

SOUTH AFRICA / JUDGMENT

Kunogqala Local Residents and Others v Ab Xuma Local Municipality and Another (4146/2023) [2025] ZAECMHC 4 (6 February 2025)

[2025] ZAECMHC 4

COURT

Eastern Cape High Court, Mthatha

BEFORE

A.S Zono

CASE / FILE NUMBER

4146/2023

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FLYNOTES:

MUNICIPALITY – Constitutional duties – Road and bridge –
Lack
of proper infrastructure – Significant hardships to community – Difficulties accessing essential services, education and dignified burial practices – Municipality's reliance on budgetary constraints not sufficient justification –
Clear and unambiguous legal duty to construct access road – Prolonged failure constituted violation of Constitution –
Application succeeds – Local Government: Municipal Structures Act No 117 1998, ss 83(1), 84(1)(f) and 184(2).
IN
THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION, MTHATHA)
CASE
NO.: 4146/2023
In

the matter between:

KUNOGQALA
LOCAL RESIDENTS
1ST
APPLICANT
NOWANATHI
MXUXUMBA
2ND
APPLICANT
NOJIKILE
MAKHAMBA
3RD
APPLICANT
ASAKHE
MAKHAMBA
4TH
APPLICANT
NGCAWE
NTSHEQANE
5TH
APPLICANT
NOBUTNTI
NTSHEQANE
6TH
APPLICANT
LULAMILE
TSHEQANE
7TH
APPLICANT
and
AB XUMA LOCAL
MUNICIPALITY
1ST
RESPONDENT
THE MUNICIPAL
MANAGER, AB XUMA
LOCAL
MUNICIPALITY
2ND
RESPONDENT

JUDGMENT

ZONO AJ:

Introduction

[1] The applicants seek to compel the respondents to construct Nogqala access road and complete the incomplete Nogqala crossing bridge. As a consequential relief, the applicants seek an order in terms of which the respondents are ordered to commence with steps initiating the process of construction within thirty (30) days from the date of the

order; and that the construction must be finalized within 120 days of the order sought to be granted. In the event of failure to comply with the order of the court, the applicants seek an order directing the respondents to fully explain to this court and give the reasons for such failure and further report to this court the steps they have taken to comply with the time limits set out above. The applicants seek costs of the application.

[2] The applicants describe the access road and the bridge to be constructed as one linking Nogqala location, Upper Mnyolo Administrative Area, Engcobo, Eastern Cape to the towns of Engcobo and Ugie. The access road and crossing bridge are respectively known as Nogqala road and Nogqala bridge.

[3] The applicants together with the community or residents of Nogqala Village, Upper Mnyolo Administrative Area, Engcobo use Nogqala bridge to connect to Engcobo and Ugie Towns. It is contended that Nogqala residents cannot cross the river without the bridge as the situation becomes worse when it is raining and the river becomes full and resulting to overflow. The dire consequences of the incomplete bridge are set out as follows: Firstly, school pupils stay at home when the

weather is bad for at least a month, that sometimes result in the school drop outs in the location; Secondly, during the times of death of one of the residents, male members of the community carry the casket crossing the river on foot and consequently walk long distances because of the incomplete bridge to bury one of their own. The hardship of walking a long distance to reach to the gravel road for transport is a general struggle of every resident of Nogqala Village. Their businesses are tremendously struggling as a result of bad and poor condition of the road and the bridge.

[4] The applicants contend that during the year 2021 the bridge was constructed for the first time since 1994 at the instance of the respondents and left unfinished. The bridge then became a source of danger to animals and Nogqala Village residents. Pursuant to countless requests by the community to the respondents, community members instructed legal representatives to demand completion of the unfinished bridge, but to no avail.

[5] It is therefore contended that at the time of institution of the instant proceedings the respondent had already appointed the construction company to complete the uncompleted crossing bridge. The construction company is on the site to undertake the work relating to the completion of the bridge. However, no work relating to construction of the access road has been and will be undertaken.

- [6] About the access road the applicants contend that Nogqala Village community never had access road since the advent of democracy. Pleas for the construction of access road were made to the successive respondents' councillors. Nogqala Village residents are adversely affected by respondent's failure to take necessary steps to construct the access road.
- [7] Previous and present Municipal Councillors were approached and complaints were made about the road but to no avail. Municipal Councillors would have opportunities of visiting Nogqala Village community to hold meetings with them, and they would be advised of the problem of incomplete bridge and dilapidated state of the access road. The Councillors are using the same road when attending meetings with Nogqala Community. Their present ward Councillor is an aborigin of Nogqala Village. They all knew the extent of the problem besetting the Nogqala road and bridge in the Village. The last meeting between the applicants' community and respondents' officials was in March 2023 where the subject was the incomplete bridge and lack of access road. Respondents' officials left community with promises to revert back with the date and time when the grievances would be attended to. That did not happen. The respondents promised to investigate the matter and resolve same. The respondents, contrary to their promise did not revert back to the applicants' community. Instead, when a letter of demand was sent to the respondents by applicants' legal representatives, they opposed that letter.
- [8] In addition to the hardships set out above, faced by the Nogqala Village Community, the applicants allege that members of that community cannot connect or go to Engcobo and Ugie to do their banking services, shopping and other necessities of life. They are simple cut off from their towns where they get their necessities of life.
- [9] The applicants rely on the following legal and Constitutional provisions for the relief they are seeking: section 152(1)(b), 156, Part B of Schedule 5 of the Constitution; Section 83(1), 84(1)(f) and 184(2) of Local Government: Municipal Structures Act No 117 1998.
- [10] The matter is opposed by the respondents, in so doing the respondents have filed their notice to oppose, answering affidavit and annexures.
- [11] What immediately comes out of the papers is the common cause fact that the contractor has been appointed and has commenced with the construction of Nogqala bridge. The appointment was made on 17th July 2023 and the site was handed over to the new contractor who commenced with the civil works on or about 04th October
2023. The construction by the new contractor was commenced with even before the institution of the instant proceedings. Nothing more need be said about the construction of Nogqala bridge except the issue of costs. I will return to this later in this

judgment.

[12] With regards to the construction of the access road the respondents assail applicants' papers for being vague, embarrassing and confusing. They criticised applicants' papers for being unclear on whether access road implies the construction of an entirely new road or whether the upgrade of an existing road is intended. The substantial part of the answering affidavit is dedicated to allegation relating to the construction of the bridge. On the subject of access road applicants' papers are assailed for they allegedly fail to identify or describe the location and/or the description of the road to which they refer.

[13] About location of the Village the first applicant identifies the location in paragraph 14 of the following affidavit as follows:

"The broader community affected by this application is situated approximately 48 kilometres from Ngcobo at the foot of the mountain that separates it from Gqaza and Zabaza Localities" (all sic)

[14] Paragraph 8.1 of the founding affidavit alleges inter alia, that

"... The applicants are members of a previously disadvantaged community that had no crossing bridge linking the locality with the main gravel road leading to Ngcobo and Ugie Town". (all sic).

The notice of motion refers to Nogqala access road. When referring to the bridge the respective parties refer to Nogqala bridge. It goes without saying that Nogqala bridge is on and part of Nogqala access road described as linking Nogqala Village to the main road leading to Engcobo and Ugie.

[15] Lastly, it is the road that the respondents' officials and Councillors have used to visit them about the construction of the bridge and the road. This road is well known to and by the respondents. The road therefore is sufficiently described.

[16] The applicants allege in paragraph 26 of founding affidavit as follows:

"Due to the condition of Nogqala incomplete bridge and that there is no access road the applicants experience great hardship in trying to access Ngcobo and Ugie Towns where they do their shopping for daily necessities, access banking services and to work. Their lives are literally being cut off from their source of income and their amenities which is unbearable."

[17] Answering to paragraph 26 of the founding affidavit the respondents make the following allegation:

"As stated above, the incomplete structure left behind by the previous contractor will be demolished and the construction of an entirely new bridge is in progress. It is not disputed that the access to and from the said village is currently substandard but steps have been taken by the first respondent and the completion of the bridge and 500 meters of a new road either side of the bridge will provide adequate access to and from the village. In these circumstances no mandatory or supervisory relief against the respondents are warranted" (all sic).

These allegations buttress a point that both the road and the bridge are well known by the respondents. The substandard nature of their condition is well known by the respondents. The concerned road is well known to the respondents and it is sufficiently described in the parties papers. Accordingly, I find the point to be unmeritorious.

Discussion

- [18] I have alluded to the fact that it is the common cause that the construction has been commenced with on or about 04th October 2023 as the civil works have been restarted. With regards to the construction of the bridge there is accordingly no live issue for adjudication. There is no justification to hear this issue as it has become academic. Courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to abstract questions or to advise upon differing contentions.[1]
- [19] In the context of mootness of the issue on appeal Mogoeng CJ in the case of the President of Republic of South Africa[2] had the following to say:
- “35. This Court is thus being asked to advise or guide the President. That is the only real purpose to be served by entertaining this appeal. And courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision now. Entertaining this application requires that we expend judicial resources that are already in short supply especially at this level. Frugality is therefore called for here.”*
- [20] There’s no virtue of deciding an issue that has been resolved even before the institution of this matter. The case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinion on abstract propositions of law.[3] I shall accordingly make no order regarding the construction of the Nogqala bridge.
- [21] On the issue of the construction of the access road the applicants rely on section 156 which confers on the Municipalities powers, functions and a right to “administer the local government matters listed in Part B of Schedule 5 and any other matter assigned to it by National or Provincial Legislation.” Part B of Schedule 5 provides for Municipal Roads as a local government matter administration of which is within the powers and functions conferred upon the Municipalities.
- [22] From the onset it is significant that the respondents accept that the construction of the access roads is within their power and competency. More so that the bridge that is part of that road was built at the respondents’ instance. It is without a doubt that the respondents are not denying that they are responsible for the construction of road in question. To put this to bed, I refer to paragraph 7 and 8 of respondents answering affidavit which reads as follows:

“7. Whilst the need to upgrade, improve and maintain the first respondents existing road and storm water network in many rural areas is acknowledged, budgetary constraints dictate that a phased approach over several years must be followed....

8. In the context of these circumstances the first respondent developed and adopted a three-year capital plan which inter alia, focuses extensively on a road infrastructure upgrade programme. This capital plan had been the subject of extensive public participation and was subsequently incorporating into the first respondents integrated development plan as contemplated in section 25 of the Municipal Systems Act.”

This put paid to first respondents’ responsibility to construct roads.

[23] Section 84 of Municipal Systems Act[4] provides:

“(2) A local municipality has the functions and powers referred to in section 83(1), excluding those functions and powers vested in terms of subsection (1) of this section in the district municipality in whose area it falls.”

It suffices to mention that the first respondent is the local Municipality referred to in this section.

[24] Section 83(1) referred to in section 84(2) of the same Municipal Structures Act provides:

“(1) A municipality has the functions and powers assigned to it in terms of sections 156 and 229 of the Constitution”.

It worths repetition that section 156(1) of the Constitution confers power upon the Municipality, in this case Local Municipality[5] to administer local government matters listed in Part B of Schedule 5 of the Constitution. Part B of Schedule 5 of the Constitution

provides for inter alia, Municipality roads. During the hearing of this matter the submission was made on behalf of the applicant that Municipal roads are all roads or road network within the geographical or territorial area of the Municipality. No contrary submission was made on behalf of the respondents. In fact, as already observed above, the respondents have patently accepted the responsibility to construct Nogqala roads.

[25] In conferring those powers and imposing these duties the Constitution and the Municipal Structures Act were contemporaneously conferring rights to the applicants and their Village community. Service delivery rights entail basic Municipal services to all persons living in the jurisdiction of that Municipality.[6] Where a statute confers a right, that provision is imperative and its non-observance is fatal.[7]

[26] Where there is a right, there is a remedy, “Ubi jus, ibi remedium”. Where the right holder is injured in the enjoyment of his right he must have means to vindicate and maintain his right[8]. The Constitutional Court quoted with approval the sentiments shared by Centlivres CJ[9] as follows:

“There can to my mind be no doubt that the authors of the Constitution intended that those rights [that is, the rights entrenched in the Constitution] should be enforceable by the courts of law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. Ubi jus ibi remedium”.

Mandamus and /or mandatory interdict provides remedy to maintain, protect and restore the legal rights.

[27] Section 10 (1) of the Interpretation Act No 33 of 1957 provides:

“(1) When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty be performed from time to time as occasion requires.”

It is imperative that a duty imposed by the law or legislation must be performed from time to time as the occasion requires.

[28] Public powers and functions are given for a purpose: they are intended to be exercised in furtherance of the public interest. As a result, when officials fail to exercise their powers or perform their functions, affected parties may require defaulting officials to perform their duties.[10]Where a power deposited with a public officer for the purpose of being used for the benefit of persons who are specifically

pointed out and with regard to whom a definition is supplied by the legislature of the conditions upon which they are

entitled to call for its exercise that power ought to be exercised and the court will require it to be exercised[11].

[29] Even prior to the advent of the Constitutional dispensation, powers conferred on administrators were inevitably accompanied by an implied duty to exercise the power[12].The enactment of Promotion of Administrative Justice Act has perpetuated the common law position by inter alia, rendering a failure to a decision a ground of review[13]. Here we are concerned with a failure to act in terms of the law.

[30] In *Mc Gregor NO*[14] Greenberg J held that:

“I think therefore that it follows from these decisions that where a statute requires an official to give a decision within a reasonable time and he fail to do so, the court will order him to carry out his duties.”

This applies with equal force where the state fails to perform duties imposed on it or fails to exercise powers conferred upon it.

[31] The doctrine of legality ensures in the sphere of public law that:

- (a) The exercise of public power by the administration conforms to constitutional principle;
- (b) public authorities comply with specific duties and obligations in the exercise of their discretionary powers, and

(c) the state and its officials obey the law to ensure good and fair administration[15].

[32] In addition to section 156 of the Constitution referred to above, it is apposite to refer also to section 195 of the constitution which provides as follows:

“195. Basic values and principles governing public administration.

(I) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles-

(a) A high standard of professional ethics must be promoted and maintained.

(b)

(c) Public administration must be development-oriented.

(d)

(e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.....”

[33] Whilst the respondents accepted that access to and from applicant’s village is substandard, nothing is said to have been done to take steps to construct the road in question. This happens at the happenstance of the Municipal Councillors and officials visiting and seeing the dilapidated state of the road of Nogqala residents from their village to Ngcobo, Ugie and back. I accordingly come to a conclusion that the conduct of the respondents is not development- oriented[16], and therefore unconstitutional.

[34] Notwithstanding countless meetings with respondents’ Councillors and officials about a need to construct the road in question, their need has not been responded to and that failure constitutes an infraction to Constitution provisions outlined above[17].

[35] Given the amount of delay that has been occasioned by respondents’ inaction to take steps necessary to construct the road in question, I find respondent’s failure to promptly take the necessary steps to construct the road in question to be unconstitutional and unlawful. Section 237 of the Constitution, provides for diligent performance of obligations, and it provides thus:

“All constitutional obligations must be performed diligently and without delay.” Performance of Constitutional obligation in terms of section 156 and 195 of the Constitution have been delayed without any explanation. Accordingly, the delay is unjustifiable.

[36] The law cannot and does not countenance an ongoing illegality. Courts are constrained by the doctrine of legality to enforce the law. The courts have a duty to uphold the doctrine of legality, by refusing to countenance an ongoing statutory contravention[18]. Courts are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice[19]. The courts are enjoined to apply and enforce the constitution and the law. It is a basic principle of our law that a court can never

lend its aid to the enforcement of an illegal act[20]. Failure to take steps necessary to construct Nogqala road is an illegal act. If this court cannot grant such a relief, it will be effectively lending its aid to the enforcement of an illegal act. Such conduct would in effect be turning a blind eye to the Constitutional provision relating to accountability[21].

[37] An order of dismissal of this application would be an antithesis to these provisions. Accordingly, an order compelling the respondents forthwith to take steps necessary to construct the road in question; and an order directing the respondent to periodically report to the applicants through their legal representatives about the steps they have taken or steps to be taken to construct the road is justified in the circumstances. Respondents' lament about budgetary constraints is well taken care of by this kind of order. In fact, the respondents should have factored into their budgetary priorities the construction of this road as a lot of consultation has been going on between the parties for a long time. No explanation for respondents' failure to have included the construction of this road in its previous annual budgets.

[38] It is apposite quote the words of Leach JA in Kalil NO[22]

"30 The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance."

The respondents failed to fully explain facts of this case and to take this court into their confidence. No explanation also why construction of the road has not been commenced with up to this date.

[39] Section 165(4) of the Constitution provides:

"Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

The respondents failed dismally to assist this court to optimally and effectively come to a right decision.

[40] It is apparent from the applicants' founding papers that there are other rights that are affected by the respondents' failure to construct the road in question. These rights are predicated on the fact that school pupils or learners find it difficult to attend schools, especially when it is raining. That implicates section 28(1) of the Constitution which reads as follows:

"Everyone has a right-

(a) to a basic education, including adult basic education...."

[41] It is further plain that Nogqala Village resident do not enjoy their right to dignity even after they have met their demise.[23] The dilapidated state of the road stripped Nogqala residents of their dignity. They carry coffins, with long distances,

crossing rivers while at the same time they are mourning. While their departed one is not handled in dignity because of the state of the road, the mourners are not mourning in dignity for the same reason. This shows the deep pain and suffering people of Nogqala Village are enduring at the hands of the respondents.

[42] Multiple rights protected in the bill of rights can be violated by a single action[24]. And those rights are not always squarely or perfectly correlative or corresponding. What informs the need for their vindication is the fact of their violation.[25]One can, in passing, imagine a number of rights protected in the Bill of Rights that are violated by the aforesaid state of the road, for example, right to health care services[26]. A sickly person may ultimately die for lack of means to transport him or her. Accordingly, lack of proper road threatens the life of Nogqala Village community[27].

[43] The kinds of rights affected by the dilapidated state of Nogqala road are the ones which, if not protect by the order this court is going to make, may cause irreparable harm to ensue[28].

[44] I need to deal with this simple issue: That the applicants are acting in their own interest as well as members of Nogqala Village Community. Accordingly, in that case they are acting in their own interest and in the public interest[29]. Applicants have locus standi to approach this court.

[45] In the spirit of accountability, I feel constrained to explain the delay to deliver this judgment. This matter was heard on 08th August 2024. On 16th August 2024, I was finalizing my proof reading of the judgment. On 16th August 2024 I was furnished with respondent's supplementary heads of argument. I took time to consider respondents' heads of argument.

[46] When I was about to finish considering respondent's supplementary heads, applicant's heads of argument were given to me on or about 29th August 2024. I communicated through the office of registrar, especially to applicant's legal representatives, outlining my concern about and the inconvenience brought about by the late filing of supplementary affidavit.

[47] In the interest of justice and in the interest of equity I decided to revisit my judgment with a view to take into account applicant's supplementary heads. I had a lot of other reserved judgments I had to deal with at the time.

[48] In essence, late filing of supplementary heads of argument contributed to the delay.

Order

[49] In the result I make the following order:

49.1 The respondents are directed to forthwith take all steps necessary to commence with and finish Nogqala Road that connects applicants' village to the road to Ngcobo and Ugie Towns.

49.2 The respondents are directed to report to the applicants through their legal representatives within one hundred and eighty (180) days hereof, of the steps already taken, and steps to be taken within ninety (90) days after the lapse of one hundred and eighty (180) days mentioned herein above.

49.3 The first respondent is hereby ordered to pay costs of the application.

A.S ZONO

ACTING JUDGE OF THE HIGH COURT

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Matter heard on

: 08 August 2024

Delivered on

: 06 February 2025

[1] Coin Security Group (Pty) Ltd v SA National Union for Security Officers

[2000] ZASCA 137; 2001

(2) SA 872 (SCA) at 875A-D; Port Elizabeth Municipality v Smit 2002

(4) SA 241 (SCA) at 246I-247A.

[2] President of Republic of South Africa v Democratic Alliance 2020

(1) SA 428 (CC) Para 35.

[3] National Coalition for Gay and lesbian Equality v Minister of Home Affairs and others
2000(2) SA 1; Minister of Tourism and others v Afri forum NPC and another 2023

(6) BCLR 752 (CC) Para 23.

[4] Local Government: Municipal Structures Act No 117 of 1998.

[5] Section 84(2) of the Local Government: Municipal Structures Act 117 of 1998.

[6] Joseph and Others v City of Johannesburg 2010

(4) SA 55 (cc) Para 47.

[7] G.M Cockram: Interpretation of Statute Page 161.

[8] Masemola v Special Pensions Appeal Board and another 2020(2) SA 1 (CC) Para 51.

[9] Minister of Interior v Harris 1952

(4) SA 769 (A) 780H-781B.

[10] Vumazonke and Others v MEC for Social Developmnet, EC 2005

(6) SA 229 (SE) Para 35.

[11] Julius v Lord Bishop of Oxford [1880] 5 AC 214 at 225.

[12] Chatabai v Union Government (Minister of Justice) and Registrar of Asiatics 1911 AD 13 at
31, Baxter L Administrative Law, Juta (1984) at 414.

[13] Section 6(2)(g) of PAJA.

[14] Furniture Workers Union v Mc Gregor NO 1930 TPD 682.

[15] Lester v Ndlambe Municipality 2014

- (1) ALL SA 102 (SCA); 2015 (6) SA 283 (SCA) Para 25.
- [16] Section 195(1) (c) of the Constitution.
- [17] Section 195(1) (e) of the Constitution .
- [18] Lester v Ndlambe Municipality 2015
- (6) SA 283 (SCA) Para 26, 27 and 28.
- [19] Section 165(2) of the Constitution.
- [20] Cools Ideas 1186 CC v Hubbard and another 2014
- (4) SA 474 (CC) Para 77and 99.
- [21] Section 195(1)(f) provides that Public Administration must be accountable.
- [22] Kalil NO and others v Mangaung Metropolitan Municipality and Others 2014
- (3) ALL SA 291 (SCA); 2014 (5) SA 123 (SCA) Para 30.
- [23] Section 10 of the Constitution.
- [24] Such to include failure to act.
- [25] Eskom Holdings SOC Ltd v Vaal River Development Association (Pty)Ltd and others 2023
- (5) BCLR 527 (CC); 2023 (4) SA 325 (CC) Para 194.
- [26] Section 27 of the Constitution.
- [27] Section 11 of the Constitution provides that everyone has a right to life.
- [28] National Treasury v Opposition to Urban Rolling Alliance 2012
- (6) SA 223 (CC) Para 50.
- [29] Section 38 Constitution.

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