

SOUTH AFRICA / JUDGMENT

Michau N.O and Others v Member of the Executive Council, Eastern Cape Province and Others (3550/13) [2014] ZAECGHC 115 (24 December 2014)

[2014] ZAECGHC 115

COURT

Eastern Cape High Court, Grahamstown

BEFORE

E Revelas

CASE / FILE NUMBER

3550/13

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – GRAHAMSTOWN

Case

No: 3550/13

DATE:

24 DECEMBER 2014

In

the matter between:

FRANCOIS

MICHAU

N.O.....First

Applicant

ELSA

MARIE MICHAU

N.O.....Second

Applicant

LAFRAS

MOOLMAN

N.O.....Third

Applicant

(IN

THEIR CAPACITIES AS TRUSTEES

OF

BARUCH TRUST)

FRANCOIS

MICHAU
 N.O.....Fourth
 Applicant
 ELSA
 MARIE MICHAU
 N.O.....Fifth
 Applicant
 LAFRAS
 MOOLMAN
 N.O.....Sixth
 Applicant
 OF
 KABOD TRUST)
 And
 THE
 MEMBER OF THE EXECUTIVE COUNCIL,
 ROAD
 AND PUBLIC WORKS FOR
 THE
 EASTERN CAPE
 PROVINCE.....First
 Respondent
 LOUIS
 BOTHA.....Second
 Respondent
 HENDRIK
 ALBERTYN
 BOTHA.....Third
 Respondent

JUDGMENT

REVELAS J

- [1] This application for review is brought in terms of the provisions of the Promotion of Access to Administrative Justice Act, No 3 of 2000 (“the PAJA”), read with Uniform Court Rule 53. The applicants, in their capacities as the trustees of two trusts (The Kabod Trust and the Baruch Trust), seek to review and set aside a decision by the first respondent to deproclaim and close a public road, which was proclaimed as Local Minor Road MN43C (“43C”), in 1958 and gave access to various farms owned by the trusts and also by the second and third respondents (“the Bothas”) in the Cradock area. The closure of a portion 43C occurred on 1 August 2013 and was pursuant to an application by the second respondent, supported by his son, the third respondent.
- [2] The application for closure of 43C was desired by the Bothas to prevent it from being used as an access road to their various farms by persons (other than themselves) from the R61, a provincial road which connects Cradock and Tarkastad. The applicants are aggrieved by the

closure of 43C, because they are now forced to use an alternative minor road, MN47C (“47C”) (also proclaimed in 1958) from the R61, as an access road to the farms owned by the two trusts (“the trusts”). According to the applicants, 47C is virtually impossible to traverse in large trucks, which is an operational necessity for their farming business activities. In its present condition they maintain that only 4x4 vehicles and bakkies are capable of travelling on 47C. On the other hand, they contend, 43C is passable in all conditions and therefore its closure has a very negative impact on them.

[3] The parties share the submission that this review falls to be adjudicated on two issues:

- (a) The interpretation of the relevant sections of the Act. The question is one of statutory interpretation.
- (b) Whether on the correct interpretation of the Act, the applicants’ grounds of review justify setting aside the closure of 43C.

[4] The Factual Background

To understand the underlying dispute between the parties herein, who are farmers and neighbours, a bit of geography must be explained first. As said, the trusts own several farms in the Cradock district, and so do the Bothas.

[5] The Kabod trust is the owner of the farm Brooklands which lies adjacent to the R61 which is a provincial road. The Baruch

trust owns the farm Modderpoort which lies adjacent to Brooklands at the latter’s north western boundary. North of Modderpoort and adjacent thereto, lies the farm Fairview, also owned by the Baruch trust. These three farms are the most relevant for purposes of this application.

[6] From its junction with the R61, 47C traverses Brooklands, then Modderpoort and runs adjacent to Fairview, along its western boundary and ultimately leads to a junction with another public road, twenty kilometres further which connects Cradock with Hofmeyer. 43C runs roughly parallel to 47C. From its junction with the R61, 43C first traverses the farm Gunsteling, (owned by the second respondent). Brooklands lies to the west of Gunsteling and they share a common boundary and 43C runs along this boundary.

[7] 43C thereafter traverses the farms Honingkrantz and Langerif, respectively owned by the two respondents. 47C and 43C were

both proclaimed minor roads in 1958. Between 47C and 43C runs a road which is partly a private road and partly a local or minor road. It runs as a private road on Modderpoort until it reaches the boundary of Honingkrantz. There it becomes a local road named as 130C. It runs from the Honingkrantz/Modderpoort boundary to 43C and thus affords access to Modderpoort from the R61, via 43C. Also, 130C runs between 47C and 43C and the part of it which is a private road, runs over Modderpoort. 130C was proclaimed a minor road in 1984.

- [8] The applicants maintain that 43C is passable in all conditions by all types of vehicles, and has until recently served as the access route of choice from Modderpoort and Fairview to parts of Brooklands where it runs adjacent to the boundary of Brooklands, from the R61.
- [9] The applicants pointed out the following regarding the condition of 47C: Firstly, 47C runs in the watercourse or riverbed of the Modder River and carries on to Fairview. In times of rain the homestead on the farm Modderport can be reached via road 47C from R61, although its boundary can be reached. Even in dry conditions, 47C gives very limited access. Large trucks and sedan vehicles cannot traverse it by virtue of deeply embedded rocks on its surface, which are protrusions of bedrock and can't be removed. The causeways cannot be traversed by large trucks, because they are too narrow and the angle of the rock makes it more difficult. They are also likely to collapse under the weight of a ten ton truck and in support of thereof affidavits by two cartage contractors were attached to the founding affidavit. The deponent to the founding affidavit, Mr Michau, had recently called upon the Department of Public Works ("the department") to attend to the grading of local road 47C. The works had to be ceased, according to him, because the machine used was incapable of breaking down the rocks.
- [10] The use of the 43C by the applicants led to conflict between the parties. The Bothas locked gates on 43C in 2011 and in early 2012, barring thoroughfare on the road by others. A damwall was also extended over 130C (the partly private road referred to). When the trusts became aware that the respondents were taking steps for the deproclamation and thus the closure of 43C, their attorneys wrote to the department in Queenstown.
- [11] In the first letter addressed to the department, dated 31 January 2013 (marked for the attention of Mr AA Moore, the District Road Engineer) they pointed out firstly, that the trusts did not receive the required notice of the application for deproclamation.

Secondly, the letter listed the trusts' reasons for objecting to the closure. These were that:

- (a) Roads 43C and 130C are the only suitable roads for carrying large trucks to Modderpoort.
 - (b) Road 47C is unsuitable for the aforementioned purposes because for certain portions thereof, it runs in a riverbed, rendering it inaccessible for any vehicle. (The bridge's inability to carry heavy trucks is a further limitation).
 - (c) Ordinary vehicles are unable to traverse 47C.
 - (d) For daily use 43C, is the only suitable road and if 43C and 130C are closed, the inhabitants of Modderpoort would be unable to reach R61 in the rainy season.
- [12] When no response from the department was received, a second letter was written on 9 March 2012, attaching a copy of the first. The department was advised of the possibility of it being cited as a respondent in court proceedings to be instituted in the event of the road being closed. The applicants' objections to the closing of the road were reiterated.

- [13] In early September 2013, the department issued a notice which read that it was a notice in terms of section 17 of the Act and its stated purpose was to invite “public opinion, and/or objections from all interested parties for the closure of Minor Road 43C”.
- [14] The notice set out the motivation behind the proposed closure of the road as being:
1. That the farms accessed by 43C are all consolidated, owned by one owner who has alternative access to them.
 2. Security on the farms was compromised due to the lack of control over vehicles and persons, with the result that poaching of wildlife, stock theft and trespassing occurred.
 3. The police were in favour of the closure of 43C.
- [15] In response to this notice the applicants (through their attorney) disputed the validity of the consolidation argument, pointing out that the farms did not have only one owner, and closure of 43C would have an adverse effect on the value of the properties concerned in the event of them being sold of separately. The applicants submitted that the closing of a road was no guarantee of safety, and neither would it prevent stock theft, the prevalence of which they alleged is exaggerated. The point was also made that theft affected all persons whose properties are accessed by private roads. The applicants also disputed that poaching of wildlife was regular occurrence, since they did not experience it on their own farms. They highlighted their own inconvenience by the closure and set out the reasons which have been traversed before.
- [16] The letter also reminded the department that when its own trucks came to effect repairs to 47C, even the department’s driver preferred to use 43C to travel on, and that its officials also advised the applicants that bridges and river crossings are not capable of accommodating large trucks. The letter also recorded that the applicants were advised by a Mr Walton of the department, that the closure of roads were actively encouraged by the department in order to divest the department of its obligation and duty to maintain them.
- [17] A map attached to the applicants’ objections reflected all the minor bridges to be transverse in 47C, as well as a crossing over the Modderpoort River. It was pointed out by the applicants that:
- “MN47C is not viable or suitable for use by an Interlink or Superlink truck in that:*
- 17.1 the approach to the cement bridge over the water furrow is at the wrong angle for a big truck and the bridge are too narrow and appears unable to carry a 30 ton truck.
- 17.2 the river crossing cannot be negotiated due to the sharp angles of approach and steepness of the approach.”
- [18] Photographs were attached of the bridges in different weather conditions.

- [19] Lastly the point was made that the graders used by the department to repair 47C, were unable to effectively repair it, due to the protruding bedrock the road. An aerial photograph of the river crossing at Modderpoort was also enclosed.
- [20] The first communication from the department to the applicants was on 13 August 2013 in an e-mail, after the closure of 43C had already been effected on 1 August 2013. In the interim, a sign was erected in front of the entrance to 130C stating: "Private Road" and the gates were locked, barring any access. 130C was however, never deproclaimed.
- [21] In the 13 August 2013 e-mail, Mr Mclachlan of the department wrote to the applicants' attorneys:

"WITHOUT PREJUDICE

. . . . had your client come to an amiable resolution with Mr Botha on shared maintenance costs and access control on MN43C, as thousands of other farmers are able to do with other shared minor roads in this and neighbouring province (WC & NC), this matter would never have had to go the deproclamation route.

Issues

to bear in mind –

- With a few exceptions due to high traffic and de facto status minor roads are in effect "public rights of way" not "public roads".
- Beyond this right of access farmers must provide their own internal infrastructure necessary for their farming operations.
- Modderpoort was and remains served by MN47C.
- Our department previously offered to help your client to improve the condition of MN47C well beyond what we are normally prepared to do on Minor roads – an offer he refused as he insisted on using MN43C.
- Nothing stops your client from repairing his relationship with his neighbour and negotiating access for trucks along the now private road with his neighbour.
- Nothing stops your client from improving the condition of MN47C so that it is accessible by trucks and has improved accessibility for light vehicles during poor weather. To this end and on written request our department will blade the road once a year.
- From aerial photograph inspection the only portion of MN47C that runs "in the stream bed" appears to lie beyond the point where MN130C intersects and therefore this appears to be an irrelevant argument to the deproclamation.

Please can you advise your client that, despite what you advise him, I am advising him that he will be wasting his money and time by taking this to court – money that will be far better spent now improving the condition of MN47C.

- [22] In respect of the contents of this e-mail, the applicants made various points which are important in so far as the objections and submissions were before the first respondent when she had to consider her decision.
- [23] The applicants argue that the question of shared maintenance referred to by Mr Mclachlan, was not one of the issues raised in the notice issued which invited comment in terms of section 17 of the Act. They reiterated that the Province bears the responsibility (section 3(1) (b) and (f) of the Act) for the control and maintenance of public roads (which the applicants insist 43C and 47C are). The applicants found it remarkable that maintenance should be a consideration in determining whether or not a local (public) road should be deproclaimed, where that obligation falls on the department.
- [24] Being told that the trusts should provide their own infrastructure, did not sit well with the applicants either, since they were of the view that the infrastructure had nothing to do with the conditions and traverseability of 47C. I understood the department to mean that the conditions on 47C was an internal matter for the applicants to resolve.
- [25] The applicants further disputed the department's allegation that the department's offer to improve 47C, went well beyond what was normally expected from the department. In any event, the applicants say, they have repeatedly stated that maintenance work would not render local road 47C passable in all conditions by all types of vehicles. The protruding bedrock is simply not capable of being removed by maintenance in its ordinary course.
- [26] The applicants also stressed that under "General Prohibitions" in section 36 of that Act, it is provided that no organ of State "may, unless authorized by this Act:
- (a) Close a Provincial Road or any other road that the public is entitled to use "
- [27] The applicants were also critical of the department's classification of minor roads a "public rights of way"

rather than "public roads" by the department of works in this e-mail, when in their view, local road 43C was plainly a public road.

The Reasons for the Decision

- [28] The reasons for recommending the closure of 43C to the first respondent, were set out in a memorandum from the Districts Roads Engineer, Mr AA Moore, addressed to the first respondent. The memorandum contained the considerations and facts which informed the first respondent's decision to close 43C. These grounds were also traversed in the e-mail sent by Mr Mclachlan of the Department, to the trusts' attorneys.

In the preamble Mr Moore was explained that:

[28.1] 43C was one of several minor roads proclaimed in 1958 to ensure that all subdivided and alienated properties have access to them. These minor roads were proclaimed “rights of ways” to ensure that private property could be accessed from the proclaimed public road network. All subdivided land previously accessed by 43C, has now been consolidated and is owned solely by the second respondent and his son, the third respondent. Similarly the properties served by 47C have been consolidated and are solely owned “by the Baruch Trust (F Michau). Since Mr L Botha (the second respondent) is the only person who uses 43C there are no other

affected parties except for Mr F Michau who uses 43C as an alternative route to his (own) access road which is 47C”.

[28.2] In the previous dispensation the maintenance of minor roads was the responsibility of the Local Divisional Council, at the time, who from time to time received a contribution from the Provincial Road authority, as and when funds permitted. It is not clear who in the new dispensation bears responsibly to maintain minor roads but in the interim, Cape Provincial Ordinance 19 of 1976, is still adhered to. The majority of landowners maintain the minor roads which serve their land. The second respondent maintains 43C at his own cost and without a contribution from Mr Michau who uses 43C, because 47C has deteriorated “thru (sic) lack of maintenance”.

Mr Moore’s motivation continued further along the following lines:

[28.3] The only persons who are dependent on 43C are the Bothas and their staff. Mr Michau has his own route namely 47C.

[28.4] The Bothas suffered the following stock losses in 2012:

[28.4.1] Forty five sheep reported stolen under CAS 195/6/2012.

[28.4.2] Thirty six sheep reported stolen under CAS 87/04/2012.

[28.4.3] No game poaching was reported but the stock theft indicates trespassing.

[28.5] Safety and security of the Bothas and their staff would be compromised if 43C is not deproclaimed.

[28.6] The argument that 43C is of vital importance to the various residents on the trusts’ farms is not an acceptable one because “Mr Michau created a trust in which three of his properties are registered with him being the sole beneficiary”. It was submitted that Mr Michau and the trust maybe separate legal entities, but they are in effect the same person. Neither the trust, nor Mr Michau or any of his tenants would be denied access to Mr Michau’s farms, off National Road R61, as they will continue to have access via Minor Road 47C.

[28.7] Mr Moore alleged that the department provides “right of way” access from National or Provincial Roads and from that point on it becomes the responsibility of the landowners to develop and maintain an internal road network to suits farming practices. “It is not the department’s responsibility to ensure that minor roads are constructed to cater for varying farming practices”.

[28.8] “As Mr Michau and his trust have never upgraded the ‘right of way’ minor road MN47C to cater for their own farming activities and/or failed to maintain the road or alternatively make arrangements for the department to assist with the maintenance they have taken to using MN43C, which was and is being maintained by Mr Botha to access their property. This issue can be easily resolved by Mr Michau upgrading MN47C to suit his farming requirements”.

[28.9] Regarding the complaint that 47C in part runs in a riverbed and is inaccessible in the rainy season, the view of the department (or Mr Moore) was that Mr Michau should have considered that once the properties served by 47C become consolidated, the department would no longer be responsible for its maintenance as it is no longer required as a public right of way. The same applies to 43C. When dealing with this point, Mr Moore conceded that 43C would be a more convenient way for Mr Michau to reach his farms.

[28.10] The following is also said about maintenance of minor roads:

“the DRPW [department] is not mandated to maintain minor roads, however as a result of uncertainty wrt (sic) ownership of such roads, the DRPW maintains such roads as and when funds permit. Their closure is supported “when such roads are no longer required”.

[28.11] The department’s view on the complaints submitted by tenants and visitors to Modderpoort, was that they could be disregarded as the farm belongs to Mr Michau and only landowner’s complaints will be dealt with.

[28.12] In conclusion pointed out that the original reason for the existence of 43C has fallen away. “Whereas it will not disappear with the deproclamation, it will become private road and Mr Botha will be able to control access onto his farm and along the road by locking his gate”.

The Applicant’s Response to the Recommendation

[29] The applicants challenged the recommendations which informed the first respondent’s decision, now sought to be reviewed, on several grounds. These are the following:

[30] The applicants aver that the letters and photographs opposing the application for closure of 43C, appears not to have been included in the documents forwarded to the first respondent. The latter disputed this and reiterated that she had seen letters and the photographs. The applicants argued that if she indeed had them before her, her decision to close 43C was irrational for failing to have regard to that which is obviously conveyed by the photographs.

- [31] The applicants further disputed that the poaching of game was an issue and the deponent to the founding affidavit, Mr Michau, stated that the stock theft figures were exaggerated. Insofar as the safety issues are concerned, it was submitted that violent crime in the countryside was an issue of real concern, but it rarely occurred and it was suggested that safety concerns on a public road was not a valid consideration.
- [32] Of greater concern to the applicants was that Modderpoort and Fairview were cut off from the outside world and emergency services in the rainy season by closing 43C. Mr Michau stated that the trusts had no objection in principle, to the control of access over 43C but that the trusts should “be entitled to insert their own locks”. The author of the memorandum is also criticized for not mentioning that 43C was locked by chain since 2011, when the Baruch Trust acquired Modderpoort and Fairview, and access was only possible to those who had their own key for the lock. It was also stressed out that section 36 of the Act prohibits the locking of a public road, except in exceptional circumstances.
- [33] The applicants also disputed that the farms owned by the trusts were consolidated. Brooklands farm, it was pointed out, is not owned by the same owner as the Modderpoort and Fairview.
- [34] The applicants contended that there was a total lack of understanding by those who advised the first respondent, of just how serious the limitations of 47C as an access route were, because of the unapproachable causeways and because it runs in a watercourse of a river.
- [35] The applicants contend that the fact that the second respondent maintains 43C at his own costs and without any contribution from the department or his neighbour ought not to have been considered by the first respondent. The applicants say that the trusts have no objection to making such a contribution. However, and more importantly, they argued, this aspect was not an issue raised in the department’s section 17 notice, (which the first respondent did not have before her when she made her decision).
- [36] The applicants further reiterated that the maintenance of public roads is the Province’s responsibility.

The Interpretation of Certain Provisions of the Eastern Cape Roads Act, 3 of 2003

- [37] In section 1 of the Act “local road” means any public road other than –
- (a) a national road as defined in section 1 of the South African National Roads Agency Limited and National Roads Act, 1988 (Act 7 of 1998);
 - (b) a provincial road proclaimed under section 5(1) of this Act; or
 - (c) a municipal road;

“provincial road” means the full road reserve of any road proclaimed for the use of the general public under this Act and includes a temporary deviation thereof, but excludes –

- (a) municipal roads; and
- (b) national roads;”

Section 2(1) of the Act provides:

- (1) “Within twelve months after the commencement of this Act the MEC or his or her delegate must compile a list of provincial roads which must include –
 - (a) all provincial roads proclaimed as such under this Act or situated on land expropriated under this Act;
 - (b) all roads proclaimed as or deemed to be public roads under the Roads Ordinance 19 of 1976; and
 - (c) all roads that were listed as numbered roads in the former Transkei and Ciskei administrations before the commencement of this Act, but excluding roads contemplated in subsection (2)”.

Section 2(5) provides:

“(5) Only Provincial Roads listed in terms of subsection (1) must be under the control and supervision of the MEC and the MEC must not be obliged to control, maintain, protect or rehabilitate any road that is not so listed”.

Section 2(7) provides:

“(7) Any public road not proclaimed a provincial road under this section, must be a local road”.

[38] The applicants contend that considering in closing 43C, which is a provincial road, the provisions of section 17 of the Eastern Cape Roads Act, 3 of 2003 (the Act) were applicable and the first respondent did not comply with the peremptory procedures prescribed in that section. The applicants argued that if this interpretation is correct, the first respondent’s decision was materially influenced by an error of law.

[39] The first respondent is of the view that 43C is not a provincial road, but a local road and since section 17 of the Road Act is only concerned with provincial roads, its provisions found no application to the second and third respondents’ application for closure of that road.

[40] The applicants argue that if section 17 of the Act was to be held not applicable to the closure of 43C, the first respondent’s

decision to close it was never authorized by any other empowering provision in the Act and that the first respondent thus created

empowering provisions where none existed in the Act.

[41] The applicant's argument that 43C was a public road and that the Province ought to maintain such roads went as follows:

[42] The Cape Road Ordinance, 5 of 1952 proclaimed roads 43C and 47C as minor roads in terms of section 124(4) of the Cape Road Ordinance. In the Cape Road Ordinance of 1952, minor roads were defined as:

"any road . . . over which a right of way exists in favour of the public".

[43] When the 1952 Cape Road Ordinance was repealed by Road Ordinance 19 of 1976, section 66 of the 1976 Ordinance provided for the retrospective retention of existing trunk, main, divisional and minor roads, as well as public paths, and the "person" who was responsible for the construction, reconstruction, maintenance, repair and improvement of any such public roads and paths was deemed to be the "road authority" for such a road, subject to certain provisions.

[44] The 1976 Road Ordinance was repealed by Section 42 of the Act, but it was still adhered to (also according to the first respondent). In this regard the applicant relies on section 41 of the Act which provides that:

"41 Transitional Provisions

- (1) Despite the provisions of this Act, all roads and fences constructed in accordance with laws repealed by this Act, must be deemed to have been fully constructed under this Act and must vest in or be administered by the persons prescribed in the Act.
- (2) Proclamations, notices, regulations, permissions and consents issued under a law repealed by the Act must remain in force until repealed or amended under this Act, unless inconsistent with the provisions of the Act".

Thus, the applicants argue, Roads 43C and 47C were, by the provisions of section 41 of the Act, deemed to be roads to be administered in terms of the Act. It follows that such roads must be maintained by the province and it also meant that 43C and 47C were retained as minor roads.

Section 2 of the Eastern Cape Roads Act provides as follows:

2. List of Provincial Roads

- (1) Within twelve months after the commencement of this Act the MEC or his or her delegate must compile a list of provincial roads, which must include:
 - (a) all provincial roads proclaimed under this Act or situated on land expropriated under this Act;
 - (b) all roads proclaimed as or deemed to be public roads under the Roads Ordinance, 19 of 1976; and

- (c) all roads were listed as numbered roads in the former Transkei and Ciskei administrations before the commencement of this Act, but excluding roads contemplated in sub-section (2)".

The applicant pointed out that Section 2(1) of the Act is framed in mandatory terms. It requires of first respondent that she compile a list of provincial roads and that such list include "all proclaimed or deemed to be public roads under Roads Ordinance 19 or 1976". Roads 43C and 47C are two such roads.

It is common cause that despite ten years having elapsed since the promulgation of the Act, neither the first respondent nor her

predecessors have complied a list of provincial roads.

Section 2(2) provides:

"(2) The MEC or his or her delegate may decide to exclude a road contemplated in paragraph (b) of sub-section (1) from the list contemplated in that sub-section, depending on factors such as –

- (a)

[45] Section 2 (2) thus provides for a discretion to be exercised by first respondent. Since section 2(1) of the Act has not been complied with, it follows that until it is complied with, first respondent cannot exercise the discretion to decide to exclude a road contemplated in section 2 (1) (b) from the list of provincial roads provided for in sub-section 2 (2) of the Act.

[46] As argued, 43C and 47C were, by virtue of section 41 of the Act deemed to the roads to be administered by the Act. In terms of section 3 of the Act, the first respondent is required to administer the provisions of the Act and to provide and maintain road infrastructure is set out in section 39(b), and the obligation to provide financial assistance for the maintenance or construction of road can be found in 3(1)(c). These powers also imply concurrent obligations, according to the applicants.

[47] The applicants also deferred to Schedule 5 of the Constitution in terms of which provincial roads and traffic falls within the exclusive competence and the obligations imposed on it to carry out that competence. The applicants argue, that the competence

includes an obligation to maintain public roads.

[48] The first respondent pointed out the following:

Minor roads were originally proclaimed to ensure access to subdivided properties and all alienated pieces of land from public roads.

When 43C and 47C were proclaimed in 1958, the purpose of the proclamation was to afford various pieces of land access to the road. Subsequently, all subdivided land previously served by 43C was consolidated and solely owned by the second and third respondents.

[48.1] In the previous dispensation, the maintenance of minor roads was the responsibility of the current Local Divisional Council who, from time to time, received contributions from the Provincial Road Authority, as and when funds permitted to maintain minor roads. In the post 1994 dispensation, there is no certainty as to who is responsible for the maintenance of proclaimed minor roads.

[48.2] No roads re-classification exercise has been completed and the Act remains unrevised. The stance adopted by the department is that due to a lack of funds, minor roads should be maintained by the owners of the farms traversed by them, as it is the responsibility of the landowners to develop a road network to suit their farming activities.

[49] Since no list was drawn up in terms of section 2(2) of the Act, the first respondent submits that strict compliance with the Act was not possible.

[50] The first respondent argues that section 2 of the Act envisages that roads which are not proclaimed as provincial roads shall be local roads but not provincial roads and thus be excluded from the list required by section 2(2). Such (excluded) roads are by definition local roads. Thus section 2(2) envisages that a discretion has to be exercised as to whether previously proclaimed minor roads will become provincial or local roads.

[51] The distinction and differentiation between main roads, divisional roads and public paths in the 1976 Ordinance was vital to the operation of the previous dispensation, in that section 7(1) of the 1976 Ordinance provided that the construction and maintenance of every public road, other than a minor road, shall be undertaken by the Administrator. The exclusion of minor roads from the duty to construct and maintain was deliberate. Their maintenance and construction is provided for in sections 7(3) and 7(5) and the costs thereof in section 9 of the 1976 Ordinance. Works were to be performed by the Divisional Council but at the expense and behest of those who benefitted therefrom.

[52] The first respondent pointed out that this situation prevailed under the 1952 Ordinance which also differentiated between various classes of roads, where the expense of maintenance and construction fell upon the users of some of those roads.

[53] The first respondent submitted that had the listing process envisaged in implemented as foreseen in section 2(1) of the Act, minor roads most probably would have become local roads. Accordingly, minor roads which are presently called local roads would not have been proclaimed as provincial roads in terms of section 5. Such roads would then fall within the exclusion set out in section 2(5) as read with section 2(7). The Province would therefore have no duty to maintain them. This argument went further. The first respondent submitted that even without the procedures of section 2(1) having been complied with, the intention of the legislature is clearly that roads which are not provincial roads are local roads, and no obligation to construct or maintain such roads falls upon the Province.

[54] The directive in section 2(1) of the Act, enjoining the first respondent to compile a list of provincial roads, envisages that

roads not listed as provincial roads, would be local roads. The Act only defines types of roads: provincial and local roads. By contrast, the ordinances (predecessors of the Act) made provisions for a whole range of classes of roads. The introduction of section 2(1) of the Act was to simplify the classification of roads. However, the failure to compile a list of provincial roads does not mean 43C and 47C can be regarded as provincial roads, when they were previously classified as minor roads. They were previously minor roads. It follows that the first respondent's non-compliance with the procedures set out in section 17 of the Act, in so far as there was non-compliance, is of little consequence as section 17 of the Act does not apply to the closure of 43C, which is a local minor road.

- [55] Section 17 provides for the closure of provincial roads and therefore it finds no application to a local road. As a result there is no section providing for the closure of a local road. It is in the aforesaid absence of any provision for a procedure, that the department adopted the procedure of section 17 of the Act. There can be therefore no valid complaint that the first respondent did not follow its mandatory procedures.
- [56] The uncertainty in the Act as to which roads are to be maintained by the department, should however, not preclude all local roads from being maintained by the Province. The department has adapted an apparently pragmatic approach while the uncertainty exists: Such owners of land traversed by local roads must maintain the roads traversing their properties, but if and when funds permit, the department would, in certain circumstances assist with the maintenance. The discretion to be exercised in deciding which roads to maintain should be exercised fairly and reasonably and it stands to reason that the same should apply when a road is closed in terms of a discretion.

Discussion

- [57] The first respondent gave the following summary of the case before her and what she was called upon to do.

“What was decisive was the chief purpose of 43C which was plainly to give access to the properties owned by the Bothas. Once this chief purpose was established, then the only question remaining was whether the difficulties experienced by the Michau’s relating to access through 47C to the R61 should outweigh the interests and wishes of the Bothas to close 43C”.

- [58] The first respondent further reasoned that the difficulties experienced by the “the Michau’s” (the trusts) did not outweigh the difficulties experienced by the Bothas because the obligation to maintain 47C rested on them, and not the department.
- [59] The first respondent exercised her discretion on the basis that she only had to consider competing interests between the Michaus and the Bothas. Although minor roads are “rights of way” as Mr Moore reminded everyone, that right is a public right and he treated it as if it were a personal right. The personalizing of this right caused the first respondent to exercise her discretion without regard to the purpose of the empowering provisions of the Eastern Cape Roads Act.[1] The first respondent ought to have considered the public

purpose, and thus public interest, which is the purpose for which the roads are proclaimed in the Act. That public purpose, as pointed out by the applicants, is much wider than the personal considerations of the Bothas. The Act does not have as one of its purposes, private dispute resolution. In the exercise of her discretion the first respondent disregarded the purpose of the Act.

- [60] On several occasions, as shown above, the applicants have pointed out what their difficulties were. I will confine myself at first to the question of the bedrock embedded 47C, because I see it as the most substantial obstacle, in that its removal is virtually impossible. Even if the trusts had the financial means (which I do not assume as a fact) to reconstruct the surface of 47C, on the version of the applicants, it is not possible to do so. There was evidence before the first respondent to the effect that not even the department's staff members who wished to work on 47C to improve its traversability were able to remove the bedrock on 47C. They also preferred to travel on 43C. The refrain that it is not the department's responsibility to maintain local roads permeated the whole approach to this dispute. The department conceded that the state of the road was a problem but implied it was "thru neglect". This reason can obviously not apply to the bedrock obstacle.
- [61] Secondly, the applicants clearly demonstrated that without being able to use at least that portion of 43C that runs between the R61 and Road 130C, they have no route by way of passenger vehicles. In the rainy season it cannot be accessed with heavy vehicles either. There is no viable route. The first respondent treated the matter as if only Mr Michau or "the Michau's" were affected. There are workers, families, tenants and visitors on these farms. Their access to medical, police and educational services are clearly affected. So, also the farming operations and its agricultural produce. There are personal and public rights which were clearly effected.
- [62] On the facts before the first respondent there can be no other conclusion than that the applicants could not use 47C in all circumstances for very sound reasons. By closing 43C, on the facts before the first respondent, in certain circumstances (in the rainy season or when only sedan cars were available) the homestead on Modderpoort would be cut off from R61. The decision to close the only alternative access in those circumstances, is not rationally connected to the facts before her and is unfair.
- [63] The first respondent remarked (with disapproval of the applicants), that there was no tender made by the applicants to pay for the maintenance of 43C. This matter was not raised in the notice calling for comments and objections (which was not in the papers before her), so it could not have been properly considered by the first respondent. It also appears that the closure of 43C was largely motivated by the impression of the first respondent that the applicants refused to maintain road 43C. There was no indication before the first respondent that the applicants were ever asked to contribute to the maintenance of 43C and that they refused. Yet she treated the matter as if there was such a dispute and it could not be resolved because of an intractable stance on the part of Mr Michau.

- [64] The first respondent accepted that the policy of the department in the new dispensation is, that if there are funds available, minor roads and on the first respondent's argument, also local roads could be maintained by the department. This avenue was not pursued by the department. According to the first respondent, the Province would also not be under any obligation to maintain 43C. It seems to somewhat illogical that the first respondent assumed the authority to close a road in respect of which she contends the department has no concurrent obligation to maintain. This was not a case with an easy answer and it was treated as such.
- [65] The department's stance towards maintenance of roads, was very prominently displayed throughout its correspondence as one of a strong desire to divest itself from any obligations in respect of maintenance. In my view, and based on the various correspondence between the department and the applicants, it was probably the strongest consideration of those who recommended to the first respondent that 43C ought to be closed. In my view, this reasoning closed the door to any submissions or objections the applicants advanced and that was unfair and falls foul of Schedule 5 of the Constitution.
- [66] Based on the factually incorrect information given to her by Mr Moore, the first respondent simply accepted that the properties of the applicants were all consolidated, which they were not. The trusts are separate legal entities (a fact admitted by Mr Moore) and the closure of 43C, and thus its privatisation, could have serious implications for the value of any of the farms if the trusts were of a mind to sell any of them. The fact that Mr Michau is a trustee of both trusts does not detract from the aforesaid. The continuous reference to "the Michaus" in the correspondence and the first respondent's reasons for her decision, demonstrates that the consolidation argument was misconceived and once again borne of the personalizing of the issues as a neighbourly dispute between farmers.
- [67] The first respondent's approach to the facts before her was flawed in another respect. She accepted the case for the Bothas on the basis that "there was nothing in the objections before me to cast material doubt on the veracity of the averments of the Bothas". This statement negates the real purpose of affording an affected party an opportunity to make representations. There was nothing before her to suggest that the applicants' veracity ought to be doubted. In fact, in the absence to indicate anything to the contrary, which there was not, she was bound to accept the truth of their assertions and allegations. By implication the first respondent casted aspersions on the veracity of their complaints without any reason. That is unfair.
- [68] The first respondent placed little or no reliance on the correct facts placed before her by the applicants and that lead her to accepting irrelevant considerations and failing to consider relevant information. Had she properly considered the applicants' case, she would not have taken the decision to close road 43C. As it stands, her decision was not rationally connected to the facts before her.

[69] In *Pepkor Retirement Fund and Another v Financial Services Board and Another*[2] it was held that:

*“The doctrine of legality which was the basis of the decisions in *Fedsure*, *Safru* and *Pharmaceutical Manufacturers* requires that the power conferred on a functionary to make decisions in the public interests, should be exercised properly, i.e. on the basis of the true facts; should not be confined to cases where the common law would cauterize the decision as *ultra vires*”.*

[70] It is now a well established principle that a material error of fact is ground for review, even if it is not listed specifically in section 6(2) of PAJA. It has been held that it falls within the grounds specified in section 6(2)(e)(iii) of PAJA, undertaking into account irrelevant considerations and ignoring relevant ones. “. . . but it may just as easily be accommodated under section 6(2)(1), the catch all provision that allows for the development of new grounds of review. This section provides that administrative action may be reviewed and set aside on the basis of it being ‘otherwise unconstitutional’ or unlawful”. [3]

[71] In the result, and for the aforesaid reasons, the decision by the first respondent to close 43C falls to be reviewed and be set aside.

Order

[72] The following order is made:

1 The first respondent’s decision to deproclaim a portion of minor road MN43C situate in the Inxuba Yethemba Municipal area, and its deproclamation by the first respondent on 1 August 2013, MN43C, by way of provincial Gazette extraordinary, No 2999 of 1 August 2013, is hereby reviewed and set aside.

2 The costs of this application is to be paid by the first respondent together with interest thereon, calculated at the legal rate of interest from a date fourteen days after allocator, to date of payment.

E REVELAS

JUDGE OF THE HIGH COURT

Counsel for the Applicant’s: Adv DH De La Harpe

Grahamstown

Instructed by: McCallum Attorneys

Counsel for the Respondent’s: Adv TJM Paterson SC

Adv KL Watt

Instructed by: NN Dullabh & Co

Date Heard: 22 May 2014

Date Delivered: 24 December 2014

- [1] Section 6(2)(f)(ii)(bb) of the PAJA Bata Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others 2004(7) BCLR 687 CC.
- [2] 2003 (3) SA 38 (SCA) at [47] and Dumani v Nair and Another 2013 (2) SA 274 (SCA) at [29] – [32].
- [3] Chairman: State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman State Tender Board v Schneller Digital Pty (Ltd) and Others 2012 (2) SA 16 SCA at [34].

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2014/115.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/michau-no-and-others-v-member-unknown-topic-aecghc-2014>

Prepared on 14 October 2026 · Esheria