IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL 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

ANGLOGOLD'S HEADS OF ARGUMENT

A. OVERVIEW OF THESE SUBMISSIONS

1. On 18 July 2005, the Minister of Water Affairs and Forestry, acting in terms of the appeal power accorded to her by section 8(9) of the Water Services Act 108 of 1997 ("**WSA**"), made a ruling overturning a decision of the applicant municipality ("**Merafong**").[1] The ruling was made on an appeal brought by the respondent ("**AngloGold**") in terms of section 8(4) of the WSA.[2]

2. The effect of the ruling was to prevent Merafong from levying proposed surcharges on water supplied to the respondent's ("**AngloGold**") mines for industrial use and requiring the negotiation of a reasonable tariff for water supplied for domestic use.

[1] "FA8" vol 1 p 57-8.
[2] Section 8(4) of the Water Services Act: "A person who has made an application in terms of section 6 or 7 may appeal to the Minister against any decision, including any condition imposed, by that water services authority in respect of the application".

3. Merafong at first sought to have the Minister withdraw this ruling. When these efforts did not bear fruit, the municipality subsequently took the view that the ruling was invalid and that it could be ignored.[3] It did not apply for the judicial review and setting-aside of the Minister's decision. Instead, with effect from July 2006, it has levied a surcharge, increasing over time, on water used by AngloGold's mines for both domestic and industrial purposes. It has compelled payment of the surcharge from AngloGold under threat that it would cut off the water supply to the mines.[4]

4. AngloGold, no longer willing to continue making payment of surcharges that Merafong had been specifically prohibited from charging, instituted an application in the High Court in April 2011 to enforce[5] the Minister's ruling.[6]

5. In its answering affidavit, Merafong contended that the Minister's ruling was unenforceable owing to its being in conflict with the constitutional provisions regulating the division of powers and functions among the spheres of government. It contended that the WSA did not confer a power on the Minister to interfere with the setting of tariffs for water services by a municipality and sought a declaration along these lines. In the event that it was found that the Minister did have such a power, Merafong conditionally

[3] Answering affidavit vol 2 p 174 para 165.
[4] "FA 19" vol 1 p 94.
[5] As to the form of relief compare:**MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd** 2014 (3) SA 481 (CC) [78].
[6] AngloGold joined Rand Water as a party by virtue of the relief sought. It initially filed a notice of opposition, but filed no papers. By notice served on 15 May 2013 it withdrew its opposition and indicated that it would abide the decision of the court. The Minister was also joined but no relief was sought against her. The Minister did not file any papers.

counter-applied for a declaration of constitutional invalidity of section 8(9) of the WSA.[7]

6. Merafong did not, however, apply or counter-apply for the judicial review and setting-aside of the Minister's decision, or even for a declaration of constitutional invalidity of the decision. Instead, it targeted only the empowering provision underlying that decision.

7. The High Court and the Supreme Court of Appeal held that Merafong was not entitled to ignore the ruling of the Minister, which in clear and undisputed terms prevented it from imposing the surcharges on the supply of water to the mines that it has imposed for almost a decade. Though Merafong had persisted with its constitutional case in the High Court, it did not do so in the Supreme Court of Appeal. Instead it pursued there an argument first raised in the High Court hearing. This is that the Minister's decision was a nullity on administrative-law grounds because, so the argument goes, the Minister was not authorised by section 8(9) to make a decision on the rate at which AngloGold was to be charged for water.[8] The same argument is made on appeal to this Court.[9]

8. Merafong's conduct is in direct conflict with the principle of legality. Whatever its objections to the Minister's decision, the decision fell to be treated as valid and binding on Merafong until reviewed by a court and set aside. Instead, Merafong simply chose to "*treat … [the ruling] as void and*

[7] Notice of conditional counter-application "EML1" vol 2 p 177.
[8] SCA judgment [14] vol 5 p 457-8.
[9] Merafong's heads of argument, p25-9 paras 69-76.

await developments".[10] In the meantime it relied on its coercive powers that allow it discontinue the supply of water services to compel payment by AngloGold of surcharges that it has levied in direct conflict with the ruling. Even Merafong's belated attempt to cure the unlawfulness of its conduct by way of counter-application for a declaration of invalidity of section 8(9) does not seek to impeach the ruling itself. The administrative-law arguments impeaching the ruling, first essayed in the High Court and maintained in this appeal, have never been raised in the papers.

9. It is our submission that the principal issue in this appeal is, as found by the Supreme Court of Appeal,[11] whether the municipality is entitled simply to ignore the decision of the Minister on the strength of its view that it is void, to fail to take any positive steps to have its view confirmed by the Courts and to await AngloGold's application to enforce its rights before raising its constitutional argument as its defence against that application. It is our submission that it is not. To permit an organ of state to act in this way would fatally undermine the principle that "*the courts alone, and not public officials, are the arbiters of legality*".[12] It would thus have grave consequences for the rule of law.

10. In any event, the basis laid in the answering affidavit for the contention that section 8(9) does not confer the power on the Minister to make the ruling she did is misconceived. So too is the contention that such a power is an

[10] **Oudekraal Estates (Pty) Ltd v City of Cape Town and others** 2004 (6) SA 222 (SCA) [34], quoting Christopher Forsyth: '"The Metaphysic of Nullity": Invalidity, Conceptual Reasoning and the Rule of Law' in *Essays on Public Law in Honour of Sir William Wade QC* (Christopher Forsyth and Ivan Hare (eds), Clarendon Press) at 156.
[11] SCA judgment [1] vol 5 p 451.
[12] **Kirland** (above) [103].

intrusion on municipal powers contrary to the scheme of the Constitution. The WSA is national legislation providing a regulatory framework for the exercise of the fiscal powers of municipalities and their executive authority in respect of water and sanitation services. Such a framework is envisaged by sections 151(3) and 229(2)(b) of the Constitution, and by the principle of co-operative government.

11. AngloGold submits that the application should be dismissed. We will deal, in **section C** below with the administrative-law challenge that is made in this appeal. Such a challenge is prohibited by the principles set out in the **Kirland** decision of this Court which require an organ of state to apply formally to set aside an impugned decision. The municipality cannot, moreover, invoke the collateral challenge doctrine to justify its omission properly to seek the review of the Minister's decision since that doctrine is confined to instances in which an individual subject is sought to be coerced by a public authority into compliance with an unlawful administrative act.[13] This covers the terrain of the first issue set out in the Court's Directions of 15 September 2015.[14]

12. We then deal, in **section D** with the constitutional challenge to the validity of section 8(9) of the WSA, in **section E** with the WSA within the constitutional environment, and in **section F** with the second, third and fourth issues identified in the Directions.[15]

[13] **Oudekraal** (above) [35].
[14] Directions, vol 5, p 474, para 3(a).
[15] Paragraphs 3(b),(c) and (d).

12.1. Before doing so, we set out a brief chronological account of the facts leading to the litigation between AngloGold and Merafong and a description of that litigation.

B. BACKGROUND TO THE DISPUTE

AngloGold's operations and the supply of water to its mines

13. AngloGold has conducted gold-mining operations since the mid-1940s at its Tautona, Mponeng and Savuka mines near Carletonville.[16]

14. The mines use water for two primary purposes:

14.1. For operations in the mining and production of gold such as dust allaying during drilling and rock handling, as a cooling medium, as a transport medium and as a solvent in the metallurgical process.

14.2. For domestic purposes by AngloGold's employees housed on the mine properties.[17]

15. Some of the water used by the mines is saved in reservoirs, treated and recycled.[18] For decades, the additional water that is required for industrial and domestic use on the mines has been supplied directly to AngloGold by Rand Water (formerly the Rand Water Board) in terms of written supply agreements.[19] The supply of water has at all times been provided by Rand Water's system of reservoirs, pipelines and other apparatus, which Rand

[16] Founding affidavit vol 1 p 9 para 5, Answering affidavit vol 2 p 163 para 140.
[17] Founding affidavit vol 1 p 9-10 para 6.
[18] Founding affidavit vol 1 p 9-10 para 6-7.
[19] The most recent of these agreements was concluded on 20 October 2003: "FA2" vol 1 p 31-42.

Water is responsible for maintaining,[20] and not through Merafong's distribution system. This is common cause.

16. Merafong accordingly incurs no overhead, operational or maintenance costs in respect of the storage, purification or delivery of water to AngloGold, nor is it responsible for the replacement or refurbishment of the infrastructure.

17. It appears from the founding affidavit (which is not disputed) that AngloGold treats waste water in its own sewage plants and therefore makes no use of Merafong's sanitation services.[21]

Changes consequent upon the coming into effect of the WSA

18. Following the establishment of the three spheres of government in the 1996 Constitution, significant changes were made to the law regulating the management of water resources on the one hand and the supply of water and sanitation services on the other.

19. The WSA deals with the latter. It expressly takes into account the constitutional authority of local government to administer "*water and sanitation services*".[22] The WSA provides a regulatory framework for "*water services institutions*". One such institution is a municipality, which the WSA constitutes as the "*water service authority*" for its area of jurisdiction and

[20] Founding affidavit vol 1 p 13 para 13; p 14 para 15; Answering affidavit, vol 2 p 165 para 145 (admitted).
[21] Founding affidavit vol 1 p 10 para 7, Answering affidavit vol 2 p 165 para 143.
[22] See para 5 of the Preamble to the Act and part B of Schedule 4 read with section 156(1)(a) of the Constitution.

places upon it the duty progressively to ensure access to water services by consumers.[23]

20. Consonant with the Constitution's circumscription of the functional area of municipal authority, the WSA defines "*water supply services*" as the abstraction, conveyance, treatment and distribution of potable water – but not water for industrial use.[24] In turn, the WSA defines water for *"industrial use"* as the use of water for mining, manufacturing, generating electricity, land-based transport, or any related purpose.[25]

21. The WSA, further, repealed most of the private Act that governed the Rand Water Board[26] and established Rand Water (together with other existing water boards) as organs of state governed in terms of the Act. The primary activity of a water board, in terms of the WSA, is to provide water services to other water service institutions, including to municipalities in their capacity as water service authorities.[27]

22. In addition to its primary activity, a water board may, with the approval of the water services authority having jurisdiction in the area, also supply water directly to users for industrial use and act as a water services provider directly to consumers.[28]

[23] Section 11 of the WSA, read with the definition of "*water service authority*".
[24] Section 1 sv "water supply services".
[25] Section 1 sv "industrial use".
[26] The Rand Water Board Statutes (Private) Act 17 of 1950. See section 84(2) of the WSA.
[27] Section 29 of the WSA, read with the definition of "*water service institution*" in section 1.
[28] Section 30(2)(d) of the WSA.

23. The WSA came into effect on 19 December 1997. Municipalities did not, however, begin to exercise their powers and perform their duties as water service authorities until 1 July 2003.[29]

Merafong assumes the functions of a water services authority in 2004

24. The Merafong City Local Municipality, which has geographical jurisdiction over the mines, wrote to the mine managers on 11 February 2004.[30] The letter recorded that Merafong had, with effect from 1 July 2013, been accorded the powers and functions of a water services authority. It requested the mines to "*apply for approval … for the supply of water for industrial use*" in terms of section 7 of the WSA.

25. AngloGold replied to this letter on 8 April 20014. AngloGold requested the approval of Merafong "*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*".[31]

26. On 31 May 2004, Merafong wrote to AngloGold. The letter is headed "*Approval to be supplied with water*".[32] It says that Merafong "is appointing Rand Water to supply you with water as a water services provider to the municipality". Rand Water would directly supply water to the mines as an agent of Merafong and would bill and collect revenue. The letter set out the conditions for the supply of water to the mines, which entailed sharp

[29] Answering affidavit vol 2 p 138 para 68.
[30] "EML2" vol 1 p 182.
[31] "FA3" vol 1, p 43.
[32] Annexure "FA4.1" vol 1 p 44-5 is partly obscured and has no date. This is the letter sent to AngloGold. Annexure "FA4.2" vol 1 p 46 and 47 is a better copy of an identical letter sent to another company.

increases over the prices charged by Rand Water and included a higher tariff for "*operational use*" compared to "*domestic use*".

AngloGold appeals to the Minister

27. On 11 June 2004, AngloGold appealed to the Minister of Water Affairs and Forestry in terms of section 8(4) of the Water Services Act.[33] Its letter of appeal drew attention to the tariff increases proposed by Merafong. These increases were, according to AngloGold, "*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*". AngloGold also drew attention to the municipality's "*failure to make any attempt, other than to request information on the mines' consumption, to develop an understanding of the economic situation of AngloGold Ashanti …*".

28. The Minister upheld the appeal on 18 July 2005,[34] overturning the decisions of Merafong to impose a surcharge on the water supplied to the mines for industrial use and the proposed tariff for water for domestic use. The Minister ruled that a surcharge could only be levied on the portion of the water used for domestic purposes and not for industrial use. AngloGold, Rand Water and Merafong were required to negotiate a reasonable tariff for water used by AngloGold for domestic purposes.

29. A negotiation process duly commenced but was abandoned during the course of 2007. Considerable progress was nevertheless made, as

[33] Founding affidavit vol 1 p 16 para16.4; "FA5" p 50-51.
[34] "FA8" vol 1 p 57.

evidenced by the draft agreement dated 13 July 2006 that is included in the founding affidavit.[35] The agreement proposed that the mines would be charged Merafong's domestic tariff for domestic water use. The mine hostels would be charged Rand Water's industrial use tariff. The hostels' share of the domestic consumption was estimated at 24 percent. Operational water use would be charged Rand Water's industrial use tariff.[36]

30. From early in 2007, Merafong itself started invoicing AngloGold for water received from Rand Water. During July 2007 Merafong advised AngloGold that it would impose a flat rate tariff on all water consumed on the mines with effect from June 2006.[37] It did so, but subsequently started charging a differential rate.[38]

31. Merafong has, throughout the period following July 2006 consistently charged AngloGold an amount far in excess of the price paid by it to Rand Water.[39]

Merafong elects not to follow the Minister's ruling

32. The current dispute between AngloGold and Merafong squarely arises from the municipality's apparent adoption, at some point during 2007, of the view that the Minister's decision was invalid on constitutional grounds and that it need not be followed. The founding affidavit records that the Chamber of Mines had been so advised by Merafong.[40]

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[35] "FA12" vol 1 p 66.
[36] "FA12" vol 1 p 70-1 para 5.
[37] Founding affidavit vol 1 p 19 para 24.
[38] Founding affidavit vol 1 p 26 para 29.
[39] Founding affidavit vol 1 p 23 para 29.1; "FA18" vol 1 p 92-3.
[40] Founding affidavit vol 1 p 19 para 23; Answering affidavit vol 2 p 245 para 150 (admitted).

33. Merafong made unsuccessful attempts to engage the Minister, ultimately declaring a dispute with her on 30 March 2006.[41] It appears from an opinion furnished to Merafong and annexed to one of the letters to the Minister that the purpose of the proposed engagement was to attempt to persuade the Minister "*to withdraw the decision to set aside the decision of Merafong to levy tariffs on the mines*".[42] If this is so, the attempted intervention would have been purposeless as the Minister was *functus officio* in respect of her powers in terms of section 8(9).[43] Merafong's proper remedy was to seek judicial review of that decision but, for reasons not disclosed in its affidavit, it never did so.

34. AngloGold withheld certain payments from Merafong, prompting Merafong, in September 2008, to demand payment of the arrears and to inform AngloGold that it intended to implement "*the appropriate steps … to limit water supply to your Mine*".[44]

35. AngloGold's attorneys responded to this letter on 28 September 2007. They said that, in light of the "*drastic consequences that could ensure if you were to cease the supply of water and the irreparable harm that our client would suffer*", AngloGold intended to settle the arrears and make further payments to Merafong under protest and without prejudice to its rights.[45]

36. Merafong's attorneys responded to this letter on 9 October 2007. In response to a request to indicate the legal basis on which the amounts were

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[41] Answering affidavit vol 2 p 154 para 111-113; annexures "EML12", "EML13" and "EML14" vol 2 p 276-83.
[42] "EML11" vol 2 p 421.
[43] SCA judgment [10], vol 5, p 456. **Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and another** 2014 (3) SA 251 (SCA) [25].
[44] "FA19" vol 1 p 94.
[45] "FA20" vol 1 p 95.

levied, Merafong's attorneys set out a list of statutory and constitutional provisions. The letter made no reference to the Minister's ruling.[46]

37. This effective stalemate continued until the launch of AngloGold's application to enforce the Minister's ruling.

38. AngloGold sought an order enforcing the ruling of the Minister, interdicting the municipality from imposing a surcharge on water for industrial use, and requiring the municipality and Rand Water to enter into negotiations with AngloGold with a view to reaching agreement on a tariff for domestic water.[47]

39. In its answering affidavit, Merafong responded to the principal basis of AngloGold's case as follows: "*…section 8(9) of the Water Services Act, on which the Applicant relies, in as much as it authorises the Third Respondent to exercise the power 'to vary or overturn any decision of the Water Services Authority concerned on appeal' should be read in light of the restrictions imposed on national legislation elsewhere in the Constitution, for example section 155(6) and (7) insofar as national legislation deals with function[al] areas in Schedule 4B and 5B.*"[48]

40. This captures the essence of Merafong's case. At length, the municipality elaborated on its contention that the Constitution's allocation of the right to administer the affairs of its community in respect of the matters listed in part B of Schedules 4 and 5 of the Constitution conferred on it plenary power in respect of the provision of water services within its area of jurisdiction. On the strength of this interpretation of the Constitution, Merafong said that the

[46] "FA21" vol 1 p 97-8.
[47] Amended Notice of Motion, "RA1" paragraphs 2, 3, 4 and 5, vol 4 page 543-544.
[48] Answering affidavit vol 2 p 163 para 141.2.

Minister did not have the power to make a ruling that interferes with an exercise of the executive authority of a municipality by overturning its tariff and surcharge for water services. It said that the Act should not be read to confer such a power. If it was found that the Act did confer such a power, the municipality conditionally counter-applied for a declaration of invalidity of section 8(9).

C. THE ADMINISTRATIVE-LAW CHALLENGE AND THE SCOPE OF THE KIRLAND PRINCIPLE

Administrative action cannot simply be treated as a nullity but a proper process must be undertaken to have it set aside

41. The argument sought to be pursued in this appeal is that the Minister was asked to determine "*whether the Mine should be permitted to contract for the supply of water with Rand Water direct*". She could do so only if Rand Water was a body other than "*a water services provider nominated by the water services authority having jurisdiction in the area in question*" as section 7(1) puts it. Rand Water had, so the argument goes, so been nominated by Merafong. Given this fact, it is contended, "*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*".[49]

42. Though it avoids saying so, this argument is to the effect that the Minister's decision, which is plainly an exercise of administrative action, was materially influenced by an error of law or that it was not authorised by the empowering

[49] Merafong's heads of argument p 29 para 76.

provision, as contemplated by section 6(2)(d) or 6(2)(f)(i) of the Promotion of Administrative Justice Act ("**PAJA**"). Characterising the decision as "manifestly ultra vires" does not alter the fact that the challenge to the Minister's decision is an administrative-law challenge, one that must be brought under the terms of and in accordance with the procedures set out in the PAJA.[50]

43. However, as set out above, Merafong has never challenged the Minister's decision as an exercise of administrative action, either directly or by way of counter-application. Its invocation of the principle of legality does not assist it; even if, as Merafong contends, the Minister exercised the powers conferred by the subsection in the absence of the jurisdictional facts permitting her to do so, this does not render the decision a nullity from the outset, but rather liable to be set aside on review.[51]

44. If Merafong had sought to review the Minister's decision it was incumbent on it to identify in its affidavit both the facts upon which it bases its cause of action, and the legal basis of that cause of action.[52] It had to formally and properly invoke the PAJA, comply with its procedures and specify the grounds on which it sought to impugn the Minister's decision.[53] It did not do so. It is not permissible for it to attempt to do so now in its argument on appeal.

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[50] **Kirland** [82]-[83], [114]
[51] **Kirland** [99].
[52] **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** 2004 (4) SA 490 (CC) [27].
[53] **Kirland** [84].

45. All of this is, we submit, authoritatively established by the decision of this Court in **Kirland**. This was, in turn, the basis for the decision of the Supreme Court of Appeal.

46. Merafong seeks to avoid the considerable obstacle posed by **Kirland** by arguing that:

46.1. The principle in **Kirland** most clearly applies to decisions "*that are impugnable on the grounds that they are vitiated by some flaw in the process*". Such decisions can be distinguished from decisions that "*on their face fall beyond the ostensible scope of the powers conferred on a public officer*". The latter class of decisions, so the argument goes do not have to be struck down by a reviewing court but "*have no validity and can, at least in appropriate circumstances, be treated as such in ensuing litigation even though they have yet to be set aside on review*".[54]

46.2. There is no procedural obstacle to proceeding by way of collateral challenge in such cases. There is no need to employ review proceedings if the litigant as respondent is able to raise a defence of nullity that can be demonstrated on the uncontested facts.[55]

47. Neither argument is tenable. We deal with each in turn.

There is no exception to the Kirland principle in cases of a decision that is "manifestly ultra vires"

[54] Merafong's heads of argument p 30 para 78.
[55] Merafong's heads of argument p 31 para 82.

48. This qualification of the principle is said to be contained in paragraph [105] of the Constitutional Court's judgment in **Kirland***,* more precisely a single phrase within that paragraph. But the paragraph relied upon by the applicant to establish the distinction contended for, read in the context of the decision as a whole, does not in fact create such a distinction.

49. We submit that **Kirland** authoritatively holds that a contention that an exercise of public power is outside the jurisdiction of an administrator must, like any other challenge to the lawfulness, procedural fairness or reasonableness of administrative action, be tested by a court in judicial review proceedings. Administrative action cannot be ignored and treated as a nullity by an organ of state simply because that organ of state takes the view that it the administrator who took it acted ultra vires. It makes no difference if that view is that the degree to which the decision is outside jurisdiction renders it "*manifestly ultra vires*", as opposed to a decision that is "*ostensibly valid*". Both are matters of opinion on a question of legality, premised on an interpretation of the scope of the empowering provision in question. The courts alone, and not public officials, are the arbiters of legality.

50. Merafong's reading of paragraph [105] of **Kirland** is a good example of the impermissible interpretative practice of "*excessive peering at the language to be interpreted without sufficient attention to the contextual scene*".[56] In the proper context of the judgment as a whole, it is quite clear that the words "*empowered to take it*" that Merafong relies on, do not create an exception to

[56] **Jaga v Dönges NO and Another; Bhana v Dönges NO and Another** 1950 (4) SA 653 (A) at 664G – H.

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

51. We submit that, properly interpreted, **Kirland** holds that:

51.1. Administrators cannot disregard administrative actions. To allow otherwise would be contrary to the rule of law, would be a licence to self-help, and would undermine the court's supervision of the administration.[57]

51.2. The concept of administrative action includes unjust administrative action, ie, decisions that are unlawful, procedurally unfair or unreasonable in breach of any of the review grounds listed in the PAJA and therefore invalid.[58]

51.3. It also includes decisions that are unlawful because they are outside the jurisdiction of the decision-maker.[59] Administrative action is not a nullity because it is unlawful. It means only that it is reviewable on the grounds of lawfulness.[60]

52. Because unjust administrative action is not a nullity but valid until reviewed and set aside, it follows that an organ of state cannot escape the effect of this principle by the simple device of alleging that a particular exercise of administrative action is particularly or obviously or egregiously unjust. Yet this is precisely what Merafong seeks to do by contending that the Minister's decision is "*manifestly ultra vires*". This amounts to no more than saying that

[57] **Kirland** (above) [89].
[58] Ibid [93].
[59] Ibid [98]. See paragraph [16] of the SCA judgment vol 5, p 459.
[60] **Kirland** (above) [99].

it is, in Merafong's opinion, an obvious breach of section 6(2)(a)(i) of the PAJA. To permit an organ of state to disregard administrative action in this manner would fatally undermine the principle established in **Kirland** and **Oudekraal**.

The Minister's decision is in any event not "manifestly ultra vires"

53. In any event, even if an allegation that a decision is "*manifestly ultra vires*" is sufficient to permit an organ of state to disregard it, the Minister's decision can hardly be said to fall into this category. AngloGold proceeded to enforce the decision precisely on the basis that it was "*ostensibly valid*". Nor did it occur to Merafong that the decision was "*manifestly ultra vires*" the powers conferred by the WSA until the point was raised in its argument before the High Court.

54. Merafong's attack on the validity of the Minister's decision was considered by the High Court and was rejected.[61] The High Court held, correctly we submit, that Merafong's attack on the decision rested on a misconception of the basis of AngloGold's appeal and of the scope of the Minister's powers on appeal in terms of section 8(9) of the Act. As to the latter, the High Court held that:

54.1. Before Merafong took over as the water services authority in respect of its area of jurisdiction, all mines including AngloGold's were

[61] Paragraphs [28]-[40] of the High Court judgment vol 5 p 407-412.

supplied with water for both industrial and domestic use directly by Rand Water;[62]

54.2. When Merafong assumed this responsibility the mining houses were afforded the choice of being supplied with water by Merafong, or by another water services institution[63] (which would include a Water Board). In the case of the mines, Merafong was unable to supply water itself, hence the appointment of Rand Water as its water services provider.[64]

54.3. The WSA permits consumers to be supplied water directly from a different water services institution other than the water services authority in that area, but in order to do so approval from the water services authority must be obtained. Sections 6(2) and 7(3) of the Act permits a consumer who at the commencement of the Act was obtaining domestic or industrial water from another source, to apply for approval to continue so doing.[65]

54.4. Merafong acted correctly in informing the mining houses of their need to apply for approval in terms of section 7 of the WSA, although they should also have been invited to do so in respect of section 6.[66]

54.5. At the time that AngloGold made its application, Merafong had not yet appointed Rand Water as a water services provider, and at that

[62] Paragraph [32] of the High Court judgment vol 5 p 409.
[63] Ibid [33].
[64] Ibid [34].
[65] Ibid [33].
[66] As held in para [27] of the High Court judgment, AngloGold applied in terms of both sections 6 and 7.

time Rand Water was a source other than a service provider nominated by the municipality.[67]

55. Seen in this light, Merafong's letter to AngloGold on 31 May 2004, may either be regarded as the nomination by Merafong of Rand Water as Water Services Provider in terms of section 6(1) and section 7(1), alternatively may be regarded as the approval by Merafong for AngloGold to continue obtaining water from Rand Water in terms of section 6(2)(b)(i) for domestic water and section 7(3)(b)(i) for industrial water. In either event the conditions of approval were susceptible to an appeal in accordance with section 8(4) of the Water Services Act, as was held by the High Court.[68]

56. The Minister's decision thus cannot be said to be so obviously flawed as to wear its invalidity on its face, as Merafong contends. The hypothetical examples of maverick licensing officers concluding international trade agreements raised in Merafong's heads of argument bear no resemblance to the case at hand.[69] They are an inappropriate analogue when dealing with the ministerial performance of a statutory duty.

57. Merafong's case in this Court is that the Minister's decision was so obviously and unarguably outside the scope of her powers that it constitutes an exception to the rule established in **Oudekraal** and **Kirland** and that the municipality need not approach a Court to confirm its opinion. This is not so. Merafong's argument concerning the lawfulness of the Minister's decision

[67] Ibid [36].
[68] Ibid [68].
[69] Merafong's heads of argument, p 31, para 81.

must be decided by the Courts in review proceedings and not by the municipality itself in what amounts to an exercise of self-help.

The collateral challenge doctrine cannot be relied upon by an organ of state

58. Having formed the view that the Minister's ruling was invalid, and failed in its quest to have the Minister withdraw it, Merafong took no further steps. It contented itself with the fact that the mines were compelled, under threat of disconnection to pay whatever charges it demanded. The municipality, as the heads of argument put it, "*all along received what it wanted, took no further action but left it to the Company to pursue such remedies as it saw fit*".[70]

59. In justification for its failure to challenge the validity of the Minister's ruling Merafong has invoked the doctrine of collateral challenge. It has sought, by reference to comparative jurisprudence, to accommodate its belated administrative-law challenge under the doctrine but also to justify its supine stance regarding its constitutional challenge. "*There is a strong case*", it is contended, "*for giving parties the right to challenge constitutional infringements without the strictures of procedural compliance contemplated by the collateral challenge rules*".[71]

60. Whatever its outer limits, the scope of application of the collateral challenge doctrine is clearly established. It permits a subject, confronted by an act of compulsion by a public authority, to raise as a defence the absence of a lawful basis for that compulsion. Thus in cases where the subject is sought

[70] Merafong's heads of argument, p 9, para 22.
[71] Merafong's heads of argument, p 40, para 99.

to be "*coerced by a public authority into compliance with an unlawful administrative act - … the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act*".[72] The paradigm case of such coercion is when a person is charged with a criminal offence for contravening a provision.[73] Such a person is always entitled to raise as a defence that the provision is unlawful and invalid.

61. The origins of the doctrine lie in the principle of individual liberty.[74] Merafong seeks the extension of the doctrine to permit an organ of state to resist an attempt by a private individual to enforce rights stemming from administrative action granted in its favour by challenging the validity of that administrative action. As the Supreme Court of Appeal held, the "*notion that an organ of State can use this shield against another organ of State is simply untenable*".[75]

62. It is the imbalance between the coercive power of the state and the position of the subject that underpins the doctrine of collateral challenge. This imbalance does not inevitably arise in the inter-relationship between organs of state, even where these organs fall within different spheres of government. To permit an organ of state to challenge collaterally the administrative act of another organ of state would spawn the very confusion

[72] **Oudekraal**) [32].
[73] As in **Boddington v British Transport Police** [1999] 2 AC 143 (HL), referred to in **Oudekraal** (above) [32]. That is not to say that the doctrine is confined to criminal proceedings: see **Liversidge v Anderson** [1942] AC 206 (L sued the Home Secretary claiming damages for false imprisonment, the defence was statutory authority. L's answer was that the legislation relied upon was invalid.)
[74] **Boddington** (above) at 161D, 173F.
[75] SCA judgment [17] vol 5 p 459, citing **City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd** 2010 (3) SA 589 (SCA) [15].

and conflict that this Court has warned of regarding self-help.[76] The internecine conflict that would prevail would also, most importantly, be inimical to the principles of co-operative government in section 41 of the Constitution.

D. CONSTITUTIONAL PRINCIPLES ENGAGED

The progression of Merafong's constitutional challenge

63. In this litigation Merafong's reliance on a constitutional challenge to section 8(9) of the Water Services Act has been equivocal. In answering AngloGold's application before the Gauteng High Court to enforce the Minister's ruling, Merafong said that this ruling constituted an unlawful infringement on its executive authority and was a contravention of sections 151(4), 155(6) and Part B of Schedule 4 of the Constitution.[77] This constitutional issue was argued before Kubushi J in the High Court and was rejected, as was Merafong's counter- application.[78]

64. In its application for leave to appeal to the SCA one of the grounds raised by Merafong was the alleged error of the High Court in dismissing Merafong's counter-application.[79] In its written argument submitted to the SCA Merafong said nothing about the constitutional challenge raised in its answering papers, nor did it claim relief in terms of its counter-application. The Constitutional issue was not raised in oral argument before the SCA.

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[76] **Kirland** [89]
[77] Answering affidavit para 59 p135, paras 124 and 125 p157-159, Merafong's conditional counter-application vol 2 paras 2 and 3 p178-9.
[78] High Court judgment vol 5 para 74-76 p423-4, Order para 83 d p426.
[79] Vol 5 para 19 p433.

65. Although Merafong has been astute to avoid expressly asking this Court to declare section 8(9) of the Water Services Act unconstitutional, its application for leave to appeal refers to the scope and consequence of the exercise of State power.[80] This assertion unmistakably highlights the division of powers between the various spheres of Government and the manner in which National Government exercises its constitutional mandate to regulate certain activities of local government. Merafong has not explained why, having raised a constitutional challenge before the High Court, it abandoned that challenge before the SCA, but now seeks to reprise the challenge.

66. This gives rise to the following observations. First, there is some doubt whether there is an order of constitutional invalidity before this Court.[81] We however accept that this court is itself at large to consider a constitutional issue.[82] Second, as this Court has emphasised, the insights and analysis of the SCA are valuable in the Constitutional Court's evaluation of a constitutional argument.[83] Merafong's failure to advance its constitutional challenge in the SCA deprives this court of the considered views of that forum.

67. In its heads before this Court Merafong invokes sections 151, 152, 156(i)(a), 229(i)(a) and Part B, Schedule 4 of the Constitution regarding the authority of municipalities to exercise their executive authority free from interference

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[80] Affidavit in support of application for leave to appeal vol 5 para 13 p471.
[81] Merafong concedes in its heads of argument that section 8(9) of the WSA is neither invalid nor unconstitutional. Merafong heads para 96.
[82] **Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others** 2009 (4) SA 222 (CC) [40].
[83] **Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd & Others** 2014 (1) SA 521 (CC) [40], **Minister of Police & Others v Premier of the Western Cape & Others** [2013] ZACC 33 [20].

by National Government. In developing its argument Merafong makes certain assumptions regarding the particular phrasing of these parts of the Constitution. But it does so without examining or analysing the meaning of the words used in their context and within the constitutional framework dealing with the authority of local Government. We contend that such an analysis is necessary to arrive at the true meaning and extent of municipal authority, in relation to powers of regulation by National Government. We offer such an analysis with reference to the jurisprudence that has evolved in this Court.

The executive authority of local Government: limitations

68. We focus on the following sections of the Constitution which we reproduce for convenience:

> *"**151**. **Status of municipalities***
>
> *(1) …….*
>
> *(2) …….*
>
> *(3) a municipality has the right to govern on its own initiative, the local government affairs of its community subject to national and provincial legislation, as provided for in the Constitution.*
>
> *(4) the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."*
>
> *"**155**. **Establishment of municipalities***
>
> *(1)……*
>
> *(6) ……*
>
> *(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of the matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."*

*"**156. Powers and functions of municipalities***

(1) A municipality has executive authority in respect of, and has the right to administer –

(a) The local Government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) …." [emphasis added]

69. In its heads of argument Merafong emphasises that the powers given to municipalities are "*original*" and not delegated or subordinate.[84] This is so, but this recognition, while serving as an important foundation, does not afford the complete answer to what the nature and extent of these powers are. This question must be answered through an examination and synthesis of the constitutional provisions reproduced above.

70. Our Courts have frequently referred to the "*executive authority*" afforded to local government, but to our knowledge have not directly interpreted this phrase. In the **First Certification** case this Court cautioned against the use of dictionary definitions, and preferred to extract contextual meanings of these terms in question as evidenced by the text before it.[85] We seek further assistance in decisions that, although not dealing specifically with the focal sections, do consider the concept of executive authority and the executive powers and functions of the national executive (in the context of matters excluded from administrative-law review by the PAJA).

71. In **Minister of Defence and Military Veterans v Motau & Others**[86] the majority judgment contains a close analysis of executive powers[87] of the

[84] **CDA Boerdery (Edms) Bpk & Others v Nelson Mandela Metropolitan Municipality & Others** 2007 (4) SA 276 (SCA) [38].
[85] **Certification of the Constitution of the Republic of South Africa, 1996** 1996 (4) SA 744 (CC) [370]**.**
[86] **Minister of Defence and Military Veterans v Motau & Others** 2014 (5) SA 69 (CC).

National Executive in section 85 of the Constitution to decide the applicability of section 1(b)(aa) of PAJA. What constitutes administrative action should, it was said, be determined by the function rather than the functionary.[88] Executive powers, it was held, are in essence high-policy or broad-direction giving powers. The formulation of policy is a paradigm case of a function that is executive in nature.[89] A power that is more closely related to the formulation of policy is likely to be executive in nature.[90]

72. The extent and ambit of powers or authority constitutionally conferred on local government are not defined in the Constitution. We submit that where the Constitution refers to executive authority this, broadly speaking, has equivalence to the term "*executive powers*", being policy or direction-giving powers.[91] In section 156(1) of the Constitution a municipality has both executive authority and the right to administer the local Government matters, *inter alia*, in part B of Schedule 4. The administration is achieved by the municipality's entitlement to make and administer by-laws for the effective administration of matters under its control.[92]

73. The powers conferred by the Constitution on local government are neither unlimited nor unconstrained, as has been reiterated in a number of judgments of this Court. In **Fedsure Life Assurance Ltd & Others v**

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[87] Drawing on the foundation for analysis laid, *inter alia*, in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC), and **Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21)** 2001 (1) SA (CC). The minority, dissenting judgment in **Motau** reached a different conclusion, but did not differ on the principles- see at [102], [103].
[88] [36].
[89] [37].
[90] [38]. See also **South African Reserve Bank & Another v Shuttleworth & Another** 2015 (5) SA 146 (CC) [35].
[91] **Motau** [37].
[92] Section 156(2).

Greater Johannesburg Transitional Metropolitan Council & Others[93]it was said (with reference to the Interim Constitution) that as an incident of the principle of the rule of law local Government may only act within the powers lawfully conferred upon it.[94] In **City of Cape Town and Another v Robertson**[95] it was said that the original powers, functions and duties of a municipality may be qualified or constrained by law only to the extent that the Constitution permits, and that a power (in that case to value property and impose rates) may be defined or regulated by legislation of a competent legislative authority.[96] Further limitations are found in section 156(3) of the Constitution which says that a by-law that conflicts with national or provincial legislation is invalid, and in section 229(2)(b) which says that the power of a municipality to impose, inter alia, surcharges on fees for services may be regulated by national legislation. Plainly what is contemplated is national or provincial legislation that is of a competent legislative authority and permitted by the Constitution.[97]

74. It is significant that the executive authority of local government (in sections 151(2) and 156(1)) of the Constitution is counter-balanced by the executive authority of national government (and provincial government) conferred by section 155(7). We return to this feature below.

75. We turn now to examine the constitutionally-imposed duty and power on national (and provincial) government to see to the effective performance by

[93] **Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others** 1999 (1) SA 374 (CC).
[94] Id [56]-[58].
[95] **City of Cape Town and Another v Robertson** 2005 (2) SA 323 (CC).
[96] [60] to [62]. See also **CDA Boerdery (above) [**38].
[97] **Robertson** [60] and [62].

municipalities of their functions over matters in Schedules 4 and 5, and to regulate the exercise by municipalities of their executive authority in section 156(1).[98] Whilst emphasising the inviolable nature of local government powers this Court has noted that these powers are not entirely untrammelled. Reference is made to the powers, functions, rights and duties being "*qualified or constrained by law only to the extent the Constitution permits*",[99] "*subject to permissible constitutional restraints*".[100] National and provincial spheres of Government are not entitled to usurp the functions of local Government.[101]

76. This Court in **Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council & Others**[102] found that the Western Cape Land Use Planning Ordinance ("LUPO") was unconstitutional because it impermissibly usurped the power of local authorities to manage municipal planning, thereby intruding on the autonomous sphere of authority which the Constitution affords to municipalities.[103] In the course of the judgment the extent and ambit of section 155(7) of the Constitution was analysed, particularly with reference to the monitoring and regulatory powers of national and provincial Governments. We highlight the following features of the judgment:

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[98] Section 155(7). Also see section 229(2)(b).
[99] **Robertson** [60].
[100] **CDA Boerdery** [38].
[101] **Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others** 2010 (6) SA 182 (CC) [44], **Lagoonbay** [46].
[102] **Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council & Others** 2014 (4) SA 437 (CC).
[103] Id [13].

76.1. The powers in section 15(7) were said to be "*hands-off*".[104]

76.2. With reference to the **First Certification** case it was said that in its various textual forms '*monitor*' corresponds to "*observe*, *keep under review*" and the like. The word '*monitor*' was said not to represent a substantial power in itself to control local Government affairs but was a reference to broader powers of supervision and control.[105]

76.3. The **First Certification** case had found that the monitoring power did not bestow additional or residual powers of (provincial) intrusion on the domain of local government beyond the power to measure or test at intervals local government's compliance with national and provincial legislative directives or with the Constitution itself.[106]

76.4. The hands-off relationship between local government and other levels of government requires that higher levels of government monitor local government functioning and intervene where functioning is deficient or defective in a manner that compromises the autonomy constitutionally conferred.[107]

76.5. Following on these precepts from the **First Certification** case the Court in **Habitat Council** reasoned that:

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[104] Id [21], the phrase used in [373] of the **First Certification** case.
[105] Id.
[106] Id.
[107] Id.

> "… '*regulating' in section 155(7) means creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself. This is because the power of regulation is afforded to national and provincial governments in order "to see to the effective performance by municipalities of their functions.""*[108]

It was consequently held that the Constitutional scheme did not envisage the provinces employing appellate power over municipalities' exercise of their planning functions.[109]

77. Dealing with section 164 of the draft New Text[110] the Court in the **First Certification** case referred to the restriction of the function of national legislation in respect of local government matters to regulation. It was said that the term '*regulate*' connotes a broad managing or controlling rather than a direct authorisation function.

78. We respectfully submit that the court in **Habitat Council** did not intend to stipulate that '*regulating*' in section 155(7) is restricted only to creating norms and guidelines for the performance of a function.[111] In our submission the italicised excerpt above is contextualised by the next sentence of the judgment which cautions that section 155(7) does not mean the usurpation of power or the performance of the function itself. By exercising a regulatory function, extending beyond providing norms and guidelines, national government does not impermissibly trespass on the authority of local

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[108] [22].
[109] Id.
[110] Section 164 of the New Text remained unchanged in the certified text: "All matters concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation."
[111] It is most unlikely that such a restriction could have been intended, considering that the court had referred to the **First Certification** case.

government.[112] The power to '*regulate*' and to '*see to*' in section 155(7) therefore should, we submit, be understood to contemplate a broad managing or controlling function[113] which would include the creation of norms and guidelines, but would not be restricted to this function.

79. The provincial appellate power over zoning and land-use decisions considered in in **Habitat Council** was found to be incompatible with the competence which the Constitution affords municipalities over matters of municipal planning.[114] Section 144(1) of LUPO provided for an appeal to the Administrator against the refusal or granting or conditional granting of an application. Section 144(2) gave the Administrator the power, after consultation with the council concerned, in his discretion to dismiss an appeal or to uphold it wholly or in part or to make a decision in relation thereto which the council concerned could have made.[115] The powers conferred by LUPO were extensive and unrestricted and were found to be incompatible with the competence constitutionally afforded to municipalities over municipal planning.[116] By contrast, we will argue below that the powers of appeal conferred by the WSA on the Minister are materially constrained as to avoid any such incompatibility

80. Whilst the constitutional jurisprudence has firmly established the distinct spheres of government and the powers and functions allocated to each

[112] An example of impermissible intrusion by a court is found in **Capricorn District Municipality v South African National Civic Organisation** 2014 (4) SA 335 (SCA).
[113] **First Certification** decision [377].
[114] **Habitat Council** [24] and [25].
[115] See the judgment of the Western Cape High Court in **Habitat Council & Another v Provincial Minister of Local Government Etc, Western Cape & Others** 2013 (6) SA 113 (WCC) at 124A-E.
[116] **Habitat Council** (CC) [25].

sphere by Schedules 4 and 5,[117] it has been pragmatically accepted that the spheres of government are not contained in hermetically sealed compartments.[118] An overlap between the different spheres of government does not constitute an impermissible intrusion by one sphere into the other because the spheres do not operate in sealed compartments.[119]

81. Amongst the many fundamental changes effected by the Constitution is the movement away from the hierarchical division of governmental power where municipalities functioned only under powers afforded to them by provincial or national legislation. But as we have already observed there are some constraints on local government power. There is also some degree of overlap. In **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another**[120] it was said that national and local spheres of control can co-exist even if they overlap and that the effect of this overlap may be to permit one sphere to veto the decision of the other.[121] In **Gauteng Development Tribunal** it was noted out that the **Wary** case was distinguishable because it concerned the interpretation of an Act of Parliament empowering the Minister of Agriculture to exercise certain powers relating to agricultural land.[122] We have already pointed to the apparent overlap and concurrence of national and provincial executive authority, with municipal executive authority in section 155(7) and section 156(1) of the Constitution.

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[117] **Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others** 2010 (6) SA 182 (CC) [49] and [50].
[118] Id [55].
[119] **Maccsand (Pty) Ltd v City of Cape Town & Others** 2012 (4) SA 181 (CC) [41] to [43].
[120] **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another** 2009 (1) SA 337 (CC).
[121] Id [80].
[122] What the **Wary** case did not pronounce on was whether the Constitution permits the concurrent exercise of powers between national and local spheres of Government- see [68].

82. We suggest that there is no unavoidable conflict between the two provisions. Following the approach in the **First Certification** case, the phrases '*see to the effective performance*' and '*regulating the exercise by municipalities of their executive authority*' should be read as encapsulating both monitoring and regulating powers by national and provincial government, but excluding direct functional involvement in the administration of local government powers. This achieves harmony with section 151(3) which affords a municipality the right to govern, on its own initiative the local Government affairs of its community, subject to national and provincial legislation. A municipality is primarily responsible for the administration of those functions afforded to it (in the instant case) by Part B of Schedule 4. National (and provincial) government form, as it were, a parallel tier of executive authority which does not serve as the primary policy driver, but permits a constitutionally approved degree of oversight and regulation. This Court has said that *"[w]hen this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres to co-operate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another*."[123]

83. Seen in this way the Constitution creates the mechanism for the distinction between the three spheres of Government as well as the interdependence necessary for the functioning of Governmental process.

[123] **Maccsand** [47], with reference to section 41 of the Constitution.

E. THE WSA WITHIN THE CONSTITUTIONAL STRUCTURE

Relevant features of the WSA, the National Water Act and the previous legislation

84. The WSA and the National Water Act 36 of 1998 ("the Water Act") brought about significant changes in the management of water, including that mandated by section 25(4) of the Constitution, which directs reforms to bring about equitable access to all South Africa's natural resources. This constitutional provision required a fundamental shift away from the legislative scheme under the Water Act 54 of 1956 ("the 1956 Act"). The 1956 Act recognised the distinction between '*public water*' and '*private water*'.[124] Section 5(1) of the 1956 Act provided that the sole and exclusive use and enjoyment of private belongs to the owner of land on which such water is found.

85. The WSA is new order legislation giving effect to the Constitutional mandate of the State in section 27 of the Constitution to ensure that everyone has access to, *inter alia*, sufficient water, and requiring the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. The establishment of the three spheres of government required material changes to the law regulating

[124] Section 1 of the 1956 Act. Private water was all water rising or falling naturally on any land not capable for common use for irrigation purposes. See generally **H Thompson: Water Law** (Juta) 2006 p80-90.

the management of water resources on the one hand, and the supply of water and sanitation services on the other.[125]

86. Broad expressions reflective of the role of national government as the custodian of the nation's water resources, on the need for collaboration between all spheres of government and for regulatory monitoring and intervention by the Minister of Water Affairs[126] are found in the long title to the WSA and in the Preamble. Perhaps most important in the context of the present case is the following:

> *"RECOGNISING that the provision of water supply services and sanitation services, although an activity distinct from the overall management of water resources, must be undertaken in a manner consistent with the broader goals of water resource management;"*[127]

This, in our submission, closely articulates the interdependence between local and national government concerning the management of water resources, as well as the authority of national government to regulate and see to the exercise by local government of the functional matters set out in the WSA. The Water Act reinforces the broad statements of policy and of intent in the WSA by referring to national government's overall responsibility for and

[125] The WSA came into operation before the National Water Act 36 of 1998, was put into operation on 1 October 1998.
[126] In the original version of the legislation the Minister of Water Affairs and Forestry.
[127] Preamble to WSA.

authority over the nation's water resources, and the need for the integrated management of all aspects of water resources.[128]

87. A White Paper on Water Policy that was approved by Cabinet on 30 April 1997.[129] The third principle of a list of 28 principles identified in the White Paper provides that *"There shall be no ownership of water but only a right (for environmental and basic human needs) or an authorisation for its use. Any authorisation to use water in terms of the water laws shall not be in perpetuity."*

88. Consonant with this principle, the WSA and the Water Act jointly abolished the concept of privately owned water through the unequivocal declaration of national government as custodian of the nation's water resources holding overall responsibility for and authority over these water resources. This gives effect to the fundamental rights contained in sections 25(4) and 27(1)(a) of the Constitution.

89. The importance of the progression lies also in the direct involvement of local government in regulation of water supply and in charges imposed for the use of water. Under the 1956 Act the right to control and use public water vested in the Minister,[130] and the Minister was responsible for levying rates on the use of certain water.[131] The new water laws conferred authority to authorise and charge for the supply of water on local government, subject to oversight and regulation by national government.

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[128] Preamble to Act. See also section 3(3) of the Water Act.
[129] Available at www.polity.org.za/polity/govdocs/white_papers/water5.html
[130] Section 62(2).
[131] Section 66.

Merafong's challenges to the WSA

90. In addition to Merafong's constitutional argument it raises an argument before this Court based upon the interpretation of sections 6, 7 and 8 of the WSA. In essence, this argument is that AngloGold's application to Merafong for permission to continue to receive water for domestic purposes (section 6) and for industrial purposes (section 7) was invalid. It is contended that in terms of both section 6 and section 7 of the WSA a water user can apply for permission to obtain water from a third party, which third party is one other than a water service authority (in this case, Merafong) or a water services provider (Rand Water). Because Merafong is a water services authority and Rand Water is a water services provider, neither, so the argument goes, can be a third party within the contemplation of either section 6 or section 7 of the WSA. It is consequently said that Merafong had no power to consent to AngloGold's request, and that the Minister had no power to make a decision on appeal.[132] This is wrong.

91. The WSA distinguishes between potable water and water for industrial use. This distinction is achieved through the definition of '*industrial use*' which means the use of water for mining, manufacturing, generating electricity, land-based transport, construction or any related purpose.[133] Potable water is not expressly defined, but is referred to in the definition of '*water supply services*' which means the abstraction, conveyance, treatment and distribution of potable water, water intended to be converted to potable water

[132] Merafong's heads of argument, p 25-7, 69 to 73.
[133] Section 1.

or water for commercial use but not water for industrial use.[134] In the interactions between AngloGold and Merafong the terms '*industrial water*' and '*domestic water*'. For consistency we will use the term '*domestic water*' to mean potable water.

92. Part B of Schedule 4 to the Constitution uses the term '*potable water*'.[135] Section 6 of the WSA regulates the supply of water services (which includes both water supply services and sanitation services)[136] and accordingly concerns the supply of potable/domestic water. Section 6(1) requires a person wishing to use water services (domestic water) from a source other than a water services provider nominated by the water services authority to seek the approval of that water services authority. Section 7 of the WSA regulates supply of water for industrial use in a materially similar, although not identical textual fashion. In its heads Merafong treats these two sections as practically identical, as do we.

93. Merafong says that from a quality perspective water can be potable or non-potable, and that whilst water for domestic use must always be potable, water for industrial use can be potable or non-potable.[137] This is correct and is so accepted by AngloGold. As we set out above, all water supplied to AngloGold has at all times been supplied by Rand Water, utilising Rand Water's system of reservoirs, pipelines and other apparatus which Rand

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[134] Id. For completeness we note that the Water Act 34 of 1956 defined water used for industrial purposes to be that used in connection with, *inter alia*, mining or the winning or washing of sand, gravel or stone (section 1) and water used for urban purposes to mean use by urban and rural people, for purposes for which water is ordinarily used by a local authority or by the inhabitants of such an area, including use for domestic purpose or (in an apparent contradiction) for industrial purposes (section 1).
[135] '**Potable**' is defined in the Shorter Oxford Dictionary (5th Edition)) as '**drinkable**'.
[136] Section 1.
[137] Merafong's heads of argument p 19 para 51.

Water is responsible for maintaining. This is common cause.[138] AngloGold accepts that the water supplied to it by Rand Water has at all times been potable water.

94. The interpretation contended for by Merafong is strained and in our submission, unsustainable. The central feature of both section 6 and section 7 of the WSA is that the supply of water must take place through a water services provider nominated by the municipality having jurisdiction, in this case Merafong. Supply of water from a source other than a nominated water services provider requires the approval of the municipality. Rand Water has, both prior to the commencement of the WSA and thereafter, provided water services (effectively domestic water) to customers, including AngloGold. It would accordingly at all material times have fallen within the definition of a water services provider in section 1 of the WSA.[139]

95. Because AngloGold was at the commencement of the WSA obtaining and using water services (domestic water) from Rand Water it was required to apply to Merafong for permission to continue to do so in terms of section 6(2) and 7(3) of the WSA.[140] Merafong's letter to AngloGold on 11 February 2004[141] directed AngloGold in terms of section 7 of the WSA to apply for approval for the supply of water for industrial use. This unmistakably indicated Merafong's understanding – correct in the circumstances – that Rand Water was not a water services provider

[138] Founding affidavit vol 1 para 13 p13, answering affidavit vol 2 para 145 and particularly the admission in para 145.2 (p165-166).
[139] Approval to continue acting as a water services provider is dealt with in section 22 of the WSA.
[140] It has never been suggested by Merafong that Rand Water was at the commencement of the WSA a nominated water services provider.
[141] Annexure " EML2" vol 2 p182. This letter is addressed to Driefontein, but it is common cause that the identical letter was addressed to Rand Mines.

nominated by Merafong, and that accordingly the approval of Merafong in terms of section 7(1) of the WSA was required.[142]

96. The attempt by Merafong to interpose the notional '*third party*' (a party other than a water services provider or a water services authority) is unsustainable for an interpretation either of section 6 or section 7 of the WSA.[143]

97. Against this backdrop we deal with the issues described in the second, third and fourth paragraphs of the Court's Directions.

F. THE COURT'S DIRECTIONS

Direction para 3(a): whether the Supreme Court of Appeal correctly applied *Oudekraal* and *Kirland*

98. This question is answered affirmatively with reference to **section C** above.

Direction para 3(b): does Part B of Schedule 4 of the Constitution confer the power to supply water to industrial entities on the local sphere of government?

99. The relevant local government matter in Part B of Schedule 4 reads:

> *"Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems."*

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[142] AngloGold has at all times contended that its request was made in terms of both sections 6 (domestic water) and 7 (industrial water), and was so found by the High Court- Judgment *a quo* vol 5 para 27 p407. This finding was impliedly accepted by the SCA- see judgment vol 5 para 13 lines 18-21.

[143] This argument was not raised in the High Court and was raised for the first time in the SCA. The argument was summarised by the SCA but not dealt with because of Merafong's failure to challenge the Minister's ruling – SCA judgment vol 5 paras 14 and 15 p457-458.

100. This Court has cautioned that in the interpretation of a Constitution respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.[144] Potable water must be given its normal and ordinary meaning, which is '*drinkable*'.

101. The separation of the functional areas in Schedules 4 and 5 is not absolute.[145] The contextual setting found in Part B of Schedule 4 does not provide a complete answer to the question posed in Direction para 3(b). While there are matters which are unmistakably limited to local government (municipal airports, municipal planning, municipal health services, municipal public transport, municipal public works – as restricted – and, arguably, local tourism and fire-fighting services). Others (air pollution, building regulations, child care facilities, electricity and gas reticulation and harbours) are equally regulated by national government.[146] Application of the *maxim expressio unius est exclusio alterius*[147] provides a guide to the textual interpretation, but is not conclusive. We say this because in the instant case the water supplied to AngloGold by Rand Water is potable water which AngloGold uses partly for domestic purposes and partly for industrial purposes. The wording in Part 4 of Schedule B refers not to '*potable water*' but to '*potable water supply systems and domestic waste water and sewage disposal systems*'. This wording is not replicated in the WSA, which uses such terms as '*water services work'* which, in broad

[144] **S v Zuma & Others** 1995 (2) SA 642 (CC) [13]-[15].
[145] **Ex Parte President of the RSA: Constitutionality of the Liquor Bill** 2000 (1) SA 732 (CC) [69].
[146] Steytler and De Visser "Local Government" in Woolman & Bishop (eds) **Constitutional Law of South Africa** (2nd Ed) p22-35 to 22-36.
[147] **Beaver Marine (Pty) Ltd v Wuest** [1998] 4 All SA 641 (A) at 646.

terms covers structures for the storage and conveyance of water services (domestic water) and water for industrial use.[148]

102. The minority judgment of Justice O'Regan in **Democratic Alliance & Another v Masondo NO & Another**[149] expresses the vision of the Constitution that local government is the primary tier of government and that closest to the people.[150] Interpreting section 160 of the Constitution Justice O'Regan adds that the nature of the functions of local government are matters concerning delivery of services and facilities to local communities such as power, water, waste management, parks and planning matters. Decisions made by municipal councils will ordinarily be decisions which have direct effect on the lives and opportunities of those living in the area.[151]

103. We understand the question posed in para 3(b) of the directions to refer to water for industrial use (as referred to in section 7 of the WSA), although we recognise that the reference is to the supply of water '*to industrial entities'*. We answer this question in the following manner:

103.1. The primary control and executive authority over water for industrial use (as defined in the WSA) is that of national

[148] Section 1 of the WSA, sv "water services work".
[149] **Democratic Alliance & Another v Masondo NO & Another** 2003 (2) SA 413 (CC).
[150] Id [55].
[151] [60]. We submit that there is nothing in these statements which is at odds with the majority judgment.

government as contemplated in section 155(7) of the Constitution.[152]

103.2. The executive authority of local government to supply water (including supply through a water services provider/ water board) is restricted to potable water.

103.3. Where local government supplies potable water to an industrial entity such as a mine, this supply, for the purposes of the Constitution and the WSA should be regarded as water for industrial use as defined in the WSA, and excluded from the executive authority of local Government.

103.4. The supply of water to industrial entities by local government is legally valid, subject to the qualification in 37.5.3 above.

Direction 3(c): whether section 8(9) of the water Services Act 108 of 1997 is invalid

104. The powers of appeal conferred by the WSA on the Minister are constrained in the following manner:

104.1. A water services authority whose approval is required in terms of section 6 or section 7 may not unreasonably withhold the

[152] Mining is a matter of national strategic importance The State is the custodian of South Africa's mineral and petroleum resources which belong to the nation. See the Preamble read with section 3 of the Mineral and Petroleum Resources Development Act 28 of 2002.

approval,[153] and may give the approval subject to reasonable conditions.[154]

104.2. In determining what is reasonable in terms of subsections (1)(a) and (b) a water services authority must consider certain factors (including the cost and practicality of providing the water services[155] and may consider any other relevant factor.[156]

104.3. A person who has made an application in terms of section 6 or 7 may appeal to the Minister against any decision, including any condition imposed in respect of that application.[157]

104.4. The Minister may on appeal confirm, vary or overturn any decision of the water services authority concerned.

104.5. An appeal against a decision of a water services authority is only competent against the unreasonable withholding of approval or the imposition of conditions which are not reasonable.[158] Variation would be limited to conditions which are not reasonable, and overturning would be limited to an unreasonable withholding of approval. This is no more than a broad management and controlling function. This is the exercise of concurrent national legislative competence as contemplated in Schedule 4 Part B of the Constitution, and is also the exercise of executive authority to

[153] Section 8(1)(a).
[154] Section 9(1)(b).
[155] Section 8(3)(a).
[156] Section 8(3)(b).
[157] Section 8(4).
[158] Section 8(1) read with 8(4).

see to the effective performance by a municipality of its functions in respect of potable water in section 155(7) of the Constitution.

105. In its heads of argument Merafong seeks to make something of AngloGold's appeal to the Minister in terms of section 8(9) of the WSA and of the Minister's ruling.[159] There is nothing peculiar about AngloGold's objection to the tariff structure imposed by Merafong.[160] AngloGold's appeal was against the condition attached to Merafong's approval in terms of section 8(1)(b) of the WSA. In its heads before this Court Merafong seeks to alter its stance of whether approval was given. It has been common cause until now that Merafong's response to AngloGold's application had been approval.[161] Now, for reasons that are not clear, Merafong seeks to withdraw its admission and says that it refused to accede to AngloGold's request.[162] Merafong's letter of 31 May 2004[163] in response to AngloGold's application was unmistakably an approval, as appears from the header to the letter, 'APPROVAL TO BE SUPPLIED WITH WATER'.

106. This legislative authority of national government extends, for the reasons already submitted, to the supply of both domestic/potable water and water for industrial use to industrial entities such as AngloGold. The power of the Minister to ensure that approvals are neither unreasonably withheld nor are

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[159] Heads para 97.
[160] "FA4.2" vol 1 p46-47, "FA5" p48-51.
[161] Founding affidavit vol 1 para 16 p15, answering affidavit vol 2 para 145.2 p166. Kubushi J held that AngloGold's application was refused – High Court judgment vol 5 para 37 p411. AngloGold respectfully contends that this finding was wrong.
[162] Merafong's heads of argument, p 5 para 12.
[163] "FA4.2" vol 1 p 46.

subject to unreasonable conditions is the power to define or regulate the executive authority of local Government. [164]

107. AngloGold contends that section 8(9) of the Water Services Act is not invalid.

Direction 3(d): whether it was competent for the High Court to order the applicant to comply with the Minister's appeal ruling of 18 July 2005

108. We deal with this question as if the first three questions in the directions have been answered favourably to AngloGold. We also assume that the Minister's ruling of 18 July 2005 is valid.

109. The relief sought by AngloGold is essentially a *mandamus.* An order is sought directing Merafong to comply with the Minister's ruling [165] and interdicting Merafong from charging AngloGold for water used for industrial use[166] and for domestic use.[167]

110. The order of the High Court rephrased the relief sought in the notice of motion, but does no more than grant the primary relief sought by AngloGold, namely enforcement of the ruling.[168] It is not disputed that Merafong has never complied with the Minister's ruling, and its attitude is that it may ignore this ruling.

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[164] **Robertson** [60] to [62].
[165] Notice of motion vol 1 p 2 para 2.
[166] Notice of motion vol 1 p 2 para 3.
[167] Notice of motion para 4 p2. The relief in para 1 of the notice of motion was not granted by the High Court: vol 5 para 83 p425-426.
[168] High Court judgment vol 5 para 83a p 425.

111. The interdictory relief contained in paragraphs 83 a(i), (ii) and (iii) of the High Court judgment is aimed at judicial enforcement of the Minister's ruling made in terms of section 8(9) of the WSA. It was necessary for this relief to be granted because of Merafong's attitude to the ruling.

112. A Court is entitled to grant an interdict for contravention of a statutory provision.[169] [170] A Court generally has the discretion as to whether an interdict should be granted. In the instant case Merafong ignored the Minister's ruling from July 2005, and up to the present time persists with its attitude that the ruling is invalid. We submit that without the sanction of a Court order there is every reason to fear that Merafong will continue to defy the ruling.

113. The Minister's ruling required Merafong, AngloGold and Rand Water to negotiate a reasonable tariff on water used by AngloGold for domestic purposes. The Minister's ruling (echoed in the High Court judgment[171]) seeks to give effect to the preference that competing rights and interests should be resolved by engagement between the parties.[172] The process of engagement did not resolve matters and AngloGold accordingly approached the High Court for relief.

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[169] **Bitou Local Municipality v Timber Two Processes CC & Another** 2009 (5) SA 618(C) [23]-[31], **Booth & Others NNO v Minister of Local Government, Environmental Affairs and Development Planning & Another** 2013 (4) SA 519 (WCC) [63]-[66].
[170] AngloGold does not contend that Merafong was guilty of any criminal conduct.
[171] Para 83 a (iii).
[172] **Schubart Park Residents' Association & Others v City of Tshwane Metropolitan Municipality & Another** 2013 (1) SA 323 (CC) [42]-[44].

114. We submit that there can be no grounds for Merafong to ask a Court to exercise its discretion against the grant of the relief sought. Merafong's conduct is contrary to the principle of legality and contravenes the duty of co-operative government in section 41(1)(e) and (f) of the Constitution. Merafong has to date taken no steps to have the Ministers ruling set aside on review, and this matter is not before the Court.

115. AngloGold contends that it was competent for the High Court to order the applicant to comply with the Minister's ruling.

G. CONCLUSION

116. For the reasons given above, we submit that the application for leave to appeal falls to be dismissed with costs, including the costs of two counsel.

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I B CURRIE
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Sandton Chambers
27 November 2015