



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

**CASE NO.: 4146/2023**

**In the matter between:**

**AB XUMA LOCAL MUNICIPALITY**

**1<sup>ST</sup> APPLICANT**

**THE MUNICIPAL MANAGER, AB XUMA  
LOCAL MUNICIPALITY**

**2<sup>ND</sup> APPLICANT**

**and**

**KUNOGQALA LOCAL RESIDENTS**

**1<sup>ST</sup> RESPONDENT**

**NOWANATHI MXUXUMBA**

**2<sup>ND</sup> RESPONDENT**

**NOJIKILE MAKHAMBA**

**3<sup>RD</sup> RESPONDENT**

**ASAKHE MAKHAMBA**

**4<sup>TH</sup> RESPONDENT**

**NGCAWE NTSHEQANE**

**5<sup>TH</sup> RESPONDENT**

**NOBUTNTI NTSHEQANE**

**6<sup>TH</sup> RESPONDENT**

**LULAMILE TSHEQANE**

**7<sup>TH</sup> RESPONDENT**

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**JUDGMENT**  
**ON APPLICATION FOR LEAVE TO APPEAL**

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## ZONO AJ:

### Introduction

[1] This is an application for a leave to appeal against the judgment granted and delivered on 06<sup>th</sup> February 2025. Application for leave to appeal was delivered on 25<sup>th</sup> February 2025. Parties will be referred to as in the application for leave to appeal. The Municipality and its Manager are the applicants herein. The respondents herein are Nogqala residents.

[2] Section 17(1) (a) of the Superior Courts Act 10 of 2013 provides thus:

*“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—*

*(a)*

*(i) the appeal would have a reasonable prospect of success; or*

*(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;”*

[3] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal<sup>1</sup>.

[4] During argument, applicants’ Counsel wisely focused his argument on two topics, namely:

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<sup>1</sup> *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2025) [2016] ZASCA (25 November 2016) Para17; *Smith v S* ( 475/10) [2011] ZASCA 15; 2012(1) SCACR 567(SCA) (15 March 2011) Para 7.

- 4.1 First, dispute of facts which allegedly warranted the application of Plascon-Evans principle<sup>2</sup>.
- 4.2 Second, the applicants argued that the order of this court infringes the doctrine of separation of powers. The court does not have power to dictate to the Municipality as to when and how its duties have to be performed.

### **Dispute of facts**

[5] Regarding dispute of facts, the applicants argued that whilst the respondents contend that there is nothing that has been done to construct the Nogqala road; the applicants on the other hand argued that 500m metre road had been constructed approaching from both sides of the Nogqala bridge. With regard to the construction of the road on both sides of the bridge, the applicant relied on paragraph 38 and 44 of its answering affidavit which states as follows:

“38. **Ad Paragraph 19 thereof**

*It is denied that the respondents only appointed a contractor after receipt of the so called statutory letter. The contractor was appointed on 17<sup>th</sup> July 2023 and the statutory letter was only delivered to the Office of the second respondent on 04<sup>th</sup> August 2023 as is evidenced by the endorsement on the last page of annexure “NM3”. Furthermore, the supply chain and procurement processes take time and the project specification for the construction of the Nogqala Bridge had already been published on 14<sup>th</sup> April 2023. The allegation that “nothing is being done with the fact that there is no access road”[sic], is incorrect. Incorporated in construction of 500 meters of road approached either side of the new bridge.*

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<sup>2</sup> *Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984(3) SA 623 (A); *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277(SCA) Para 26

44. *As stated above, 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 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 the 500 metres of new road either of the bridge will provide adequate access to and from the village. In these circumstances no mandatory or supervisory relief against the respondent are warranted.”*

[6] The context in which the aforesaid allegations were made was the answer to the allegations of construction of the Nogqala Bridge. These allegations were answering a complaint about the failure to construct the Nogqala bridge. The allegations themselves demonstrate that the alleged 500 metre road was constructed in the context of constructing a bridge. It would be inconceivable that a bridge would be constructed only in the river space or area and beyond the river nothing would be done. The said new road was built as part of the Nogqala bridge for which a tender had been issued and appointment been made.

[7] As Lord Steyn said in *Secretary of the State for the Home Department, Ex Parte Daly*<sup>3</sup> “In law, context is everything.” This *dictum* was approved by the Supreme Court of Appeal.<sup>4</sup> The Municipal Manager, Mr K.L Mulaudzi duly appointed in terms of a letter dated 17<sup>th</sup> July 2023 Limiculture Rural Empowerment J.V Lakhiwe General Trading, which appointment was for the construction of Nogqala Bridge. This appointment took place after

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<sup>3</sup> *R v Secretary of the State for the Home Department Ex Parte Daly* [2001] VKHL26; [2001] 3 ALL ER 43 (HL) at 447A.

<sup>4</sup> *Aktiebolaget Hassle and another v Triomed (Pty) Ltd 2003* (1) SA 155 (SCA) Para 1 ; *Minister of Home Affairs and others v Scalabrini Centre, Cape Town and others* 2013(6) SA 421 (SCA); 2013(4) ALL SA 571 (SCA) Para 89.

Uxhanti Builders and services JV BPKL Trading Enterprise who was appointed for the construction of the Nogqala Bridge in terms of the letters dated 30<sup>th</sup> August 2021 failed to perform in terms of the agreement. No separate independent appointment was ever made for the construction of the road. The alleged 500 metre road approaching from both sides of the bridge was constructed as part of the bridge. It is reiterated that it was in the context of constructing the bridge that the alleged 500 meter approaching from both sides of the road was constructed.

[8] Even if I am wrong with regard to the aforesaid context in which 500 metre road approaching from both sides of the road was constructed, I would still find that a benevolent Samaritan constructor constructed the road without the blessings of the Municipality. That is so because there was no appointment at all made by the Municipality to construct the Nogqala road, notwithstanding Municipality's express acknowledgement that such road is substandard. I therefore find that applicants' argument is untenable.

[9] Lastly, it is common cause that applicants Integrated Development Plans (IDP) including the one for 2023-2024 financial year do not have in them any plan for the construction of the Nogqala Road. The one for 2023-2024 financial year provides a standard purpose of the IDP as follows:

*“This infrastructure master plan is intended to create a vision for Dr AB Xuma Local Municipality in order to guide decision making process and provide a basis for a comprehensive planning framework relating to the roads and storm water, transport and electricity infrastructure.”*

[10] There is no vision at all that has been created in order to guide Municipality's decision making process relating to the construction of Nogqala road. No planning framework at all has been provided as a basis for the construction of Nogqala Road. In the interest of accountability<sup>5</sup>, it would be expected of the Municipality to advise the respondents from time to time of what had happened and what would happen going forward with their request for the construction of the road.

### **Separation of Powers**

[11] With regards to the second argument relating to the doctrine of separation of powers, I find that this argument is equally without merit. On this subject, Baxter<sup>6</sup> neatly puts it thus:

*“Without statutory authority the court may not venture to question the merits or wisdom of any administrative decision that may be in dispute. If the court were to do this, it would be usurping the authority that has been entrusted to the administrative body by the empowering legislation.”<sup>7</sup>*

[12] This court only directed the applicant to take all steps necessary for or with a particular aim to commence and finish the described Nogqala Road. The second order takes the form of a structural interdict or order. Nothing in both orders usurps the duty of the Municipality. It is clear that the Municipality has failed to perform its statutory and constitutional duties or take the steps statutorily and constitutionally prescribed to commence and

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<sup>5</sup> Section 195(1)(g) & (h) of the Constitution.

<sup>6</sup> Baxter: Administrative Law, Page 305.

<sup>7</sup> *National Treasury v Opposition to Urban Tolling Alliance* 2012(6) SA 223 (CC) Para 44; *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) Para 92.

also finish the construction of the road. I therefore come to the conclusion that this court has not in any way usurped the powers of the Municipality.

[13] Accordingly, the application for leave to appeal must fail with costs as there would be no prospect of success on appeal.

[14] In the result I would make the following order:

14.1 **Application for leave to appeal is dismissed with costs.**

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**A.S ZONO**

**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES:**

**For the Applicants**

**Instructed by**

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**c/o**

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**Matter heard on**

**: 16 May 2025**

**Judgment delivered on**

**: 27 May 2025**