



CONSTITUTIONAL COURT OF SOUTH AFRICA

Merafong City Local Municipality v AngloGold Ashanti Limited

CCT 106/15

Date of hearing: 18 February 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday 18 February 2016 at 10h00, the Constitutional Court will hear an application for leave to appeal against a judgment of the Supreme Court of Appeal regarding whether a municipality is entitled to ignore a ruling made by the Minister of Water Affairs and Forestry (Minister) in terms of the Water Services Act (Act). Section 8(4) of the Act allows a person who applies for access to water services and is dissatisfied by the outcome to appeal to the Minister. Section 8(9) of the Act empowers the Minister to confirm, vary or overturn the decision.

The applicant is Merafong City Local Municipality (Municipality). The respondent is AngloGold Ashanti Limited (AngloGold), a global mining company that operates mines situated within the Municipality's jurisdiction. From 1958 to 2004, Rand Water directly supplied AngloGold with water for its mining operations (industrial use) and for use by its employees who are resident at the mine (domestic use). In July 2003, the Municipality became a "water service authority". This meant it could take over the direct supply of water to the mines in its jurisdiction, including AngloGold. In February 2004, the Municipality requested AngloGold to apply for approval in terms of section 7 of the Act to continue receiving water for its industrial operations from a source other than the water services provider nominated by the water services authority. The Municipality also announced that new tariffs would come into effect from 1 July 2004. In response, AngloGold requested the Municipality's approval for it to continue receiving water directly from Rand Water. The Municipality replied that it had nominated Rand Water as its water services provider to provide the water services on its behalf and collect payment. It also set out its proposed tariffs for water supply which were considerably higher than Rand Water's tariffs.

Dissatisfied with the increased tariffs, AngloGold appealed to the Minister in terms of section 8(4) of the Act. The Minister, under section 8(9), overturned the Municipality's decision to levy a surcharge on water supplied to AngloGold for industrial use. She also ruled that the Municipality, AngloGold and Rand Water should negotiate a reasonable tariff for the supply of water for domestic use. Negotiations ensued but were later abandoned. The Municipality considered that the Minister's ruling was beyond her powers and refused to follow it. It continues to invoice AngloGold at the new tariff. AngloGold maintains that the Minister's ruling is valid and that the Municipality has thus far overcharged it nearly R31 million.

AngloGold continued to pay the new tariff under protest and launched legal proceedings in the North Gauteng High Court to compel the Municipality to comply with the Minister's ruling. The Municipality opposed the application and launched a counter-application asserting the Municipality's constitutional authority over that of the Minister. The High Court ruled in AngloGold's favour, dismissing the counter-application. It concluded that the Municipality's executive and legislative powers as a water services authority are subject to national legislation. Further, it held that the Minister's decision remained binding on the Municipality until a court reviewed and declared it unlawful. Since the Municipality had not challenged the decision on review, the High Court held, it remained binding and the Municipality could not raise the invalidity of the decision as a defence (a collateral challenge) because this defence was not available to a public authority.

The Municipality applied for leave to appeal to the Supreme Court of Appeal which held that the Minister's decision existed in fact and had legal consequences which the Municipality could not simply ignore without challenging it in a court of law. Thus the Municipality had breached the principle of legality. Additionally, the Supreme Court of Appeal confirmed that a public authority or organ of state cannot rely on a collateral challenge. On that basis, the Supreme Court of Appeal dismissed the Municipality's appeal.

Before this Court, the Municipality seeks leave to appeal against the Supreme Court of Appeal's judgement. The Municipality contends that the Constitution gives it executive authority over water and sanitation services and empowers it to impose rates and surcharges for services provided by it or on its behalf. It further contends that section 8(9) of the Act is invalid and that it was not competent for the High Court to order it to comply with the Minister's ruling.

AngloGold submits that the Municipality's conduct violates the principle of legality and undermines the courts' supervision of the administration. It submits that the powers of municipalities are not unlimited and can be regulated and monitored by other spheres of government and that the powers of local and national government overlap.