

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (FUNCTIONING AS GAUTENG DIVISION,
PRETORIA – MIDDELBURG CIRCUIT COURT)**

CASE NO: 3542/18

1. REPORTABLE: YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED.

.....

DATE

.....

SIGNATURE

In the matter between:

CAROL MYBURGH N.O.

First Applicant

IGNATIUS WILHELM MYBURGH N.O.

Second Applicant

(In their capacities as trustees of the Carna Trust)

BURLEC ELECTRICAL DISTRIBUTION (PTY) LTD

Third Applicant

(Registration Number: 2005/028601/07)

and

MSUKALIGDA LOCAL MUNICIPALITY

First Respondent

JUDGMENT

Coram: Roelofse AJ:

[1] This application concerns Wessel Road located on the Western periphery of the Central Business District of Ermelo (“*the road*”). The road is in a serious state disrepair. The road is no longer a functional tar road. It is almost impossible for normal vehicles to use the road and at best an off-road vehicle is required. The road is pot-hole ridden and it is even not possible to dodge certain of the pot-holes on the road because by doing so, another pot-hole would be driven through. Vehicles are forced to drive on the pavement area of the road. The road is also used for purposes of detouring heavy vehicles from the Ermelo CBD - as a result, it carries heavy traffic.

[2] The first and second applicants are the trustees of the Carna Trust who owns a business premises being leased by the third applicant from where the third applicant conducts a business. The business premises are situated along the road.

[3] The applicants and another business owner along the road have been in engagement with the Msukaligwa municipality since 2015 and 2016 respectively over the condition of the road. The owners complain that they are severely affected by the condition of the road. Not only do their business suffer, but also, the road poses danger to road users as well as health risks.

[4] The road falls within the area of jurisdiction of the first and second respondents. The respondents are both joined in the proceedings and relief is sought against them on this basis, and, according to the applicants, on the basis that the respondents may point fingers at each other.

[5] The applicants approach the court for a structural interdict aimed at forcing the first, alternatively second respondent, further alternatively, both the respondents to repair and do whatever is necessary to restore the road to a functioning tar road to

accommodate the flow of traffic. The applicants also seek orders compelling the respondents to commence with steps to repair the road within 30 days of the date of the order and that they fully comply with the interdict within 180 days of the order. The applicants also seek an order that once the road is restored the respondents be ordered to maintain and do whatever may be necessary to procure the functionality of the road.

[6] A structural interdict consists of five elements - *“First the court declares the respects in which the violator’s conduct falls short of its constitutional obligations, second the court orders the violator to comply with its constitutional obligations, third the court orders the violator to produce a report within a specified period of time setting out the steps it had taken, fourth the Applicant is afforded an opportunity to respond to the report and finally the matter is enrolled for a hearing and, if satisfactory, the report is made an order of court”*. See: Propshaft Master (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Others 2018 (2) SA 555 (GJ) at para. 10.2. I do not think that the aforesaid dictum intends to set the requirements to be complied with before a structural interdict may be granted in order to compel an organ of state to comply with its constitutional obligations.

[7] It is common cause that the road falls within the area of jurisdiction of the respondents and the road is in a serious state of disrepair. At the hearing of the matter, counsel for the respondents conceded (rightly so) that the first respondent is obligation to maintain and repair the road and that the applicants are entitled to a proper road. I say that the respondents rightly conceded that the first respondent must maintain the road because the Constitutional responsibility of the first respondent in this matter arises from the Bill of Rights, the provisions of section 156 of the Constitution of the Republic of South Africa, 1996 (*“the Constitution”*) read with Sections 83 and 84 of the Local Government: Municipal Structures Act 117 of 1998 (*“the Structures Act”*) – See: Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others 2017 (2) SA 86 (ECG). I proceed to refer to the relevant provisions of the Structures Act later in this judgment.

[8] The respondents elected to oppose the application on a number of preliminary defences. In respect of the merits, the defences advanced by the first respondent were

that the first respondent do not have money to fix the road, that the first respondent are obliged to comply with the procurement prescripts and that the applicants have not satisfied the requirement for the granting of an interdict, namely establishing a right to the relief sought. In addition, albeit in a somewhat disguised form, the respondents also raised the issue that the applicants have not established that the no other satisfactory alternative remedy requirement because, so the respondents allege, the applicants first had to exhaust their internal remedy.

[9] The respondents initially also attacked the first and second respondent's standing as trustees of the Carna Trust. This defence was abandoned. The respondents persisted with the following four defences: the applicants have failed to exercise an internal remedy; non-joinder, in that the Department of Co-operative Governance ("*COGTA*") was not joined in the proceedings and that the applicants approached the court on a wrong basis, i.e, the applicants should have approached court for a review in terms of the Promotion of Access to Administrative Justice Act 3 of 2000 or Rule 53 of the Uniform Rules. In the respect of the second respondent, the respondents allege that the second respondent was not a necessary party to the proceedings and therefore was mis-joined.

MATTER A PAJA REVIEW?

[10] The respondents' first defence hinges upon the question whether the first respondent failure to repair and maintain the road constitutes administrative action for only an administrative action is subject to review in terms of PAJA.

[11] In order to answer this question, it must be determined what the nature of the first respondent's duty is to maintain road infrastructure within its area of jurisdiction. In order for the respondents' defence on this score to succeed, the maintenance of the road or lack thereof must be an administrative act.

[12] Section 156 of the Constitution sets out the powers and functions of municipalities. The section provides that a municipality has executive authority over, and, has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution and any other matter assigned to it by national or provincial legislation. Part B of Schedule 5 specifically refers to

municipal roads. The upkeep and maintenance of the road is therefore an executive function of the first respondent. In terms of (cc) under paragraph (b) of the definition of “administrative action” in section 1 of PAJA, the executive powers or functions of a municipal council is specifically excluded from an administrative action. In any event, an obligation to maintain roads can never be regarded as decision or failure to take a decision. I therefore find that PAJA finds no application. Having made this finding both the respondents’ first preliminary defence must fail.

[13] The respondents’ third preliminary defence is this. The respondents say that the applicants approached the court on the wrong basis in law. On this score the respondents allege that “....*where administrative action is involved....*” the grounds of review “....*or collateral challenge....*” are “....*located....*” in section 33(1) of the Constitution “....*read with....*” section 6(2) of PAJA (Paragraph 2.4 of the first respondent’s answering affidavit and paragraph 2.5 of the second respondent’s answering affidavit).

[14] It is therefore clear that is not the respondents’ case that the applicants must be non-suited because they should have approached court with a legality review, founded upon section 1(c) of the Constitution. The respondents confine this preliminary defence to a review under PAJA on not upon a legality review. In light thereof that I have already found that the maintenance of the road constitutes an executive function and not administrative action, the first and third preliminary defences must fail.

NON-JOINDER OF COGTA

[15] The respondents’ contention is that the Department of Co-Operative Governance and Traditional affairs (“COGTA”) is a necessary party to the proceedings because COGTA “.....*is also an interested party in matters related to municipalities and their functioning....*” (Paragraph 2.3 of the first respondent’s answering affidavit and paragraph 2.4 of the second respondent’s answering affidavit). This contention is incorrect because a party is not liable (or entitled) to be joined in proceedings just by virtue of some general interest it may have in a matter. A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person’s rights or interest – see: *Snyders and*

Others v De Jager (Joinder) 2017 (5) BCLR 604 (CC) at para. 9.

[16] The respondents do not set out in any manner whatsoever what COGTA's direct and substantial interest is (or even might be) in the orders that are sought in the proceedings. COGTA's alleged interest in matters related to municipalities and their functioning, do not equate to a direct and substantial interest in these proceedings. This defence is dismissed.

MIS-JOINDER OF THE SECOND RESPONDENT

[17] The second respondent raises the defence that it was mis-joined in the application. The second respondent contends that, because of its mis-joinder, the application must be dismissed against it and, in that event, it would be entitled to costs on an attorney and client scale.

[18] Section 84 of the Structures Act provides for the division of functions and powers between district and local municipalities. In terms of Section 84(1)(f), municipal roads which form an integral part of a road transport system for the area of the district municipality as a whole are included under the powers and functions of a district municipality. The basis upon which the applicant joined the second respondent appear from paragraphs 2.11 to 2.13 of the founding affidavit. The applicants allege that:

"2.11 The Second Respondent 'features' as a district municipality and the First Respondent falls within its jurisdictional area as district municipality. Accordingly the aforesaid properties as well as Wessels Road indirectly also fall within the Second Respondent's area of jurisdiction."

2.12 Both the First and Second Respondents are cited in this application as the Applicants want to prevent a situation where a local municipality blames the district municipality or visa versa;

2.13 Undoubtedly the First Respondent, alternatively the Second Respondent, further alternatively the First and the Second Respondents are responsible for the municipal services within its area of jurisdiction and obliged to maintain such services.

[19] Only municipal roads which form an integral part of a road transport system for the area of the district municipality as a whole are included under the powers and functions of a district municipality. For the second respondent to have had a direct and substantial interest in these proceedings and therefore had to be joined by necessity, the applicants had to establish that the road forms an integral part of the road transport system for the area of the district municipality. This is nowhere alleged by the applicants and the facts does not establish same. I therefore find that the second respondent was mis-joined in these proceedings and, in addition that in the absence of proof that the road forms an integral part of the road transport system for the area of the second respondent, no relief can be granted against it. The responsibility of the road is that of the first respondent.

THE RESPONDENTS' DEFENCE ON THE MERITS

[20] The first respondent's defence is that there is no money to repair the road. In paragraphs 13.1 to 13.3 Ms Gladness Jabu Majola, the first respondent's municipal manager sets out as follows:

"13.1 The Court cannot make the order, that, is asked by the Applicants, as the Court may know that, the 1st Respondent is duty bound to follow its integrated plan, that, inter alia, is dependent on budget which is approved annually in May of each year, as provided for in the Municipal finance management Act.

13.2 Although Wessel and Pet Street is catered in the First Respondent's integrated plan, currently in the approved budget for the financial year 2018/2019 the Municipality has not budgeted the rehabilitation of Wessel Street and Pet Street, due to the fact that, The [sic] Wessel and Pet Street link is about 1,22 km in length and the estimated cost of the rebuilding the road is about R36,000,00.00 (Thirty Six Million Rand), which is be funded out of rates and taxes, as this road is in Town and is therefore not covered by the Municipal Infrastructure Grant.

Currently the Municipality is in consultation with other sector departments to raise the necessary funds to rehabilitate the said Street.

13.3 *Furthermore, the financial position of the Municipality is not good due to the huge amount owed to Escom and Water and Sanitation which is approximately +/- R500,000,000.00 (Five Hundred Million Rand)."*

[21] In my view, the fact that the first respondent may or may not have money now for the fixing of the road because it has not budgeted therefore in the 2018/2019 financial years rings hollow and no defence. I say this because as on 13 April 2015 (Annexure "FA11"), the second respondent's Municipal Manager recorded as follows:

"Your concern is noted and will inform you if we have been able to secure funding as the budget processes are unfolding."

[22] In addition, on 5 December 2017, the first respondent's Acting Municipal Manager was mandated to embark with other municipalities for a viable road maintenance plans and strategies. On 12 February 2018, the public protector, subsequent to a complaint laid to the public protector concerning the road, informed the third applicant that the first respondent approved an initiative to source funds from the second respondent, mines and the private sector including companies and institutions for the road. On 9 February 2018, the Public Protector informed the third applicant that the municipality has confirmed that the road has deteriorated to such an extent that it needs to be rebuilt and that the municipality does not have funds for the road and only does limited maintenance for the time being.

[23] The respondents' defences that the applicants have not established a clear right must be dismissed in light of the respondents' concession that the applicants are entitled to a proper road. So also must the respondents' defence that the applicants have an alternative remedy also be dismissed because I have found that the first respondent's constitutional obligations does not amount to administrative action.

[24] In my view, the applicants are entitled to relief against the first respondent. I

am not going to grant the order as prayed for because I have a concern that the relief sought in prayers 2 and 3 of the notice of motion may provide the first respondent with an opportunity to delay the repair of the road. My concern lies with the manner in which prayers 2 and 3 of the notice of motion is worded. Paragraphs 1 to 3 of the notice of motion reads as follows:

- “1. That the First Respondent, alternatively the Second Respondent, alternatively both the First and the Second Respondents be ordered to repair and do whatever may be necessary to restore Wessels Road located on the western periphery of the Central Business District of Ermelo, to a functioning tar road to accommodate the flow of traffic associated with a connection road between two class 3 roads functioning as and [sic] urban collector street or an urban local street;*
- 2. That the First Respondent, alternatively the Second Respondent, alternatively both the First and the Second Respondents be ordered to commence with steps in compliance with paragraph 1 above within 30 days from the date of the order and fully comply with paragraph 1 above within 180 days from date of the order.*
- 3. Should the First Respondent, alternatively the Second Respondent, further alternatively both the First and the Second Respondents fail to comply with the time periods mentioned in paragraph 2 above, the First Respondent, alternatively the Second Respondent, further alternatively both the First and the Second Respondents be ordered to, report to the above Honourable Court and set out fully the steps taken to procure compliance with paragraph 1 above and provide full explanation, to the satisfaction of the above Honourable Court, on any extended time period required by the relevant respondent within which to comply with paragraph 1 above.”*

[25] The wording of prayer 3 of the notice of motion only obliges the first respondent to report to court upon the expiry of 180 days from the date of the order. It does not oblige the first respondent to do so after 30 days. The insertion of the words

“*any of*” between the words “*with*” and “*the time periods*” in line 3 of prayer 3 of the notice of motion.

COSTS

[26] The second respondent urges me to award punitive costs in favour of it against the applicants. I am not going to do so because the second respondent’s own e-mail to the other business owner, dated 13 April 2015 created an impression that the second respondent is indeed ceased with securing finding for the road (Annexure “FA12”). This gives credence to the applicant’s concern that the first respondent might be blaming the second respondent (Paragraph 2.13 of the founding affidavit).

[27] The same cannot be said for the first respondent’s defence. All of its defences were found to be void of any merit. In my view the first respondent’s defence to the application was frivolous and without any basis at all. This as well as the first respondent’s demonstrated delay to properly address the issue of the road warrants sanction.

I make the following order:

1. The application is dismissed against the second respondent.
2. The applicants are ordered to pay the second respondent’s costs.
3. The first respondent is ordered to:
 - 3.1. Repair and do whatever may be necessary to restore Wessels Road located on the western periphery of the Central Business District of Ermelo, to a functioning tar road to accommodate the flow of traffic associated with a connection road between two class 3 roads functioning as an urban collector street or an urban local street;
 - 3.2. Commence with steps in compliance with the order in paragraph 3.1 above within 30 days from the date of the order and fully comply with the order in paragraph 3.1 above within 180 days from date of this order.
 - 3.3. In the event the First Respondent fails to comply with any of the time periods mentioned in paragraph 3.2 above, the First Respondent is

ordered to, report to the this court and set out fully the steps taken to procure compliance with the order in paragraph 3.1 above and on any extended time period required by the relevant respondent within which to comply with the order in paragraph 3.1 above.

- 3.4. The applicants are granted leave to, on the same papers, supplemented as necessary, approach this court if the first respondent fails in any manner whatsoever to comply with the orders in paragraphs 3.1 to 3.3 above;
- 3.5. The first respondent is ordered to pay the applicants' costs.

JH Roelofse
Acting Judge of the High Court

APPEARANCES

FOR THE APPLICANTS:	Adv JA Venter Instructed by Schalk Pieterse Attorneys, 4 Santam Trust Building, McCullam Street, Middelburg
FOR THE RESPONDENTS:	Adv PW Makhambeni Instructed by Mothlala Attorneys, Kruger & Bekker Attorneys, 32 Walter Sisulu Street, Middelburg
DATE OF HEARING:	28 February 2019
DATE OF JUDGMENT:	4 March 2019