**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 300/19

In the matter between:

**MINISTER OF WATER AND SANITATION** Applicant

and

**SEMBCORP SIZA WATER (PTY) LIMITED** First Respondent

**UMGENI WATER** Second Respondent

**Neutral citation:** *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another* [2021] ZACC [20]

**Coram:** Mogoeng CJ, Jafta J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

**Judgments:** Jafta J and Victor AJ (majority): [1] to [92]
Madlanga J (dissenting): [93] to [111]

**Heard on:** 10 November 2020

**Decided on:** 23 July 2021

**Summary:** Water Services Act No 108 of 1997 — section 31 — powers of water boards to set tariffs — lawful and rational

Local Government Finance Management Act No 56 of 2003 — section 42 — confers no power on Minister to set tariff

## ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg):

1. The application for leave to appeal is granted.
2. The appeal by the Minister of Water and Sanitation is dismissed.
3. The Minister of Water and Sanitation is ordered to pay the costs of Sembcorp Siza Water (Pty) Limited in this Court, including the costs of two counsel.
4. The appeal in favour of Umgeni Water is upheld.
5. The orders of the High Court and Supreme Court of Appeal are set aside to the extent that they refer to Umgeni Water and are replaced with:

   "The application to review the tariff set by Umgeni Water is dismissed with costs, including costs of two counsel."
6. Sembcorp Siza Water (Pty) Limited is ordered to pay the costs of Umgeni Water in this Court and the Supreme Court of Appeal and such costs shall include costs of two counsel.

## JUDGMENT

JAFTA J AND VICTOR AJ (Mogoeng CJ, Mathopo AJ, Mhlantla J and Tshiqi J concurring):

*Introduction*

[1] This case concerns the unequal implementation of the cost of potable water by a Water Board. Umgeni Water (Umgeni) charged municipalities less than they did a

private bulk consumer that had been contracted by the municipality to supply water to certain areas.

*Background*

[2] The Minister of Water and Sanitation (Minister) has certain general powers and various obligations in relation to the supply of water and sanitation services in terms of the Water Services Act[1] (Water Services Act) as set out in the legislative framework.

[3] The cost of bulk water is the core dispute in this matter. At issue here is whether Umgeni had validly increased a tariff. Further, whether the Minister was correct in approving the differential tariff charged by Umgeni, a Water Board and supplier of bulk water to various water services providers such as municipalities and other bulk water consumers such as the respondent, Sembcorp Siza Water (Pty) Limited (Siza). Was the Minister's decision to confirm Umgeni's water tariff increase of 37.9% on Siza whilst imposing a differential increase of only 7.8% on all of its other bulk water customers, rational?

[4] Umgeni is a water board established in terms of section 28 of the Water Services Act, which provides bulk water to water services providers within its service area.[2] These water services providers include municipalities and private entities within its jurisdiction. Umgeni's jurisdiction extends along the coast from the southern boundary of KwaZulu- Natal to the Tugela or uThukela River and inland to the boundaries of the uMgungundlovu District Municipality west of the city of Pietermaritzburg. Umgeni's jurisdiction includes Ilembe Municipality.

[5] On 29 January 1999, the predecessor of Ilembe Municipality, a water services authority, concluded a Water and Sanitation Concession agreement (concession agreement) with Siza. It undertook to supply potable water and sanitation

[1] 108 of 1997.

[2] Section 28 provides that the Minister may establish a water board and determine its area of service.

services to a portion of the Ilembe region (concession area) for a period of 30 years. The concession area lies between the Tongaat River and the Umvoti River and incorporates the urban areas of Zimbali, Ballito, Umhlali, Shakas Kraal, Chakas Rock, Salt Rock, Sheffield Beach and Tinley Manor. It also incorporates certain inland areas and informal settlement areas.

[6] Pursuant to the concession agreement, Ilembe's predecessor assigned to Siza its rights under an existing Bulk Water Supply Agreement which it had concluded with Umgeni.

[7] On 7 August 2000, Umgeni as the supplier, Siza as the customer and Ilembe as a municipality, concluded a tripartite bulk water service agreement (tripartite agreement) in terms of which Umgeni undertook to supply potable water to Siza. Ilembe acted as a guarantor for the obligations of Siza in this regard.

[8] Until 2014, Siza had enjoyed annual tariff increases equivalent to those imposed on Umgeni's other customers, which are all municipalities. In other words, until 2014, Umgeni adopted the same (blanket) price increase across the board for all its customers including Siza. However, in 2014, Umgeni applied a costing model which resulted in the formulation of a tariff increase of 41.4% for Siza and 8.3% for the municipalities including Ilembe. The Minister and Umgeni state that the reason for the tariff increase, amongst other things, was the effect of the drought which befell the Province of Kwa-Zulu Natal and which required it to mitigate its effects and reduce water disruptions.

[9] In November 2014, Umgeni informed Siza of the proposed tariff increase whereupon Siza requested Umgeni to provide it with further information to enable it to make relevant submissions. The tariff increase was substantially higher for Siza. It was 41.4%, whilst the other bulk consumers' increase was 8.3%. Umgeni provided Siza with the details on comparable tariffs applicable to municipal customers and the rationale for the tariff increases. After the exchange of correspondence, Siza expressed

its disagreement with the proposed tariff increase. Notwithstanding the dissatisfaction raised by Siza, on 23 January 2015, Umgeni applied to the Minister for the approval of the tariff increase for the financial year commencing on 1 July 2015. However, she reduced the tariff to 37.9% from the 41.4% that Umgeni had initially wanted to charge.

[10] Umgeni had increased the tariff in terms of section 31 of the Water Services Act which empowers water boards to set and enforce tariffs for the provision of water services.[3] However, it appears that all parties concerned erroneously believed that a tariff set by Umgeni was subject to approval by the Minister, hence she decreased it from 41.4% to 37.9%. Dissatisfied with the decisions taken by Umgeni and the Minister, Siza turned to the High Court for help. It challenged those decisions on a number of grounds, including legality and rationality.

*Litigation history*

*High Court*

[11] Following the tariff increase and the approval thereof by the Minister, Siza applied to the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, for the review and setting aside of the decisions by both the Minister and Umgeni to

[3] Section 31 provides:

> "(1) A water board is a body corporate, and has the powers of a natural person of full capacity, except those powers—
>
> (a) which by nature can only attach to natural persons; and
>
> (b) which are inconsistent with this Act.
>
> (2) A water board may—
>
> (a) perform its primary activity and the other activities contemplated in section 30;
>
> (b) set and enforce general conditions, including tariffs, for the provision of water services;
>
> (c) determine the procedure for convening and conducting meetings of its board;
>
> (d) do all things necessary for or in connection with or incidental to the performance of its activities in a manner consistent with this Act; and
>
> (e) enter into contracts with any person in terms of which that person undertakes and is authorised to exercise any of the powers or to perform any of the duties of the water board, provided that a water board may not by contract make over to another person its power to set general conditions, including tariffs, for the provision of water services."

increase and approve the tariff increase at the rate of 37.9%. In the main, Siza reasoned that the decision to impose the tariff increase was unfairly discriminatory and irrational as Umgeni did not impose a similar tariff on its other non-municipal customers. All of Umgeni's other municipal customers were levied an increase of 7.8% for the same period.

[12] The High Court found that there were two main reasons advanced by Umgeni and the Minister to defend the impugned decision. First, Umgeni contended that it would no longer allow a "cross-subsidy" on the price of bulk water supplied to Siza. Second, they argued that Siza was not a municipality and consequently must not be allowed to make a profit because its profits will not be ploughed back into the service delivery system.

[13] Citing *Pharmaceutical Manufacturers*,[4] *Albutt*,[5] and *Democratic Alliance*,[6] the High Court stressed that the impugned decision must at the very least comply with the well accepted rationality standard set out in those cases. In addition, without any analysis, it was of the view that the impugned decision was administrative action that was reviewable in terms of Promotion of Administrative Justice Act[7] (PAJA).

[14] The High Court held that the decision to single out Siza as a commercial entity was "opportunistic" in light of the fact that Siza "stepped into the shoes" of Ilembe and was fulfilling Ilembe's constitutional and statutory obligations as a water services provider. The High Court also emphasised that, because Ilembe stood as a guarantor for Siza in terms of the concession agreement, there was a "committal of public funds" behind its operations.

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[4] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[5] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[6] *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC).

[7] Promotion of Administrative Justice Act 3 of 2000.

[15] Turning to the second reason, the High Court reasoned that even on the assumption that preventing Siza from reaping undue profits was a legitimate basis for differentiation, this was nevertheless irrational in the circumstances. This was for several reasons. First, this approach ignored the fact that Siza was "acting in the stead of [Ilembe] in discharging [its] constitutional and statutory obligation to provide water to residents in the concession area". Second, this approach did not seem to consider the impact of the increase on consumers. Third, there was no evidence on record to support the proposition that Siza was reaping profits of the kind contended for by Umgeni.

[16] For all these reasons, the High Court ruled that the decisions of Umgeni and the Minister in respect of the tariff increase imposed on Siza were irrational. As such, it reviewed the decisions on the basis of PAJA and set them side.

*Supreme Court of Appeal*

[17] The Minister and Umgeni appealed the High Court's judgment to the Supreme Court of Appeal. The Appeal Court held that the impugned decision constituted administrative action which was reviewable in terms of PAJA. This was because the tariffs had to be determined in terms of the Water Services Act; so, the process was "essentially statutory". In addition, the impugned decision met the other requirements of administrative action in that: (i) it was one of an administrative nature under an empowering provision; (ii) it was taken by an organ of State when exercising a public power in terms of legislation; and (iii) the decision had a direct external legal effect and adversely affected the rights of Siza and its customers. The Supreme Court of Appeal also approved a rationality standard based on PAJA. It held that in order for there to be differentiation, there needed to be a rational basis for it.

[18] The Court did not find it necessary to characterise Siza's legal status as it was performing "the identical functions to those that Ilembe would otherwise have to

perform".[8] The Court reasoned that if Siza stopped supplying those water services, or the concession agreement was terminated, then Ilembe (which is also the guarantor) would have to supply the end users with water it had obtained from Umgeni. In the result, the Court held that Siza was discharging a constitutional obligation resting upon Ilembe in the same manner and in terms of the same constitutional and statutory obligations as those resting on Ilembe. Its obligations are no different from those of the municipalities to which Umgeni supplies bulk water, the Court said.

[19] The Supreme Court of Appeal also described the defence by Umgeni and the Minister as "reducing to nil what was described as the cross-subsidy to Siza". The Supreme Court of Appeal found that the tariff increases could not be justified in terms of the pricing policy. First, based on dictionary definitions of the term "cross-subsidisation", the use of the term by Umgeni in these circumstances was a "misnomer" as it was only supplying one service. In addition, the only type of differentiation that was contemplated by the pricing policy was between economic schemes, where the aim was full recovery of costs, and social schemes, where full recovery was not possible. On the Court's reading of the policy, it supported a uniform bulk tariff which would be applicable to all of Umgeni's customers. It reasoned further that "[t]his would allow for cross-subsidisation of social schemes and maintain Umgeni's financial viability".

[20] The Court pointed out that it had not been demonstrated that Umgeni did in fact intend to eliminate cross-subsidisation. This much was clear from the fact that Umgeni had fixed a uniform tariff for all its other bulk water customers. Furthermore, the fact that Siza also supplied water to indigent communities had not been considered. To this end, the Court stated that "[t]here appears to be no reason why the other municipalities who operate at a loss were not treated in the same way as Siza".[9]

[8] *Umgeni Water v Sembcorp Siza Water (Pty) Ltd* 2020 (2) SA 450 (SCA); [2019] 4 All SA 700 (SCA) (Supreme Court of Appeal judgment) at para 10.

[9] Supreme Court of Appeal judgment at para 36.

[21] The Court also opined that the actual figures did not demonstrate that charging a differential tariff to Siza would have a material beneficial effect on Umgeni's financial situation and contribute to the elimination of cross-subsidisation. The Court held as such that the empowering provision did not empower this type of "discrimination" between Siza and Umgeni's other customers.

[22] Turning to the argument that Siza was a private entity, the Court found that this reason rendered the decision irrational because Siza performed the same constitutional and statutory obligations as any of Umgeni's municipal customers. The differentiation between Siza and other customers was especially irrational because within the concession area, Siza was discharging Ilembe's constitutional and statutory functions, yet it was being charged a higher tariff. This meant that if the concession areas were expanded and included portions currently under Ilembe's jurisdiction, these areas would pay a higher tariff than that paid in the other areas of Ilembe. In the Court's view, this illustrated the patent irrationality of the differentiation between Siza as a "private entity" and Umgeni's other customers who are municipalities.

[23] The Court accepted that the decision was one of an administrative nature under PAJA as it was taken under an empowering provision and by an organ of State, while exercising a public power in terms of legislation. The administrative action had a direct external legal effect and adversely affected the rights of Siza and its customers.[10] The Court found that there was "no rational connection between the purpose for which the power to fix a tariff was conferred and the exercise of that discretion".[11]

[10] Section 6(2) of PAJA in relevant parts, reads:

> "(ii) is not rationally connected to—
>
> (aa) the purpose for which it was taken;
>
> (bb) the purpose of the empowering provision;
>
> (cc) the information before the administrator; or
>
> (dd) the reasons given for it by the administrator;"

[11] Supreme Court of Appeal judgment at para 54.

*In this Court*

*Application for leave*

[24] Since the matter deals with the review of the exercise of public power, it cannot be doubted that it raises constitutional issues. Consequently, it falls within the jurisdiction of this Court. What remains for determination is the question whether it is in the interests of justice to grant leave.

[25] The prospects of success on the merits play an important part in matters where, like in the present, leave is sought against a decision of the Supreme Court of Appeal. In *Fleecytex*,[12] this Court said:

> "In dealing with applications for leave to appeal against a decision of the Supreme Court of Appeal this Court has held that the prospects of success are of fundamental importance. Such an appeal is the only remedy left to the applicant and if there are reasonable prospects that the appeal will succeed there are compelling reasons for granting the leave that is necessary."[13]

[26] It is evident from the above statement that in a matter like the present, the presence of prospects of success compels the granting of leave, as the applicants have no other forum to approach. Such prospects here relate to the application of the standard of irrationality. The Supreme Court of Appeal has approached the matter on the footing that the reasons for the impugned decisions needed to be evaluated in order to determine whether they were rational. It appears that the Supreme Court of Appeal may have been mistaken in its approach to the matter. Therefore, it is in the interests of justice that leave be granted.

[27] However, there is a further issue that affects Umgeni alone. This is that on 5 February 2020, this Court granted an order that dismissed Umgeni's application for

[12] *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) (*Fleecytex*).

[13] Id at para 6.

leave to appeal under case number CCT 292/19. But later the Court set down for hearing the separate application under case number CCT 300/19 brought by the Minister. The latter application sought leave against the same judgment that Umgeni wished to appeal.

[28] On becoming aware of this development, Umgeni sought to join the proceedings. It lodged a substantive application seeking that the order of 5 February 2020 be recalled and that Umgeni be allowed to file written submissions and have its appeal under case number CCT 292/19 set down for hearing together with CCT 300/19.

[29] It appears plain from the record that Umgeni's application was erroneously dismissed. As stated above, it was obliged to approach this Court if it was unhappy with the decision of the Supreme Court of Appeal. And since there are reasonable prospects of success, Umgeni's matter should also have been set down for hearing.

[30] Siza had opposed this application for leave on the ground that it was dismissed in terms of the order of 5 February 2020. It contended that the parties have since concluded an agreement for the repayment by Umgeni of funds collected from Siza's customers under the impugned tariff that was set aside in the judgment that was upheld by the Supreme Court of Appeal.

[31] But Umgeni avers that it entered into the agreement in the belief that no appeal was available to it as it then thought that the order of 5 February 2020 could not be rescinded. Umgeni contended that the agreement in question cannot be an obstacle to the rescission of the order of 5 February 2020 and granting it leave. We agree. The fact that the parties had arranged their affairs on the basis of that order cannot prevent the reconsideration of that order. Since it is evident that the order was granted in error, it should be set aside and the application for leave by Umgeni be considered afresh. When so considered, it is evident from relevant facts that leave should be granted to Umgeni too.

*Issues*

[32] The issues raised in this application for leave to appeal are those that were raised in the High Court, namely whether—

(i) Umgeni's decision was irrational;
(ii) that decision also constituted unfair discrimination; and
(iii) the Minister's decision to approve Umgeni's tariff was legal.

[33] For a proper appreciation of these issues, it is necessary to recall the factual context within which the various decisions were made. To a large extent these facts are not disputed. For more than 10 years Umgeni had been increasing its tariffs for water supplied to Siza and other water services providers, by not more than 10%. These tariffs included cross-subsidies to the providers in question. As it became difficult for Umgeni's business to break even, it had to consider and adopt cost-cutting measures. These measures were designed to recover, among other goals, Umgeni's capital, operational and maintenance costs.

[34] One such measure was to do away with the cross-subsidy that was afforded to Siza, but to retain it in respect of other water providers which are municipalities. The effect of the removal of the subsidy resulted in the increase that applied to Siza being 41.4%. By removing that subsidy to Siza, Umgeni stood to save R10 million. It also appeared that the increase that applied to other water providers that were municipalities was much lower, owing to the continuing cross-subsidy to them. But the Minister decided to reduce the increase charged on Siza to 37.9%.

[35] For obvious reasons, Siza was unhappy and expressed its dissatisfaction to Umgeni in a number of meetings held to discuss the matter. Siza held the view that it was being singled out for a higher tariff and that it was improper. Umgeni sought to explain the differentiation on the basis that Siza was a private company, performing a public function and to whom different rules applied when it came to using its profits. Umgeni pointed out that Siza was free to use the profits made from the supply of water

as it pleased, whereas the municipality water providers were obliged to expend their profits in improving infrastructure relating to water supply to communities.

[36] Siza did not accept this explanation and continued to hold the view that it was unfairly discriminated against purely on the ground that it was a private company.

[37] Regarding the reasons for the steep tariff increase, Siza's opinion was that those reasons were bereft of rationality. This is how Siza pleaded the issues in its founding affidavit:

> "Umgeni seems to calculate the costs of its entire water operation and then break it up in certain areas and water supply systems. Some areas have lower water costs and the prices there are pitched slightly higher to even out increases in higher cost areas. Umgeni contends that [Siza] falls in one of the higher cost (North Coast pipeline) areas and seeks to single it out and exclude it for 2015-2016 from such evening-out benefit. Previously it and all the municipalities in such areas were equally treated in this regard. Solely because [Siza] is now interposed as the in line bulk supply purchaser for portion of Ilembe's bulk water, it appears that [Siza] alone must pay the full costs of supply to it in the North Coast area, hence the extra 30% cost increase. It is this which is the reason for the decision to increase bulk water supply price to [Siza] by an extra 30% over and above the 8.3% for the municipalities in that water system component."

[38] With reference to correspondence, Siza concluded:

> "The staggering price increase thus turns on [Siza] not being a municipal customer. This is an artificial and contrived distinction."

[39] Siza, however, confirmed that it was making a profit and that it operated in a way that was different to how municipalities are run. It stated:

> "It is unlikely that Ilembe could provide a cheaper more efficient service. Although [Siza] makes a profit on its operations it does so for reasons of efficiency and access to capital funding for the extension of infrastructure. By contrast, a municipality must budget in advance for capex (capital expenditure) and obtain Treasury approval

therefor, and often the pace of development is so slow that projects do not get off the ground in the year in which capex has been budgeted. Any failure in this regard means that a further application for approval of capex then has to be to Treasury. In short, bureaucracy hinders the roll out of service and often adds to the cost."

[40] As the parties failed to resolve the dispute, Siza launched the review application. In a rather unusual way, Siza pleaded its review grounds as follows:

"[75.] Indeed the Applicant always had a legitimate expectation that it would be treated by Umgeni on the same footing as a municipal bulk water receiver and purchaser.

. . .

76.1 The extra price increase (38% as opposed to 8.3%) constitutes grounds for review in terms of PAJA, more particularly Section 6:

'6 Judicial review of administrative action

. . .

(2) A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-

(i) was not authorised to do so by the empowering provision;

. . .

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

(i) for a reason not authorised by the empowering provision;

. . .

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

. . .

(vi) arbitrarily or capriciously;

(f) the action itself—

. . .

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.'

76.2 It is also offensive to the principle of legality under PAJA and Section 33 of the Constitution."

[41] The ground of arbitrariness was substantiated in these terms:

"From the Umgeni response to [Siza], it is clear that it did not calculate the [Siza] increase, based on the costs of water provision to the Ilembe Area as a standalone cost component. It has calculated the costs of water supply to such area on the cost of supplying a greater area of the North Coast through the North Coast pipeline. In that sense it was arbitrary and capricious to increase the costs to water users in part of such area by 38% compared to 8.3% for all other areas. If you are an end water user in the adjoining North Coast area, your charges would have to reflect and accommodate an 8.3% increase for the bulk water supply. If, however, you reside in the Concession Area, that increase would be some 38%. All of that because Ilembe had rationally and legitimately tasked [Siza] with part of its water services function."

[42] The irrationality ground was further pleaded thus:

> "Umgeni is obliged to provide water to its municipal customers without unjustified discrimination. The extra charge is effectively directed at Ilembe and the consumers in a portion of that Municipality's area. The reason for the discrimination is baseless. It is offensive to the provisions of PAJA and indeed, ultimately, section 209 of the Constitution."

[43] This is the backdrop against which these issues must be assessed. But before doing so, it is necessary to clarify some preliminary issues. These are the distinctions between decisional rationality and procedural rationality. Further issues are the identification of the test and the application of that test to the present facts by the courts below. The High Court referred to authorities on both decisional and procedural rationality which are mentioned in paragraph 13 above.

*Decisional rationality*

[44] The leading authority on this issue is *Pharmaceutical Manufacturers*[14] which laid down the principle that for the exercise of public power to be valid, a decision taken must be rationally connected to the purpose for which the power was conferred. This entails determining whether there is a rational link between that decision and the purpose sought to be achieved.[15] In its proper context, decisional irrationality does not relate to the procedure followed in reaching the decision in question.

[45] However, the concept of rationality encompasses the procedure followed in reaching a decision. Our law requires that the procedure followed should itself be rationally connected to the purpose for which the power was exercised. In other words, the procedure followed must reasonably be capable of leading to the attainment of the purpose for which the power was conferred. The leading cases on this point are *Albutt*[16]

[14] *Pharmaceutical Manufacturers* above n 4 at para 85.

[15] *Law Society of South Africa v Minister of Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 32.

[16] *Albutt* above n 5.

and *Democratic Alliance*,[17] both of which were referred to by the High Court. The High Court quoted the following statements from *Democratic Alliance*:

> "The means for achieving the purpose for which the power was conferred must include everything that is done to achieve that purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred."[18]

[46] For its part, the Supreme Court of Appeal relied on *NERSA*[19] and the rationality standard as espoused in that case.[20] In *NERSA*, this Court emphasised that rationality relates to both the decision made and the procedure followed in reaching that decision. It was also stressed that rationality under PAJA must carry the same meaning.

[47] But it bears emphasis that there is a distinction between irrationality relating to the decision itself and irrationality relating to the procedure leading up to that decision. The presence of each of them is fatal to the exercise of power. If the procedure followed is such that it could not result in achieving the purpose for which the power was conferred, the purported action must be set aside. The same result must follow if the decision taken would equally not lead to the attainment of that purpose.

[48] Making the distinction between the two grounds of irrationality, this Court stated:

> "The evolution of our constitutional jurisprudence culminated in a principle that recognises that rationality applies not only to the decision, but also to the process in terms of which that decision was arrived at. And this applies to our President acting

[17] *Democratic Alliance* above n 6.

[18] *Sembcorp Siza Water (Pty) Ltd v Umgeni Water*, unreported judgment of the High Court of South Africa Kwa-Zulu Natal Division, Pietermaritzburg, Case No 11908/2015 (13 September 2017) (High Court judgment) at para 35.

[19] *National Energy Regulator of South Africa v PG Group (Pty) Ltd* [2019] ZACC 28; 2020 (1) SA 450 (CC); 2019 (10) BCLR 1185 (CC) (*NERSA*).

[20] Id at paras 48-50.

> either as Head of the Executive or Head of State. In sum, the exercise of the power to amend the Treaty must in relation to both the process leading up to the amendment and the amendment itself, be rationally related to the purpose for which that power to amend was exercised."[21]

[49] For completeness procedural rationality should not, as it often happens, be conflated with procedural fairness. It has nothing to do with the fairness of the process and has no bearing on whether there should have been a pre-decision hearing. The fact that in *Albutt* the procedure followed related to a failure to give a hearing to the families of the victims of crime was a mere coincidence. It did not mean that in every case where there was no hearing, procedural rationality had been breached. There will be a violation of procedural rationality only if the purpose for which the power was exercised could not be achieved without a pre-decision hearing.

[50] That this must be so is apparent from a careful reading of *Albutt*, where this Court said:

> "The participation of victims is not only crucial to establishing the truth of what happened, but is also crucial to the twin objectives of nation-building and national reconciliation.
>
> . . .
>
> Excluding victims from participation keeps victims and their dependants ignorant about what precisely happened to their loved ones; it leaves their yearning for the truth effectively unassuaged; and perpetuates their legitimate sense of resentment and grief. These results are not conducive to nation-building and national reconciliation."[22]

[51] It will be recalled that in *Albutt*, the President was granted the power to pardon prisoners convicted of offences that were committed with a political motive in order to achieve the purposes of nation-building and national reconciliation. But the procedure chosen by the President in exercising that power excluded hearing the victims of those

[21] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC) (*Law Society of South Africa*) at para 61.

[22] *Albutt* above n 5 at paras 59 and 61.

offences. In that context, this Court held that the chosen procedure could not result in nation-building and national reconciliation. In other words, the purposes for which this power was conferred could not be reached under the procedure chosen by the President, hence there was no rational connection between that procedure and those objectives.

[52] The fact that procedural rationality does not mean fairness is further affirmed by decisions of this Court in *Democratic Alliance* and *NERSA*, both of which had nothing to do with a hearing. For example, in *Democratic Alliance* the issue was whether, by ignoring a report that said a candidate to be appointed to the position of a National Director of Public Prosecutions was dishonest and lacked integrity, the President could achieve the objective of appointing a person of integrity, as required by the empowering provision. This Court concluded that without considering the report in question, the President could not be said to have appointed someone who met the essential qualities required for the appointment.

[53] In *Law Society of South Africa*, this Court declared:

> "The proposition in *Masetlha* might be seen as being at variance with the principle of procedural irrationality laid down in both *Albutt* and *Simelane*. But it is not so. Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether, or ensuring that, there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power.
>
> The question to be answered in this case therefore is not whether anybody was heard or not heard or dealt with in terms of a fair or arbitrary and oppressive process. It is whether the procedure for the exercise of the power to suspend the Tribunal and amend the jurisdiction of the Tribunal is rationally related to the realisation of the purpose for which the power to amend the Treaty was conferred and exercised by our President

> together with other [Southern African Development Community] Heads of State and Heads of Government, on behalf of Member States."[23]

[54] Having clarified and outlined the rationality standard, it is now apposite to consider whether the courts below have properly applied it to the facts. The High Court held:

> "As I see it, the hurdle besetting [Umgeni] and the Minister is that the water services contract between the applicant and the Ilembe came about as a result of the decision of the Ilembe in considering how best to serve its residents in the concession area and this arrangement is allowed by section 19 of the Act. It follows from this that once it is accepted (as I do) that the applicant performs an in line function in the delivery of bulk water from [Umgeni] to the Ilembe and to the water consumers of the concession area, the fact that the applicant is interposed in that chain of delivery is an irrelevant consideration in deciding on such increase and that cannot serve to justify the imposition of a different tariff by [Umgeni].
>
> In my view, the fundamental tenet which lies at the heart of this application is that the Ilembe is the guarantor of all debts owed by the applicant to [Umgeni], which is a committal of public funds and is only valid because the applicant has stepped into the shoes of the Ilembe and acts as a public service provider instead of the Ilembe to fulfil the Ilembe's constitutional and statutory role as water services provider within the concession areas which form part of its jurisdiction. In the circumstances, it seems opportunistic on the part of the respondents to consider the applicant's identity as a commercial entity warranting an imposition of a different tariff from the municipal entities."[24]

[55] This conclusion by the High Court was endorsed by the Supreme Court of Appeal.[25] But the conclusion was mistaken. First, it did not apply the rationality test with reference to the decision to raise the tariff charged on Siza or

[23] *Law Society of South Africa* above n 21 at paras 64-5.

[24] High Court judgment at paras 43-4.

[25] Supreme Court of Appeal judgment at paras 23 and 38.

the procedure followed to reach such tariff. Nor are we told what the purpose Umgeni sought to achieve through the tariff increase was and whether the increase was rationally connected to that purpose.

[56] On the contrary, the High Court focused on whether the reason for treating Siza differently from other customers which were municipalities was cogent. The fact that Siza was a commercial entity, reasoned the High Court, was irrelevant and did not "justify the imposition of a different tariff by Umgeni Water". Since Siza had stepped into the shoes of Ilembe Municipality, the High Court concluded, "it seems opportunistic on the part of the respondents to consider the applicant's identity as a commercial entity warranting an imposition of a different tariff from the municipal entities".

[57] This reasoning evidently reveals the misconstruction and misapplication of the rationality standard. That standard is not about the cogency of reasons furnished for a particular decision. Instead, it is all about whether there was a rational connection between "the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power".[26]

[58] The Supreme Court of Appeal also approached the matter on a similar footing. That Court dedicated much of its judgment to evaluating and showing that the reasons for imposing a higher tariff upon Siza were not satisfactory. In doing so, the Supreme Court of Appeal did not only follow an incorrect approach but it also blurred the distinction between an appeal and a review. Cautioning against the blurring of the two processes, this Court declared in *Bato Star*:

> "Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative

[26] *Law Society of South Africa* above n 21 at para 64.

> agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."[27]

[59] We must immediately point out that the evaluation of reasons referred to in *Bato Star* applied only to where the ground of review was reasonableness and not where, as here, it was rationality. Even then *Bato Star* emphasised that decisions of administrative agencies must be accorded appropriate respect:

> "In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision."[28]

[60] But when it comes to rationality the issue is always whether there was a rational connection between the decision taken or procedure followed and the purpose for which the power was granted. If there is such connection, the review challenge based on this ground must fail, regardless of the cogency of reasons furnished for the decision in

[27] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 45 (*Bato Star*).

[28] Id at para 48.

question. This is because rationality is the lowest threshold required for the exercise of public power.

[61] It follows that in relation to Umgeni's decision, the courts below erred by applying the incorrect standard. However, the appeal by Umgeni may succeed only if upon the application of the correct test, it should have succeeded. It was not Siza's fault that the courts below misapplied the test to its review based on rationality.

*Was the tariff imposed on Siza rational?*

[62] At the level of fact, the Supreme Court of Appeal found that 90% of the bulk water supplied by Umgeni went to eThekwini and Msunduzi Municipalities. The cost to supply water to these municipalities was lower, owing to the nature of the infrastructure required and since these municipalities constitute greater areas, Umgeni generated profits from supplying water to them at lower operation costs. But those profits were applied to offset losses incurred by Umgeni in supplying water to other municipalities, including Ilembe, on behalf of which Siza provides water to people and businesses within its area.[29] The offsetting, that Court found, amounted to what Umgeni described as cross-subsidisation.[30]

[63] It was that cross-subsidisation which Umgeni sought to abolish by fixing the impugned tariff. Umgeni sought to eliminate the cross-subsidy that Siza enjoyed and thereby treated Siza differently from other customers which were municipalities.

[64] The Supreme Court of Appeal recorded the reasons for the differentiation thus:

> "The rationale for imposing a different tariff on Siza was described in the annual review document as follows:
>
> > '[Siza] draws its sales volumes from the North Coast Pipeline only. However based on a 8.3% tariff increase for 2016, the cross subsidy to

[29] Supreme Court of Appeal judgment above n 8 at para 25.

[30] Id at para 26.

> Siza Water (who is not a municipal customer to [Umgeni]), will be R1.534/kl. To reduce the cross subsidy to nil, the required tariff to Siza Water will be R6.552/kl. Therefore, the tariff increase will have to be 41.4% in 2016. Alternatively, the increase can be smoothed in (over the next five years).'

In its letter to the Minister seeking approval for the increases, [Umgeni] said that, in order to break even,

> '[Umgeni] cannot continuously cross subsidise losses incurred in the water supply to [Siza] which is a private entity that continuously makes a profit on its water supply operation.'

It went on to say in regard to Siza that:

> 'as far as supply of water to Siza is concerned [Umgeni] has to at least break even, since Siza Water [is a] private entity all the profits it makes from supplying water does not necessarily get ploughed back into service delivery in a similar manner as other municipal entities.'

In the answering affidavit, the Chief Executive of Umgeni Water said that its 'municipal public sector clients' operate various water schemes, which make it possible for Umgeni Water to explore other avenues through which it can enable municipal customers to break even. This was not the case with Siza. In order to break even, Umgeni Water would no longer allow the 'cross-subsidy' which applied to Siza."[31]

[65] The Supreme Court of Appeal found that Umgeni would have saved R10 million from the abolition of the cross-subsidy to Siza. But that Court reasoned that the amount could not help Umgeni in a material way in funding the bulk water supply to other loss-making customers. The non-profitable municipalities would continue being unprofitable, concluded the Court, and it appeared that Siza was singled out for being a private entity.[32]

[66] Therefore, the irrationality of the impugned tariff increase was grounded in the fact that Siza was treated differently from other customers of Umgeni which were

[31] Id at paras 16-7.

[32] Id at paras 37 and 40.

municipalities. This much is clear from Umgeni's documents referred to in paragraphs 16-7 of the judgment of the Supreme Court of Appeal.

[67] Our jurisprudence recognises that for a modern state to govern effectively, it may have to treat persons differently and that differentiation per se is not proscribed by the Constitution. In *Prinsloo*,[33] this Court stated:

> "It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element. What this further element is will be considered later."[34]

[68] This means that differentiating Siza from the other customers of Umgeni alone does not render the differentiating tariff irrational, without more. And the test for irrationality of this kind does not require the reviewing court to evaluate reasons underlying the differentiation, as the courts below have done here. Instead, the test is to establish whether there is a rational link between the differentiation concerned and a legitimate purpose sought to be achieved by the differentiation. In *Prinsloo*, the rationality standard was formulated in these terms:

> "Accordingly, before it can be said that mere differentiation infringes section 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe section 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe section 8, it is not a sufficient condition; for the differentiation might

[33] *Prinsloo v Van Der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

[34] Id at para 24.

> still constitute unfair discrimination if that further element, referred to above, is present."[35]

[69] It cannot be gainsaid that the Water Services Act under which Umgeni was established authorises water boards to impose charges for the supply of bulk water and that those charges are set in the form of tariffs. Section 31 of that Act empowers water boards to set and enforce tariffs. It is also apparent from the record that Umgeni sought to achieve two objectives in increasing the tariff for Siza by 41.4%. The first objective was to abolish cross-subsidisation and the other was to save on operation costs.

[70] In applying the rationality test based on differentiation, the question that arises is whether there is a rational connection between the differentiation in question and the objectives sought to be achieved through the increased tariff. The legitimacy of those objectives cannot be disputed. And the rational connection between the means and the end has been established here. The direct consequence of the increased tariff was to abolish the cross-subsidy enjoyed by Siza and that tariff could have saved an amount of R10 million for Umgeni.

[71] Questions like whether this saving would have made a material difference in the operation of other loss-making customers of Umgeni are not relevant to the rationality enquiry. And neither are issues like whether there were less onerous means or better ways which could have been followed to achieve those objectives. In *Prinsloo*, this Court emphasised:

> "[A] person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the State objective could have been achieved in a better way. As long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way."[36]

[35] Id at para 26.

[36] Id at para 36.

[72] Since the discrimination complained of by Siza was based on the differentiation addressed above and to which the rationality test applied, it is not necessary to consider whether the differentiation in question amounted to unfair discrimination. This is so because the facts on record do not suggest that the differentiation rose to the level of unfair discrimination. Moreover, it is not clear from the present matter whether Siza is the bearer of rights guaranteed by section 9(3) of the Constitution.[37] The grounds listed in this provision suggest that the right is enjoyed by human beings. But it is not necessary for us to definitively decide the point in this matter.

[73] It follows that the challenge against the tariff set by Umgeni must fail. However, the Minister's decision is on a different footing.

*Minister's powers*

[74] The Minister's role is clearly defined in the Water Services Act. In terms of section 9 of the Act, the Minister's powers include the power to prescribe compulsory national standards relating to the provision of water services, the quality of water and the effective and sustainable use of water. The standards prescribed by the Minister may differentiate between different users. Section 9 also provides for certain considerations the Minister must take into account when prescribing standards in relation to the need for equitable access to water and *any norms and standards for applicable tariffs for water services*. In our view, the power to prescribe norms and standards does not necessarily translate into having the power to approve tariff increases unless the norms and standards expressly provide for this.

[75] The Minister must also consider matters such as the National Government's obligation to act as a custodian of water resources on behalf of all South Africans. The compulsory national standards set by the Minister may differentiate between different

[37] Section 9(3) of the Constitution provides:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

water users, between different geographical areas and consider socio-economic and physical attributes of each area. In terms of section 10, the Minister may with the concurrence of the Minister of Finance, prescribe norms and standards in respect of water services. These norms and standards may differentiate on an equitable basis between different water users and place limitations on surplus or profit; and provide tariffs to be used to promote or achieve water conservation. In terms of section 10(4), "[n]o water service institution may use a tariff which is substantially different from any of the prescribed norms and standards".

[76] In terms of section 19(5), the Minister may oversee the contents of a joint venture or a contract with a water services provider. The Minister must also provide for the monitoring of water services and provide for the gathering of information to be fed into a national information system to prescribe norms and standards with the concurrence of the Minister of Finance.

[77] This analysis of the provisions in the Water Services Act does not refer to any power (be it express or implied) which the Minister has to approve tariff increases, whether on an equal or differential basis, or at all. During oral argument, counsel on behalf of the Minister as well as counsel for Umgeni were driven to rely on the provisions of section 42 of the Local Government Finance Management Act (Management Act)[38] for the source of this power.

*Are the Minister's powers sourced from section 42?*

[78] In response, to a question as to where the Minister's power to approve tariffs is vested, counsel for both the Minister and Umgeni submitted that the power is found in section 42 of the Management Act. Section 42 of the Management Act provides for price increases of bulk resources for provision of municipal services. The section reads:

[38] 56 of 2003.

"(1) If a national or provincial organ of state which supplies water, electricity or any other bulk resource as may be prescribed, to a municipality or municipal entity for the provision of a municipal service, intends to increase the price of such resource for the municipality or municipal entity, it must first submit the proposed amendment to its pricing structure—

(a) to its executive authority within the meaning of the Public Finance Management Act; and

(b) to any regulatory agency for approval if the national legislation requires such approval.

(2) The organ of state referred to in subsection (1) must at least 40 days before making a submission in terms of subsection 1(a) or (b) request the National Treasury and organised local government to provide written comments on the proposed amendment.

(3) Any submission in terms of subsection (1)(a) or (b) must be accompanied by—

(a) a motivation of the reasons for the proposed amendment;

(b) an explanation how the amendment takes account of—

(i) the national governments inflation targets and other macroeconomic policy objectives;

(ii) steps taken by the organ of state to improve its competitiveness or efficiency in order to reduce costs;

(iii) any objectives or targets as outlined in any corporate or other governance plan to that organ of state; and

(c) any written comments received from National Treasury. . . or any municipalities; and

(d) an explanation has taken how such comments have taken into account.

(4) The executive authority of the organ of state, must table the amendment and the documents referred to in subsection (3) in Parliament or relevant provincial legislature, as may be appropriate.

(5) Unless approved otherwise by the Minister, an amendment to a pricing structure which is tabled in Parliament or the relevant provincial legislature—

(a) on or before 15 March in any year, does not take effect for the affected municipalities or municipal entities before 1 July in that year; or

> (b) after 15 March in any year, does not take effect for the affected municipalities or municipal entities before 1 July the next year."

[79] In the context of this matter, a reference to the executive authority to whom a proposed amendment on a pricing structure should be submitted under section 42(1) is the Minister. But the section proceeds to say that the amendment is submitted for approval to the Minister and a regulatory agency if national legislation requires such approval. This means that it is the national legislation referred to in section 42(1) which empowers the Minister to approve. It is not section 42(1) itself that empowers approval. Otherwise, the role of the Minister, as the executive authority, is to table the amendment in Parliament in terms of section 42(4). And the approval "by the Minister" referred to in section 42(5) relates to the Minister of Finance, as defined in the Management Act, and not the Minister of Water and Sanitation who purportedly approved in a reduced percentage, Umgeni's tariff.

*Analysis*

[80] There is no provision in the Water Services Act which makes it mandatory for the Minister to approve a tariff. As can be seen from the powers of the Minister outlined above, it is the Minister's task to present the tariffs to Parliament, not to approve them. Section 42 of the Management Act takes the matter no further.

[81] It is an established principle of our law that words defined in a statute must be given their defined meaning whenever they appear in a statute unless doing so would lead to an injustice or absurdity not intended by Parliament.[39] The Minister has the power to prescribe norms and standards in terms of section 10 of the Water Services Act, but does not have the power to approve an increase.

[39] See for instance *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 47.

[82] The wording of the statute is clear and unambiguous and where no power is expressly given to the Minister to approve a tariff increase there is no basis to imply such a power. The powers granted to the Minister in terms of the Water Services Act are really aimed at developing and implementing matters of national interest. There is no provision in the Act which provides for the source of the Minister's alleged power to approve tariff increases.

[83] In the absence of an empowering provision, the Minister's decision is in violation of the principle of legality and must consequently be set aside on that basis alone. This Court has on several occasions stressed that the executive is constrained by the principle that they may not act beyond the powers conferred upon them by law. This principle is fundamental to the rule of law and the legality principle. In *Fedsure*,[40] the Court captured the essence of this principle in the following words:

> "It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality."[41]

[84] It is impermissible to appropriate a power to the Minister which is not sourced or defined in the relevant statute. This is so even on a conspectus of the provisions of the Water Services Act; the Minister's role is really policy driven. Similarly, the provisions of the Management Act do not source the Minister's power to approve or disapprove the tariff increase. Nothing in the relevant statute read on its own suggests that the Minister has that power.

[40] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*).

[41] Id at para 58.

[85] As such, for all these reasons, the Minister's decision to approve the tariff increases recommended by Umgeni was unlawful insofar as there was no empowering provision which authorised this decision. The decision was contrary to the principle of legality and must consequently be set aside on this basis.

[86] The second judgment concludes that since both Umgeni and the Minister believed that a tariff set by Umgeni had to be approved by the Minister, the latter's lack of power to approve the tariff increase set by Umgeni vitiates Umgeni's tariff increase. We disagree. Umgeni had statutory power to increase the tariff charged on Siza to 41.4%.[42] And that decision was distinct from the Minister's purported approval. While it is true that both Umgeni and the Minister proceeded from a wrong perception of what the law was, this error of law cannot render invalid a decision taken correctly by Umgeni in terms of the Water Services Act. The law is what was passed by Parliament and not what some parties think it is. Besides, the two decisions have been addressed separately by the parties and the Courts below.[43] Indeed the High Court, after treating these decisions as separate in its judgment, framed its order in these terms:

> "(a) The decision of [Umgeni] proposing to impose a tariff increase of 38,5 per cent on the cost of supply of bulk water to the applicant on 12 November 2014 for the financial year commencing 1 July 2015 and the subsequent approval of a tariff increase of 37,9 per cent by the Minister is hereby reviewed and set aside.
>
> (b) [Umgeni] and the Minister are directed to pay the costs of this application jointly and severally, the one paying the other to be absolved, such costs to include the costs occasioned by employment of two counsel."

[42] Section 31 of the Water Services Act clearly empowered Umgeni to do so.

[43] The order issued by the Supreme Court of Appeal reads:

> "The order of the High Court is amended to read:
>
> > 'The decision of Umgeni Water proposing to impose a tariff increase of 41.4 per cent on the cost of supply of bulk water to the Applicant on 12 November 2014 for the financial year commencing on 1 July 2015 and the subsequent approval of a tariff increase of 37.9 per cent by the Minister is hereby reviewed and set aside.'"

[87] Although there is an error in the High Court's order in relation to the percentage by which the tariff was increased, it cannot be gainsaid that the Court regarded Umgeni's increase of the tariff to be a decision, and rightly so. In addition, the High Court described the Minister's decision as "the subsequent approval of a tariff increase". And the order treats both decisions as a single administrative action that was reviewed and set aside. The Supreme Court of Appeal having corrected the tariff increase imposed by Umgeni, confirmed the order of the High Court.

[88] In our law, it is common to have administrative action comprising two decisions, taken sequentially by different functionaries.[44] If this kind of administrative action occurs, each decision is subject to scrutiny to determine its validity. If the first decision was properly taken, it cannot be vitiated by irregularities which occurred when the second decision was taken.[45]

[89] There is nothing in principle which suggests that this Court should render a judgment that accords with the parties' error of the law. The 41.4% increase that was set by Umgeni was not in law subject to the Minister's approval, despite the erroneous view held by those parties. Consequently, the Minister's lack of power to approve it had no bearing on the tariff set by Umgeni, regardless of what Umgeni itself thought of the purported approval. The fact of the matter is that Umgeni's decision was valid in the eyes of the law and it continues to be valid until properly set aside.

[90] We must emphasise that the question whether in law a tariff fixed by a water board requires approval before it can be implemented is not before this Court. Instead, what is before us is whether Umgeni's decision and the Minister's decision were invalid on the bases that they were illegal and irrational. We hold that the Minister's decision was illegal, but that the tariff set by Umgeni was legal and rational.

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[44] *Merafong City v Anglogold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC); *Walele v City of Cape Town* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC); and *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA).

[45] *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae*) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

*Costs*

[91] Siza has succeeded in opposing the Minister's appeal and the latter should pay its costs in this Court. Umgeni has succeeded against Siza. Ordinarily, Siza would be insulated from liability to pay Umgeni's costs by the principle laid down in *Biowatch*.[46] But since for present purposes Siza was performing a public function on behalf of Ilembe Municipality, it should be treated as an organ of state. Consequently, the protection in *Biowatch* does not extend to it. That protection applies to private litigants who lose a case against the state.[47] Here, the ordinary principle that costs follow the result should apply. Therefore, Siza should pay Umgeni's costs in all Courts.

*Order*

[92] In the result, the following order is made:

1. The application for leave to appeal is granted.
2. The appeal by the Minister of Water and Sanitation is dismissed.
3. The Minister of Water and Sanitation is ordered to pay the costs of Sembcorp Siza Water (Pty) Limited in this Court, including the costs of two counsel.
4. The appeal in favour of Umgeni Water is upheld.
5. The orders of the High Court and Supreme Court of Appeal are set aside to the extent that they refer to Umgeni Water and are replaced with:

   "The application to review the tariff set by Umgeni Water is dismissed with costs, including costs of two counsel."
6. Sembcorp Siza Water (Pty) Limited is ordered to pay the costs of Umgeni Water in this Court and the Supreme Court of Appeal and such costs shall include costs of two counsel.

[46] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[47] Id at para 43.

MADLANGA J (Theron J concurring):

[93] I have had the pleasure of reading the judgment by my colleagues Jafta J and Victor AJ (majority judgment). I find it to have an internal contradiction in its treatment of the applications of Siza and the Minister. As I explain presently, the removal of that contradiction – which is what must be done – results in both applications suffering the same fate. And that is, in both leave to appeal must be refused.

[94] At the outset, let me state that I agree with the majority judgment – and for the reasons it gives – that the Minister lacks power to approve tariffs. What impact, if any, does that have on Umgeni's recommendation to the Minister on the tariff increase? I use "*recommendation*" advisedly. The judgment of the Supreme Court of Appeal aptly captures the facts that underlie the basis of divergence between the majority and me.[48] The Supreme Court of Appeal judgment says, "Umgeni *recommended* [a 41.4%] increase . . . in the final annual review submitted to the Minister for her *approval*. She reduced the increase . . . to 37.9%".[49] The majority does not take issue with these facts. In fact, it says something similar, which is that "Umgeni applied to the Minister for the approval of the tariff increase for the financial year commencing on 1 July 2015. However, she reduced the tariff to 37.9% from the 41.4% that Umgeni had initially wanted to charge".[50] Indeed, in paragraph 85 the majority refers to "the Minister's decision *to approve* the tariff increases *recommended* by Umgeni".[51]

[95] Thus, there is no gainsaying that Umgeni's idea of a 41.4% tariff increase was a mere recommendation. Happily – and as I have just demonstrated – this is accurately captured by the majority judgment itself. A recommendation is not a decision; certainly not in the sense of a final implementable decision. It is "a suggestion or proposal as to

[48] Supreme Court of Appeal judgment at paras 14-6.

[49] Id at para 15 (emphasis added).

[50] See the majority judgment at [9].

[51] Emphasis added.

the best course of action".[52] To further define at least one of these two descriptors (i.e. "suggestion" or "proposal"), a proposal is "a plan or suggestion put forward for consideration".[53] The upshot of this, is that Umgeni never intended to charge Siza a 41.4% increase without that tariff first having been approved by the Minister. If language is to be given its true meaning, all that Umgeni did was to put forward that percentage as a suggestion to the Minister for her consideration. Of course, upon consideration, the Minister did not approve the suggested increase, but reduced it to 37.9%.

[96] Having merely made a recommendation and sought approval from the Minister, it stands to reason that it is the Minister's tariff – the 37.9% – that Umgeni then sought to implement. And it is that increase that Siza challenged in Court. If the Minister's purported decision to approve a tariff increase comes tumbling down for lack of power on the part of the Minister to fix or approve tariff increases, it seems only logical that nothing remains to be implemented. No final implementable decision remains. We are left with something inchoate; the suggested increase for the Minister's consideration.

[97] Is this form over substance? Absolutely not. At no stage did Umgeni ever purport to take a final and binding decision in terms of which it increased Siza's tariff. Instead, it purported to implement the Minister's purported approval. However much one traverses the length and breadth of the papers, one will not find a decision by Umgeni – final or in the form of a recommendation for approval – which fixed a tariff of 37.9%. This means one thing and one thing only: Umgeni never took a final decision of its own in terms of which it fixed a tariff increase of 37.9%, which it now seeks to implement.

[98] Unsurprisingly, nowhere does the majority judgment suggest that Umgeni ever itself fixed the 37.9% tariff increase. That is because this never happened. To ask

[52] *Concise Oxford English Dictionary* 11 ed (OUP, Oxford 2009) at 1201.

[53] Id at 1151.

rhetorically, on what basis then can Siza be held to a 37.9% increase fixed by the Minister and which – for the reasons aptly articulated by the majority – is invalid and, therefore, unenforceable? The 37.9% increase, which was not Umgeni's figure to begin with, simply has to be ineffectual. What Umgeni "decided" on was a *recommendation* of a different figure, 41.4%. This 41.4% increase is not what Umgeni required Siza to pay. And that is understandable for the simple reason that the 41.4% was not meant to be final.

[99] A serious difficulty I have is that I am not altogether sure as to whether the majority judgment holds that what is now implementable is the 37.9% or the 41.4%. The substituted order contained in paragraph 5 of the order in the majority judgment reads: "the application to review the tariff *set by Umgeni Water* is dismissed with costs, including costs of two counsel".[54] One is curious as to which tariff this substituted order is referring to. Plainly, this order means some tariff must apply to Siza. Which tariff is that? Is it the 37.9% increase? If so, Umgeni never "set" any such tariff. And the 37.9% increase, which was approved by the Minister, could not have magically metamorphosed and become a "tariff set by Umgeni". Or, is the substituted order referring to the 41.4% *recommendation*, which is the only figure that was "decided" by Umgeni, but which was subject to approval by the Minister? Of course, I want to think – against all indications – that it is not. And I want to think so because, if it is, that would be the height of illogicality. Whatever the position may be, I would be surprised if Siza and Umgeni will not be confused. I am.

[100] In responding to my judgment, the majority says at [86]:

> "The second judgment concludes that since both Umgeni and the Minister believed that a tariff set by Umgeni had to be approved by the Minister, the latter's lack of power to approve the tariff increase set by Umgeni vitiates Umgeni's tariff increase. We disagree. Umgeni had statutory power to increase the tariff charged on Siza to 41.4%. And that decision was distinct from the Minister's purported approval. While it is true

[54] Emphasis added.

> that both Umgeni and the Minister proceeded from a wrong perception of what the law was, this error of the law cannot render invalid a decision taken correctly by Umgeni in terms of the Water Services Act."

[101] This seems to suggest that the majority now purports to elevate a *recommendation* – i.e. Umgeni's recommendation to the Minister for approval of a 41.4% tariff increase – to a final and implementable decision. I cannot quite grasp how it does this. What makes this even more difficult to comprehend is that, only in the preceding paragraph, the majority accepts in so many words that what Umgeni did was to recommend: it refers to "the Minister's decision to approve the tariff increases *recommended* by Umgeni".[55] And much earlier in the judgment the majority says, "Umgeni applied to the Minister for the approval of the tariff increase for the financial year commencing on 1 July 2015. However, she reduced the tariff to 37.9% from the 41.4% that Umgeni had initially wanted to charge".[56] At the risk of repetition, at what point then did a mere *recommendation* which was plainly meant to be approved by the Minister morph to an implementable increase of 41.4%?

[102] In context, the majority's answer seems to be that, because the power to set tariffs lies with Umgeni, its "decision" to set the 41.4% increase cannot be vitiated by the error shared by the Minister and Umgeni that the "decision" had to be approved by the Minister. Well, that begs the question. I want to see the *decision*; a final, implementable decision by Umgeni, that is. There is simply none; there is a recommendation. The majority says as much.

[103] In yet another attempt at rendering a comprehensible explanation, the majority calls in aid the scenario of a two- or multiple-stage decision making process, a well-known phenomenon in administrative law. And it argues – correctly – that an irregularity committed at a later stage cannot vitiate a decision taken properly at an earlier stage. The point being made is that Umgeni's 41.4% remains intact and

[55] See the majority judgment at [85].

[56] Id at [9].

implementable and cannot be affected by the invalidation of the Minister's purported decision. First, a fundamental flaw in this reasoning is that it proceeds from the wrong premise that Umgeni had made a final, implementable decision. It never did; in the majority's own words it only made a recommendation. The fact that there did not have to be the interposition of the Minister's decision matters not. What Umgeni "decided" is inchoate and will forever remain so. And being inchoate, it is ineffectual.

[104] Second and relatedly, what the majority does is not to explain that in a two- or multiple-stage decision making process, the nature and effect of the sequential decisions may differ, if not often differs.[57] The sequential decision making process often becomes one composite implementable whole once the last decision has been taken.[58] In such instances, in the event of the last decision in the sequence being invalidated, earlier decisions in the process retain their nature; i.e. they do not graduate to make the process complete and implementable.

[105] I am not unmindful of the facts that in the instant matter – as a matter of law – there ought not to have been a two-stage decision making process; that it lay with Umgeni to take a final decision; and that the Minister's decision is invalidated exactly because she ought not to have participated in the process. With that in mind, we would not be having this debate if Umgeni had taken a final decision. It never did; period, as the Americans would say.

[106] In sum, the analogy of the two- or multiple-stage decision making process does not assist the majority at all.

[57] These different roles are confirmed in *Walele* above n 44 at para 68 where this Court held that "the purpose of the recommendation is to furnish the decision-maker with a basis for his or her opinion, one way or the other". And in *Helen Suzman Foundation v Robert McBride* [2021] ZASCA 36; [2021] 2 All SA 727 (SCA) at para 40 the Supreme Court of Appeal held that recommendations are not preliminary decisions and are not binding on decision-makers.

[58] Compare *Minister of Health* above n 45 at paras 136-7.

[107] In what appears to emphasise the fact that we are here concerned with two discrete decisions, the majority makes much of the fact that Siza challenged both Umgeni's recommendation and the Minister's approval of a reduced rate. I do not see how this advances the debate. A recommendation remains that and cannot mutate based on how a litigant has framed the relief it seeks. That puts paid to this point. But although I need say nothing more on it, it was Umgeni's recommendation that informed the phenomenal increase purportedly fixed by the Minister. That explains why Siza would have seen the need to challenge not only the Minister's approval, but also the underlying recommendation by Umgeni.

[108] It is more than interesting that the majority eschews enlightening us on how and when Umgeni's "decision" of the 41.4% was ever sought to be implemented. This is so because there never was and there could never have been an attempt to implement a recommendation. If what the majority is seeking to revive in terms of the substituted order in paragraph 5 is the 41.4%, that will be foisting a different increase on all concerned. Siza will now find itself unfairly and unjustly faced with a higher increase than what was sought to be implemented. And I am sure Umgeni itself will be surprised – whether pleasantly or otherwise, one has no idea – by this manna. To put it bluntly, Umgeni required Siza to pay for bulk water supply at an increased rate of 37.9%. The majority – not Umgeni – foists on it an additional 3.5% increase. That is an injustice.

[109] To conclude, the upshot of the Minister's lack of power is that her application for leave to appeal has no reasonable prospects of success. So, she must be refused leave to appeal. The fate of Umgeni's application becomes obvious. It too must fail for lack of reasonable prospects of success. It serves no purpose to spare an ineffectual inchoate decision.

[110] Consequently, it is not necessary to deal with the basis or bases on which the majority judgment sets aside the judgment of the Supreme Court of Appeal.

[111] Thus, I would have granted an order that refuses leave to appeal with costs, including costs of two counsel, in both applications.

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