THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 522/2023

and 524/2023

In the matter between:

ELMIR PROPERTY PROJECTS (PTY) LTD

T/A ELMIR PROJECTS **FIRST APPELLANT**

EMALAHLENI LOCAL MUNICIPAL COUNCIL **SECOND APPELLANT**

and

BANKENVELD HOMEOWNERS ASSOCIATION (PTY) LTD **RESPONDENT**

Neutral citation: *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)

Coram: PONNAN, SCHIPPERS, NICHOLLS and SMITH JJA and MANTAME AJA

Heard: 26 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 21 October 2024.

Summary: Town-Planning and Townships Ordinance 15 of 1986 (the Ordinance) – township establishment conditions imposed by municipality in terms of s 98 of the Ordinance constitute administrative action as defined in terms of the Promotion of Administrative Justice Act 3 of 2000 – such conditions therefore remain effectual and binding on developer until set aside by a competent court.

ORDER

On appeal from: Mpumalanga Division of the High Court, Middelburg (Langa J, sitting as court of first instance):

1. The first appellant's appeal is dismissed.
2. The second appellant's appeal is upheld.
3. The costs occasioned in 1 and 2 above, including those of two counsel where so employed, are to be paid by the first appellant.
4. The order of the high court is set aside and replaced with the following order:

   '1. The first respondent is liable to provide sanitation services to the Bankenveld Golf Estate, including the operation and maintenance of the activated sludge water reclamation plants, at its own cost, and to the satisfaction of the second respondent.

   2. The first respondent shall pay the costs of the applicant and the second respondent, including those of two counsel where so employed.'

JUDGMENT

Smith JA (Ponnan, Schippers and Nicholls JJA and Mantame AJA concurring):

[1] The Bankenveld Golf Estate is a substantial upmarket housing development on the banks of the Witbank Dam, Emalahleni, Mpumalanga. The development consists of two residential estates, which are divided by a privately owned golf course, where wildlife roam free. However, all is not well. The cause of the complaint is the dysfunctionality of two sewage reclamation plants (the plants). The plants were designed to process sewage and to provide recycled water for irrigation but have fallen into disrepair after years of neglect and inadequate maintenance. The malfunctioning plants not only cause inconvenience and health risks for homeowners but also pose a serious threat to the environment, due to the danger of contaminated water discharging into the dam.

[2] The question as to who bears the responsibility for the operation and maintenance of the plants lies at the heart of the dispute between the parties. The respondent, the Bankenveld Homeowners Association (Pty) Ltd (Bankenveld HOA), took the view that the appellants, namely, the developer, Elmir Property Projects (Pty) Ltd t/a Elmir Projects (Elmir) and the Emalahleni Local Municipal Council (the municipality), jointly bear the responsibility to operate and maintain the plants. Bankenveld HOA, consequently, during June 2020, launched an application in the Mpumalanga Division of the High Court, Middelburg (the high court), for an order, *inter alia*, directing Elmir and the municipality jointly to provide sanitation services, 'which are compliant to all legislation'. In addition to the two appellants, the Bankenveld HOA also cited various other respondents. However, except for the sixth respondent, namely, the Golf Club Bankenveld (Pty) Ltd (the Bankenveld Golf Club), no relief was sought against any of the other respondents, and they also did not enter the fray.

[3] Elmir, thereafter, instituted a counter-application in which it sought a declaratory order to the effect that the township establishment conditions imposed by the municipality, in respect of Bankenveld Extension 11 (the second phase of the development) and in terms of which Elmir was obliged to construct, operate and maintain the plants, fell away because that property was never proclaimed as a township. However, Elmir did not obtain leave to appeal in respect of the counter-application. This Court, therefore, does not have jurisdiction to entertain that dispute.[1]

[4] In a written judgment, delivered on 14 November 2022, the high court, per Langa J, found that Elmir accepted that Extension 11 would be further subdivided into other townships and, by necessary implication, that the conditions attaching to Extension 11 would also apply in respect of those townships. Furthermore, it was clear from Elmir's conduct, following the proclamation of the subdivided townships, that it considered itself bound by those conditions. The high court thus concluded that there was 'overwhelming evidence to illustrate that Elmir never had issues with the Township Establishment

[1] *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [2015] ZASCA 25; 2015 (4) SA 34 (SCA); [2015] 2 All SA 322 (SCA) para 13.

Conditions', and that its conduct 'justifies a conclusion that it regarded the conditions as applicable to Extension 11, as well as Extensions 12 to 14.'

[5] The high court also made short shrift of Elmir's claims that the plants had been handed over to the municipality and that the Bankenveld Golf Estate Property Association (Pty) Ltd (the eighth respondent before the high court) took over the maintenance of the plants. It found that Elmir failed to provide any evidence in support of those assertions and that there was, conversely, compelling evidence that the plants were handed over to Elmir.

[6] 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.

[7] The high court consequently granted an order:

(a) interdicting Elmir from developing, alternatively, selling or subdividing any of its properties in the Bankenveld Estate pending compliance with the order;

(b) directing the appellants, jointly and severally, to provide sanitation services to the Bankenveld Estate;

(c) directing the appellants, jointly and severally, to prevent or mitigate any environmental damage caused by sewage spillage, and to the extent that such damage has already occurred, to take remedial steps to rehabilitate the affected areas; (d) directing Elmir to apply for the necessary environmental authorisations in terms of the applicable legislation;

(e) prohibiting the Bankenveld Golf Club from extracting any water from the reclamation plants for the purposes of irrigation pending compliance by the appellants with applicable legislation; and

(f) compelling Elmir to register a *caveat* against listed properties, effectively stating that it is interdicted from selling or developing or subdividing the properties until it has complied with the high court's order.
The appellants and the Bankenveld Golf Club were ordered, jointly and severally, to pay the respondent's costs on the attorney and client scale.

[8] The appellants appeal 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 impose related obligations, being those mentioned in paragraphs (b) and (c), above. Both appeals are with the leave of the high court.

[9] Although the municipality has consistently asserted that Elmir is primarily responsible for the operation and maintenance of the plants, it has accepted its constitutional oversight responsibility to ensure that Elmir complies with its obligations as developer. On 6 November 2020, the high court, per Mphahlele J, on application by the municipality, granted an interim interdict compelling Elmir to operate and maintain the two reclamation plants and to rehabilitate the environmental damage caused by the sewage spillage. It is common cause that Elmir has complied with that order. Most of the relief granted by the high court has thus been overtaken by the grant of that order. Consequently, despite the voluminous documents filed in the matter, the issue that falls for decision in this appeal has resolved itself into a very narrow and discrete question, namely, who is responsible for the development, operation and maintenance of the reclamation plants. That question must be answered against the backdrop of the following factual matrix.

The factual background

[10] The first phase of the Bankenveld Estate, comprising Bankenveld Extension 1 to 10, commenced in 2001. That development required approximately 500 kilolitres of water per day for irrigation. The municipality points out that this amount of water would, over a

period of a month, be equal to the basic water supply for at least 2500 households, at 6 kilolitres per day.

[11] In 2006, Elmir applied for approval for the development of Phase 2, namely Bankenveld Extension 11, which would include close to 1000 residences, an exclusive golf course, country club, hotel, golf driving range, a Primary and High School 'with all associated infrastructural services'. Elmir also simultaneously applied for the subdivision of Extension 11 into different townships in terms of s 99 of the Town-Planning and Townships Ordinance 15 of 1986 (the Ordinance).

[12] It is common cause that Elmir was aware, at the time, that the existing municipal sewage and water infrastructure was operating at full capacity and could not possibly accommodate any further housing developments in the area. Elmir, being mindful of these debilitating infrastructural constraints, proactively proposed township establishment conditions that would address those problems. That application was considered and approved by the municipality in terms of s 98(1) of the Ordinance, and Extensions 12, 13 and 14 were consequently declared as approved townships in terms of s 103 of the Ordinance. During February 2018, Extension 12 was further subdivided into two separate townships.

[13] On 1 October 2007, the municipality wrote to Elmir informing it of the decision to approve the application subject to certain conditions. The following conditions are important for the purposes of this appeal:

'2.7 that it be noted that the treatment and handling capacities of the sanitation system is operating at full design capacity, therefore the proposed option of the developer establishing a water reclamation project be required. The water purification works which supplies potable water to the area is operating above design capacity;

2.8 that the activated sludge water reclamation plan be installed and operated by the developer at his cost to the satisfaction of the Council;

. . .

2.11 that it be noted that the upgrading of bulk infrastructure as mentioned in 2.7–2.8 above must be budgeted for in future budgets and will be subject to the approval of the budget by the Council;

2.12 that it be noted that if there are no funds approved in the capital budget for the upgrading of the water, sewer, sanitation and electrical bulk services, Council will not be held liable for the fact that the development of the township, Bankenveld Extension 11 (to be subdivided into Bankenveld Extensions 12 – 33) cannot continue and it is recommended that the developer provide the necessary funds to the Council for the upgrading required;

. . .

2.21 that it be a condition of the township establishment that an endowment be paid into a trust account to the value of 3% of the land value of the selling price of each erf on date of registration to compensate for the upgrading or construction of new bulk infrastructure'.

[14] The material portions of Elmir's response to the municipality, on 5 February 2008, read as follows:

'Your letter dated 1 October 2007, contains the following provision:

2.8 that the activated sludge water reclamation plant be installed and operated by the developer at his cost to the satisfaction of the Council;

This condition is acceptable to Elmir Projects as developer. The implication of this condition is that Elmir will be responsible for the "bulk" sanitation infrastructure, while the local municipality will be responsible for the "internal" sewer network.

This position does not make sense from a practical and administrative point of view. It is much more practical to operate and maintain the sanitation system as a unit. We therefore propose the following with regards to the sanitation:

1. Elmir Projects will be responsible for the installation of the activated sludge water reclamation plant.

2. The HOA of the Golf Estate (a Sec. 21 company) will be responsible for the operation and maintenance of the sanitation system for the whole of the estate to the satisfaction of the municipality. The HOA will recover the expenditure in regard to any works to the sanitation system from the residents by means of their compulsory levies.

3. That the local municipality agrees not to charge any of the property owners in the estate any sewer levies or tariffs.'

[15] Elmir's proposal for the amendment of the township establishment conditions was referred to the municipal council by its Acting Director: Development Planning. The latter's report and recommendations were considered at a council meeting on 8 December 2011. The minutes of that meeting show that Elmir's proposal was emphatically rejected and that the council resolved that the 'status quo remains.'

[16] It is common cause that Bankenveld Extension 11 was never formally proclaimed as a township in terms of the Ordinance. The reason being that immediately after approval it was subdivided into Bankenveld Extensions 12 to 33. It is also common cause that the conditions attaching to Extension 11 were not included in the Proclamations which established Bankenveld Townships 12, 13 and 14, and neither were they included in the Service Level Agreements concluded between Elmir and the municipality in respect of those townships. Nevertheless, Elmir accepted responsibility for the design and construction of the plants. The certificates of completion issued by the constructing engineers show that they were completed and handed over to Elmir in 2010.

[17] The plants were designed to process and recycle the sewage water to be used, *inter alia*, to irrigate the golf course and for the establishment of the private wildlife estate. It is, however, common cause that they are dysfunctional due to a lack of proper and regular maintenance. Elmir conceded as much and in its answering affidavit. It states that 'BTW Engineers reported (in October 2016) that the difficulty with the reclamation plants was that they were ineffective in aeriation, disinfection and recirculation of pumps and there was no flow measurement within the plants.'

[18] During August 2019, Enviro-Lab, an independent engineering company specialising in environmental testing, compiled a report confirming that the problems were far more serious. Although there is some dispute as to who commissioned the report, all affected parties accepted that the findings reflected the true operational state of the plants at the time. Enviro-Lab reported that the plants have no incoming effluent meter, the aeriation systems are inadequate, blowers are inefficient, and the return activated sludge pumps in both plants are not functioning properly and must be replaced. Enviro-Lab

further cautioned that the water used to irrigate the golf course 'is extremely dangerous as it contains high concentrations of pathogens such as e-coli as well as high ammonia and nitrate/nitrite.' Furthermore, in a letter addressed to the Department of Water Sanitation on 11 March 2020, Elmir confirmed, *inter alia*, that, '[t]he waste-water plants are currently in urgent need of new equipment and major maintenance.'

[19] Although Elmir had been issued with an Environmental Authorisation to operate the plants in terms of the National Environmental Management Act 107 of 1998 (the NEMA), it is common cause that it failed to obtain the requisite licences in terms of the National Water Act, 36 of 1998 (the Water Act). Pursuant to s 21*(e)* (read with s 37(1)) of the Water Act, Elmir requires a licence for irrigation, and in terms of s 21*(f)*, it requires permission for the discharge of water containing waste into the Witbank Dam (a water resource) through a pipe, canal, sewer or conduit.

[20] On 20 October 2009, Elmir submitted a revised application to the Department of Water Affairs for a water use licence in terms of s 27 of the Water Act. The Department replied on 6 October 2010, advising Elmir that the application was lacking in numerous 'administrative and procedural aspects' and invited Elmir to provide the requested information to enable it to process the application. The letter also stated that if the information was not provided within seven days, the application would be considered on the available information. It is common cause that Elmir did not follow up on its application and the water use licence was never issued.

[21] The parties are also at loggerheads regarding who had assumed responsibility for the operation of the plants after their installation. Elmir contends that the plants had been handed over to the municipality and that the Bankenveld Golf Estate Property Association has assumed responsibility for their operation since 2013.

[22] In support of its assertion that the plants were handed over to the municipality, Elmir relies on the fact that the municipality signed the engineers' certificate of completion, and contends, furthermore, that the municipality has also assumed the responsibility to

operate and maintain the plants in terms of the Service Level Agreements. According to Elmir, the municipality had confirmed as much in a letter to it on 18 November 2019.

[23] However, the certificates of completion in respect of both plants show that they were handed over to Elmir in October 2009 and April 2010, respectively. The terms of the Service Level Agreements also do not support Elmir's claim in this regard. The Service Level Agreements are generic contracts which refer to the municipality's general obligations to render services to areas 'under its jurisdiction', and not merely to the Bankenveld Estate. The letter on which Elmir relies for this assertion also does not constitute proof that the plants had been transferred to the municipality. It merely postulates what the position would have been if they had in fact been transferred. That letter was prepared by Elmir and presented to the municipality for signature. It endeavours to explain the municipality's obligations 'to the extent that infrastructure is constructed and transferred to the municipality'. In any event, subsequent correspondence between Elmir and the municipality evince that both parties were of the view that the responsibility vested in Elmir. By way of example, in an email to the Bankenveld HOA (dated 3 December 2014), more than four years after the installation of the plants, Elmir said the following:

'Die Munisipalitiet het die werke oorgeneem, maar ons moet dit instand hou in terme van die goedkeuring van die dorpstigting (par 2.8).

Ek het destyds probeer om 'n diens ooreenkoms met die Munisipaliteit te sluit, maar was onsuksesvol.' [2]

[24] In support of its assertion that the Bankenveld Golf Estate Property Association had assumed responsibility for the plants in 2013, Elmir pointed to the fact that the former has been collecting levies of approximately R30 000 per month from members, presumably to fund the operation and maintenance of the plants. It is, however, common cause that the former never adopted a resolution to take over the maintenance of the plants. It explained that the levies were an emergency measure, introduced to contribute

[2] English translation: 'The municipality has taken over the plants, but we must maintain it in terms of the township approval conditions. I tried at the time to conclude a service level agreement with the Municipality but failed.'

to the operational fees of Enviro-Lab after it had been appointed by Elmir, and to discharge any possible statutory obligations it may have had in terms of the NEMA.

[25] In any event, Elmir's conduct after the plants were handed over to it compels the conclusion that it had accepted responsibility in respect of the operation and maintenance of the plants. It has, *inter alia*, obtained environmental approval for the construction and operation of the plants, constructed the plants at significant cost to itself, attempted to obtain a water use licence, accepted responsibility to pay for the desludging of the plants, and has expended substantial sums of money on environmental experts and the replacement of components to keep the plants operational. Its conduct was, therefore, manifestly at odds with its assertion that either the municipality or the Bankenveld Golf Estate had taken over the operation of the plants.

Submissions by the parties

[26] Elmir contends that the high court erred in imposing on it, albeit jointly with the municipality, the obligations set out in paragraphs 2, 3, 4 and 5 of the order, since those are the municipality's constitutional obligations. It argues that the municipality bears the obligation to render the services in terms of ss 24 and 27, read with Schedule 4B, of the Constitution; the provisions of the NEMA; the Water Act, and the Water Services Act 108 of 1997. The high court's order, so it is contended, has the effect of impermissibly transferring to Elmir the municipality's constitutional obligation to provide bulk engineering services.

[27] Elmir argues, furthermore, that the pre-proclamation conditions attaching to Extension 11 'fell away' because that township was never proclaimed in terms of the Ordinance. Those conditions were also not included in the conditions attaching to Extensions 12, 13 and 14, neither were they included in the Service Level Agreements. Elmir, in its capacity as the developer, could only have assumed the municipality's obligations in terms of township establishments conditions that have been duly proclaimed in terms of the Ordinance.

[28] In this regard, while Elmir initially contended that the entire condition 2.8 fell away because Extension 11 was never proclaimed as a township, Emir's counsel clarified during his argument in reply, that it is only the responsibility for the maintenance thereof that is being refuted. The argument being that Elmir had requested the municipality to amend that condition, and since the proclamations in respect of Extensions 12, 13 and 14 were published without that condition, it must be accepted that the obligation fell away.

[29] As previously stated, the municipality only takes issue with those paragraphs of the order that hold it jointly and severally liable with Elmir. It asserts that the conditions which attached to Extension 11 were proposed by Elmir on the common understanding that the municipality did not have the capacity to render the services and that the development could only proceed if Elmir accepted full responsibility for the design, construction, operation and maintenance of the plants. It was on that understanding that Elmir proposed the conditions and subsequently, both explicitly and through its conduct, accepted that it remained bound by those conditions. When Elmir applied for approval in respect of Extension 11, it had simultaneously also applied for the subdivision of the property into Extensions 12 to 33. The conditions were thus imposed by the municipality well-knowing that the property would be further divided into different townships. After the municipal council rejected Elmir's application to be released from the obligation to operate and maintain the plants, it continued to fulfil that obligation for some 15 years.

[30] The municipality contends that its decision to impose the conditions was an administrative act, which remains valid and effectual until it is set aside by a competent court. It asserted, in addition, that the argument that the conditions, including condition 2.8, fell away because Extension 11 was never proclaimed as a township, a point raised by Elmir for the first time in its counter-application, was a disingenuous attempt by the latter to escape obligations which it had assumed voluntarily.

[31] While the municipality accepts that it has oversight responsibility to ensure that Elmir complies with its obligations, it argues that its legal obligations are fundamentally different to that of Elmir. The municipality has a constitutional obligation to provide water

and sanitation services, in a sustainable manner, to all consumers in its area of jurisdiction. That obligation does not encompass the responsibility to provide services to exclusive and upmarket developments, to the prejudice of poorer communities. The condition imposed on Elmir, on the other hand, is a private obligation relating to the operation and maintenance of sewage reclamation plants designed and constructed for the sole benefit of the Bankenveld Estate.

[32] The municipality contends, furthermore, that it has, in any event, already taken various steps in pursuance of its supervisory responsibility, including directing Elmir to report to it regarding the operation and maintenance of the plants; offering to assist Elmir by allowing it to dispose of the sludge build-up in the municipal dumping sites; instituting application proceedings to compel Elmir to comply with its legal obligations; and issuing a notice inviting tenders for the appointment of 'capable and competent service providers to establish and manage a modular package plant at Point B, Doornpoort Dam and Bankenveld Estate.'

[33] The Bankenveld HOA makes common cause with the municipality's argument regarding the applicability of the pre-proclamation conditions imposed in respect of Extension 11 to Extensions 12 to 33. It asserts, however, that the municipality bears the primary constitutional and statutory obligation to render the services. Moreover, it argued that property owners pay water and sanitation levies to the municipality, consequently, the municipality remains jointly liable with Elmir to provide the services.

Analysis and discussion

[34] For the reasons which I have stated above, Elmir's contention that either the municipality or the Bankenveld Golf Estate Property Association had assumed responsibility for the operation and maintenance of the plants can, in my view, be readily dismissed. I agree with the high court's finding that Elmir has failed to provide any evidence in support of that assertion. As the high court correctly found, there is, on the contrary, compelling evidence that Elmir has been operating the plants for some 15 years after their completion, albeit in an unsatisfactory manner.

[35] Elmir's contention that the conditions attaching to Extension 11 'fell away' because that township was never formally proclaimed, is also manifestly unsustainable. First, those township establishment conditions were proposed by Elmir, well-knowing that the municipality's existing sanitation infra-structure was over-extended and that it did not have the financial resources to pay for the construction of the plants or to fund their continued operation and maintenance. Elmir was also aware that the development would not have been approved, if it did not accept the responsibility for the services in terms of condition 2.8.

[36] 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. It thereafter continued to operate and maintain the plants for years after their construction.

[37] Third, the conditions were imposed by the municipality in terms of s 98(2) of the Ordinance, which provides that '[w]here an authorised local authority approves an application in terms of subsection (1), it may impose any condition it may deem expedient'. Because the municipality was clearly exercising a public power in terms of empowering legislation, that decision constitutes administrative action as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000. Those decisions remain valid and effectual until set aside by a competent court.[3]

[38] In any event, as mentioned earlier, Elmir's counsel clarified during his argument in reply that its case is that only the obligations to operate and maintain the plants fell away. This argument was predicated on the assertion that the municipality agreed to release Elmir from those obligations. Not being able to point to any explicit statement by the municipality to that effect, counsel argued that we must infer that intention on the part of the municipality from the fact that the conditions, which attached to Extension 11, were not included in those that apply to the subdivided townships. Nor were they incorporated into the Service Level Agreements. He argued, furthermore, that it is significant that only

[3] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) para 100-101.

the condition pertaining to the three percent endowment (condition 2.21) was made applicable to Extensions 12, 13 and 14. This can only mean that the municipality intentionally omitted the other conditions in compliance with its decision to amend the conditions, or so counsel argued.

[39] There are, however, two fundamental problems with that argument: First, Elmir expressly undertook to construct and operate the plants. It is for this reason that the application was approved subject to condition 2.8 that the activated sludge water reclamation should be installed and operated in a functional condition at Elmir's costs. Second, in Elmir's letter to the municipality, dated 5 February 2008, wherein it applies for the amendment of the conditions, it specifically quoted condition 2.8 and stated that, '[t]his condition is acceptable to Elmir as developer.' It then proposed that the township establishment conditions should be amended, effectively to transfer to the Bankenveld HOA the responsibility to operate and maintain the sanitation system, leaving it only with the obligation to construct the plants. But that proposal was emphatically rejected by the municipality and Elmir could therefore not have been under any illusion that it had been relieved of the obligations to operate and maintain the plants.

[40] Insofar as the relief sought against the municipality is concerned, I am of the view that it has either been overtaken by subsequent events or has in the circumstances become unnecessary. The municipality accepts its constitutional obligation to supervise Elmir's compliance with the township establishment conditions. It has, in this regard, already taken effective steps to compel proper compliance by Elmir, *inter alia*, by applying for the interdict. Any further order, in that regard, would be tautologous. If, in the future, it should fall short in this regard, any affected party can approach a competent court for appropriate relief.

[41] In summary then: Elmir's appeal falls to be rejected with costs; the municipality's appeal must be upheld with costs; and Elmir should be compelled to operate and maintain the plants in accordance with condition 2.8. 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 the requisite water use licences. In my view, it is therefore also unnecessary for that obligation to be spelt out in the order that issues.

Costs

[42] There is no reason why costs should not follow the result, both in this Court and in the high court. The findings that Elmir is primarily responsible for the provision of sanitation services to the Estates; that the municipality only has constitutional oversight responsibility; and that the court consequently erred in holding it jointly liable for the operation and maintenance of the plants, must mean that the municipality has been substantially successful. Elmir is consequently liable for the costs of both the Bankenveld HOA and the municipality

Order

[43] In the result:

1. The first appellant's appeal is dismissed.
2. The second appellant's appeal is upheld.
3. The costs occasioned in 1 and 2 above, including those of two counsel where so employed, are to be paid by the first appellant.
4. The order of the high court is set aside and replaced with the following order:

   '1. The first respondent is liable to provide sanitation services to the Bankenveld Golf Estate, including the operation and maintenance of the activated sludge water reclamation plants, at its own cost, and to the satisfaction of the second respondent.

   2. The first respondent shall pay the costs of the applicant and the second respondent, including those of two counsel where so employed.'

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J E SMITH

JUDGE OF APPEAL

Appearances

For the first appellant:	L G F Putter SC with S Ogunrobi
Instructed by:	Van der Merwe Van den Berg Attorneys, Pretoria
	McIntyre Van Der Post, Bloemfontein
For the second appellant:	O Ben-Zeev with M Peacock
Instructed by:	Ka-Mbonane Cooper, Johannesburg
	Van der Merwe & Sorour, Bloemfontein
For the respondent:	F J Erasmus SC
Instructed by:	Van Heerden & Brummer Inc., Witbank
	Honey Attorneys, Bloemfontein