IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 34421/2012

In the matter between:

JOHANNES MBONANI	Applicant
and	30/4/2014
MPUMALANGA DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT	1st Respondent
GAUTENG DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT	2nd Respondent
VICTOR KHANYE LOCAL MUNICIPALITY	3rd Respondent
EMALAHLENI LOCAL MUNICIPALITY	4th Respondent
SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	5th Respondent

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

30/4/14
DATE

SIGNATURE

FOURIE, J:

[1] This application relates to the R555 road between Delmas and Witbank. The Applicant applies for an order declaring that the failure by the Respondents to ensure that this road remains in a good condition is a violation of the constitutional rights of the Applicant and members of the public. He also applies for an interdict ordering the

Respondents to take all reasonable measures to repair the road. The application is opposed by the Respondents.

BACKGROUND:

[2] This application already served before the urgent court on 7 August 2012 when It was struck from the roll due to a lack of urgency. About 18 months later the Applicant re-enrolled the application without filing any further affidavits. It came before me during the week of 22 April 2014.

[3] Having regard to the nature of the relief sought, more particularly what appears to be a final interdict in the form of a *mandamus*, I enquired from Mr Omar (who represented the Applicant) whether the Applicant should not file a further affidavit. He declined the invitation and decided to proceed with the application on the papers as they stand.

CASE FOR THE APPLICANT:

[4] In the founding affidavit it is alleged that the R555 road was built during the previous political dispensation and was not designed for the

Coal Haul. Because of the high volumes of traffic, primarily heavy trucks, this road has fallen into a state of disrepair and is characterised by potholes and erosion of the road surface. According to the Applicant it poses a hazard to road users who, by using the road, could become injured in accidents. Photographs depicting the condition of the road have been annexed to the application.

[5] According to the Applicant this is a municipal and provincial road. It is alleged that the Respondents have a collective duty to provide safe roads to members of the public, but have thus far failed to do so. Specific reference is made to Sections 41(1), 152 and 172(1) of the Constitution. The founding affidavit was signed on 9 June 2012.

CASE FOR THE RESPONDENTS:

[6] According to the Respondents this is a provincial road and therefore remains within the jurisdiction of the First Respondent. Although the road traverses the municipal districts of the Third and Fourth Respondents, this does not cast a duty on them to maintain the road.

[7] According to the First Respondent the R555 to the west of Delmas was already patched and resealed. This project commenced during the 2010/2011 financial year and was completed during June 2011 at

a total cost of R13,736,233.00 To the east of Delmas (comprising some 29 km between Ogies and Witbank) the road was rebuilt between June 2008 to December 2010 at a total cost in excess of R300 million.

[8] It has also been pointed out that the First Respondent receives a fixed annual amount from Treasury. It does not otherwise generate an income and is entirely dependent upon Treasury for its annual allocation of funds. Therefore its duty to maintain this and other roads should be viewed in the context of available resources. The First Respondent's Answering Affidavit was signed on 30 July 2012.

DISCUSSION:

[9] During argument Mr Omar pointed out that in his replying affidavit the Applicant specifically denied that any of the deponents acting on behalf of the Respondents is authorised to do so. Therefore, so it was argued, the evidence contained in the answering affidavits should be disregarded. I do not agree with this submission. This issue has already been authoritatively dealt with by Streicher JA in **Ganes and Another v Telkom Namibia Ltd** 2004(3) SA 615 (SCA) at 624H where it was held that the deponent to an affidavit in motion

proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. .

[10] In the present application all the Respondents are represented by different firms of attorneys. It therefore appears, at least *prima facie*, that these attorneys were duly appointed to represent their clients, the Respondents. These appointments have not been challenged by the Applicant. Rule 7 provides a procedure to be followed by a party who wishes to challenge the authority of an attorney acting on behalf of another party. The Applicant did not avail himself of this procedure. Therefore, in my view, the answering affidavits filed on behalf of the Respondents are proper before this court.

[11] On the merits it was argued on behalf of the Applicant that a structural interdict should be granted in terms whereof the Respondents are ordered to take all reasonable measures to repair the R555 road. Usually a structural interdict directs a respondent to rectify a breach of fundamental rights under the supervision of the court. The kind of relief sought by the Applicant is that of a final interdict, in the form of a *mandamus*. No doubt, the common law requisites (a clear right, an injury actually committed or reasonably apprehended and no other

form of relief available) also apply to a *mandamus* in the constitutional context (**Pilane v Pilane** 2013(4) BCLR 431 (CC) par. 39).

[12] A *mandamus* is usually an appropriate manner to compel the performance of a specific statutory duty or to comply with a constitutional obligation (**New National Party of South Africa v Government of the Republic of South Africa** 1999(3) SA 191 (CC) at par. 46). However, since this kind of interdictory relief is always directed at present or future events, it is important for an applicant to set out in his/her founding affidavit facts which relate to recent or present events to enable a court to decide whether a statutory or constitutional right is being infringed or that it will in future be infringed. In the present matter no such evidence is before me. The founding affidavit was signed on 9 June 2012 and there is no evidence relating to the present condition of the road. For this reason alone the application should be refused.

[13] However, there is also another reason why the application cannot succeed. Having regard to the evidence that certain road works to the west and to the east of Delmas had already been performed, the Applicant said the following in his replying affidavit to the Fifth Respondent's Answering Affidavit:

> *"The road west of Delmas has already been fixed. The road between Ogies CBD and Witbank has also become fixed. The only outstanding strip is a strip of approximately 10 km between Delmas and Ogies. This is the stretch of road that I want fixed. It is not the whole R555."*

[14] It therefore appears that the parties are in agreement that substantial road works on the R555 between Delmas and Witbank had already been performed. The allegation in the Founding Affidavit that the "*R555 between Delmas and Witbank is in a very poor condition*" therefore appears no longer to be correct. Again, I do not know what the present condition of the "*outstanding strip*" of approximately 10 km is. It is possible that since August 2012 this particular section of road had already been repaired.

[15] In a last attempt to keep the application alive, Mr Omar argued that it should be referred for the hearing of oral evidence. As a general rule such a request should be made *in limine* and not when it becomes clear that the applicant is failing to convince a court on the papers (cf **De Reszke v Maras** 2006 (1) SA 401 (CPD) at 413 F-J). Although rule 6(5)(g) is not limited to cases where there is a dispute of fact, I do not think this rule should be invoked to allow a party to lead oral evidence to make out a case which is not already set out in the founding papers

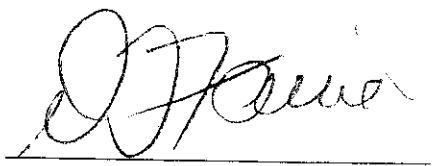
(**Dodo v Dodo** 1990 (2) SA 77 (W) at 91). In my view this is such a case and the request should therefore be refused.

[16] In the circumstances I am not convinced that the Applicant has made out a case against any of the Respondents. I am unable to find, on the papers before me, that a statutory or constitutional right has been infringed and I am also unable to find that any of the Respondents has failed or refused to fulfil a statutory obligation or to perform a constitutional duty. In the present context this means that the application cannot succeed.

[17] The last question to be considered relates to costs. It was argued by Mr Omar that in matters of a constitutional nature a court should order that each party should pay his or her own costs. It is correct that in constitutional litigation the Constitutional Court has adopted an approach to costs that is aimed at minimising the potentially negative effect of an adverse costs order on prospective litigants. However, in the present matter I should also take into account the manner in which the litigation was conducted. First, on 7 August 2012 this application was struck from the roll due to a lack of urgency and costs were reserved. Almost 18 months later the same application was set down again for hearing, without any additional affidavits. Second, at the

commencement of this hearing the Applicant was specifically invited to consider the possibility of filing additional affidavits. This invitation was declined and the application was proceeded with almost regardless of the consequences. In my view the salutary approach with regard to costs in constitutional matters should not be extended beyond its limits, for it might invite litigants to improperly take advantage thereof. For these reasons I am of the view that the application should be dismissed with costs including the costs reserved on 7 August 2012.

[18] In the result I make the following order: The application is dismissed with costs which shall include the costs reserved on 7 August 2012 as well as costs of two counsel where applicable. With regard to costs reserved on any other occasion no order is made.



D S FOURIE
JUDGE OF THE HIGH COURT

29 April 2014