



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 338/2022

In the matter between:

**GOLDEN CORE TRADE
AND INVEST (PTY) LTD**

APPELLANT

and

**MERAFONG CITY
LOCAL MUNICIPALITY**

FIRST RESPONDENT

**MINISTER OF WATER AND SANITATION
(Originally the Minister of Water Affairs
and Forestry)**

SECOND RESPONDENT

Neutral Citation: *Golden Core Trade and Invest (Pty) Ltd v Merafong City
Local Municipality and Another* (338/2022) [2023] ZASCA
126 (29 September 2023)

Coram: CARELSE, MEYER, MATOJANE and WEINER JJA and
UNTERHALTER AJA

Heard: 8 May 2023

Delivered: 29 September 2023

Summary: Administrative law – delay – legality review– reactive challenge – s 8(9) of the Water Services Act 108 of 1977 – whether the high court erred in overlooking the first respondent’s long delay in reviewing the Minister’s decision in terms of s 8(9) of the Water Services Act – whether the Minister’s decision should be enforced – the reactive challenge and review as to whether s 8(9) of the Water Services Act provides the Minister with authority to interfere with the Municipality’s imposition of surcharges in respect of the supply of water for industrial and domestic use.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Strydom J, sitting as a court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The judgment of the high court is set aside and replaced with the following:

2.1 The first respondent's review application is dismissed with costs, including the costs of two counsel.

2.2 It is declared that:

2.2.1 The tariff imposed by the first respondent for the supply of water to the appellant for industrial use, in the period 1 July 2004 until the promulgation and imposition of a new tariff of application to such supply, was unlawful.

2.2.2 The tariff imposed by the first respondent for the supply of water to the appellant for domestic use, in the period 1 July 2004 until the promulgation and imposition of a new tariff of application to such supply, was unlawful.

2.3 The first respondent is ordered to pay the appellant's costs, including the costs:

2.3.1 in the proceedings of the High Court in 2013 and in 2021 under case number: 23558/2011, including the costs of two counsel;

2.3.2 in the proceedings of the Supreme Court of Appeal under case number: 20265/14 in 2015, including the costs of two counsel; and

2.3.3 in the proceedings of the Constitutional Court under case number: 106/2015 in 2019, including the costs of two counsel.

JUDGMENT

Meyer JA and Unterhalter AJA (Carelse, Matojane and Weiner JJA concurring):

Introduction

[1] This appeal challenges the judgment and order of the Gauteng Division of the High Court, Pretoria, per Strydom J, delivered on 22 November 2021 (the high court redux). It: (a) dismissed with costs, including those of two counsel, an application for a declarator brought by the appellant, AngloGold Ashanti Limited, substituted by Golden Core Trade and Invest (Pty) Ltd on 1 April 2020 in terms of r 15(2) of the Uniform Rules of Court (AngloGold), against the first respondent, Merafong City Local Municipality (the Municipality); (b) condoned the Municipality's late filing of its counter-application for the review of a decision of the second respondent, the Minister of Water and Sanitation (the Minister); (c) upheld with costs, including those of two counsel, the Municipality's counter-application for the review and setting aside of the Minister's ruling made on 18 July 2005 (the Minister's decision); and (d) made no order as to costs against the Minister. The appeal is with leave of the high court redux.

[2] The Minister's decision set aside the Municipality's tariffs imposed upon AngloGold for the supply of water for industrial and domestic use. The questions on appeal are whether the high court redux erred in: (a) overlooking the delay of the Municipality in the initiation of its review of the Minister's decision taken in terms s 8(9) of the Water Services Act 108 of 1997 (the Act); (b) upholding the Municipality's review; and in (c) dismissing AngloGold's application for declaratory relief.

Factual background

[3] Since 1958, the Tautona, Mponeng, and Savuka mines of AngloGold in Carletonville have produced gold. Rand Water (formerly Rand Water Board)¹ has always provided it with potable water in bulk. AngloGold uses water for drilling, rock handling, cooling, transportation, and as a solvent in their metallurgical process. It provides domestic water to four hostels accommodating 10,202 migrant workers and 171 dwellings in the mine village, which are occupied by mine workers and their families. It purchases 502,600 kl of potable water every month, 35% of which is used for industrial and 65% for domestic purposes. Rand Water's reservoirs, pipes, and other equipment supply its water. AngloGold built and maintained infrastructure for water distribution and sewage treatment facilities. Therefore, it considers itself a water supplier.

[4] Parliament passed the Act in December 1997. It recognises the constitutional authority of local government to provide water and sanitation. Municipalities become water services authorities and gradually guarantee that consumers within their jurisdictions have access to water services. The Act makes a distinction between a 'water services authority' and a 'water services provider' of 'water services'. Section 1 defines a 'water services authority' as 'any municipality, including a district or rural council as defined in the Local Government Transition Act 209 of 1993, responsible for ensuring access to water services'. A 'water services provider' is defined as 'any person who provides water services to consumers or to another water services institution, but does not include a water services intermediary'. '[W]ater services' means 'water supply services and sanitation services'. '[W]ater supply services' means 'the abstraction, conveyance, treatment, and distribution of potable water, water

¹ Rand Water is a water board established under Chapter VI (ss 28-50) of the Water Board Statutes (Private) Act 17 of 1950. In terms of s 29 of the Act 'the primary activity of a water board is to provide water services to other water services institutions within its service area'.

intended to be converted to potable water for commercial use but not water or industrial use'. '[S]anitation services' is defined to mean 'the collection, removal, disposal or purification of human excreta, domestic wastewater, sewage and effluent resulting from the use of water for commercial purposes'.

[5] Section 4 mandates that '[w]ater services must be provided under the conditions of the water services provider.'² Section 6(1) stipulates that '. . . no person may use water services from a source other than a water services provider nominated by the water services authority having jurisdiction in the area in question, without the approval of that water services authority.'³ Section 7(1)

² Section 4 reads:

'4(1) Water services must be provided in terms of conditions set by the water services provider.

(2) These conditions must—

- (a) be accessible to the public;
- (b) accord with conditions for the provision of water services contained in bylaws made by the water services authority having jurisdiction in the area in question; and
- (c) provide for—
 - (i) the technical conditions of existing or proposed extensions of supply;
 - (ii) the determination and structure of tariffs;
 - (iii) the conditions for payment;
 - (iv) the circumstances under which water services may be limited or discontinued;
 - (v) procedures for limiting or discontinuing water services; and
 - (vi) measures to promote water conservation and demand management.

(3) Procedures for the limitation or discontinuation of water services must—

- (a) be fair and equitable;
- (b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless—
 - (i) other consumers would be prejudiced;
 - (ii) there is an emergency situation; or
 - (iii) the consumer has interfered with a limited or discontinued service; and
- (c) not result in a person being denied access to basic water services for nonpayment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.

(4) Every person who uses water services provided by a water services provider does so subject to any applicable condition set by that water services provider.

(5) Where one water services institution provides water services to another water services institution, it may not limit or discontinue those services for reasons of nonpayment, unless it has given at least 30 days' notice in writing of its intention to limit water services or 60 days' notice in writing of its intention to discontinue those water services to—

- (a) the other water services institution;
- (b) the relevant Province; and
- (c) the Minister.'

³ Section 6 reads:

'6. Access to water services through nominated water services provider.—

(1) Subject to subsection (2), no person may use water services from a source other than a water services provider nominated by the water services authority having jurisdiction in the area in question, without the approval of that water services authority.

provides that ‘. . . no person may obtain water for industrial use from any source other than the distribution system of a water services provider nominated by the water services authority with jurisdiction in the area in question, without the approval of that water services authority.’⁴ Section 8 prescribes the procedure for the approval by a water services authority of applications submitted in accordance with ss 6 and 7, which may not be denied unreasonably and may be granted with reasonable conditions. A person who has made an application pursuant to ss 6 or 7 may appeal any decision, including any condition imposed by the water services authority in relation to the application, under s 8(4). On appeal, s 8(9) empowers the Minister to ‘confirm, vary, or overturn’ any water services authority decision.⁵

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- (2) A person who, at the commencement of this Act, was using water services from a source other than one nominated by the relevant water services authority, may continue to do so—
 - (a) for a period of 60 days after the relevant water services authority has requested the person to apply for approval; and
 - (b) if the person complies with a request in terms of paragraph (a) within the 60 day period, until—
 - (i) the application for approval is granted, after which the conditions of the approval will apply; or
 - (ii) the expiry of a reasonable period determined by the water services authority, if the application for approval is refused.’

⁴ Section 7 reads:

- ‘(1) Subject to subsection (3), no person may obtain water for industrial use from any source other than the distribution system of a water services provider nominated by the water services authority having jurisdiction in the area in question, without the approval of that water services authority.
- (2) Subject to subsection (3), no person may dispose of industrial effluent in any manner other than that approved by the water services provider nominated by the water services authority having jurisdiction in the area in question.
- (3) A person who, at the commencement of this Act, obtains water for industrial use or disposes of industrial effluent from a source or in a manner requiring the approval of a water services authority under subsection (1) or (2), may continue to do so—
 - (a) for a period of 60 days after the relevant water services authority has requested the person to apply for approval; or
 - (b) if the person complies with a request in terms of paragraph (a) within the 60 day period, until—
 - (i) the application for approval is granted, after which the conditions of the approval will apply; or
 - (ii) the expiry of a reasonable period determined by the water services authority, if the application for approval is refused.
- (4) No approval given by a water services authority under this section relieves anyone from complying with any other law relating to-
 - (a) the use and conservation of water and water resources; or
 - (b) the disposal of effluent.’

⁵ Section 8 reads:

- ‘(1) A water services authority whose approval is required in terms of section 6 or 7—
 - (a) may not unreasonably withhold the approval; and
 - (b) may give the approval subject to reasonable conditions.
- (2) A water services authority may require a person seeking approval to provide water services to others on reasonable terms, including terms relating to—
 - (a) payment for the services; and
 - (b) compensation for the cost of reticulation and any other costs incurred in providing the water service.
- (3) In determining what is reasonable under subsections (1)(a), (1)(b) and (2), a water services authority—

[6] In July 2003, the Department of Water Affairs and Forestry accepted the Strategic Framework paper, thereby constituting municipalities as water services authorities. On 11 February 2004, AngloGold and other mines received written notification from the Municipality. It informed them that, as of 1 July 2003, it became a water services authority. It also requested that they apply for approval to be provided with water for industrial use, per s 7 of the Act.

[7] On 8 April 2004, AngloGold requested permission from the Municipality to continue purchasing water from Rand Water for its mining and domestic use on the basis of Rand Water's tariffs and conditions. On 31 May 2004, the Municipality responded in writing. It said that Rand Water may supply water directly to the mines, charge and collect water sales revenue, and manage water quality and other technical issues. It also set significantly higher tariffs than those of Rand Water for water provided to the mines. It approved AngloGold's water

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- (a) must consider the following factors, to the extent that the water services authority considers them to be relevant:
 - (i) The cost of providing;
 - (ii) the practicability of providing;
 - (iii) the quality of;
 - (iv) the reliability of;
 - (v) the financial, technological and managerial advisability of providing;
 - (vi) the economic and financial efficiency of; and
 - (vii) the socio-economic and conservation benefits that may be achieved by providing the water services in question; and
 - (b) may consider any other relevant factor.
 - (4) 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.
 - (5) An appellant, under subsection (4), must note an appeal by lodging a written notice of appeal with—
 - (a) the Minister; and
 - (b) the person against whose decision the appeal is made, within 21 days of the appellant becoming aware of the decision.
 - (6) A person who has made an application in terms of section 6 or 7 may appeal to the Minister if the water services authority in question fails to take a decision on the application within a reasonable time.
 - (7) An appeal under subsection (6)—
 - (a) must be conducted as if the application had been refused; and
 - (b) must be noted by lodging a written notice of appeal with the Minister and the water services authority in question.
 - (8) A relevant Province may intervene as a party in an appeal under subsection (4) or (6).
 - (9) The Minister may on appeal confirm, vary or overturn any decision of the water services authority concerned.
 - (10) The Minister may prescribe the procedure for conducting an appeal under this section.'

supply application, with effect from 1 July 2004, under these conditions. It concluded by advising AngloGold of its right to a ministerial appeal.

[8] On 11 June 2004, AngloGold filed an appeal in terms of s 8(4) appeal with the Minister. Its main complaints were that: (a) the Municipality's tariff was excessively higher than the equivalent Rand Water tariff (R498 599 per month), while the Municipality was not adding any value to, or assuming any responsibility for any aspect of the water supply; and (b) the Municipality failed to recognise AngloGold's role as a water services provider or make any attempt, other than requesting information on its mines' consumption, to understand its economic situation.

[9] On 18 July 2005, the Minister upheld the appeal and ruled that the premium established in respect of the water price for industrial usage was unreasonable, because the Municipality provided no value for the services given to AngloGold by Rand Water. She concluded that a surcharge could only be assessed on the share of water used by the mines for domestic purposes and not for industrial ones, '[s]ince water for industrial use is not designated as a municipal service in terms of section 1(xxv) of the [Act]'. The Minister overturned 'the surcharge on water for industrial use'. She also directed AngloGold and Rand Water to negotiate a reasonable tariff for AngloGold's domestic water use.

[10] The Municipality's attorney provided a detailed legal opinion on 5 September 2005. The Municipality was advised that the Minister could not set rates or interfere with municipal tariff-setting and such interference was void in law. He recommended that the Minister be requested to reverse her decision. The Municipality sent the opinion to the Minister on 31 October 2005. It again brought the opinion to her attention on 3 March 2006, as well as on

24 October 2007. Multiple attempts were made to meet with the Minister. Those she called, in response, were postponed or cancelled at her request and never held.

[11] In accordance with the directive of the Minister, the Municipality interacted with the mining houses, including AngloGold. From September 2005 to October 2007, it conducted meetings with them and Rand Water. In the end, no agreement was reached. The Municipality declared a formal dispute with the Minister concerning her decision of 30 March 2006. Section 41(3) of the Constitution stipulates that a state entity involved in an intergovernmental dispute must exhaust all reasonable efforts to resolve it before going to court. Section 40(1) of the Intergovernmental Relations Framework Act 13 of 2005 (the IGRF Act), requires organs of state to attempt to resolve their disputes by cooperation before resorting to legal action.

[12] The Municipality continued to enforce the tariffs imposed by it upon AngloGold for the supply of water for industrial and domestic use. AngloGold responded by withholding the contested portion of the tariffs. In September 2007, the Municipality demanded that AngloGold pay the arrears or face measures to curtail water supply to its mining operations. If its water supply had been drastically curtailed, the mining operations would suffer severely. As a result, AngloGold complied with the demand and paid the disputed surcharge and arrears under protest and without prejudice to its legal rights.

Litigation background

(i) The court of first instance

[13] On 19 April 2011, AngloGold initiated motion proceedings in the Gauteng Division of the High Court, Pretoria (the court of first instance). It sought relief that would require the Municipality to comply with the Minister's decision.

AngloGold maintained that the Minister's decision existed in fact, had legal consequences and the Municipality could not treat it as though it did not exist.⁶

[14] On 3 August 2011, the Municipality filed its opposition and conditional counter-application. It sought declaratory relief, asserting that: (a) it has exclusive executive authority to set, adopt and implement tariffs for the provision of water services within its area of jurisdiction, including surcharges; and (b) the Act does not give the Minister authority 'to interfere with a tariff set and implemented' by it for the provision of water services. Alternatively, it argued that s 8(9) of the Act, which governs ministerial appeals, is unconstitutional and invalid.

[15] The court of first instance (Kubushi J) granted AngloGold's application on 26 February 2014, and dismissed the Municipality's counter-application. It found that Anglo-Gold legitimately applied to the Municipality under ss 6 and 7 of the Act and that the Minister lawfully exercised her appellate power under s 8. Even if the Minister's decision was impugnable, the court of first instance said, it remained binding on the Minister until overturned by the court.

(ii) The Supreme Court of Appeal

[16] This Court upheld the court of first-instance's decision on appeal.⁷ It held that: (a) the municipality was required to seek judicial review of the Minister's decision; (b) it violated the principle of legality by simply ignoring it; (c) its failure to challenge the Minister's decision in judicial review proceedings, rather than attacking the empowering statutory provision, posed an insurmountable difficulty for it; and (d) a collateral challenge to the validity of an administrative act is a remedy available only to an individual.

⁶ It relied on *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para 40.

⁷ *Merafong City Local Municipality v AngloGold Ashanti Limited* [2015] ZASCA 85; 2016 (2) 176 (SCA) (*Merafong SCA*).

(iii) The Constitutional Court

[17] In a subsequent appeal to the Constitutional Court,⁸ the Municipality's primary argument was that there is a fundamental distinction between administrative decisions that: (a) belong within the scope of powers with which a public official is vested but are merely erroneously taken; and (b) appear to be outside the decision-maker's authority. It argued that a person or entity subject to a decision in the second category can disregard it until it is enforced against them, at which point it can use the decision's invalidity as a defence.

[18] The majority of the Constitutional Court disagreed with this Court's position as to who can bring a reactive challenge. Cameron J, writing for the majority, held that the Constitution, logic, and our case law provides insufficient support for a doctrinal limitation as to who can bring a reactive challenge. The Constitutional Court ultimately concluded that this Court erred in holding that a municipality could not raise a reactive challenge. The Constitutional Court nevertheless recognised that the Municipality should either have accepted the Minister's decision as valid or challenge it in court by way of a review. By deciding not to comply with the Minister's decision, the Municipality was engaged in self-help. The Constitutional Court remitted the Municipality's reactive challenge and review to the high court.

High court redux proceedings

[19] As a result of the Constitutional Court's remittal order, the record of the Minister's decision was filed. The Municipality amended its notice of motion in which it sought, *inter alia*, condonation for the late institution of its reactive challenge and its review and setting aside the Minister's decision. In the

⁸ *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (*Merafong CC*).

introductory section of its supplementary affidavit, the Municipality stated unequivocally that its challenge to the Minister's decision was brought under PAJA and, alternatively, under the principle of legality. Its PAJA review was founded on the grounds that the Minister's decision was: (a) based on and informed by a material error of law in respect of her functions and authority to intervene in an exclusive municipal competence; and (b) irrational and/or constituted a material error of law, in that she ruled that the Municipality could not levy a surcharge, ignoring the legally competent authority of a Municipality to effect cross-subsidisation across its tax base. The basis for its legality review was that the Minister's decision interfered with the Municipality's exclusive constitutional authority, under s 156(1) of the Constitution, to implement municipal property rates, municipal tariffs and levy surcharges.

High court redux judgment

[20] In a judgment delivered on 22 November 2021,⁹ the high court redux evaluated the question of delay, including the merits, in the context of a legality review. Regarding the approximately 13-year period of delay, the high court redux distinguished between the initial six-year period - between the date of the Minister's decision on 18 July 2005 and the filing of the Municipality's answering affidavit and counter-application in response to AngloGold's application on 11 August 2011 - and the subsequent seven-year period before the municipality amended its counter-application on 12 July 2017, by adding a prayer for judicial review. It held that the delay in the first period was unreasonable or undue, but not the delay in the second period.

[21] The high court redux then considered whether it should exercise its discretion to overlook the delay and entertain the review. In doing so, it examined

⁹ *Merafong City Local Municipality v Golden Core Trade Investments (Pty) Ltd and Another* [2021] ZAGPPHC 805 (*Merafong HC*).

the nature of the Minister's decision, the merits of the legal challenge brought against it, the potential prejudice to affected parties and the repercussions of setting it aside, as well as the Municipality's conduct. It considered the merits of the legal challenge to be decisive and concluded that the Municipality's delay in filing the review application should be condoned.

[22] The high court *redux* found that the Minister, in taking the impugned decision, exceeded the limits of the authority vested in her under s 8(9) of the Act, and that her decision must be reviewed and set aside as unlawful and invalid on the basis of the principle of legality. It also found the Minister's act in making the contested decision, to be unconstitutional and, as such, that it should be deemed null and void in accordance with s 172(1)(a) of the Constitution.

Constitutional challenge against s 8(9) of the Act

[23] Concerning the municipality's argument that s 8(9) of the Act is constitutionally invalid, the majority judgment of the Constitutional Court states: 'I should add that it is also inapposite for this Court to determine Merafong's constitutional challenge. Merafong avowedly did not persist in this before the SCA. Before us, it did not mention the issue in its written argument, nor did it allude to it in oral argument. When counsel for Merafong was asked about it, he averred simply "it's alive on the papers". This Court invited submissions from the Minister, who had not appeared in the High Court and SCA. The Court itself here inquired about the constitutional point. The Minister urged that the point not be decided. But Merafong now seized the opportunity to assert that it could be decided. That is belated opportunism the Court should not countenance. Since Merafong had in effect let the point lie, so far as not even to make written or oral submissions on it, it is not in the interests of justice to allow it to now try to resuscitate it. In any event, counsel for Merafong submitted in oral argument that the constitutional point was "conditional on this Court finding that the Minister's decision was lawful - that she had jurisdiction in terms of the Act to make the decision". Since, for the reasons I have set out we relay that very question to the High Court,

it follows that, even on Merafong's approach, the constitutional point should be decided only later.'¹⁰

[24] On the court day preceding the further high court hearing, the Municipality included a prayer in its counter-application for a declaration of constitutional invalidity of s 8(9). In the light of its finding that s 8(9) did not empower the Minister to interfere with the Municipality's authority to determine the tariffs, including surcharges, for AngloGold's water supply, the high court deemed it superfluous to examine the constitutionality of s 8(9). Nonetheless, the high court made the following observation:

'I am in agreement with the submission on behalf of AngloGold that if a serious challenge to the constitutionality of an act of Parliament is to be made, then this must be raised pertinently, with full and proper motivation and demonstrating clearly why a declaration of unconstitutionality should be made. The constitutional challenge raised by Merafong was more in the context of a legality challenge aimed against the decision of the Minister which was made in conflict of the Constitution. The burden of an applicant who wants to attack the constitutionality of an Act of Parliament will include satisfying the court that the subsection cannot sensibly be interpreted in a manner consistent with the Constitution but must ineluctably be declared to be unconstitutional. Moreover, a prayer for a declaration of constitutional invalidity of section 8(9) was only inserted before this application was heard by this court.'¹¹

[25] We cannot fault the high court's position: The Municipality's last-minute attempt to introduce a claim for a declaration of constitutional invalidity of s 8(9) should not be countenanced, also due to the unambiguous formulation of the Municipality's cause of action in its supplementary affidavit as a reactive challenge against the Minister's decision based on the provisions of PAJA alternatively legality.¹²

¹⁰ *Merafong CC* para 82.

¹¹ *Merafong HC* para 150.

¹² Pursuant to the Constitutional Court's remittal order, a supplementary affidavit on behalf of the Minister was filed in accordance with that order. Therein it is made clear that she abided the decision of the court. She refrained from entering the controversy regarding condonation and Merafong's counter-application for review. Submissions were only made on her behalf in the event of the court reaching the constitutional issue.

Delay

[26] The majority of the Constitutional Court in *Merafong CC* held that while the Municipality was not precluded from bringing a reactive challenge, the Municipality was required to show that its challenge should be entertained, notwithstanding its delay.¹³ So too, *Merafong CC* decided that the Municipality was obliged to institute proceedings to review the Minister's decision, whether under PAJA or by way of legality review. Whether that review is precluded by reason of the Municipality's delay is also a threshold question for determination.¹⁴ *Merafong CC* remitted the matter to the high court. The high court redux to which the matter was remitted held that although the Municipality's explanation for its delay was wanting, the delay should nevertheless be overlooked, and its review entertained. What weighed most strongly with the high court redux was its conclusion that the Municipality's review had merit, and that the delay in bringing the review should not stand in the way of deciding the review.

[27] Whether the high court redux was correct to do so, is the first question before us. The appellant contended that the high court redux was in error, the Municipality submitted it was not. The Municipality, however, raises a preliminary point. It submitted that the high court redux exercised a discretion to decide the review, and overlook the delay. This Court, it contended, cannot interfere with the exercise of that discretion, even if we should consider that the high court redux came to the wrong conclusion, unless we find that the discretion was not properly exercised, and there is no basis to do so.

[28] The preliminary point is unavailing. Appellate courts, including the Constitutional Court, many times over, have considered whether the high court

¹³ *Merafong CC* para 72.

¹⁴ *Ibid* para 73.

reached the correct conclusion on the question of delay.¹⁵ That position is entirely principled. Whether a court should entertain a review is a question of jurisdiction. A court is required to find that the delay is not unreasonable or that it may nevertheless be overlooked to permit the review to be decided. That is not the exercise of a discretion requiring special deference by an appellate court. On the contrary, the appellate court must be satisfied that the court's powers of judicial review can be exercised. Hence, the question of delay is a threshold issue, as to which this court must be satisfied that the high court *redux* came to the correct conclusion. It is to this issue that we now turn.

[29] The Municipality, following the decision of *Merafong CC*, amended its conditional counter-application and sought to review and set aside the Minister's decision. It also applied for condonation. It brought a legality review, as also a review under PAJA. There are certain differences in the approach to delay under legality review and in a PAJA review,¹⁶ but the two-step test laid down in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (Khumalo)*¹⁷ was rightly adopted by the high court *redux* to decide whether to entertain the Municipality's legality review. The fixed period of 180 days does not apply to a legality review, and so the two-step test is somewhat more favourable to the Municipality.

[30] The two-step test requires a court to answer two questions. Is the delay unreasonable or undue? If it is, should the court overlook the delay? The high court *redux* found the delay of the Municipality to be undue, though the Municipality's explanation of its delay fell only 'just short' of a reasonable

¹⁵ See for example *Department of Transport & Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) paras 160 – 171.

¹⁶ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at paragraphs 46-51

¹⁷ *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) paras 49 - 52.

explanation. However, other considerations, and, in particular, the merits of the Municipality's review, led the high court *redux* to overlook the delay, decide the review, and uphold it.

[31] On 18 July 2005, the Minister upheld the appeal that AngloGold had lodged with her. The Municipality brought its review on 12 July 2017, just shy of 13 years later. That is a very long time. It places a burden upon the Municipality to explain its lengthy delay and justify why a court should be moved to exercise its powers of judicial review, when the challenged decision was in place and binding upon the Municipality for so long a period of time.

[32] The Municipality divides the period into two. The first period is the six years from the Minister's decision to the launch of its conditional counter-application brought in August 2011, in response to AngloGold's application of April 2011 to enforce the Minister's decision. The counter-application did not seek to review the Minister's decision. I will refer to this as the first period. The Municipality then defines a second period, after August 2011, until it amended its counter-application on 12 July 2017 to review the Minister's decision. I will refer to this as the second period.

[33] Central to the explanation offered by the Municipality, as to why it did not seek to review the decision of the Minister in the first period, is the reliance it placed upon the advice given to it by its attorney, Mr Nalane. His advice, the Municipality explained, was that the Minister's decision was invalid, and may be ignored. And hence there was no need to move a court to set the Minister's decision aside.

[34] After the Minister gave her decision on 18 July 2005, Mr Nalane on 8 September 2005 furnished the Municipality with an opinion. He opined that the

Minister did not enjoy the power to set aside, review or challenge any tariff set by the Municipality. Mr Nalane recommended to his client that the Municipality engage the Minister because ‘both Merafong and the Minister have misconstrued their positions in law as regards the setting of water tariffs’. Mr Nalane then directed correspondence to the Minister on behalf of the municipality, on 23 September 2005, enclosing the opinion, seeking a meeting, and affirming the position that the Municipality and the Minister had ‘misconstrued their positions in law’.

[35] In anticipation of a meeting that was meant to take place with the Minister in February 2006, Mr Nalane composed some introductory remarks. Although the meeting did not take place, the remarks indicate the stance then taken by the Municipality. Mr Nalane concluded that since the position taken by the Minister (that an appeal to the Minister was competent) was wrong in law, the Minister’s letter (that is, her decision) ought to be revoked. And, absent agreement on this, the Minister and the Municipality, as organs of state, ‘. . . are obliged to seek consensus, *before resorting to legal action*’. (Our emphasis.).

[36] There can be little doubt that Mr Nalane recognized that if the Minister would not agree to revoke her decision, legal action would be required to achieve that result. That is, to set aside the Minister’s decision, which Mr Nalane considered to be invalid because the Minister lacked the power to make it.

[37] This was not simply the position of Mr Nalane. It was the position of the Municipality. In a letter from the executive mayor of the Municipality to the Minister, dated 5 April 2006, the following is stated:

‘It has become imperative for us to resolve this matter decisively. *As a result we have obtained an opinion to the effect that we have a case to make in court to overturn your decision.*’

(Our emphasis.)

[38] Although the Municipality sought to resolve its challenge to the validity of the Minister's decision by way of agreement, and through a process of constitutionally obligatory engagement, absent such resolution, the Municipality understood, full well, that it would have to go to court to overturn the Minister's decision. And it would have to do so because an administrative decision, once taken, is binding until it is set aside.

[39] The Municipality thus laboured under no misapprehension that it could simply ignore the Minister's decision on the basis that it had obtained a legal opinion that the decision was invalid. The Minister's decision had to be overturned because, until that was done, the decision was binding.

[40] The Municipality made further efforts to meet with the Minister. It declared a dispute with the Minister under the provisions of the Inter-Governmental Relations Framework Act 13 of 2005 (IFRA). No resolution was achieved. And by August or so of 2006, the Municipality could not reasonably have thought that resolution of the dispute with the Minister could be achieved without recourse to the courts.

[41] The Municipality did not launch review proceedings. It imposed upon AngloGold the very surcharges on water for industrial and domestic use that the Minister had ruled upon in her decision. The Municipality went further. It threatened that it would cut off AngloGold's water supply if it did not pay the tariffs that the Municipality had determined. As the judgment in *Merifong CC* makes plain, this was unconscionable conduct. The Municipality abused its power to exact payment, in the face of an adverse decision of the Minister, which it chose not to review, but rather disobey. And it persisted in this conduct for many years.

[42] Of this, the Municipality submits that Mr Nalane's advice was not to review the decision of the Minister but to ignore it, to the extent of its invalidity. That submission cannot hold. The Municipality's own correspondence shows that it understood that the Minister's decision had to be overturned, either by agreement, and if not, by recourse to the courts.

[43] In the first period, there is no proper explanation for the failure by the Municipality to review the Minister's decision. But worse, the Municipality flouted the law, and used coercive means to secure payment by AngloGold of its tariffs for the supply of water.

[44] On 19 April 2011, AngloGold brought an application in the high court to enforce the Minister's decision. The Municipality brought a conditional counter-application on 3 August 2011. The municipality sought a declarator that it has exclusive authority to set, adopt and implement tariffs for the provision of water services. It also sought a declarator that s 8 of the Act did not confer authority on the Minister to interfere with a tariff set and implemented by the Municipality. Alternatively, it sought to strike down as unconstitutional s 8(9) of the Act in terms of which an appeal lies to the Minister. What the Municipality did not do was to bring proceedings to review and set aside the Minister's decision.

[45] What followed, as we have set out above, was a lengthy progress through the courts, ending up in the Constitutional Court, the decision in *Merafong CC*, and, finally, on 12 July 2017, the municipality amended its notice of motion in its counter-application to review the Minister's decision. Of this second period, the high court redux took a more benign view of the Municipality's conduct. It had at least raised the invalidity of the Minister's decision, and sought relief predicated upon such invalidity. And, the high court redux observed, there

remained a minority position in the Constitutional Court that *Oudekraal* is not authority for the proposition that an invalid administrative act is binding as long as it is not set aside by a competent court. Hence, on this minority view, an administrative action that is *ultra vires* is void from the outset, and it is not necessary to have a court set aside an action that is a nullity. This minority position, at the very least, according to the high court redux, created uncertainty as to the correct position in our law. Indeed, the minority judgment (*per* Jafta J) in *Merafong CC* maintained that an illegal or *ultra vires* administrative act that is void *ab initio*, had no legal force, and could not be complied with.

[46] True enough the Municipality did in its counter-application, in 2011, raise the invalidity of the Minister's decision. However, it did not do so out of any acknowledgement that its conduct prior to 2011 was unconscionable. It did so because it wished to oppose the declaratory relief sought by AngloGold. Its failure to review the Minister's decision was a calculated strategy. In its affidavit in support of the counter-application, the Municipality offers a lengthy account of its efforts to resolve its dispute with the Minister, and its negotiations with the mining houses. What it does not explain is why it considered that it could impose tariffs that were the subject of the Minister's decision, when that decision had not been set aside. Its case rested on the invalidity of the Minister's decision. But that does not explain its clear understanding, set out in its correspondence, that it needed to overturn the Minister's decision. Nor does it claim that this understanding was later dislodged by a newfound adherence to the minority position taken in the Constitutional Court as to the meaning and consequence of *Oudekraal*.

[47] Having chosen not to review the Minister's decision in 2006, and to impose the tariffs in the first period, we do not consider that the Municipality's conduct is more susceptible of reasonable explanation in the second period. The

Municipality was simply required to defend its position in court. It raised invalidity in its counter-application to do so, without in any way recognising or acknowledging that it had conducted itself, knowingly, by taking the law into its own hands.

[48] We find that the delay of the Municipality is unreasonable, and egregiously so. Not simply by reason of the length of the delay, but because the Municipality failed to bring the review, when it clearly understood that it was required to do so. And then resorted to self-help in the face of the Minister's decision.

[49] We turn then to the second question that requires an answer: should the delay have been overlooked, as the high court *redux* considered it should?

[50] The high court *redux* cited *Khumalo*¹⁸ and *Buffalo City*¹⁹ in support of the proposition that in deciding whether to overlook the delay of the applicant who brings its review out of time, the nature of the impugned decision and the merits of the challenge should be taken into account. That is so. However, the high court *redux* considered this an invitation to decide the merits of the Municipality's challenge to the Minister's decision. It decided that the challenge was good. And, having done so, the high court *redux* then considered the prejudice to AngloGold, and found, unsurprisingly, given this line of reasoning, that since the Minister's decision was taken *ultra vires*, AngloGold had paid the tariffs the Municipality was entitled to levy, and hence suffered no prejudice.

¹⁸ *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) para 57.

¹⁹ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 56.

[51] This reasoning is faulty. Whether a delay should be overlooked does not and should not entail a determination of the merits of the review or collateral challenge. The merits of the challenge are to be weighed on the following basis: if the delay is to be overlooked, is there a challenge that warrants the attention of the court. In other words, whether there is a serious question to be decided. To decide the merits assumes the very jurisdiction that is yet to be determined. And more, it inevitably skews the weighing of factors that *Khumalo* requires. On the approach taken by the high court redux, if the merits of the challenge is decided against the applicant, the question of whether to overlook the delay is redundant. If the merits are good, in the sense that the applicant is entitled to succeed and enjoy a remedy, it is vanishingly difficult then to decide not to overlook the delay, and engage in *ex post* reasoning of the kind to which the high court redux had recourse: the Minister had no power to interfere with the setting of tariffs by the Municipality, AngloGold was obliged to pay what it did, and hence suffered no prejudice.

[52] The proper starting point is to consider the nature of the impugned decision. AngloGold in April 2004 had sought the approval of the Municipality, in terms of s 7 of the Act, to continue obtaining water from Rand Water for its mining operations and associated domestic applications at the tariff set, and under the conditions imposed, by Rand Water. In May 2004, the Municipality wrote to AngloGold. It notified AngloGold that it was the water services authority, in terms of the Act, with jurisdiction over the area in which AngloGold operated certain of its mines. The Municipality appointed Rand Water as a water services provider. The Municipality specified particular tariffs as a condition, in terms of s 7 of the Act, for the supply of water to AngloGold, with effect from 1 July 2004. The Municipality also notified AngloGold of its right to appeal the decision of the Municipality to the Minister. On 11 June 2004, AngloGold did so in terms of s 8(4) of the Act. On 18 July 2005, the Minister decided the appeal, and

overturned the decision of the Municipality to impose specified tariffs as a condition of supply.

[53] What was the decision of the Municipality that AngloGold appealed to the Minister? It was not the appointment of Rand Water as a water service provider to supply water to AngloGold. That appointment had been sought by AngloGold and was granted. AngloGold had, in addition, sought approval, under s 7, for Rand Water to continue to supply water for its mining operations and associated domestic applications, ‘at the tariff set by, and under the conditions imposed by Rand Water.’ The decision taken by the Municipality was, in terms of s 7, to approve the supply of water with effect from 1 July 2004 by Rand Water, on the specified condition of particular tariff charges. These charges were as follows: ‘water supplied for operational use will be charged at R4.18 per kilolitre’ and ‘water supplied for domestic use will be charged at 3.91 per kilolitre’. The Municipality explained that ‘[t]hese tariff charges must be seen in the context of the overall municipal tariff structure for the supply of water’ the details of which were then set out.

[54] The condition imposed by the Municipality as to tariffs was materially higher than those applied by Rand Water. Hence the appeal of AngloGold and its description in its notice of appeal of the tariffs ‘announced’ by the Municipality as ‘excessively higher than the equivalent Rand Water tariff’. Thus, at the heart of the appeal was the decision of the Municipality to impose specific tariffs for the supply of water to AngloGold by Rand Water.

[55] Those tariffs, as the decision of the Municipality made clear, were determined by reference to the Municipality’s overall municipal tariff structure. They were tariffs of application in 2004/2005. The affidavits of the parties explain however that after the decision of the Municipality in May of 2004, and the

Minister's decision in the appeal in July of 2005, the Municipality and AngloGold held further negotiations. In addition, the Municipality, in line with its annual budget, adopted revised tariffs for the financial year 2005/2006. These tariffs were reflected in higher tariffs charged to AngloGold for the supply of water. Later, and from July 2007, the Municipality introduced a uniform tariff for all water consumed. The flat rate included surcharges on water for both domestic and industrial use. Since that time, the tariffs have continued to change by way of further decisions of the Municipality, in successive annual budget cycles.

[56] What then did the Minister's decision in the appeal before her overturn? Whatever the reasons for her decision, the Minister's decision could never do more than that which s 9 of the Act permits. That is, on appeal to 'confirm, vary or overturn *any decision* of the water services authority concerned'. (Our emphasis.) The only decision before the Minister on appeal was the decision of the Municipality to impose a condition as to specified tariffs for the supply of water. However, those tariffs were only of application, until replaced by new tariffs imposed by the Municipality. New tariffs were introduced for the 2005/2006 financial year. It follows that when the Minister set aside the specific tariffs that the municipality had decided upon in 2004, her appeal jurisdiction could not and did not extend beyond the life of these tariffs. When the Municipality introduced new tariffs of application in the 2005/2006 financial year, that decision was beyond the reach of the Minister's appellate decision-making because it was not before her on appeal, and could not have been.

[57] There are important consequences which flow from this finding. The belated review of the Municipality would set aside the decision of the Minister. Such an order would do no more than effect the tariffs charged to AngloGold from 1 July 2004 until the new tariffs were imposed by the Municipality in the next financial year.

[58] The question that then arises is this: should the delay of the Municipality have been overlooked by the high court *redux* so as to entertain the review of the Minister's decision taken in 2005? In our view, there are considerations that count against doing so.

[59] First, the decision of the Minister was taken in the distant past. It set aside tariff charges of application to AngloGold for a limited time. The Municipality failed, culpably, to comply with the Minister's decision. In these circumstances, there is little reason to reward the Municipality for its willingness to flout its duty to comply with the Minister's decision by, many years later, entertaining its review. All the more so, when the Municipality could have reviewed the Minister's decision timeously, should have done so, and chose not to.

[60] Second, both AngloGold and the Municipality, perhaps by reason of the duration of their dispute, have inflated the significance of the issues at stake, and their consequences. True enough, the reasons that the Minister gave for setting aside the tariffs that the Municipality had decided to impose in 2004 appear to have some far-reaching consequences. The Minister reasoned that the supply of water for industrial use is not a municipal service under the Act, and therefore no surcharge can be levied on water for industrial use. She also said of the tariff for water supplied for domestic use that AngloGold and Rand Water should negotiate a reasonable tariff. The Minister is not a court of law. Her reasons are not precedent. What matters is what decision she took. That was restricted to setting aside specific tariffs of application for a limited time. When the Municipality imposed the next set of tariffs, in the 2005/2006 budget cycle, AngloGold was at liberty to appeal them. And the Municipality was at liberty to persuade the Minister of the errors of her reasoning.

[61] Third, there is little question that the review and reactive challenge that the Municipality would pursue raise important questions of law. What powers did the Minister enjoy under s 8 of the Act to decide the appeal before her, and did her decision fall within these powers? How is the regulatory scheme set out in ss 4, 6, 7 and 8 of the Act to be reconciled with the power of the Municipality deriving from s 229 of the Constitution to impose surcharges on fees for services? More generally, how does the regulatory scheme of the Act, at issue in this case, fit into the constitutional framework that recognises a municipality's right to govern, subject to national and provincial legislation, as provided for in the Constitution. (s 151(3) of the Constitution)? And if s 8 of the Act should be found to trespass upon the municipality's right to impose a surcharge beyond what the Constitution permits, what of the Municipality's challenge to the validity of s 8(9) of the Act?

[62] Did these questions warrant the attention of the high court redux? They are, without doubt serious questions. And in the right case, they should be considered by a court. But is this such a case? We think not. True enough, the dispute between AngloGold and the Municipality endured beyond the period in which the Minister's decision was of application. But that does not alter the scope of the order sought by the Municipality's review: to set aside the Minister's decision of 18 July 2005. That decision had no ongoing effect, as we have explained, after the imposition of the 2005/2006 tariffs. There is no warrant to decide important legal questions to resolve a long expired ministerial decision. That is so, moreover, since the Minister was not called upon to exercise her appellate power in the dispute between the parties since 2005.

[63] This consideration is bolstered by the following. The constitutional challenge brought by the Municipality to s 8(9) of the Act was in essence abandoned before the Constitutional Court, and then revived, shortly before the matter was heard before the high court redux. The challenge is not properly

formulated and justified on the papers, as the high court *redux* correctly found. It has figured as an afterthought, and at other stages of the litigation only notionally kept alive. And yet if the legal questions to which we have referred are to be engaged, it would be important that the constitutional challenge is properly formulated and justified, in the event that the issue of the constitutional validity of s 8(9) of the Act is reached.

[64] Nor do we apprehend that there is prejudice to the Municipality. The effect of the Minister's decision has long expired. The tariffs for the water that was supplied to AngloGold were paid to the Municipality, under protest. If the Minister's decision is not reviewed and set aside, the Municipality will remain liable for the consequences of the Minister's decision in setting aside the tariffs that were of application from 1 July 2004 for a short period of time. That has been the status quo for 19 years. Whatever liability attaches to the Municipality is a deserved consequence of its deliberate failure to adhere to the law. We see insufficient basis now to disturb the status quo. Finality must prevail. And the correct order that the high court *redux* should have made was to refuse to entertain the Municipality's review, and dismiss it.²⁰

[65] We conclude that the high court *redux* was incorrect to overlook the delay of the Municipality in bringing its review. That delay was both unreasonable and should not have been overlooked. The review therefore must be dismissed.

[66] What then of the Municipality's reactive challenge? This challenge, as *Merafong CC* has made clear, is also subject to a regime that must consider the question of delay. However, the reactive challenge of the Municipality was

²⁰ *Khumalo and Another v Member of the Executive Council for Education: Kwa-Zulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) *para 44*, *Associated Institutions Pension Fund and Others v van Zyl and Others* [2004] ZASCA 78; [2004] 4 All SA 133 (SCA); 2005(2) SA 302 SCA.

offered as a defence to the relief sought by AngloGold. Whether the Municipality is put to its defence, and, if it is, whether the Municipality's defence should be entertained are the issues to which we now turn.

AngloGold's relief and the Municipality's reactive challenge

[67] In April 2011, Anglogold launched proceedings in the high court to compel the Municipality to comply with the Minister's decision. This application prompted the Municipality to bring its reactive challenge in the form of a conditional counter-application for declaratory relief. The declarator it sought was that the Municipality enjoyed exclusive authority to set, adopt and implement tariffs for the provision of water services in its jurisdiction; and that the Minister did not have the power to interfere with a tariff set and implemented by it.

[68] The court of first instance that first heard the matter granted AngloGold's application and dismissed the Municipality's counter-application. This court sustained that order on appeal. As we have recounted, when the matter went on appeal to the Constitutional Court, *Merafong CC* decided the question of whether the Municipality could raise its reactive challenge, but did not decide the merits of the appeal. Rather, it set aside the orders of the court of first instance and of this court, and remitted the matter back to the high court to determine the lawfulness of the Minister's decision. The high court redux, having upheld the Municipality's review, logically, dismissed the declaratory relief that AngloGold had sought. Plainly, if the Minister's decision had to be set aside, as the high court redux held, then AngloGold could not enforce such a decision.

[69] We however have come to a different conclusion. The Municipality's review cannot be entertained. We must then decide whether AngloGold was entitled to the relief it sought in 2011. That relief was widely framed, as follows:

- ‘1. declaring that the municipality may not levy surcharge on water for industrial and domestic use;
- 2. for the municipality to comply with the minister’s ruling of 18 July 2005, the municipality may not levy surcharge on water for industrial use;
- 3. interdicting the municipality from charging water for industrial use at a price greater than the unit cost of water charged by Rand Water.
- 4. interdicting and restraining the municipality from charging more than the unit cost of water charged by Rand Water pending an agreement being reached as a reasonable tariff for domestic use.
- 5. for the municipality to commence negotiations with AngloGold within 21 days of the order;
- 6. granting leave to AngloGold to approach the court on these papers duly supplemented in the event of no agreement being reached on domestic water, within 90 days from the date of the order for further direction.
- 7. alternatively reviewing and setting aside in terms of PAJA and/or principle of legality the decisions of the municipality made on 31 May 2004 together with the resolution to amend the tariff of charges.
- 8. the municipality to pay costs.’

The relief granted by the high court was as follows:

- ‘a. the first respondent must comply with the minister’s ruling of 18 July 2005, in that:
 - (i) the first respondent may not levy surcharge on water for industrial use;
 - (ii) the first respondent may not levy surcharge on water for domestic use pending an agreement being reached by the first respondent, the applicant and the second respondent for a reasonable tariff; and
 - (iii) the first respondent must commence negotiations with the applicant and the second respondent within 21 days of the order.
- b. The applicant is granted leave to approach the court on these papers duly supplemented in the event of no agreement being reached on domestic water, within 90 days from the date of the order for further direction.
- c. The first respondent must pay costs of litigation in the main application including costs of two counsel.
- d. The first respondent’s conditional counter application is dismissed with costs which costs shall include costs of two counsel.’

[70] Before us, AngloGold submitted that what it had sought before the high court in 2011 was relief to compel the Municipality to comply with the Minister's decision. The relief it now seeks from this court is formulated as follows:

- '1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The judgment of the court *a quo* is set aside and replaced with the following:
 - 2.1. Merafong's review application is dismissed with costs, including the costs of two counsel.
 - 2.2. Merafong is directed forthwith to comply the Minister's decision of 18 July 2005 as follows:
 - 2.2.1. to render monthly charges to Golden Core for water supplied to it for industrial use at no more than the rate charged by Rand Water to Merafong in respect of water for industrial use, from time to time;
 - 2.2.2. to render monthly charges to Golden Core for water supplied to it for domestic use at no more than rate charged by Rand Water to Merafong in respect of water for domestic use, from time to time.
 - 2.3. It is declared that the current rates promulgated and/or imposed by Merafong relating to its supply of water to Golden Core for both domestic and industrial use, shall not be enforceable against Golden Core.
 - 2.4. Merafong is directed to negotiate with Golden Core to reach agreement on a reasonable tariff for the supply of water for domestic use, after which the agreed tariff will be charged for this water in place of the order in 2.2.2.
 - 2.5. Merafong is directed to credit the account of Golden Core in respect of all tariffs paid to and recovered by Merafong for the supply of water for both domestic and industrial use to AngloGold Ashanti/Golden Core in respect of excess of the rate charged by Rand Water to Merafong in respect of water for domestic and industrial use, from time to time. This will apply from the date of the Minister's decision on 18 July 2005 to date of this Order.
 - 2.6. Merafong is ordered to pay Golden Core's costs, including previous costs incurred by AngloGold Shanti Ltd:
 - 2.6.1. in the proceedings of the High Court in 2013 and in 2021 under case number: 23558/2011, including the costs of two counsel;

- 2.6.2. in the proceedings in the SCA under case number: 20265/14, including the costs of two counsel; and
- 2.6.3. in the proceedings in the Constitutional Court under case number: 106/2015, including the costs of two counsel.’

[71] AngloGold had sought alternative relief before the high court *redux* to review and set aside the Municipality’s tariff charges for water in 2004, and in subsequent years, to the extent that it imposed tariffs or surcharges on the supply of water used by AngloGold for industrial and domestic purposes. That relief is not persisted in before us. However, it is relief that the high court *redux* dismissed on the basis it was brought out of time and would be contrary to the powers of the Municipality to impose and recover tariffs and surcharges of the very kind AngloGold sought to review.

[72] The primary issue, then, before us, is whether AngloGold was entitled to relief to enforce the Minister’s decision, and if so, what relief should that have been. Although declaratory relief is not subject to jurisdictional questions of delay that are of application to the exercise by courts of their powers of judicial review, declaratory relief is a discretionary remedy that must be justified to resolve a live issue. In 2011, what was the live issue that subsisted between AngloGold and the Municipality?

[73] The Minister’s decision, as we have found, pertained to the imposition upon AngloGold of tariffs for the supply of water for domestic and industrial use from 1 July 2004 on the basis of tariffs of application for the financial year 2004/5 (the supply tariffs). The Municipality took its decision to impose the supply tariffs on 31 May 2004, with effect from 1 July 2004. The Minister’s decision was taken on 18 July 2005. The Minister expressly set aside the surcharge that the Municipality had imposed upon AngloGold for the supply of water for

industrial use. The Municipality had exacted payment from AngloGold on the basis of this surcharge. AngloGold was entitled to a declarator that the Municipality must comply with the Minister's decision. However, the only live issue that remained in 2011, in respect of the supply tariffs, was the excess payment that the Municipality had exacted from AngloGold over the rate Rand Water would have charged AngloGold to supply water for industrial use. That period commenced on 1 July 2004 and extended no further than the promulgation by the Municipality of tariffs for the supply of water of application in the financial year 2005/2006. The effect of setting aside the supply tariff for water for industrial use was that such tariff was not of application. The supply tariffs formed part of the Municipality's decision of 31 May 2004 to approve the supply of water by Rand Water to AngloGold. The supply tariffs were to commence on 1 July 2004. In so far as the Municipality exacted tariffs for water for industrial use from that date in excess of the charges made by Rand Water, the Minister's decision rendered such excess unlawful, and AngloGold was entitled to a declarator that the tariff imposed by the Municipality for the supply of water to AngloGold for industrial use, in the period 1 July 2004 until the promulgation and imposition of a new tariff of application to such supply, was unlawful.

[74] The position in respect of water supplied for domestic use is somewhat less clear. But a similar conclusion is warranted. The Minister decided that there should be negotiations between AngloGold and Rand Water (she must have meant the Municipality) for a reasonable tariff in respect of water for domestic use. The Minister did not expressly set aside the tariff of application to the supply of water to AngloGold for domestic use. But this is a necessary implication of the negotiations she required. What the Minister required was the negotiation of a reasonable tariff for the supply of water for domestic use, and thus the existing tariff could not remain in place. The Minister's decision must be interpreted in

the light of what she had to say about the imposition of a surcharge absent any value added by the Municipality. At best then for AngloGold, without agreement with the Municipality, the Minister's decision must be taken, by necessary implication, to have required that the tariff of application to the supply of water for domestic use to be the charge applied by Rand Water over the relevant period. That is the period from 1 July 2004 until the promulgation and application by the Municipality of a new tariff for the supply of water to AngloGold for domestic use.

[75] It is certainly the case that, in the aftermath of the Minister's decision, the parties were, and remain, at odds as to the powers of the Municipality to impose tariffs for the supply of water to AngloGold and the powers of the Minister under the Act to interfere with the exercise by the Municipality of its powers. But the application brought in 2011 was to enforce a decision made in 2005. That decision was of limited scope. It set aside the imposition of a time-bound tariff regime on water supplied to AngloGold for industrial use, and by implication, for domestic use. The Municipality, after 2005, made successive decisions, in its annual budgetary process, to impose revised tariffs for the supply of water. These were not the subject of any appeal to the Minister. As a result, we cannot, and should not make declaratory orders that range beyond what could be said to be a live issue when enforcement was sought in 2011 of the Minister's decision.

[76] Compliance with the Minister's decision, in 2011, cannot then go beyond the financial year to which the supply tariffs taken on appeal to the Minister were of application. There was no point to be served in 2011 to order negotiations to take place. These had occurred and run aground. All that could be ordered was to declare that the Municipality was entitled to impose tariffs at the rate charged by Rand Water for the supply of water to AngloGold for industrial and domestic use

in the period from 1 July 2004 until the coming into force of the tariffs of application to such supply for the financial year 2005/2006.

[77] What then of the Municipality's reactive challenge, put up as a defence to the declaratory relief sought by AngloGold. For the reasons we have traversed above, the Municipality raised its reactive challenge only when AngloGold resorted to the courts to enforce compliance with the Minister's decision. It did so then, when the Municipality had been under an obligation for some five years either to comply with the Minister's decision or bring proceedings to review it. The Municipality chose rather to impose tariffs and coerce payment from AngloGold in violation of the Minister's decision. Once that is so, it cannot be permitted to rely on the same issues it should have raised by way of review, in a reactive challenge to the relief that was sought by AngloGold. The delay in raising these issues, for so long a period of time, until 2011, and its conduct in this period, does not permit of its delay being overlooked. Accordingly, we decline to entertain the reactive challenge.

Relief and costs

[78] We find therefore that the high court redux should not have entertained the Municipality's review or reactive challenge. The Municipality's review must be dismissed. AngloGold had a right to secure compliance with the Minister's decision. But in 2011, compliance was of limited scope, as we have found, and we intend to make a declarator in conformity with this finding. The other relief sought by AngloGold cannot be granted. The alternative relief sought by AngloGold by way of review does not arise for our consideration because such relief only arises, as set out in its notice of motion, if AngloGold failed to secure declaratory relief. It has not so failed.

[79] As to costs, AngloGold has been substantially successful. It has vindicated its claim that it was entitled to enforce the Minister's decision, albeit on a narrower basis than it had sought. But it had to go to court to secure that relief. Although the high court and this court, when the case was first heard, ruled that the Municipality could not bring a reactive challenge, and in this *Merafong CC* decided otherwise, nevertheless the essential principle that was vindicated is that the Municipality could not ignore the Minister's decision, without bringing a review. On this score also, AngloGold has prevailed. The municipality's review and reactive challenge fall to be dismissed. The order given in *Merafong CC* was to reserve the question of costs. Since AngloGold has been substantially successful, we have decided that AngloGold is entitled to its costs, including the costs of two counsel, in respect of the original high court proceedings, the original appeal before this Court, the appeal to the Constitutional Court, the proceedings before the high court redux, and the appeal now before this Court.

[80] In the result the following order is made:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The judgment of the high court is set aside and replaced with the following:
 - 2.1 The first respondent's review application is dismissed with costs, including the costs of two counsel.
 - 2.2 It is declared that:
 - 2.2.1 The tariff imposed by the first respondent for the supply of water to the appellant for industrial use, in the period 1 July 2004 until the promulgation and imposition of a new tariff of application to such supply, was unlawful.
 - 2.2.2 The tariff imposed by the first respondent for the supply of water to the appellant for domestic use, in the period 1 July 2004 until the promulgation and imposition of a new tariff of application to such supply, was unlawful.
 - 2.3 The first respondent is ordered to pay the appellant's costs, including the costs:

2.3.1 in the proceedings of the High Court in 2013 and in 2021 under case number: 23558/2011, including the costs of two counsel;

2.3.2 in the proceedings of the Supreme Court of Appeal under case number: 20265/14 in 2015, including the costs of two counsel; and

2.3.3 in the proceedings of the Constitutional Court under case number: 106/2015 in 2019, including the costs of two counsel.

P MEYER
JUDGE OF APPEAL

D N UNTERHALTER
ACTING JUDGE OF APPEAL

Appearances

For appellant: N G Graves SC (with him I B Currie)

Instructed by: Knowles Husain Lindsay Inc, Johannesburg
McIntyre van der Post, Bloemfontein

For first respondent: A D de Swardt

Instructed by: De Swardt Myabo Attorneys, Pretoria
Symington de Kok Attorneys, Bloemfontein

For second respondent: M C Erasmus SC (with him H A Mpshe)

Instructed by: The State Attorney, Pretoria
The State Attorney, Bloemfontein