



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

CASE NO.: 1880/2025

Reportable	YES
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In the matter between:

EHESINI AND KUNOMYAYI LOCALITIES	1 st Applicant
NOMTHA THWANE	2 nd Applicant
NO-ANDILE GIGI	3 rd Applicant
NCEDISWA JALISA	4 th Applicant
THOZAMA JALISA	5 th Applicant
CELISWA ZIDE	6 th Applicant
DALIWONGA GIGI	7 th Applicant
MABOLINA JALISA	8 th Applicant
MALIZO JALISA	9 th Appellant

and

DR. AB XUMA LOCAL MUNICIPALITY	1 st Respondent
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JUDGMENT

CENGANI-MBAKAZA AJ

Introduction

[1] Before this court is an application for an order mandating the respondents to repair, resurface and generally restore to good condition the Ehesini Access Road, from its junction with MR00715 or near Elityeni Lomthwa to the applicant's community.

[2] The applicants further seek an order directing the respondents to commence with the steps set out in paragraph 1 above within 90 days of the date of this order, and to fully comply therewith within 180 days of the date of this order.

[3] In addition, the applicants seek an order directing the respondents to file a report with this court within the time periods set out above, setting out in full the steps taken to secure compliance with paragraph 1, and further directing that any request for an extended period, comply with paragraph 1 be made to this court on notice to the applicant. That the respondents be ordered to pay costs of this application.

[4] The respondents oppose the application and raise two *points in limine*. The first is that the applicants have failed to exhaust internal remedies. The second is that the applicants have failed to comply with s 29(1)(b) of the Local Government :Municipal Systems Act 32 of 2000 (Municipal Systems Act).

[5] Furthermore, the respondents contend that addressing the needs of the local communities is subject to the municipality's operational and strategic processes and must comply with s 33 of the Municipal Finance Management Act, 2003 (MFMA).

The applicants' case.

[6] In her capacity as the Headwoman of Ehesini and Kwa Nomyayi, within the Upper Mnyolo Administrative Area, the second applicant avers that these communities are rural areas inhabited by indigent and marginalised people.

[7] The communities, so it is averred, have limited amenities and are compelled to access Ngcobo Town, the nearest centre for all government services, via a grossly dilapidated access road which is an eyesore and impassable in parts. Critically, the road has not been constructed since the dawn of democracy.

[8] The Ehesini locality is situated near the Khovothi and Khovithana forests adjacent to the Mnyobo River. During periods of rainfall, the valley collects

rainwater and deposits it into the Mnyolo River. This causes the soil to become muddy and results in severe soil erosion.

[9] As a result of the erosion and mud, the road becomes slippery and dangerous. This prevents the residents from accessing Ngcobo Town, which is the nearest centre for government services, especially during the summer season when heavy rainfall is prevalent. Due to the absence of any drainage system, rainwater accumulates on the road surface, causing further damage and accelerating deterioration.

[10] The applicants aver that they attempted to resolve this matter prior to litigation. Complaints were made to various councillors. In particular, Councillor Mzuku has personal knowledge of the condition of the road and the difficulties experienced by the residents. He has on several occasions visited the communities using the same road in its dilapidated state.

[11] Prior to instituting these proceedings, specifically on 16 January 2024, the applicants held a community meeting and resolved to pursue legal action. During or around January 2024, the applicants caused a statutory notice in terms of s 3 of the Legal Proceedings Against Certain Organs of the State Act 40 of 2002 to be served on the respondents.

[12] On 02 February 2024, the respondents replied and requested that the applicants should halt litigation as they were still investigating the issues raised.

The respondents undertook to revert to the applicants on or before 08 March 2024. That undertaking was not honoured.

[13] In their bundle, the applicants have filed photographs which depict the dilapidated and dangerous state of the access road. Some confirmatory affidavits further attest to the hardship suffered by residents, including the inability to access health facilities, schools and to transport the sick due to the grossly defective condition of the road.

The respondents' case.

[14] In opposing the application, and in particular the material issues raised therein, the respondents through Mr Muladzi Khathutshelo Lucky, the municipal manager, aver that the applicants' community falls within ward 20. The respondents further contend that the roadshows were conducted between 20 October and 26 October. The respondents refer to the attached Integrated Development Plan which details the priorities and community needs that were raised by those present.

[15] The respondents contend that, despite the opportunity afforded to them, the applicants neglected and/or failed to participate and present their needs. The respondents further state that there is a backlog in service delivery. The total road network under the jurisdiction of the respondent is 930.33 km in length, consisting of 111.68 of surfaced roads and 818.65 km of gravel roads. The

respondents admit that the valley roads, both paved and unpaved, are not in good condition and are in need of maintenance and upgrade.

[16] The respondents argue that they rely on budgets allocated by the National Treasurer which, from time to time, are not sufficient to cater for the entire Province of the Eastern Cape. The respondents further state that from time to time they have to develop a strategy to ensure that the needs of communities for roads are catered for.

[17] The respondents aver that since the institution of these proceedings, on either 22 April or 24 May 2025, they have, through their Technical Services Department, attended to the repair, fixing, re-surfacing, widening and restoration of the road to a good condition.

[18] Given the budget limitations and costly nature of road maintenance, the department engaged with municipalities to enable them to prioritise road maintenance based on the unique circumstances of these respective communities. One area that was identified as needing attention was the Sandile Road. The respondents claim that the Integrated Developmental Plan for Sandile Road was completed in December 2023.

[19] The respondents submit that these proceedings are now moot in that the issues underlying the dispute have been resolved and are no longer justiciable. The case no longer presents an existing or live prejudice or threats of prejudice to the applicants, and there remain no live issues.

The applicants' reply.

[20] In reply, the applicants state that the respondents' reliance on s 29 of the Municipal Systems Act is misplaced. Section 29 places an obligation on the respondents to consult the local community in relation to the drafting of the Integrated Development Plan (IDP). This never happened in this case.

[21] No invitation was ever extended to the applicants and their community to participate in the drafting of the IDP. Had the respondents complied with their statutory obligation to consult the community, the deplorable condition of the access road in question would have been raised and prioritised in the IDP. The applicants would not have been compelled to institute these proceedings.

The issues

[22] The issues for determination are:

- 22.1 Whether the respondents have breached their constitutional and statutory duties in respect of maintaining the Ehesini Access Road.
- 22.2 Whether the respondents' defences, namely, lack of consultation, budgetary constraints, service delivery backlog, and mootness justify that breach; and
- 22.3 What the appropriate remedy is, and whether this court has jurisdiction to grant a structural interdict in the circumstances of this case.

The parties' legal submissions

[23] This court has carefully considered the comprehensive oral submissions and the heads of argument filed by both parties. The applicants acknowledge the steps taken by the respondents after the institution of these proceedings. Despite this, they submit that the steps belatedly taken by the respondents, post-litigation, in an attempt to comply with the relief sought are inadequate and cannot excuse their earlier failure to discharge their constitutional obligations.

[24] The applicants' counsel persists with the application contending that in light of the factual matrix, and especially the common cause facts, the respondents have dismally failed to discharge their legal and constitutional service delivery obligations. They failed to demonstrate the legal, financial, and administrative/operational measures taken to progressively realise the applicants' rights, namely, to have a decent, properly paved access road.

[25] Counsel for the respondents, on the other hand, concedes that the road is in need of maintenance. However, she denies that the respondents had been supine. She avers that the work commenced on or about 24 May 2025, pursuant to which the Technical Services Department undertook repairs, patching and resurfacing of the sections of the road.

[26] Counsel contends that, owing to operational budgetary constraints and prevailing financial limitations, outsourcing the work or undertaking extensive intervention was not practical. She further argues that the relief sought by the

applicants- that the road be repaired, fixed, resurfaced and restored within 90 days is overly broad. It goes beyond routine maintenance and in effect seeks rehabilitation or reconstruction, with attendant procurement processes and substantial budgetary implications.

[27] According to the respondent's counsel, the relief sought triggers statutory prerequisites, including planning, the development of strategies, prioritisation and alignment with available resources. She argued that s 15, in particular s 16 of the (MFMA) is peremptory, and this court is precluded from granting an order compelling unlawful expenditure.

[28] Counsel further states that by virtue of the separation of powers, courts lack the institutional competence to make primary policy decisions. This includes decisions involving trade-offs between competing public needs and the sequencing and prioritisation of public expenditure.

[29] Additionally, counsel submits that the primary policy decisions fall within the terrain of the executive and legislative branches. She refers to two cases, namely: *Minister of Health and Others v Treatment Action Campaign and Others (No.2)*(TAC)¹ and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty)Ltd*(Blue Moonlight Properties)², and argues that they are distinguishable from the present case and should not be

¹ 2002 (5) SA 721 (CC).

² 2012 (2) SA 104 (CC).

applied. Counsel contends that in the present case, there is a clear dispute of fact stemming from the feasibility of a 90-day timetable, including the limited budget. She proposes that an alternative remedy would be reporting on interim maintenance and on steps taken to consider and process the Ehesini Access Road through the next IDP and budget cycle.

Analysis

[30] On the respondent's own admission that the Ehesini Access Road requires maintenance, the *points in limine* of non-exhaustion of internal remedies and failure to consult prior to litigation are unsustainable.

[31] The applicants aver that they were neither approached nor consulted. The respondents' contention that the applicants failed to co-operate in a consultation process is accordingly without foundation. It is inconceivable that a community in such desperate circumstances would refuse an invitation or even failed to engage on an issue so central to its life.

[32] The converse is true: the applicants have been ignored despite their urgent need. In any event, even if it were to be found that the applicants failed to exhaust internal remedies, such failure is not absolute and does not bar this court from considering the merits of the application.³

³ See *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC) at paras 38-39.

[33] The respondents' obligations are set out in the Constitution⁴ and are given concrete expression in the subordinate legislation. Section 152(1) provides that the objects of the local government are *inter alia*: to ensure provision of services to communities in a sustainable manner; and to promote social and economic development.

[34] Section 7(2) of the Constitution imposes a duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 27(1) of the Constitution confers on everyone the right to have access to, *inter alia*, health facilities and social security. In terms of s 27 (2) of the Constitution, the state must take reasonable legislative measures, within its available resources, to achieve the progressive realisation of this right. Section 237 further requires that all constitutional obligations must be performed diligently and without delay.

[35] The relevant provision applicable in the Municipal Systems Act includes s 4(2)(f), which obliges a municipality to give effect to the rights in the Bill of Rights. This section provides that the council of the municipality has a right to give members of the local municipality equitable access to the municipal services to which they are entitled to.

[36] In terms of s 5(1) of the Municipal Systems Act, a community has a right to have access to municipal services. Additionally, in terms of s 16 (1)(a) of the Municipal Systems Act, the municipality must develop a culture of community

⁴ The Constitution of the Republic of South Africa, 1996 (the Constitution).

participation in the use and provision of municipal services. Furthermore, the IDP must, in terms of s 26 of the Municipal Systems Act, set out its development priorities and its operational strategies for service delivery. The MFMA, on the other hand, permits emergency expenditure and adjustments of budgets during the financial year.

[37] Reverting to the facts of this matter: it is common cause that a public access road is a municipal infrastructure and municipal service. Without a motorable road, Ehesini community cannot meaningfully exercise the right or access to the services contemplated in s 152 of the Constitution. I agree with the respondents' counsel that these constitutional imperatives are given effect by statute. I further acknowledge that the respondents have an obligation to act within the framework of the Municipal Systems Act and the MFMA.

[38] Notwithstanding respondents' counsel's submissions in this regard, these statutes operate within the Constitution. They regulate how funds are appropriated and how services are planned. They do not suspend constitutional obligations. Where there is tension, s 2 of the Constitution is clear: it is supreme.

[39] The test for compliance with socio-economic rights is reasonableness. In *Government of the Republic of South Africa and Others v Grootboom*(Grootboom)⁵, the Constitutional Court (CC) set out the

⁵ 2001 (1) SA 46 (CC) at paras 39-41, 44 and 66[paraphrased].

requirements for reasonableness in the context of socio-economic rights. At paragraph 39, the CC held that a programme to realise such rights must be comprehensive, coherent, adequately resourced and implemented with reasonable speed for short, medium- and long-term needs.

[40] Despite the fact that the respondents acknowledge their constitutional and statutory role in respect of the Ehesini Access Road, their defences are contradictory and unsatisfactory. Firstly, it was submitted that it was impossible to consult in relation to the Ehesini Access Road due to the community's failure to co-operate. Secondly, on either 22 April or 24 May 2025 the respondents undertook the patching and resurfacing works on the very same road. These works were carried out in the absence of the consultation that is now relied upon as a bar to further action.

[41] Thirdly, the respondents rely on the budgetary constraints and the MFMA, but no evidence was placed before the court by the municipal manager, the Chief Financial Officer or any technical official to demonstrate how compliance within 90 days is impossible. In the absence of such evidence, a mere assertion cannot create a genuine dispute of fact.⁶ Fourthly, regarding the issue of backlog as stated in the respondents' papers, a backlog in itself cannot be regarded as a defence in the circumstances of this case. The question is not

⁶ See *Plascon Evan-Evans Paints Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 634E-F..

whether there are other needs. The question, in terms of *Grootboom*⁷, is whether the measures adopted to address the backlog are reasonable, comprehensive, coherent, and whether they pay attention to those in desperate need.

[42] The respondents have placed no evidence before this court of the nature and extent of the alleged backlog. There is no satisfactory engineering report nor IDP prioritisation matrix. The attached IDP does not allocate any budget to the Ehesini Access Road. It does not set out any adequate time frame for rehabilitation or maintenance. Moreover, there is no explanation why the Ehesini Access Road was attended to on 22 April or 24 May 2025, if the backlog is so severe as to preclude any action now. In my view, a bald assertion of a backlog, without more, cannot justify years of inaction.

[43] It is further my view that the respondents' approach fails the *Grootboom*⁸ test. Their approach is not comprehensive on the basis that the Ehesini community has been excluded for years. It is not coherent because, when resurfacing the road the respondents acted without consultation and then relied on the failure of the applicants to participate in the consultation process as a defence. Furthermore, it is not diligent because the years of inaction followed by reactive maintenance only after litigation falls short of the standard required by s 237 of the Constitution.

⁷ Fn 5 above.

⁸ Ibid.

[44] The belated works of 22 April or 24 May 2025 do not cure the breach. Instead, they confirm that there is indeed a breach. It is clear that the respondents are capable of acting, and that funds can be made available as they did after the institution of these proceedings. I therefore conclude that the respondents have failed to take reasonable measures within available resources to achieve the progressive realisation of the applicants' rights.

[45] I now deal with the question on whether the *TAC* as well as *Blue Moonlight Properties*⁹ are distinguishable and should not be applied to the facts of this case, as argued by the respondents' counsel. I accept the submission, more specifically in relation to the facts. Briefly, *TAC* concerned access to antiretroviral medication; *Blue Moonlight Properties*, on the other hand, concerned emergency housing in the form of eviction. The present matter concerns access to municipal infrastructure in the form of a road.

[46] Notwithstanding the dissimilarities, the principle articulated in those judgments is relevant in the present matter. Moreover, the respondents' failure to fully repair and resurface the Ehesini Access Road infringes s 27 of the Constitution. This is because the Ehesini community does not have free access to health care facilities and social security as a result of the impassable road. In *TAC*¹⁰, the CC emphasised the importance of the principle of separation of powers. However, stated that where the state fails to meet a constitutional

⁹ Ibid.

¹⁰ Fn 1 above at para 98-106 [paraphrased].

obligation, a court is not only entitled but obliged to grant appropriate relief. The relief may include a structural order with time frames. It is clear from the CC¹¹ judgment such an order does not constitute an infringement of separation of powers, instead, it gives effect to the Constitution.

[47] In *Blue Moonlight Properties*¹², the court confirmed that a municipality cannot rely on budgetary and policy processes to avoid compliance with the constitutional duties. Therefore, if anything, the present case calls for intervention more readily than *TAC* and *Blue Moonlight Properties*. The latter cases required the state to develop new policy and to allocate substantial new resources. In the present instance, no new policy is required in that the respondents accept that road maintenance falls within their mandate in terms of s 152(1) of the Constitution and s 5(1) of the Municipal Systems Act. Resultantly, the argument positing that *TAC* and *Blue Moonlight Properties* are distinguishable to the extent that they do not support the relief sought is rejected.

[48] Considering the *TAC* and *Blue Moonlight Properties*¹³, the respondents' assertion that the relief sought infringes the separation of powers is without merit. In my view, a structural order with a timeframe does not dictate to the

¹¹ Ibid.

¹² Fn 2 above at paras 69-72.

¹³ Ibid.

executive how to budget.¹⁴ It simply requires the executive to fulfil its constitutional and statutory obligation. Notably, the alternative relief proposed by the respondents to report on interim maintenance and to consider the road in the next IDP cycle is not effective relief. It perpetuates delay contrary to s 237 of the Constitution. Moreover, it offers no tangible benefit to the applicants in terms of the Constitution.

[49] Lastly, the submission that this matter is moot considering the works done on 22 April or 24 May 2025 is without merit. It is well-established that a matter is moot when there is no longer any practical effect that a judgment can have.¹⁵ The converse is that even if a matter were moot, a court may still hear it where it is in the interest of justice and there is continuing breach or a real prospect of recurrence.¹⁶ In this instance, the papers show that the works of 22 April or 24 May 2025 were patching and not a full repair or resurfacing. It is common cause that the road has since deteriorated.

[50] More importantly, the respondents have given no undertaking that they will continue to maintain the road. This fact, including the very fact that they only acted after the launching of this application, demonstrates a real risk that the breach will recur. Absent an order of this court, the Ehesini community will

¹⁴ See TAC fn 1 at para 100.

¹⁵ JT Publishing (Pty)Ltd v Minister of Safety and Security 1997 (3) SA 514 (CC) at para 15.

¹⁶ Fn 15 above, para 16.

be left at the mercy of ad hoc reactive patching only when the litigation is threatened. Consequently, the application must succeed.

Order

[51] The following order is issued:

1. It is declared that the first and second respondents have breached their obligations in terms of s 152(1) and s 27(1) read with s 237 of the Constitution, and ss 4(2)(f) and 5(1) of the Municipal Systems Act 32 of 2000 by failing to reasonably maintain, repair and resurface the Ehesini Access Road.
2. The first and second respondents are directed to, within 90 days of this order;
 - 2.1 conduct a full assessment of the Ehesini Access Road.
 - 2.2 adopt and implement a plan with budgetary allocation for the rehabilitation and ongoing maintenance of the Ehesini Access Road; and
 - 2.3 file a report with this court and serve it on the applicant's attorneys setting out the assessment plan, budget and timeframes referred to in 2.1 and 2.2 above.

3. The first and second respondents are further directed to ensure full compliance with the plan referred to in paragraph 2.2 above, including completion of all rehabilitation and maintenance works, within 180 days of this order.
4. The first and second respondents are directed to file a further report with this court and serve it on the applicant's attorneys within 200 days of this order confirming compliance with paragraph 3 above.
5. The respondents shall pay costs of this application on Scale B as contemplated under Rule 67A read with Rule 69 of the Uniform Rules of Court, jointly and severally, the one paying the other to be absolved.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicants : *Adv Baceni*

Instructed by : Nkele Attorneys
Mthatha

Counsel for the Respondents : *Adv Da Silva SC with Adv Booysen*

Instructed by : State Attorney
Mthatha

Heard on : 26 March 2026

Judgment Delivered on : 18 August 2026