good, but ultimately this is a matter for this court to determine.

LEAVE TO APPEAL TO ANOTHER COURT

17. The applicants have not applied and do not intend to apply for leave (or special leave to appeal) to any other court as contemplated in rule 3(d) of the Practice Direction dated 17 March 2015.

NATURE OF THE RELIEF REQUESTED BY THE APPLICANTS

18. This honourable court is requested to make the following order:

18.1. That the application for leave to appeal against the Judgment by the court *a quo* to the Constitutional Court be granted.

18.2. That costs be costs in the cause of this appeal.

SIGNED at **PRETORIA** on this 18th day of **JUNE** 2015.

DE SWARDT VOGEL MYAMBO ATTORNEYS
Applicant's Attorneys
941 Jan Shoba Street
Cnr Jan Shoba/Mackenzie Streets
Brooklyn, PRETORIA
Tel : 012 346 0050
Fax : 012 346 0240
E-mail : anton@deswardt.co.za/
nadia@deswardt.co.za

TO :
THE REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN

AND TO:
THE REGISTRAR
CONSTITUTIONAL COURT
JOHANNESBURG

AND TO:
KNOWLES HUSAIN LINDSAY INC
Attorney for Respondent
c/o Friedland Hart Solomon and Nicolson
Pretoria
Suite 301 – Block 4
Monument Office Park
79 Steenbok Avenue
Monument Park
Pretoria
Tel : 012 424 0200
Ref : T Van Straaten/Cb/298206

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