



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 21 October 2024

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgment of the Supreme Court of Appeal***

*Elmir Property Projects (Pty) Ltd t/a Elmir and Another v Bankenveld Homeowners Association (Pty) Ltd (522/2023 and 524/2023) [2024] ZASCA 141 (21 October 2024)*

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Today the Supreme Court of Appeal, (the SCA) handed down a judgment in which it dismissed, with costs, the appeal of Elmir Property Projects (Pty) Ltd t/a Elmir Projects (Elmir), and upheld the appeal of the Emalahleni Local Municipal Council (the Municipality), against an order of the Mpumalanga Division of the High Court, Middelburg (the high court).

The litigation between the parties was caused by the dysfunctionality of two sewage reclamation plants (the plants), at the Bankenveld Golf Estate development, designed to process sewage and to provide recycled water for irrigation. The plants fell into disrepair after years of neglect and inadequate maintenance, causing not only inconvenience and health risks for homeowners but also posing a serious threat to the environment.

The core issue before the SCA was to determine who bore the responsibility for the operation and maintenance of the plants between Elmir and the Municipality.

The Bankenveld Homeowners Association (the Bankenveld HOA) took the view that Elmir and the Municipality were jointly responsible for the operation and maintenance of the plants. It, consequently, launched an application in the high court, for an order, *inter alia*, directing them jointly to provide sanitation services to the Bankenveld Estate and to apply for the necessary environmental approvals, including a water use licence in terms of the National Water Act 36 of 1998.

Elmir contended that the condition applicable to Extension 11 (the second phase of the development), that it was to install and operate the plant at its own costs and to the satisfaction of the Municipality, 'fell away' because that township was never formally proclaimed.

Being of the view that the Municipality bears the primary constitutional obligation for the provision of water and sanitation services, the high court found that the township establishment conditions did not relieve it of that duty. It consequently held both the Municipality and Elmir jointly and severally

responsible for the provision of sanitation services to the Bankenveld Estate, including the operation and maintenance of the plants. The high court consequently granted an order, *inter alia*, interdicting Elmir from developing, alternatively, selling or subdividing any of the properties in the Bankenveld Estate pending compliance with that order, and directing the appellants, jointly and severally, to provide sanitation services to the Bankenveld Estate.

The appellants appealed separately against the high court's order, with Elmir appealing against the whole of the order and the Municipality appealing only against those paragraphs that hold it jointly and severally liable with Elmir to provide the sanitation services, and which imposes related obligations.

The SCA agreed with the high court's finding that Elmir had failed to provide evidence in support of its assertion that either the Municipality or the Bankenveld Golf Estate Property Association had assumed responsibility for the operation and maintenance of the plants. It found that there was, on the contrary, compelling evidence that Elmir had been operating the plants for some 15 years after their completion.

In respect of Elmir's contention that the conditions attached to Extension 11 'fell away', the SCA found that that argument was manifestly unsustainable because first, those township establishment conditions were proposed by Elmir and Elmir was aware that the development would not have been approved if it did not accept the responsibility for the services. Second, Elmir had simultaneously applied for the subdivision of Extension 11 and for the approval of the subdivided townships, namely Extensions 12, 13 and 14, and had continued to operate and maintain the plants for years after their construction. Third, the conditions were imposed by the Municipality in terms of s 98(2) of the Town-Planning and Townships Ordinance 15 of 1986, which authorises the Municipality, when approving an application, to impose any condition it deems expedient. Because the Municipality was clearly exercising a public power in terms of empowering legislation, that decision constituted administrative action as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000. The decision therefore remains valid and effectual until set aside by a competent court.

The SCA found that insofar as the relief sought against the Municipality was concerned, it had either been overtaken by subsequent events or had in the circumstances become unnecessary. The Municipality accepted its constitutional obligation to supervise Elmir's compliance with the township establishment conditions, consequently, the SCA found it unnecessary to grant an order compelling it to do so. The finding that Elmir remains responsible for the operation and maintenance of the plants also means that it is obliged to comply with applicable environmental legislation, including the obligation to obtain requisite water use licences. The SCA held that it was unnecessary for that obligation to be spelt out in the order. As a result, the SCA made an order dismissing Elmir's appeal with costs and upholding the Municipality's appeal.

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