

PAVING THE WAY FOR ACCOUNTABILITY - *AGRI EASTERN CAPE AND OTHERS V THE MEC FOR THE DEPARTMENT OF ROADS AND PUBLIC WORKS AND OTHERS*

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Attention to the poor conditions of the 37 000 km of rural gravel roads in the Eastern Cape was finally given judicial teeth in the structural interdict in *Agri Eastern Cape and Others v the MEC for the Department of Roads and Public Works and Others* (Agri Eastern Cape matter). The structural interdict was delivered by the Eastern Cape High Court on 28 February 2017 and provides great relief to the farming communities of the Eastern Cape.

The important structural interdict granted against the Member of the Executive Council and Director-General of the Department of Roads and Public Works (collectively described as the Department or the Respondents) included time frames for specific remedial actions, time frames for road repair service contract agreements to be concluded, and an Order to initiate a competitive bidding process for external contractors involved in road repairs. The Order also went as far as to stipulate a mechanism in terms of which individual farmers may attend to the repair of a farm road, depending on compliance with the procedure set out in the Order for which they will be entitled to be refunded for the costs incurred.

The rural roads serving farming communities in the Eastern Cape are not only used by commercial farmers but are a vital lifeline for access to a whole range of social services, including emergency services and access to schools. Furthermore, in the answering affidavits filed by the Respondents, they admitted that the condition of the gravel roads in the Eastern Cape is the worst in the country. In addition, there is an extensive backlog of road maintenance, which appears to be due to under-funding and lengthy procurement processes.

This structural interdict must be viewed considering the history of the matter. This involved various attempts by the Applicant - over a course of 10 years - to resolve the problem through correspondence and meetings with the Department, before turning to the Court for relief. Furthermore, the parties agreed to an Order on 12 May 2016, which provided for the Department to file reports with the Court on steps to be taken for road repair and a date by which it anticipates the necessary work to be completed. The 12 May 2016 Order also provided for the report by the Department to stipulate what urgent steps may be taken by individual farmers when the access road to a farm is in such disrepair.

The Department submitted a report in terms of the before-said Order, which provided the Court with planned activities and methods of repair for specific roads. However, the Department stated that it would be impractical to grant permission to individual farmers to attend to repair work, as this may result in claims against the Department should injuries be sustained during the repair work. Furthermore, the Department argued that this self-help repair work could only be allowed if funds had been previously provided in compliance with the *Eastern Cape Roads Act* and each application will be dealt with on a case-by-case basis.

The Department did however propose in its report to work with the Applicant to investigate a mechanism whereby farmers may repair a farm road initially at their own cost, subject to certain conditions.

The Applicant then approached the Court again to make the report submitted by the Department an Order of Court and to ensure compliance with the Order provided specific timeframes for completion of the remedial action. Furthermore, the Applicant drafted a specific mechanism in the proposed draft order setting out a detailed manner in terms of which individual farmers could attend to the repair work on a farm road and claim for the repair costs from the Department - if certain conditions were met.

In response to the proposed structural interdict by the Applicant, the Department submitted that there was no constitutional or statutory basis for such an interdict. Of great importance is that the Court - on consideration of the objections by the Department - emphasised that Part A of Schedule 5 of the Constitution provides that provincial roads are an exclusive functional area of the Provincial Legislature, which is executed by the Premier with the Executive Council. Further, fundamental rights such as the right to access to healthcare and basic education would be indirectly affected. In addition, the Court also stated that the Department could not hide behind the permissive language of the *Eastern Cape Roads Act* to argue that it has no statutory duty, as no other authority other than the Department has the power to repair and maintain the roads. It is also of great public interest that the roads are maintained to ensure access to effective social services for the community.

The Court dealt with each objection of the Department regarding the structural interdict. To reasonably accommodate the Department's budgetary concerns, it provided for reporting of progression of the implementation of the Order, as well as detail of budgetary situations that may arise after making the Order. Finally, the Court also found that the mechanism provided for claims by the individual farmers was made possible by the Department's own report, in which it proposed to find a mechanism with the Applicant and that the Respondents could not now attempt to reverse those steps.

Despite this judgment stipulating vital principles of accountability it cannot be used as a blanket precedent to force the Executive to attend to road maintenance and repairs in other parts of the country. The individual facts to justify a structural interdict will always be a vital factor. In this instance, a distinguishing factor was that much of the material for the structural interdict was already provided for in terms of the Department's own planned activities and the Department opened the door to providing a mechanism for compensation to individual farmers. What this judgment however strongly indicates is that the Courts will not shy away in evaluating the Executive's reasons for non-compliance with its Constitutional mandate.