

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 361/25

In the matter between:

THE KGETLENGRIVIER CONCERNED CITIZENS **APPELLANT**

and

THE KGETLENGRIVIER LOCAL MUNICIPALITY **FIRST RESPONDENT**

MAGALIES WATER BOARD **SECOND RESPONDENT**

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

Coram: MEYER, MATOJANE and GOOSEN JA and MJALI and KOOVERJIE AJJA

Heard: 18 May 2026

Judgments: Mjali AJA (first judgment) [1] to [39]

Matojane JA (second judgment): [40] to [51]

Delivered: 2 November 2026

Summary: Administrative Law – Constitutional Law – public procurement – municipal governance – s 217 of the Constitution – Local Government: Municipal Finance Management Act 56 of 2003 (the LGMFMA) – rationality of the decision to appoint a service provider – whether the emergency appointment of one organ of the state by another displaces or dilutes the constitutional procurement requirements of s 217, namely that procurement must be fair, equitable, transparent, competitive, and cost-effective – whether reliance on s 110(2) of the LGMFMA and regulation 36 justified deviation from ordinary procurement processes – whether there was adequate funding, reporting, council oversight and compliance with supply chain management policies – whether the high court erred in dismissing the review and granting an adverse cost order against a public interest litigant in conflict with the *Biowatch* principle.

ORDER

On appeal from: Northwest Division of the High Court, Mahikeng (Djaje DJP, sitting as court of first instance):

1 The appeal succeeds.

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

'a The first respondent's decision to appoint the second respondent as a suitable implementing agent to operate and manage the first respondent's water provision and sanitation services is reviewed and set aside.

b The second respondent's acceptance of that appointment is reviewed and set aside.

c The first respondent shall pay costs of the review application as well as the application for leave to appeal in the high court.'

3 The second respondent shall pay the costs of the appeal, including those of two counsel.

JUDGMENT

Mjali AJA

[1] This is an appeal against the judgment and order of the Northwest Division of the High Court, Mahikeng (Djaje DJP) (the high court) dated 26 January 2023, dismissing the appellant's application for review and setting aside the first respondent's decision to appoint the second respondent as a suitable implementing agent to operate and manage the first respondent's water provision and sanitation services. The appeal is also directed against the high court's dismissal of the

application to set aside the second respondent's acceptance of that appointment. Leave to appeal was granted by this Court on petition.

[2] The appellant is the Kgetlengrivier Concerned Citizens (the KCC), a voluntary association representing the interests of the residents within the jurisdiction of the Kgetlengrivier Local Municipality. The first respondent is the Kgetlengrivier Local Municipality (the Municipality), a local authority established in terms of s 12 of the Local Government: Municipal Structures Act 117 of 1998, operating under Chapter 7 of the Constitution.[1] The second respondent is Magalies Water Board (Magalies Water), a state-owned water utility established under the Water Services Act 108 of 1997.

[3] In the high court, the KCC challenged the Municipality's decision to appoint Magalies Water on the basis that the Municipality: (a) did not follow due process (or any process at all) in that there was no open tender process before Magalies Water was appointed; (b) that the Municipality did not give effect to the Public Finance Management Act 1 of 1999 and the Local Government: Municipal Finance Management Act 56 of 2003 (the LGMFMA), the Constitution and other relevant legal provisions; and (c) it failed to provide the Council resolution approving of Magalies Water as a suitable implementing agent. As such, the KCC contends that the decision to appoint Magalies Water was not in conformity with the relevant legal provisions. The KCC also challenged the Municipality's decision to appoint Magalies Water on the basis that it was irrational, without a reasonable basis, arbitrary, procedurally unfair and that it displayed naked preference for Magalies Water by disregarding its previous dismal performance, which culminated in its

[1] The Constitution of the Republic of South Africa, 1996.

contract being cancelled. Further, the Municipality failed to provide a record of its decision to appoint Magalies Water. In this regard, the KCC argued that the decision is reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000.

[4] The Municipality opposed the application and asserted that it acted in terms of s 110(2) of the LGMFMA, which precludes procurement processes where a municipality contracts with another organ of state for the provision of goods or services to the municipality. It further relied on regulation 36 of the LGMFMA, which allows deviation from the normal procurement process by the accounting officer in circumstances where there is an urgent need for goods and services. Magalies Water opposed the application on the grounds that the KCC had not made out a case for the relief sought.

[5] The high court found in favour of the respondents and dismissed the application. It reasoned thus:

'The first respondent in this matter was ordered by court to urgently take remedial steps to stop the pollution by immediately fixing the cause of the spillage and to remedy the effects thereof. In doing so the first respondent had to appoint a suitable implementing agent. The second respondent, being a public entity, was then appointed and took over the water works to assist in fixing the spillage of sewer into the rivers and provide clean water.

The situation with the spillage and provision of water was urgent and had to be attended to. As provided for above in regulation 11(2) read with regulation 36, the first respondent in appointing the second respondent acted in accordance with the provisions of the regulations of the LGMFMA which authorises the procurement of services by a public entity without following procurement processes.'

The high court also refused to set aside Magalies Water's acceptance of the appointment.

[6] This appeal is directed against that order. In its heads of argument, the KCC raised for the very first time an issue couched in the form of a legal question, namely, whether:

'Section 110(2) of the Local Government Municipal Finance Management Act 56 of 2003 ("the LGMFMA") read with Regulations 36(3) and 11(2) give a municipality contracting with another organ of state *carte blanche* to ignore the constitutional imperatives of section 217 such as transparency and cost-effectiveness and the dictates of section 3(1)(c) and 29(2)) of the LGMFMA in an "agreement" for three years that was not budgeted, not reported at a next municipal council meeting, not appropriated in an adjusted budget and of which the suspensive condition that it be reduced to writing, was not done? Applied to the facts *in casu*: May the "emergency appointment" of another organ of state (Magalies Water) to assist the municipality with the provision of water and sanitation services over an extended period be allowed if such appointment is unfunded, not reported at a next council meeting and in breach of the Municipality's policy?'

The KCC places the issues raised by these questions at the core of this appeal.

[7] In addition, the KCC challenged the high court order, inter alia, on the basis that it erred in not finding the Municipality's appointment of Magalies Water as irrational and that it failed to comply with the constitutional values of s 217 of the Constitution, the LGMFMA and the Municipality's Procurement Policy. It also challenged it on an incomplete appointment decision.

[8] The appeal is opposed only by Magalies Water. In its opposition, it objected to the adjudication of the new issue raised by the KCC on appeal on the ground that it was not covered by the pleadings and not ventilated in the application proceedings. Magalies Water also raised the issue of the mootness of the appeal, stating that, following its appointment on 12 January 2021 for a period of three years, the contract has now expired. Magalies Water, as would be expected, could not and did not address the substantive issue of the rationality or otherwise of the Municipality's

decision relating to its appointment as a suitable implementing agent. It also could not deal with the issue of the validity of its appointment.

The Facts

[9] At the heart of this matter is the consistent failure of the Municipality to carry out its constitutional mandate of service delivery by providing its residents with clean potable water in its resorts. Instead, raw sewerage flowed unhindered into the Koster and Elands rivers, which are the source of drinking water in the area of the Municipality. Consequently, the KCC have through persistent litigation, sought to enforce the delivery of clean drinking water and obtained a number of court orders against the Municipality compelling it to urgently take remedial steps to correct the situation. The implementation of such court orders presented yet another problem that culminated in litigation for either being bungled up, misconstrued or ignored.

[10] Relevant in this appeal are the following court orders. The first one is the interim order dated 18 December 2020 and returnable on 1 March 2021. Therein, the court made certain declarations relating to the failure of the Municipality to prevent raw sewage from the sewage works at Koster and Swartruggens, flowing into and contaminating the Koster and Elands rivers. It compelled the Municipality to urgently take remedial steps to stop that pollution by immediately fixing the causes of the spillages, to remedy the effects of the pollution and to rehabilitate the affected areas. The KCC avers that there was no adherence to this court order; instead, the situation deteriorated even further in that there was no potable water in any of the reservoirs at Koster and Swartruggens. A situation that prompted the KCC to take over the control of the water and sewerage works of Koster and Swartruggens on 7 January 2021.

[11] That takeover by the KCC prompted the Municipality to anticipate the 18 December 2020 court order and to enrol the matter for hearing on 8 January 2021. The parties eventually settled, and a court order by agreement was granted on 12 January 2021. That court order amended and amplified the interim order of 18 December 2020. Significantly, it ordered the Municipality to appoint a suitable implementing agent to operate and manage the Municipality's water provision and sanitation services by no later than the end of January 2021.

[12] Purportedly acting in terms of the 12 January 2021 court order, the Municipality addressed a letter to the KCC's attorneys and announced the appointment of Magalies Water as a suitable implementing agent. It also invited the KCC to a handover that was to be held on 20 January 2021. The KCC attended and objected to the handover, asserting that it was haphazard and lacked a handover plan developed by the KCC and the implementing agent.

[13] The KCC also objected to the appointment of Magalies Water, citing its earlier involvement and dismal failure which culminated in the Municipality terminating its contract. The KCC feared the same scenario recurring. In this regard, it requested proof of appointment as well as the terms on which Magalies Water was appointed. It averred that it needed to establish whether the appointment satisfied the criteria of managing, monitoring and maintaining the water works at Koster and Swartruggens and the sewage works at the respective towns.

[14] On 22 January 2021, the KCC again requested information confirming the lawful and valid appointment of Magalies Water. These requests attracted no response from the Municipality. Instead, despite being aware of the KCC's objections, Magalies Water insisted on the handover scheduled for 27 January 2021

that was to be held at the Municipality Council Chambers. The KCC attended the handover and reiterated its request for copies of records of decision, proof of Magalies Water's appointment, as well as copies of the agreement concluded between the Municipality and Magalies Water. These requests were followed by service of formal notices in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) on the Municipality and Magalies Water.

[15] In a further meeting held on 1 February 2021, the KCC again reminded Magalies Water of the request for records as well as proof of appointment. It warned Magalies Water that any work it did was subject to its lawful appointment. On 10 February 2021, the KCC again reminded Magalies Water of its PAIA request of January 2021, asserting that it had not been favoured with a copy of its acceptance of appointment by the Municipality. There was no response to the aforesaid request.

[16] On 25 February 2021, the KCC addressed emails to the Municipality, Magalies Water and representatives of the Province wherein it recorded that the appointment of Magalies Water remains in dispute. Further, both the Municipality and Magalies Water were requested to provide a record of the decision to appoint as well as Magalies Water's acceptance of such an appointment. The KCC complained about their failure to provide the requested records and raised its concerns about the possibility of hiding corruption in the appointment of Magalies Water.

[17] On 2 March 2021, the Municipality provided the KCC with an incomplete bundle of documents. It consisted of two documents, the first being a letter of appointment of Magalies Water for operation and maintenance of water treatment works and wastewater treatment works within the municipality. The second document was the operations and maintenance agreement concluded between the

Municipality and Magalies Water. The letter of appointment is dated 12 January 2021, which is essentially the same date as the court order compelling the Municipality to appoint a suitable implementing agent. The bundle of documents provided was intended to prove the appointment of Magalies Water by the Municipality as well as the terms of that appointment. Much is to be said in due course about the operations and maintenance agreement purportedly concluded consequent upon Magalies Water's appointment on 12 January 2021 that is dated 27 May 2020.

Analysis

[18] I first deal with the issue of mootness. Section 16(2)*(a)* of the Superior Courts Act, 10 of 2013 provides that:

'(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone. (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

[19] In *Minister of Tourism and others v Afriforum NPC and another*[2] the Constitutional Court stated:

'A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court's decision or which would be resolved by a court's decision. A case is also moot when a court's decision would be of academic interest only.'[3]

The reasoning behind this principle is that courts' scarce resources must be used to determine live legal disputes rather than abstract propositions of law that are merely

[2] *Minister of Tourism and others v Afriforum NPC and another* [2023] ZACC 7; 2023 (6) BCLR 752 (CC).
[3] Ibid para 23.

academic and have no immediate practical effect or result. The question of mootness is considered independently from the issue of costs.

[20] Central to this appeal is the issue of the consistent failure of the municipality to deliver in terms of its constitutional mandate of the provision of clean potable water and proper sewerage services. There is also the issue of persistent litigation by KCC regarding the delivery of these services. Such are constitutional matters and it is in the public interest to entertain the appeal. In addition to that the validity of the decision to appoint Magalies Water warrants determination as it is in issue. The permeating trend throughout is that the KCC sought proof of Magalies Water's appointment and its acceptance of that appointment. It cautioned that any work done by Magalies Water was subject to its lawful appointment. The letter of appointment supplied by the Municipality as proof of that appointment makes the appointment conditional upon the conclusion of an operations and maintenance agreement. Without a valid operations and maintenance agreement being concluded between the Municipality and Magalies Water, the appointment would not be extant.

[21] There is yet another hurdle. The KCC requested records of the decision to appoint as well as Magalies Water's acceptance of such an appointment. The rationale for that request was that the KCC wanted to understand the rationality of the decision to re-appoint Magalies Water after it had terminated its earlier contract due to poor performance. The incomplete record provided by the Municipality did not contain any information relating to Magalies Water's suitability to deal with the recurring water and sanitation problems in the area.

[22] The high court correctly formed the view that the details of the agreement between the Municipality and Magalies Water had not been disclosed. Despite that

correct finding, the high court did not consider that the absence of the agreement impacted on the validity of the appointment itself and that such was disputed. It merely accepted that there was a valid appointment and found that the Municipality acted in terms of the enabling legislation in appointing Magalies Water. Thus, the impugned decision to appoint Magalies Water as well as Magalies Water's acceptance of that appointment remain live issues, and the high court's decision in this regard must be determined in this appeal. As such, this appeal is not moot.

[23] I turn now to the question of the new issue raised for the first time on appeal. The issue at the heart of the KCC's challenge in the high court is the decision to appoint Magalies Water in that it was not in conformity with the relevant legal provisions and it was irrational. In particular the KCC's case was that the municipality: (a) did not follow due process (or any process at all) in that there was no open tender process before Magalies Water was appointed; (b) that the Municipality did not give effect to the Public Finance Management Act 1 of 1999 and the Local Government: Municipal Finance Management Act 56 of 2003 (the LGMFMA), the Constitution and other relevant legal provisions; and (c) it failed to provide the Council resolution approving of Magalies Water as a suitable implementing agent. The KCC also challenged the Municipality's decision to appoint Magalies Water on the basis that it was irrational, without a reasonable basis, arbitrary, procedurally unfair and that it displayed naked preference for Magalies Water by disregarding its previous dismal performance, which culminated in its contract being cancelled.

[24] The issues before the high court were not couched in the manner of the question that was raised for the first time on appeal. Neither was that question

foreshadowed in the pleadings nor ventilated during the hearing of the application in the high court. The high court determined the issues that were placed before it.

[25] It is trite that pleadings are designed to define the issues for the other party and determination by the court. The court must determine issues that arise from the pleadings except in certain defined circumstances, which do not arise in the circumstances of this case. One example is that the issue must have been fully ventilated during the hearing.

[26] Much as it raises an important question of law and is tempting to settle, the issue of whether reliance on s 110 of the LGMFMA and the applicable regulatory provisions permits a departure from the procurement principles entrenched in s 217 of the Constitution, particularly in circumstances characterised as an emergency and involving co-operation between organs of state, did not arise in the high court. Without it being raised and fully argued by the litigants in the high court, the issue cannot be entertained on appeal. This appeal must determine the correctness or otherwise of the high court's decision on the issues that served before it.

[27] In *City of Cape Town v Aurecon South Africa (Pty) Ltd*,[4] the Constitutional Court held that the benefit of legal argument by the litigants is indispensable in the court's decision-making process. Further, it would be undesirable for the court to decide on questions of law without the benefit of legal argument.

[4] *City of Cape Town v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) paras 35-36.

The impugned decision to appoint Magalies Water

[28] The municipality is an organ of the state. When it took a decision to appoint Magalies Water it was exercising power in terms of the Constitution and the LGMFMA. As such, the decision of the Municipality to appoint Magalies Water is an administrative decision as contemplated in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Section 6(2) of PAJA codifies grounds for judicial review of administrative action. Relevant to this judgment are s 6(2)*(e)*(iii) and 6(2)*(f)*(ii). They provide for judicial review where relevant considerations were not taken into account or where irrelevant considerations were considered as well as where the decision taken is not rationally connected to the purpose it seeks to achieve.

[29] The determination of the validity or otherwise of the decision to appoint Magalies Water lies in the scrutiny of the only two documents submitted by the Municipality. As already stated, the suspensive condition in the letter of appointment is the conclusion of an operations and maintenance agreement for the appointment to be complete.

[30] However, the document purporting to be the operations and maintenance agreement was concluded on12 January 2021, while the appointment in terms of the written agreement was dated 27 May 2020. It predates even the litigation that culminated in the order of 12 January 2021. As such, it could not by any stretch of imagination be what it purports to be. On closer scrutiny, it was part of the earlier appointment that was terminated by the Municipality following the dismal performance of Magalies Water. In this regard, the Municipality failed to produce a valid operations and service agreement to prove Magalies Water's appointment. Magalies Water could also not provide proof of its appointment as well as its

acceptance of that appointment. In the circumstances, the appointment was not complete. The incomplete record and invalid operations and service agreement points to the irrationality of the decision to appoint Magalies Water.

[31] The determination of rationality involves assessment of the process of decision making and the decision itself.[5] In this matter the Municipality failed to deliver a complete record of its decision to appoint Magalies Water. By so doing, it deprived the KCC of access to information on the crucial question relating to why Magalies Water was deemed to be a suitable implementing agent for operation and maintenance of the Municipality's water works. Viewed differently, the letter of appointment and the document purporting to be the operations and maintenance agreement concluded upon Magalies Water's appointment did not contain the information that was considered by the Municipality, as well as the reasons for its decision to appoint Magalies Water.

[32] On the contrary, the Municipality ignored facts that were rationally relevant to the end sought to be achieved, namely the supply of potable water and the eradication of sewage that was spilling into the Koster and Elands rivers. The following are the facts that the Municipality ignored: (a) the dismal performance of Magalies Water in its earlier engagement with the Municipality which culminated in the termination of its contract on 26 November 2020; (b) the confirmation by the Municipality under oath on 5 January 2021 that Magalies Water failed to deliver and that a different service provider would be appointed; (c) the effective concession that a suitable implementing agent must be appointed which culminated in a consent order being obtained on 12 January 2021; and (d) the swift decision taken literally

[5] See in this regard: *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC) para 51.

on the same day as the court order to appoint the same entity whose contract was earlier terminated for poor performance. The absence of a record of proceedings leading to that decision is significant. Not only does that make it impossible to make the rational connection between the means taken to arrive at that decision, but it also colours the entire process with irrationality and renders the final decision irrational.

[33] Nothing points to the capacity and suitability of Magalies Water, the entity that the Municipality itself, barely a week before the impugned appointment, deemed incompetent. The decision to appoint Magalies Water must therefore, under the circumstances, have been taken in flagrant disregard of clear evidence of its incompetence to carry out the works for which it was appointed. The means used to appoint Magalies Water were inconsistent with the end sought to be achieved, namely the rectification of the water and sanitation problems in the area. As such it was irrational and arbitrary.

[34] In *Democratic Alliance v President of the Republic of South Africa and Others* (*Democratic Alliance*),[6] the Constitutional Court found that the absence of a rational relationship between the means and ends regarding Menzi Simelane's appointment as the National Director of Public Prosecutions was significant. By ignoring prima facie evidence of dishonesty during his appointment, the means were inconsistent with the end sought to be achieved, i.e. the appointment of a 'fit and proper person, with due regard to his or her experience, conscientiousness and integrity . . .'.[7]

[35] In *Democratic Alliance*, Yacoob ADCJ held that:

[6] *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC).
[7] Ibid para 13.

'If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.'[8]

Those remarks are apposite to this matter. The impugned decision to appoint Magalies Water was taken in disregard of glaring and well-known evidence of incompetency to deal with the unending problems of the supply of potable water and eradication of freely flowing sewer into water drinking sources in the area. The Municipality's failure to consider that evidence of incompetency renders the whole process irrational. It follows that the appeal must succeed. The high court's dismissal of the review application must be set aside.

Costs

[36] The general principle is that costs are awarded to the successful litigant. In this appeal KCC successfully appealed the decision of the high court on the substantive issue and must succeed on the costs which were awarded against it by the high court. The basis for the high court's adverse costs order appears to be the persistent litigation by KCC against the Municipality. By so reasoning the high court failed to consider that KCC sought to enforce its constitutionally entrenched rights which the Municipality persistently failed to provide. The high court thus, failed to consider the salutary *Biowatch* principle,[9] which entails that in litigation between the government and a private party seeking to assert a constitutional right, if the government wins, each party should pay its own costs.

[8] Ibid para 39.
[9] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[37] The KCC is an organisation of concerned citizens which sought, through litigation, to assert their constitutional rights to the provision of potable water and sanitation services that the Municipality failed to provide. There is no suggestion that the litigation is frivolous. On the contrary, the facts have proven that litigation has been the only manner of getting some attention from the Municipality, albeit at times meaningless and only to necessitate further litigation. The high court appears not to have applied its mind to these important considerations but simply followed the general principle that costs followed the result. Had it applied its mind in this regard, it ought to have ordered, in line with the *Biowatch* principle, not to have mulcted the KCC with costs but ordered that each party pay its own costs. It erred in this regard. The high court costs order in the main application as well as in the application for leave must be set aside.

[38] The appeal was opposed only by Magalies Water. There is no reason that costs should not follow the event.

Order

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

1 The appeal succeeds.

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

‘a The first respondent’s decision to appoint the second respondent as a suitable implementing agent to operate and manage the first respondent’s water provision and sanitation services is reviewed and set aside.

b The second respondent’s acceptance of that appointment is reviewed and set aside.

c The first respondent shall pay costs of the review application as well as the application for leave to appeal in the high court.’

3 The second respondent shall pay the costs of the appeal, including those of two counsel.

G N Z MJALI
ACTING JUDGE OF APPEAL

Matojane JA (Meyer,Goosen JJ and Koovertje AJA concurring):

[40] I have read my colleague Mjali AJA's judgment (the first judgment). I agree with the order it proposes and with its conclusions that the appeal is not moot, that the appointment of Magalies Water was never perfected and that the decision to appoint it was irrational. I write separately because I take a different view on one question: whether this Court should decide if s 110(2) of the LGMFMA, read with regs 11(2) and 36 of the Municipal Supply Chain Management Regulations[10] (the Regulations), relieved the Municipality of the obligations imposed by s 217(1) of the Constitution. The first judgment declines to decide that question because it was raised for the first time on appeal. In my view it is properly before us and should be answered. I add brief observations on rationality, on the declaratory relief sought against Magalies Water and on costs.

[10] Municipal Supply Chain Management Regulations, GN 868, *GG* 27636, 30 May 2005.

Is the s 110(2) question properly before this Court?

[41] The first judgment treats the question as neither foreshadowed in the pleadings nor ventilated in the high court. With respect, the record does not support that. The Municipality, not the KCC, put s 110(2) and reg 36 in issue. In its answer to the review, it said these provisions authorised it to appoint Magalies Water without any procurement process. The high court accepted that defence and decided the case on it. It held that, in appointing Magalies Water, the Municipality acted in accordance with reg 11(2) read with reg 36, which in its view authorised the procurement of services from a public entity without following procurement processes, and that the Municipality's only remaining obligation was to inform the community of the appointment. The proposition the KCC attacks is therefore the ratio of the judgment under appeal. In its heads of argument, the KCC did no more than formulate, as a question of law, its answer to the ground on which it lost.

[42] The facts on which that answer depends were in issue in the high court. The KCC alleged that no tender or other process preceded the appointment, that the Municipality had not given effect to the LGMFMA and the Constitution, that no council resolution approving the appointment existed and that there was no evidence that the appointment was funded. It also alleged that the appointment was subject to the signing of a service level agreement and that none had been produced. Where the pleadings cover a point of law and its consideration on appeal involves no unfairness to the party against whom it is directed, a court of appeal is bound to deal with it.[11] Magalies Water objected to the point being decided. Still, it did not identify any evidence it would have led, or any argument it was prevented from advancing,

[11] *Cole v Government of the Union of South Africa* 1910 AD 263 at 272; *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) para 68; *Molusi and Others v Voges NO and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) paras 27-28.

had the question been framed in the same terms in the high court. It engaged with the substance. It contended that s 3(1)*(c)* and 29(2) of the LGMFMA did not apply because the cost of the appointment was to be borne by the North West Department of Co-operative Governance, Human Settlements and Traditional Affairs (COGHSTA) and not by the Municipality. The concern expressed in *City of Cape Town v Aurecon South Africa (Pty)* Ltd[12] that a court should not decide a question of law without the benefit of argument, does not arise where the question has been argued.

[43] There is a further reason to decide the question. Even if the expiry of the three-year term had left nothing of practical consequence between the parties, the proper reading of s 110(2) and the Regulations would warrant a decision in the exercise of the discretion conferred by s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013. That discretion is exercised in the interests of justice, and a discrete legal question of public importance that is likely to arise again weighs in favour of deciding it.[13] A municipality that cannot deliver water and sanitation services will often turn to a water board or another organ of state and will usually do so under pressure of time. Left undisturbed, the high court's judgment may be read as authority that such an arrangement requires nothing more than a public announcement. In my view that proposition is wrong, and this Court should say so.

Section 110(2) of the LGMFMA and s 217(1) of the Constitution

[12] *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC).
[13] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) para 11; *Minister of Justice and Correctional Services and Others v Estate Late Stransham-Ford* [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) SA 152 (SCA) para 25.

[44] Section 217(1) of the Constitution requires an organ of state in the national, provincial or local sphere of government, when it contracts for goods or services, to do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Nothing in its text confines it to contracts with private parties. A municipality that engages a water board to operate its water and sanitation works for three years at a projected cost of R37 500 000, contracts for services within the meaning of s 217(1).

[45] Section 110(2) of the LGMFMA provides that Part 1 of Chapter 11 of that Act, which regulates supply chain management, does not apply, except where specifically provided otherwise, if a municipality contracts with another organ of state for, among other things, the provision of a municipal service or assistance in the provision of a municipal service. Regulation 11(2) correspondingly excludes the application of a municipality's supply chain management policy to such procurement, and reg 36(3) excludes the duty imposed by reg 36(2) to record and report deviations. These provisions aim to avoid duplicating costly and time-consuming procurement processes where the counterparty is itself an organ of state subject to public financial controls.[14] The KCC did not challenge the validity of s 110(2) or of the Regulations, and the question is therefore one of interpretation. The LGMFMA forms part of the legislative framework contemplated by s 217(3), and its provisions must be read, so far as their language reasonably permits, in a manner that gives effect to s 217(1) and not in one that undermines it.[15] Read in that way,

[14] *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality* 2017 (1) SA 172 (ECG) para 30.
[15] Section 39(2) of the Constitution; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) paras 22-23.

s 110(2) relieves a municipality of procedural machinery. It does not release the municipality from the constitutional standard which that machinery exists to serve.

[46] Two consequences follow. The first is that the elements of s 217(1) do not all bear in the same way on a contract between organs of state. Where the law permits a municipality to engage another organ of state directly, competitiveness will often have little work to do. Transparency and cost-effectiveness remain. The municipality must still be able to show, on a record, why it chose the organ of state it did, what it agreed to pay and on what terms, and how the expenditure was to be funded and accounted for. The second is that s 110(2) is confined in its terms to Part 1 of Chapter 11. It leaves untouched the budgetary provisions of Chapter 4. These include s 15, which permits a municipality to incur expenditure only in terms of an approved budget and within the amounts appropriated, and s 29, which governs unforeseeable and unavoidable expenditure authorised by the mayor in an emergency and requires that such expenditure be reported to the council at its next meeting and appropriated in an adjustments budget.

[47] Measured against that standard, the appointment cannot stand. Nothing in the record shows how the Council chose Magalies Water. The appointment letter recorded a projected cost of R37 500 000 and made the appointment subject to the signing of a service level agreement. None was concluded. The only agreement the Municipality produced was the operations and maintenance agreement of May 2020, concluded under the contract it had terminated in November 2020. No council resolution was produced. Nothing shows that the expenditure was provided for in an approved budget, appropriated in an adjustments budget or authorised by the mayor under s 29. The contention that these provisions did not apply because COGHSTA would bear the cost does not assist Magalies Water. The papers do not establish any

funding arrangement with COGHSTA, and s 3(1)*(c)* of the LGMFMA brings provincial organs of state within the Act to the extent of their financial dealings with municipalities, so that such an arrangement would itself have had to be documented. In any event, the contract was concluded in the Municipality's name, and its accountability for that contract does not depend on who ultimately pays.

[48] The high court's reasoning on reg 36 overlooks the fact that the Municipality invoked two distinct sources of authority. Section 110(2), read with reg 11(2), takes a contract with another organ of state outside the supply chain management regime altogether. Regulation 36(1)*(a)*(i) permits a deviation from that regime in an emergency, and so presupposes that the regime, and the Municipality's policy made under it, applies. If the Municipality relied on an emergency deviation, it was bound by the conditions attached to it, including the duty under its own supply chain management policy to record its reasons and report them to the next meeting of the council.[16] If it relied on s 110(2), reg 36(3) relieved it of the reporting duty in reg 36(2), but nothing relieved it of ss 15 and 29 of the LGMFMA or of the requirement of transparency in s 217(1). On neither footing could a three-year contract worth R37 500 000 be concluded in the Municipality's name without the council being told. The council was not told.

[49] I would emphasise the limits of this 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. When it does so, s 217(1) continues to apply. The decision must be rationally founded and recorded, the expenditure

[16] Supply chain management policy cl 9.2.29(4).

must be lawfully provided for, and any departure from the municipality's own policies must be justified on the record.

Rationality

[50] I agree with the reasons in the first judgment on rationality and add only this. On 26 November 2020, the Municipality terminated Magalies Water's contract for poor performance. On 5 January 2021, it stated under oath that Magalies Water had failed to perform and that it would issue a new tender. On 12 January 2021, the day on which the consent order was granted, it appointed Magalies Water again. That called for an account of what had changed. Neither respondent gave one. Magalies Water placed nothing before the high court about its capacity at the time of the re-appointment, and the Municipality met the allegations with a bare denial and reliance on the statutory exclusion. The facts that would have explained the decision were within the respondents' knowledge and were not disclosed. On the papers as they stand, the only available inference is that the decision was not rationally connected to its purpose: to appoint an implementing agent capable of ending the water and sewage crisis.

The declaratory relief against Magalies Water

[51] The first judgment does not deal with the declaratory orders the KCC sought against Magalies Water. These were that it employed unqualified municipal staff without training, that raw sewage continued to spill into the Koster and Elands rivers after it assumed responsibility for the works, and that it failed to ensure a sufficient supply of potable water in Koster and Swartruggens. The order proposed in the first judgment does not grant that relief, and in my view the high court was right to refuse it. Section 21(1)*(c)* of the Superior Courts Act empowers a court to determine an existing, future or contingent right or obligation. Each declarator sought a finding of

historical fact, and none identified a right or obligation to be determined. To the extent the deployment of untrained municipal staff bears on the case, it goes to the rationality of the appointment, which the KCC has already decided in its favour. The spillage of sewage was, moreover, the subject of the declarations made on 18 December 2020 under case number UM271/2020, before Magalies Water was appointed, and the Municipality remained the water services authority with the primary duty to remedy it. Because the respondents never placed the terms of their arrangement before the court, there is no measure against which to assess what Magalies Water was obliged to do.

K E MATOJANE

JUDGE OF APPEAL

Appearances:

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