



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 1673/2025

In the matter between:

GXAKA-GXAKA LOCALITY	1 st Applicant
ZIHLANGENE SICAM	2 nd Applicant
GOBIJONA MZUVUKILE	3 rd Applicant
NOKWANDISA MNANA	4 th Applicant
MKHUSELI NOMNGANGA	5 th Applicant
NOMZEKELO ZALI	6 th Applicant

and

MUNICIPAL MANAGER, MBHASHE LOCAL MUNICIPALITY	1 st Respondent
MBHASHE LOCAL MUNICIPALITY	2 nd Respondent

JUDGMENT

MHAMBI AJ

Introduction

[1] The provision of basic services is a cardinal function, if not the most important function, of every municipal government. At the core of this application is the duty of the municipality to give priority to the basic needs of the local community, promote development of the local community, and ensure that all members of the local community have access to at least a minimum level of basic services.

[2] This judgment paves the way for how the local community inhabitants exercise their right of access to the basic local needs, as the local municipality has a duty to provide them.

[3] The applicants are the community members of Gxaka-Gxaka locality, in the district of Willowvale. The deponent to the founding affidavit is the local traditional leader. He avers in the founding affidavit that the local community has duly mandated him to institute these proceedings and depose to the affidavit on their behalf. A resolution of the community meeting is attached in the founding affidavit to support that averment. Some community members have deposed to the confirmatory affidavit in support of the application.

[4] The applicants seek for the following orders in their notice of motion:

- 4.1 The respondents are ordered and directed to repair, fix, re-surface and do whatever may be necessary to restore to good condition the Gxaka Gxaka access road from where it joins the Fort Malan Road, at Fort Malan, Willowvale.
- 4.2 The respondents are ordered to commence with steps, in compliance with sub paragraph 4.1 above, within 90 days from the date of the order, and fully comply with sub paragraph 4.1 within 180 days from the date of the order.
- 4.3 Should the respondents fail to comply with the time periods mentioned in sub paragraph 4.2 above, respondents should report to the above honourable Court and set out fully the steps taken to secure compliance with paragraph 4.1 above and provide a full explanation, to the satisfaction of the above honourable Court, on any extended time period requested by the Respondents, within which to comply with sub paragraph 4.1 above.
- 4.4 The respondent be ordered to pay the costs of this application.

[5] The 1st respondent is the organ of state within the local sphere of government with legislative and executive authority within the area of jurisdiction of the applicants. The 1st respondent shall hereinafter be referred thereto as the

“*Municipality*”. The 2nd respondent is the Municipal Manager of the Municipality. I understand he has been cited in a capacity as the accounting officer of the Municipality.

[6] The applicants seek for an order compelling the Municipality to fix, repair and resurface the dilapidated Gxaka-Gxaka access road. The applicants contend that they have lodged several complaints to the municipal councillors for the repairs of the Gxaka-Gxaka access road, which is riddled with potholes. Gleaned from the founding affidavit, it appears all those complaints yielded no positive response; the last resort was the institution of this application.

[7] The applicants rely on section 38 (a) and (d) of the Constitution¹ to advance an argument that they have the requisite *local standi* to institute these proceedings.

[8] The applicants contend that section 156 of the Constitution provides the Municipality with the power to administer local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. In furtherance of this contention, the applicants rely on the remark by *Ramai J in Beck and Others v Kopanong Local Municipality and Others*.²

¹ The Constitution of the republic of South Africa, 1996

² Beck and Others v Kopanong Local Municipality and Others, Unreported case no. 3772/2002

[9] The applicants rely on the provisions of the Municipal Systems Act 32 of 2000 to support a contention that the Municipality has a duty to give members of the local community equitable access to the municipal services which they are entitled to, and that the Municipality has a duty to respect the constitutional rights of citizens and those of other persons protected by the Bill of Rights.

[10] The applicants, lastly, contend that the Municipality has failed to discharge their legal and constitutional service delivery obligations in that they have failed to demonstrate the legal, financial, and administrative operational measures taken to progressively realise the rights of the applicants to have a decent and paved gravel road at the least.

[11] In opposing the application, the Municipality denies that the road is dilapidated and denies that the road has not been maintained. The Municipality avers that the road was last maintained during 2024 after a complaint by the applicants was filed with the relevant ward councillor.

[12] The respondents further deny that:

12.1 There was a complaint submitted by the applicants to the respondents alleging that even the Councillor has no knowledge of the complaint whatsoever. In substantiation, the respondent contends that the Ward Councillor is the one who interacts with the respondents for basic

services needed by their communities, and no submission of the complaint was made.

12.2 The respondents contend that, had the complaint been submitted, the complaint would have been listed in the 1st Respondent's Infrastructure Maintenance Policy. Even if the complaint was submitted by the community of Gxaka-Gxaka, the complaint would still be listed in the IMP of the 1st Respondent.

12.3 The respondents, further, contend that had the applicants submitted the letter of demand, the respondents would have advised the applicants about the 1st respondent's policies, which should be followed for their grievances to be addressed.

12.4 The respondents submit that the applicants adopted an incorrect approach by bringing the application in this manner, as they ought to have brought these proceedings by way of a review application.

[13] This court has to determine, first, whether the access road concerned has indeed been dilapidated to the extent that it needs to be restored and or fixed to a better condition. Secondly, this court has to determine whether the Municipality has breached a constitutional duty to provide adequate service delivery to the

applicants, and thirdly, whether this court has the power to grant just and equitable relief in terms of section 172 of the Constitution.

[14] In order to better understand the duty of the municipality to provide service delivery, one has to consider the objects of the local government. Section 152 of the Constitution states the objects of local government and requires municipalities to strive to achieve these objects.³

[15] Section 153(a) provides that a municipality must ‘structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community’. Section 156 authorises municipalities to carry out their functions.⁴

[16] These constitutional provisions must be considered with reference to the functions and responsibilities of the municipality set out in the local government

³ Section 152 provides:

- “(1) The objects of local government are-
- (a) to provide democratic and accountable government for local communities;
 - (b) to ensure the provision of services to communities in a sustainable manner;
 - (c) to promote social and economic development;
 - (d) to promote a safe and healthy environment; and
 - (e) to encourage the involvement of communities and community organisations in the matters of local government.
- (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).”

⁴ The relevant subsections provides:

- “(1) A municipality has executive authority in respect of, and has the right to administer-
- (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
 - (b) any other matter assigned to it by national or provincial legislation.
- (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.”

legislation. The Municipal Systems Act defines ‘basic municipal services’ as a “municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment”. Section 4 of the Municipal Systems Act provides for the rights and duties of the municipal councils.⁵

[17] Section 8 (2) gives a higher bar on the duty of the municipality to the extent that: “ a municipality has the right to do anything reasonable and necessary for, or incidental to, the effective performance of its functions and exercise of its powers.”

⁵ Section 4 provides:

- “(1) The council of a municipality has the right to-
- (a) govern on its own initiative the local government affairs of the local community;
 - (b) exercise the municipality’s executive and legislative authority, and to do so without improper interference; and
 - (c) finance the affairs of the municipality by-
 - (i) charging fees for services; and
 - (ii) imposing surcharges on fees, rates on property and, to the extent authorized by national legislation, other taxes, levies and duties.
- (2) The council of a municipality, within the municipality’s financial and administrative capacity and having regard to practical considerations, has the duty to-
- (a) exercise the municipality’s executive and legislative authority and use the resources of the municipality in the best interests of the local community;
 - (b) provide, without favour or prejudice, democratic and accountable government;
 - (c) consult the local community about-
 - (i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provide; and
 - (ii) the available options for service delivery;
 - (d) give members of the local community equitable access to the municipal services to which they are entitled;
 - (e) promote and undertake development in the municipality;
 - (f) contribute, together with other organs of state, to the progressive realization of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.

Section 11 provides a number of means for the municipality's exercise of legislative and executive authority.⁶

[18] Municipalities are legally obliged to ensure the adequate provision of basic services. Communities rely on municipalities to deliver these services and to provide amenities to ensure a good quality of life and human wellbeing. In *Joseph v City of Johannesburg*, the Constitutional Court made the following remarks relating to the importance of the municipalities providing basic municipal services:

“the provision of basic municipal services is cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop service delivery capacity in order to meet the basic needs of the inhabitants of South Africa, irrespective of whether or not they have the contractual relationship with the service provider”⁷

[19] Same sentiments were echoed in *Featherbrooke Home Owners Association v Mogale City Local Municipality*, unreported judgment⁸:

⁶ These include:

- “(a) developing and adopting policies, plans, strategies and programmes, including setting targets for delivery;
- (b) promoting and undertaking development
- (c) implementing applicable national and provincial legislation and its by-laws
- (d) preparing, approving and implementing its budgets
- (e) doing anything else within its legislative and executive competence.”

⁷ *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 34

⁸ JG 25-01-2021 case no: 1129/2020

“The duty to provide basic municipal services is based on several legislative provisions that mandate the municipalities to provide basic services and to protect community’s safety and well- being”.

[20] It is a matter of fact that, after thirty years of democracy, many communities are faced with challenges of service delivery, with little or no access to basic human needs like access to roads and health care, amongst others. The scars of the spatial apartheid era, which still exists, are a contributing factor to poor or no service delivery.⁹

[21] It is apposite for me to have regard also to the following provisions of the Municipal Systems Act: Section 73 of the Municipal Systems Act mandates a Municipality to give effect to the provisions of the Constitution as follows;

- “(a) give priority to the basic needs of the local community;
- (b) promote the development of local government;
- (c) ensure that all members of the local community have access to at least the minimum level of basic services”

[22] Notably, the Municipality has not raised financial challenges as the reason of it’s inability to provide the applicants with access to a road or a paved road; instead, it has raised other issues which I will deal with hereunder.

⁹ Mkontwana v Nelson Mandela Metropolitan and Another 2005 (2) BCLR 150 (CC) para 105.

[23] There is a dispute of fact on the issue of whether the road is dilapidated as alleged by the applicants. The applicants allege that it is, whereas the Municipality avers that it is not. Both parties advance their averments by photo evidence, and the Municipality accepts that the complaint about the condition of the road was received through Councillor Qunta, who appears to have been a ward councillor of the applicants. However, the road was maintained in 2024. That was before this application was instituted. The applicants admit the maintenance of the road in 2024; however, due to recent floods and floods that occurred soon after the maintenance, the road was badly damaged to the dilapidated state it is currently in.

[24] This dispute is not factual, for it can be resolved on paper. The general rule is that a final relief in motion proceedings may only be granted if those facts as stated by the respondent, together with those facts as stated by the applicant in the founding affidavit are admitted by the respondent, justify the granting of the application, unless it can be said that the denial by the respondent of the facts by the applicant is not such to raise a real, genuine or bona fide dispute of fact.¹⁰

[25] In this case, I am satisfied that there is no real or genuine dispute of facts not to be resolved on the affidavits. I am satisfied that the applicants have made a case to say the road is dilapidated as they allege.

¹⁰ Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1964 (3) SA 623 (A) AT 634 E-635 A-C

[26] The Constitutional provisions and the local Government legislative frameworks cited above provide the Municipality's duty and obligations to provide the basic services to the community it serves. I find that the provision of access road that the applicants seek falls within the basic services the Municipality is legally and constitutionally bound to provide to the applicants.

[27] The question of whether the Municipality has breached its constitutional obligation is answered by evidence from the party's papers.

[28] During the hearing of this matter, Mr Noah, for the Municipality, accepted the duty of the Municipality to provide an access road to the applicants. However, the breach to do so is denied by the Municipality. The applicants have attached the photographs of the dilapidated road as they allege. This point is not disputed by the Municipality; however, it raised a fault that has been repaired. The Municipality replied that due to recent flooding, the road has been damaged again. The applicants state that they seek a better-maintained road with a better surface; again, they have attached photographs of a dilapidated road in their reply affidavit.

[29] I am mindful that in application proceedings, affidavits constitute both evidence and pleadings if they were trial proceedings¹¹. The photographs demonstrate the dilapidated state and surface of the road. The evidence in the

¹¹ Fine and Country South Africa (Pty) Ltd v Tradelink Properties (Pty) Ltd (2024) ZA GPJHC 586 (21 June 2024), para 25, 27

affidavits establishes a fact that the access road concerned is indeed dilapidated. It goes without saying that the Municipality has breached its constitutional obligation to provide the applicants with a better, well-surfaced, and maintained access road.

[30] Our courts have consistently emphasised the need for organs of state (such as the municipality herein) to be exemplary in the manner in which they comply with their constitutional obligations. In *Merafong*¹², for instance, the Constitutional Court held that a municipality must act as a ‘good constitutional citizen’ and its conduct should be in compliance with the Constitution. A similar observation was made by the Constitutional Court in *Lesapo*,¹³ where it held that an organ of state should be exemplary in its compliance with the fundamental constitutional principle. Respect for the rule of law is crucial for a defensible and sustainable democracy. In *Kirkland*¹⁴, the Constitutional Court (per Cameron J) made the following observation:

‘To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.

¹² *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017(2) BCLR 182 (CC) paras 60 and 61

¹³ *Lesapo v North West Agricultural Band and another* [1999] ZACC 16; 1999 (12) BCLR 1420 (CC0 para 17.

¹⁴ *MEC for Health Eastern Cape and Another v Kirkland Investments (Pty) Ltd trading as Eye and Lazer Institute* [2014] ZACC 6; 2014 (3) 481 (CC)

Government is not an indigent or bewildered litigant, adrift on a sea litigious uncertainty, to whom the courts must extent a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly'. (Footnote omitted.)

[31] I disagree with the Municipality's proposition that the grant of the orders sought will constitute a breach of the separation of powers.

[32] The Municipality has challenged the *locus standi* of the applicants. It argues that the applicants lack the requisite locus standi to institute these proceedings. The applicants have in their founding papers attached the resolution of the community meeting as an authority to the institution of these proceedings; the deponent to the founding affidavit is the traditional leader and headman of the locality. The other community members who are applicants have signed the confirmatory affidavit. The applicants have alleged that they act in terms of section 38 (a) and (d) of the Constitution.

[33] The Constitutional Court has given guidance in this regard. In *Lawyers for Human Rights v Minister of Home Affairs and Others*¹⁵. The court dealt with what needs to be shown in order to establish whether a person or any entity is acting in the public interest.

¹⁵ 2004 (4) SA 125, 2004 (7) BCLR 775 (EC) at paras 14-16.

[34] The Court referred to the judgment by O' Regan J in *Ferreira v Lenin NO*, *Vryenhoek v Powell NO*¹⁶, where he said:-

“This Court will be circumspect in affording applicants’ standing by way of Section 7 (4) (b) (v) and will require an Applicant to show he or she is genuinely acting in public interest. Factors relevant to determining whether a person is genuinely acting in public interest will include considerations such as: whether there is another reasonable and effective manner in which challenge can be brought, whether there is another reasonable and effective manner in which challenge can be brought, the nature of the relief sought, the extent to which it is of general and prospective application, and the range of persons or groups who may be directly or indirectly affected by an order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the court. These factors will need to be reconsidered in the light of the facts and circumstances of each case”.

[35] The Court also said: -

“(A) distinction must however be made between the subject position of the person or organization claiming to act in the public interest on one hand, and whether, it is, objectively speaking, in the public interest for the particular proceedings to be brought....”

¹⁶ 1995 ZACC 13, 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 CC.

[36] In this matter, having considered the *locus standi* of applicants, and the context in which it is pleaded, objectively considered, the applicants have made a case for their *locus standi* to bring these proceedings.

[37] The applicants have a fundamental duty to hold the Municipality accountable for service delivery. The applicants are empowered by the Bill of Rights to demand equitable and accessible public services, which are essential for the protection of socio-economic rights.

[38] The Municipality has argued that the applicants should not have based their application on the constitution, whereas there is applicable local government legislation to challenge their Municipality. I disagree with the Municipality on this point. Quite clearly from the papers, the applicants have relied on a number of provisions from the Municipal Systems Act to support their application. Further to that, this court should be slow to allow procedural issues to prevent it from looking into a challenge to the lawfulness of a public power. It does so to uphold the rule of law¹⁷.

[39] Mr Nkele, who appeared for the applicants, asked this court to grant just and equitable relief as empowered by Section 172 of the Constitution. In the *South African Broadcasting Corporation*, the Constitutional Court described the

¹⁷ Van Wyk v Unitas Hospital [2007] ZACC 24; 2008 (2) SA 472 (CC) at 477G

provisions as an important one, pointing out that the only qualification on the exercise of public power contained in Section 173 was that the court must take into account the interests of justice¹⁸.

[40] Judicial support for the applicant's contentions for this type of relief is to be found in *Fose v Minister of Safety and Security*, where the Constitutional Court held¹⁹:

‘...I have no doubt that this Court has a particular duty to ensure that, within its bounds in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal.’

[41] The Constitutional Court also stated in *Treatment Action Campaign* that:

‘South African Courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they

¹⁸ South African Broadcasting Corporation Ltd v National Director of Public Prosecutions [2006] ZACC 15, 2007 (1) SA 523 para 72.

¹⁹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)

should exercise those powers depends on the circumstances of each particular case. Here, due regard must be paid to the rules of the Legislature and the Executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, Courts may – and, if need be, must – use their wide powers to make orders that effect policy as well as legislation²⁰.

[42] In conclusion, having considered the conspectus of issues involved in this matter, and the evidence from the party's papers, I am satisfied that this application should succeed. I see no reason to depart from the normal principle that the costs follow the suit.

Order

[43] In the result, I make the following order:-

1. The second respondent is ordered to:-
 - 1.1 Repair and do whatever may be necessary to restore to a good and functioning condition the Gxaka-Gxaka access road from where it joins the Fort Malan main road, Willowvale;
 - 1.2 Commence with steps in compliance with the order in paragraph 1.1 above within 30 calendar days from the date of

²⁰ 2002 (5) SA 721 (CC) para 113.

this order and fully comply with the order in paragraph 1.1 within 180 days from the date of this order.

1.3 In the event the second respondent fails to comply with any of the time periods mentioned in paragraph 1.2 above, the 1st respondent is ordered to.

2. Report to this court and set out fully the steps taken to procure compliance with the order in paragraph 1.1 above and on any extended time period required by the relevant respondent within which to comply with the order in paragraph 1 above;
3. The applicants are granted leave to, on the same papers, supplemented as may be necessary, approach this court if the first respondent fails in any manner whatsoever to comply with the orders in paragraphs 1.1 to 2 above;
4. The second respondent is ordered to pay the costs of this application on scale “A”.

M MHAMBI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicants : Mr Nkele

Instructed by : T.A. Nkele and Sons

Mthatha

Counsel for the Respondents : Mr Noah

Instructed by : T. Noah and Sons

Mthatha

Heard on : 16 April 2026

Judgment Delivered on : 26 May 2026