THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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The Kgetlengrivier Concerned Citizens v The Kgetlengrivier Local Municipality & Another (361/2025) [2026] ZASCA 148 (2 November 2026)

Today the Supreme Court of Appeal (SCA) upheld an appeal by the Kgetlengrivier Concerned Citizens (the KCC) against an order of the North West Division of the High Court, Mahikeng (the high court). The high court had dismissed the KCC's application to review and set aside the decision of the Kgetlengrivier Local Municipality (the Municipality) to appoint Magalies Water Board (Magalies Water) as implementing agent to operate and manage its water provision and sanitation services, and Magalies Water's acceptance of that appointment. The SCA set aside both the appointment and its acceptance. Two judgments were delivered. The order was unanimous.

The KCC is a voluntary association representing residents within the Municipality. For years, raw sewage from the Koster and Swartruggens sewage works had flowed into the Koster and Elands rivers, the source of drinking water in the area. On 18 December 2020, the KCC obtained an interim order compelling the Municipality to stop the pollution. The situation worsened, and on 7 January 2021 the KCC took control of the water and sewage works. On 12 January 2021, an order was taken by agreement directing the Municipality to appoint a suitable implementing agent by the end of January 2021. On the same day, the Municipality appointed Magalies Water. It had terminated Magalies Water's previous contract for poor performance on 26 November 2020, and on 5 January 2021 had stated under oath that Magalies Water had failed to perform and that a different service provider would be appointed. The KCC repeatedly asked for the decision record and proof of the appointment, including through requests under the Promotion of Access to Information Act 2 of 2000. On 2 March 2021, the Municipality produced two documents: a letter of appointment dated 12 January 2021, which made the appointment conditional on concluding an operating agreement, and an operations and maintenance agreement dated 27 May 2020.

The Municipality defended the appointment on the basis that s 110(2) of the Local Government: Municipal Finance Management Act 56 of 2003 (the LGMFMA) excludes procurement processes where a municipality contracts with another organ of state, and that regulation 36 of the Municipal Supply Chain Management Regulations permits deviation from those processes in an emergency. The high court accepted that defence and dismissed the application with costs.

Magalies Water, the only party to oppose the appeal, argued that the appeal was moot because the three-year appointment had expired. The SCA rejected that argument. It held that the validity of the appointment and its acceptance remained in dispute, and that the matter concerned the Municipality's persistent failure to meet its constitutional obligation to provide clean water and sanitation, which the public interest required the Court to determine.

In the first judgment, Mjali AJA held that the appointment was never perfected. The only agreement produced predated the appointment by some eight months and belonged to the contract the Municipality had cancelled. The Municipality produced no record showing why it considered Magalies Water suitable. It disregarded Magalies Water's recent failure, its own sworn statement that it would appoint a new provider, and the court order requiring a suitable agent. It reappointed the same entity on the day the order was granted. Relying on Democratic Alliance v President of the Republic of South Africa, the first judgment held that the failure to consider relevant material rendered the process, and therefore the decision, irrational. The first judgment declined to decide whether s 110(2) of the LGMFMA and the regulations displaced the procurement requirements of s 217 of the Constitution, because the question had been raised for the first time in the KCC's heads of argument on appeal.

In a separate judgment, Matojane JA (Meyer and Goosen JJA and Kooverjie AJA concurring) agreed with the order and with the first judgment's conclusions on mootness and rationality, but held that the s 110(2) question was properly before the SCA and should be decided. The Municipality relied on s 110(2) and regulation 36; the High Court decided the case on that basis; and Magalies Water argued the point on its merits. The question was also of public importance and likely to recur, because municipalities unable to deliver water and sanitation services often turn to water boards or other organs of state under time pressure.

On the substance, the second judgment held that s 217(1) of the Constitution, which requires organs of state to contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, is not confined to contracts with private parties. Section 110(2) relieves a municipality of the supply chain management machinery in Part 1 of Chapter 11 of the LGMFMA. It does not relieve the municipality of the constitutional standard that machinery serves, nor of the budgetary controls in ss 15 and 29 of the LGMFMA. Competitiveness may have little application when one organ of state engages another directly, but transparency and cost-effectiveness remain. The appointment, a three-year arrangement with a projected cost of R37 500 000, failed that standard. No council resolution, no evidence that the expenditure was budgeted or appropriated, no signed

agreement, and the council was never told. The argument that the provincial Department of Co-operative Governance, Human Settlements and Traditional Affairs would bear the cost did not assist: no such funding arrangement was established, and the contract was concluded in the Municipality's name. The second judgment also held that the high court had run together two distinct sources of authority. An emergency deviation under regulation 36(1) presupposes that the supply chain management regime applies, with its attendant duty to record and report the deviation. On neither footing could the appointment be concluded without informing the council.

The second judgment stressed the limits of its conclusion. A municipality may lawfully engage another organ of state as an implementing agent, and may do so urgently where a court order or an emergency requires it. But the decision must be rational and recorded, the expenditure lawfully provided for, and any departure from the municipality's own policies justified on the record.

The second judgment further held that the high court had correctly refused the declaratory orders the KCC sought against Magalies Water concerning its staffing and performance, because they sought findings of historical fact rather than the determination of a right or obligation under s 21(1)(c) of the Superior Courts Act 10 of 2013.

On costs, the SCA held that the High Court erred in ordering the KCC to pay costs. The KCC was a public interest litigant asserting constitutional rights to water and sanitation, and its litigation was not frivolous. Under the Biowatch principle, even had the Municipality succeeded, each party should have paid its own costs. The high court's costs orders were set aside. The Municipality was ordered to pay the costs of the review application and of the application for leave to appeal in the high court, and Magalies Water was ordered to pay the costs of the appeal, including those of two counsel.

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