CONSTITUTIONAL COURT OF SOUTH AFRICA

Merafong City Local Municipality v AngloGold Ashanti Limited

CCT 106/15

Date of hearing: 18 February 2016
Date of judgment: 24 October 2016

MEDIA SUMMARY

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

Today the Constitutional Court handed down judgment in a matter concerning an organ of state's ability to disregard a purportedly invalid administrative action and to raise a defensive or collateral challenge to the action in subsequent enforcement proceedings. The administrative action in question was a ruling by the Minister of Water Affairs and Forestry (Minister) in terms of the Water Services Act (Act). Section 8(4) of the Act allows a person who applies for access to water services and is dissatisfied by the outcome to appeal to the Minister. Section 8(9) of the Act empowers the Minister to confirm, vary or overturn the decision.

The applicant is Merafong City Local Municipality (Merafong). The respondent is AngloGold Ashanti Limited (AngloGold), a global mining company that owns the Tautona, Mponeng and Savuka mines situated within the Municipality's jurisdiction. AngloGold requires water for both its mining operations and the domestic use of employees living at the mines. From 1958 to 2004, that water was supplied directly by Rand Water, a statutorily established water board. This changed pursuant to the Act, which came into effect in 1997 and gave statutory recognition to local government's constitutional authority to administer water and sanitation services. The Act designated municipalities as water services authorities, with responsibilities and statutory powers to ensure access to water services in their jurisdictions. Municipalities began to exercise these powers only from 1 July 2003.

In February 2004, Merafong requested AngloGold to apply for approval for the supply of water for industrial use in terms of section 7 of the Act. Under sections 6 and 7 of the

Act, a person must obtain approval from a water service authority to receive water that is supplied from a source other than the water services provider nominated by the water services authority. In response, AngloGold requested Merafong's approval for it to continue receiving water directly from Rand Water at the previous tariff. Merafong then announced that new tariffs would come into effect from 1 July 2004. These were significantly higher. Merafong informed AngloGold and other mining houses in its jurisdiction that it had appointed Rand Water as its agent to provide water services and collect payment, including Merafong's added surcharge.

Dissatisfied, AngloGold appealed to the Minister in terms of section 8(4) of the Act. On 18 July 2005, the Minster, exercising her powers under section 8(9), issued a ruling overturning Merafong's decision to levy a surcharge on water supplied to AngloGold for industrial use. She ruled that a surcharge could be levied only on the portion of water AngloGold was using for domestic purposes. She directed Merafong, AngloGold and Rand Water to negotiate a reasonable tariff on this portion.

In September 2005, Merafong obtained legal advice that the Minister's ruling was unlawful. Negotiations over the tariff were held during 2006 and 2007 but ran aground. Merafong continued to maintain that the Minister's decision was invalid, and in September 2007, it threatened to discontinue AngloGold's water supply unless it paid the disputed surcharge plus arrears. Faced with an enterprise-throttling threat of cut-off, AngloGold paid under protest, and continues to do so.

In April 2011, AngloGold launched legal proceedings in the North Gauteng High Court to compel Merafong to comply with the Minister's ruling. AngloGold maintained that the ruling was valid and that AngloGold had thus far been overcharged nearly R31 million. Merafong opposed the application and conditionally counter-applied for declarators that it has the exclusive authority to establish tariffs on the provision of water services in its jurisdiction and that section 8 of the Act did not empower the Minister to interfere. In the alternative, it asked for the striking down of section 8(9) as unconstitutional and invalid.

The High Court ruled in AngloGold's favour and dismissed the counter-application. It concluded that the Minister's decision, even if impugnable, was binding on Merafong until it had been reviewed and declared unlawful by a court, and that Merafong, an organ of state, could not now raise the invalidity of the decision as a defence (a defensive or collateral challenge).

On appeal, with leave of the High Court, the Supreme Court of Appeal endorsed this outcome. Citing the Constitutional Court's decision in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Limited t/a Eye and Laser Institute* (*Kirland*) and its own decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (*Oudekraal*), the Supreme Court of Appeal held that Merafong was obliged to approach the court to set aside the Minister's ruling, and that it breached the principle of legality by simply disregarding it. Additionally, the Supreme Court of Appeal confirmed the High Court's conclusion that a public authority or organ of state cannot rely on a

collateral challenge, holding that an organ of state cannot remain passive in the face of an adverse ruling and then seek to use the ruling's alleged invalidity as a shield in enforcement proceedings.

Merafong then sought leave to appeal to the Constitutional Court. There Merafong primarily contended that the Supreme Court of Appeal misapplied *Kirland* and *Oudekraal*. Merafong argued that there is a distinction between decisions that fall within the scope of a public official's powers but are in some way incorrect, and decisions that on their face are beyond the powers of the official. In the latter case, Merafong contended, an entity – including an organ of state – may ignore the decision until it is sought to be enforced, and the person or entity may then raise the nullity of the decision as a defence. Merafong argued that the Minister's decision was clearly beyond the scope of her powers, as it interfered with an area of constitutionally-assigned exclusive municipal competence.

The majority judgment by Cameron J (Moseneke DCJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurring) concluded that the dispute raised constitutional issues and arguable points of law of general public importance, and granted leave to appeal. The Court found that the Supreme Court of Appeal's categorical limitation of the entitlement to raise a collateral challenge only to individuals whom a public authority threatens with coercive action was overly rigid and inconsistent with both doctrine and practical reason. Surveying pre-Constitution case law, the Court noted that South African law has always allowed a degree of flexibility in reactive challenges to administrative action.

Turning to jurisprudence under the Constitution, the Court re-asserted that the import of *Oudekraal* and *Kirland* was that the government cannot simply ignore an apparently binding ruling or decision on the basis of its alleged invalidity, but must test the validity of that decision in appropriate proceedings. The decision remains binding until set aside. At the same time, neither *Oudekraal* nor *Kirland* imposed an absolute duty of proactivity on public authorities. Nor did they foreclose the possibility of challenging the validity of a decision reactively. Instead, a reactive challenge should be available where justice requires it to be, depending on the facts.

Applying this to the case before it, the majority judgment noted that, as a matter of good constitutional citizenship, Merafong should have either accepted the Minister's ruling as valid or gone to court to challenge it. As an organ of state, Merafong had both the responsibility and resources to obtain judicial clarity rather than resort to self-help by threatening AngloGold with a water cut-off.

However, the majority judgment concluded, Merafong should not be categorically barred from raising a reactive challenge to the Minister's decision, but should rather be able to raise the challenge and seek to justify its delay in seeking judicial recourse. The majority noted that Merafong's "conditional counter-application" did belatedly bring a substantive challenge to the Minister's ruling, and dismissing Merafong's present appeal would further protract an already drawn-out dispute. The majority thus held that the matter

should be remitted to the High Court, to consider first whether Merafong's extensive delay disqualifies its challenge and, if not, the substantive validity of the minister's decision.

In a minority judgment, Jafta J (Bosielo AJ and Zondo J concurring) held that this case presents the Court with an opportunity to define the reach of the principles in both *Oudekraal* and *Kirland* in the context of the Constitution and the principle of constitutional supremacy. This is because the two decisions derive their validity, like every precedent and other law, from the Constitution. Here the judgments of the High Court and Supreme Court of Appeal illustrate a misapplication of the two decisions.

The minority judgment asserts that the proposition that an invalid administrative act that exists in fact is binding and enforceable until set aside by a competent court collides head-on with the principle of legality which is an integral part of the rule of law. The minority judgment disagrees with this proposition which is endorsed by the majority judgment.

The minority judgment also dealt with the question whether in law an organ of state is prohibited from raising a collateral challenge. It held that it was necessary for the Court to put this issue to rest, one way or the other. Leaving that open meant that courts in this country were bound by decisions of the Supreme Court of Appeal that say a collateral challenge is not available to the state. The minority added that it is in the interests of justice that there be certainty on whether the Constitutional Court affirms that conclusion or not.

In conclusion, the minority would have granted leave to appeal, upheld the appeal and declared section 8 of the Water Services Act to be inconsistent with the Constitution.