

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO: 3928/2015  
DATE HEARD: 10/11/2016  
DATE DELIVERED: 28/2/2017**

In the matter between

<b>AGRI EASTERN CAPE</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>RINDA KLOPPER</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>RICHLAND TRADING 016 (PTY) LTD</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>ALEXANDER WELSH PRINGLE</b>	<b>4<sup>TH</sup> APPLICANT</b>
<b>ALEXANDER WELSH PRINGLE N.O.</b>	<b>5<sup>TH</sup> APPLICANT</b>
<b>WILLIAM DODDS PRINGLE N.O.</b>	<b>6<sup>TH</sup> APPLICANT</b>
<b>REGINALD DAVID GOWAR N.O.</b>	<b>7<sup>TH</sup> APPLICANT</b>
<b>CHARLES PETER FEATHERSTONE</b>	<b>8<sup>TH</sup> APPLICANT</b>
<b>FLORIS JOHANNES DU TOIT</b>	<b>9<sup>TH</sup> APPLICANT</b>
<b>GLEN DAVID ZEHMKE</b>	<b>10<sup>th</sup> APPLICANT</b>
and	
<b>THE MEC FOR THE DEPARTMENT OF ROADS AND PUBLIC WORKS</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>THE DIRECTOR-GENERAL, DEPARTMENT OF ROADS AND PUBLIC WORKS</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>THE SOUTH AFRICAN NATIONAL ROAD AGENCY LIMITED</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>SUNDAYS RIVER MUNICIPALITY, REPRESENTED BY ITS MUNICIPAL MANAGER N.O.</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>NXUBA MUNICIPALITY, REPRESENTED BY ITS MUNICIPAL MANAGER N.O.</b>	<b>5<sup>TH</sup> RESPONDENT</b>

**MAKANA MUNICIPALITY, REPRESENTED BY  
ITS MUNICIPAL MANAGER N.O.**

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

**LUKHANJI MUNICIPALITY, REPRESENTED BY  
ITS MUNICIPAL MANAGER N.O.**

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

**AMAHLATI MUNICIPALITY, REPRESENTED BY  
ITS MUNICIPAL MANAGER N.O.**

**8<sup>TH</sup> RESPONDENT**

---

**JUDGMENT**

---

**ROBERSON J:-**

[1] This is an application for a structural interdict. The first applicant (“Agri EC”) is a voluntary association with legal personality which can sue and be sued. Its principal aims and objects are described in the founding affidavit as follows:

- 1.1 to establish economically viable members in a safe and secure environment;
- 1.2 to organise the farming community and the agricultural businesses of the Province into a united agricultural front within which reviews of the majority of the affiliates can be so co-ordinated to enable the agricultural community of the Province to speak with one voice in all matters;
- 1.3 to lobby and negotiate on behalf of its members and to their benefit;

- 1.4 to submit, where necessary, the co-ordinated views of the agricultural industry in the Province to the Provincial Government, the National Government or to the National Agricultural Unions, or to any other authority and to co-operate with them in all matters affecting the well-being of the agricultural industry for the purpose of solving existing problems and having necessary legislation introduced;
- 1.5 to promote agricultural business;
- 1.6 to promote, through results driven actions, the interests of members through their Agricultural Associations and affiliates;
- 1.7 to consider matters on merit alone, without party political bias, or any discrimination;
- 1.8 to do all things as in the opinion of the General Council are incidental or conducive to the successful attainment of the above objectives, which are of direct or indirect importance to the agricultural industry.

[2] The other applicants are members of Agri EC.

[3] The matter proceeded against the first and second respondents only (the MEC and the DG respectively). The MEC is cited in her capacity as the functionary

responsible for the overall repair and maintenance of roads and public works within the Eastern Cape Province. The DG is cited in his capacity as the person responsible for the repair and maintenance of roads and public works within the Eastern Cape Province. I shall refer to the MEC and the DG in this judgment collectively as the respondents. I shall refer to the Department of Roads and Public Works as the Department.

[4] The focus of the application is the poor condition and lack of maintenance and repair of the road network of the farming communities in the Eastern Cape and the need for a plan of action to remedy the situation.

[5] The relief claimed in the notice of motion was for an order declaring the respondents to be legally obliged to repair all roads within their jurisdiction and an order that they comply with that obligation. Further relief was in the form of the filing of reports dealing with steps taken to carry out these obligations and envisaged time frames. An agreement between the parties on the further conduct of the matter was made an order of court on 12 May 2016. I shall come to that order later in this judgment. Claims by some of the applicants against the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents for payment of amounts they had spent in repairing roads themselves, and for repairs to damaged vehicles, fell away.

[6] The founding affidavit was deposed to by Mr Ernest Pringle (Pringle) who is the President of Agri EC and who farms in the Bedford district. He stated that Agri EC has approached the court in the interests of all its members and in particular the interests of the other applicants. He stated further that commercial farmers throughout the

Eastern Cape, members of the public, operators of emergency vehicles and police vehicles, and parastatals such as Eskom and Telkom, will be affected by the application.

[7] According to Pringle the failure to repair and maintain the road network of farming communities in the Eastern Cape has prevailed for more than 10 years. Agri EC has tried, through correspondence and meetings, to resolve the problem without approaching the court, to little avail.

[8] During 2011 Agri EC requested a meeting with the MEC in order to discuss the poor condition of the roads and other matters. No meeting materialised. On 1 February 2012 Agri EC wrote to the MEC and other officials with reference to the poor condition of the Eastern Cape gravel road network and flood damage which occurred in 2010 and 2011. Proposals for disaster funding were made and it was requested that a gravel road maintenance programme be prioritised to prevent further damage. It was pointed out that no rural development and job creation could take place if the severity of the flood damage was neglected. The letter went on to say that rural development is dependent upon the provision and maintenance of an efficient road network, and that there are many rural towns and villages where whole communities are left stranded during heavy rains. The letter concluded by requesting an action plan, with an offer of assistance by agricultural associations in identifying priorities and serving on project steering committees.

[9] Meetings took place between Agri EC and officials of the Department during 2014 and 2015 but according to Pringle no constructive improvement resulted.

[10] Pringle annexed to his affidavit letters from a number of agricultural associations in the Eastern Cape setting out the problems they experienced as a result of the poor condition of gravel roads. The problems included infrequent mobile clinic visits, poor school attendance by children of farm employees, poor service delivery by Eskom and Telkom, complaints by the police about damage to police vehicles, lack of drainage maintenance, and very dangerous conditions after rain.

[11] The second, fourth, eighth, ninth and tenth applicants deposed to affidavits recounting problems experienced as a result of the lack of maintenance and repairs.

[12] The second applicant (Klopper) farms in the Alexandria district and raises beef cattle for export. She is a director of the third applicant which owns the farm. She and two neighbouring farmers employ between them 28 persons and accommodate their children. The three farms use the same access road, which has deteriorated to such an extent that in the event of rain access to the farms can only be achieved by a 4 x 4 vehicle or a large tractor. Occasionally the water in the road is a metre deep and access by any vehicle is impossible. The condition of the road has resulted in low productivity. On one occasion operators of cattle trucks were not prepared to use the road when the export ship was due to depart. Children of employees have not been able to attend school because taxi services are not prepared to travel on the road. There is no alternative route. During 2012 Klopper and the other farmers decided to have the road repaired themselves. They employed a construction company which used a grader, bulldozer, and earthmoving equipment to repair the road, at a cost of

some R200 000.00. The condition of the road continues to deteriorate after each rainfall, and is not maintained by the respondents.

[13] The fourth applicant (Alexander Pringle) deposed to an affidavit in his personal capacity as well as in his representative capacity as a trustee of a Trust of which the sixth and seventh applicants are also trustees. The Trust owns the farm on which Alexander Pringle farms, in the Bedford district. The road he uses to access the farm has not been maintained for nearly 20 years and he has had to blade and resurface the road at his own considerable expense because at times it becomes impassable. When the road is wet transporters delivering materials and feed or transporting livestock get stuck on the road and are reluctant to use it at all. Since it was repaired in 2012, the road has deteriorated after each rainy season.

[14] The eighth applicant (Featherstone) is a dairy farmer in the Queenstown district and delivers milk in rural areas. He stated that certain of the roads he is obliged to use are in a disastrous state of disrepair and have been for the last 15 years. As a result, the delivery of feed for dairy cattle is obstructed causing a loss of livestock and sales of milk. The bus transporting the children of employees to school has been unable to use the roads. The roads are also required to be used by the mobile clinic, ambulance services, police, and Eskom. Featherstone has effected repairs at his own expense. He has also suffered damage to his motor vehicles and tractors as a result of the condition of the roads.

[15] The ninth applicant (Du Toit) farms stock and crops in the Grahamstown district. The two minor roads he is required to use have not been maintained for 22 years. No

commercial vehicles have been able to use either road for the last 15 years. The farm's citrus production was discontinued in 2002 because transport companies were unwilling to transport the crops to packing sheds. The deterioration of the roads caused Du Toit to reduce and restructure the farm's vegetable production because large quantities could not be delivered regularly to markets. This was a result of transport companies' reluctance, and later refusal, to use the roads. Du Toit now only plants small quantities of crops for the local market. The reduction in income has resulted in unemployment of temporary labour. Police patrols are infrequent, and the mobile clinic and ambulance service are unable to use the roads. Du Toit has also incurred expenses in effecting repairs himself, and has suffered damage to his motor vehicles and tractors.

[16] The tenth applicant (Zehmke) farms in the Stutterheim district. The condition of the road by which the farm is accessed has deteriorated over the last 10 years owing to general erosion and lack of maintenance. Local farmers have maintained the road since 2010. Companies who have been awarded tenders for maintenance and road scraping are not supervised and in one mentioned instance the work done by the company resulted in blocked drains. There is no follow up by the Department's officials to ensure that the work has been done properly. Zehmke has also suffered damage to his motor vehicle.

[17] Pringle stressed that Agri EC has approached the court in desperation because "the continued deterioration of the road network will spell economic disaster and social disaster for the poorer communities throughout the Province." He was of the view that a structural interdict was warranted "where the consequences of failure to comply with



a court order will indeed be devastatingly serious for the economics of the agricultural community in the Eastern Cape, and employment prospects for the labour force resident in the Eastern Cape”.

[18] Pringle highlighted the need for certainty on what steps individual farmers could take to repair roads themselves when the access roads to their farms are in such a state of disrepair that they cannot be used safely or when operators of commercial vehicles engaged in the farms’ business refuse to use the road at all. Farmers have spent money and time in repairing roads themselves out of necessity, and, so Pringle stated, should be entitled to be recompensed, when these repairs are the responsibility of the respondents.

[19] The answering affidavit was deposed to by Mr John Davies, who is employed by the Department as the Acting Engineering Specialist: Roads Planning. He is responsible for the planning and needs assessment of the provincial roads network in the Eastern Cape at a high level. This responsibility includes assessment of road conditions, road maintenance planning, rehabilitation, reconstruction, and the prioritisation of new projects.

[20] Davies acknowledged that there is a significant road maintenance backlog and that as a result of under-funding over many years, the vast majority of gravel roads in the Eastern Cape, totalling 37 000 kilometres, require extensive re-gravelling and not simply routine maintenance. According to the most recent information, the condition of the gravel roads in the Eastern Cape is the worst in the country. This situation leaves the roads vulnerable to rain and floods and the problem is worsened by heavy

rains and floods. Even with massive funding the problem will persist. Davies said that the Department has good intentions, and has tried its best with limited resources to maintain roads in a trafficable state for public use. It has prioritised the maintenance of the existing road network at the expense of the construction of new roads. The Department wants to minimise the problem provided adequate resources are available. The provincial roads maintenance grant which was allocated in the provincial budget was “a drop in the ocean” because of the magnitude of the problem. The Department currently receives from the provincial budget about a third of the funds it needs merely to keep the roads reasonably trafficable. Davies agreed that if the problem of underfunding persisted, it would lead to a situation which was “devastatingly serious for the economics of the agricultural community and employment prospects in the Eastern Cape”. He admitted that the applicants were entitled to be informed by the Department about how it intends dealing with the problem but was not prepared to make promises which might not materialise.

[21] According to Davies the Department has taken steps in the past to repair roads. Davies attached a list of 84 roads on which work such as re-shaping, wet blading, wet grading, dry grading, culvert cleaning, and re-gravelling had been done in recent years. A complaint of the second applicant was attended to during 2013. Further the applicants have been informed at meetings of the scarcity of funds.

[22] Davies said that the Department has a clear implementation strategy regarding the maintenance of roads. However the procurement process to appoint a contractor may take up to six months and sometimes tender awards are set aside by the court, with the result that the tender process must start afresh.

[23] Davies expressed the view that a court order instructing the Department to repair the roads would amount to an instruction by the judiciary to the executive branch of government to prioritise road repairs and maintenance above other pressing social priorities. Secondly the order would not be capable of being enforced because of insufficient funds. Thirdly the applicants had no legal basis for such an order because they had not asserted any right which had been breached. Davies referred in particular to the Eastern Cape Roads Act 3 of 2003 (the Roads Act) s 3 (1) (a) and (b) of which provide:

**“3. General Powers and duties of the MEC**

(1) Subject to provisions of this Act and the Road Traffic Act, the MEC or his or her delegate may-

(a) Plan, design, construct, finance, control, manage, develop, maintain, protect and rehabilitate a provincial road and fences relating thereto;

(b) Provide and maintain road infrastructure, boreholes, pumps and all appurtenances or conveniences which he or she deems necessary for the travelling public;

Davies maintained that this was permissive language deliberately chosen by the provincial legislature because implementation depended on the availability of funds.

[24] With regard to what steps a farmer could take in an emergency, Davies referred to s 4 (1) (b) of the Roads Act. Section 4 (1) (a) and (b) provide:

**“4 Agreements with other authorities or persons**

(1) The MEC or his or her delegate may conclude an agreement with another province, a municipality or the South African National Roads Agency Limited established by section 2 of the South African National Roads Agency Limited and National Roads Act, 1998 (Act 7 of 1998), or with another person or body, in this section referred to as ‘the other party’ in terms of which –

(a) (i) the other party will take over any or all responsibility for

- or in relation to a provincial road;
- (ii) in the case of a provincial road, it must continue to be a provincial road until the MEC proclaims by notice in the *Gazette* that it is no longer such for the purposes of this Act; or
- (b) the other party may do work in connection with a provincial road, including the construction and maintenance thereof or have the work done under its supervision, for the account of the Province, or that the Province will do such work for the account of the other party, or otherwise in terms of the agreement;”

Davies said that such an agreement could only be concluded once funds had been provided and the Department was satisfied that the farmer would comply with all legislative requirements. Each application would be dealt with on a case by case basis and would depend on the individual circumstances of each case. However Davies did not admit that the farmers had been forced to effect repairs themselves or that the repairs were necessary and reasonable.

[25] Despite the negative attitude towards a court order displayed in Davies’ affidavit, matters took an encouraging and constructive turn on 12 May 2016 when Smith J granted the following order by agreement:

- “1. THAT the matter be and is hereby postponed to the 18<sup>th</sup> August 2016 for consideration of the reports dealt with below.
- 2. THAT the First and the Second Respondents shall file with the Registrar of this court within thirty (30) days a report setting out:-
  - 2.1 What steps they shall take to repair roads and maintain roads in a good state of repair, within the area of their jurisdiction;
  - 2.2 What steps the Respondents will take in the future to repair the roads and keep such roads in a trafficable state of repair;
  - 2.3 The date by which it is anticipated that the Respondents will have completed the necessary work;
  - 2.4 Who will attend to the repair of the roads, how the repair will be achieved and when the repair work will commence;
  - 2.5 What urgent steps should be taken by individual farmers (in the absence

of attention by the Respondents' employees) when the access road to his or her farm reaches such a state of disrepair that he or she is unable to use the road safely, or commercial vehicles necessary for business, refuse to use the affected road.

3. THAT the Applicants shall respond to the Respondents' report within thirty (30) days of the filing of the Respondents' report.
4. THAT the said reports, suitably amended, and if considered satisfactory by the court shall be made an order of court.
5. THAT the costs be and are hereby reserved."

[26] In a later judgment dealing with the costs of the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents, against whom the application had been withdrawn, Smith J remarked:

"There can be little doubt that the applicants' cause is indeed a worthy one. They seek to enforce and assert constitutional rights which may yet have far-reaching implications for other farmers and, for that matter, several affected rural communities throughout the province. Moreover, on the same day (i.e. 12 May 2016), they concluded an agreement with the remaining respondents which resulted in an innovative court order compelling the provincial authorities to comply with their constitutional and statutory obligations within a reasonable period of time."

[27] In accordance with Smith J's order, the respondents submitted a report under cover of the affidavit of Mr James Mlawu, who is the second respondent. He stated that the problem of maintenance and upgrading of roads is exacerbated by a lack of funds and the backlog of competing social needs of poor communities in the province. He was however of the view that continuous engagement with stakeholders, in particular the farming community, will play a large part in solving the problem and will minimise litigation. Annexed to his affidavit was a document named "2016/2017 Roads Infrastructure Immovable Asset Management Plan". This document listed several roads, the work previously done on each road, and the work, if any, planned for 2016/2017.

[28] The respondents' report followed the sequence of items contained in the Smith J order, and is reproduced in full. (The numbering of the sub-paragraphs is my own.)

**“1. What steps the Respondents shall take to repair roads and maintain the roads in a good state of repair:**

- 1.1 Annexure “A”<sup>1</sup> shows the planned activities for the specific roads as detailed in the Agri EC court papers, showing the maintenance that has been done recently, as well as the planned maintenance in the current financial year.
- 1.2 For the entire road network, the Department will be attempting to address the gap between current and required levels of service incrementally and then to manage the network on a life cycle basis. Approximately 80% of the Provincial road network will be under Integrated Routine Maintenance (IRM) contracts for gravel and surfaced roads. The remaining 20% will be maintained by in-house maintenance teams, Service Level Agreements with District Municipalities, or Route Maintenance contracts for some surfaced roads. Through the use of these contracts, it is expected that the condition of the network will improve over a period of time depending on the availability of adequate funding.
- 1.3 The department also has a reseal programme as well as a rehabilitation programme that are aimed at resealing or rehabilitating some of the most urgent surfaced roads in the province. However, resource constraints mentioned earlier are severely restricting the efficacy of these two programmes.
- 1.4 Despite its best efforts, with the current funding levels, ie approximately 32% of the required budget, it would be an impossible task to repair and maintain all roads in a good condition.
- 1.5 Also attached is the current Departmental Road Asset Management Plan (RAMP), which provides useful information on the state of the roads, as well as the current funding levels and plans that the Department will be implementing over the current and future financial years.

**2. What steps they shall take in the future to repair roads and keep such roads in a trafficable state of repair:**

- 2.1 The IRM contracts will be put in place and renewed on a continuous cycle, thereby ensuring that for 80% of the network a contractor is in place at all times. The remaining 20% of the network will be maintained through the other methods mentioned above.
- 2.2 In addition, the Department is also in the process of phasing out in-house construction activities in favour of fast-response in-house

---

<sup>1</sup> The annexure to Mlawu's affidavit.

maintenance to address situations where floods or other natural disaster require immediate interventions.

2.3 The attached RAMP provides further information on the planned network- wide activities.

**3. The date by which it is anticipated that the respondents will have completed the necessary work:**

Annexure "A" indicates the dates by which the necessary work is programmed for the specific roads mentioned. Maintenance and repairs is an ongoing requirement, and will therefore require the implementation of an appropriate maintenance cycle, as well as the repairs that are needed on a required basis due to specific occurrences, such as heavy rains, etc.

**4. Who will attempt to repair the roads, how the repair will be achieved, and when the repair work will commence:**

4.1 Annexure "A" indicates the method of repair for the specific roads in question. External contractors will change from time to time as they are appointed through a competitive bidding process.

4.2 It should be noted that in most cases, repairs to gravel roads is being done through periodic wet-blading. Unfortunately this is not the ideal treatment to the current gravel network. The network is in a very poor condition and the vast majority of roads needs regravelling in order to restore them to a good condition. The department is not in a position to perform regravelling activities on the required scale, as the regravelling cost is approximately R500,000 per km. To properly maintain the gravel road network, roads should be ideally regravelled every seven years, which would amount to 5000 km per year, at a cost of R2,5b per annum. Clearly this is not achievable, as the entire roads budget is only R2b per annum. Other activities, such as maintaining and rehabilitating the surfaced roads must surely also be prioritised, even more so.

4.3 Not properly regravelling roads leads to a risk in that the roads are vulnerable to being adversely affected by heavy rains, which has a significant impact on the trafficability of these roads, subject to the prevailing weather conditions.

**5. What urgent steps should be taken by individual farmers when the access road to his farm reaches such a state of disrepair:**

5.1 The shortage of funds within the Department will always result in the roads in question being in a sub-standard condition (especially due to insufficient gravel levels), and vulnerable to adverse weather conditions. The EC Roads Act does allow the MEC to grant permission to other parties to work on the roads, however, it would not be practical to grant such permission to farmers on an individual basis, as this may result in claims against the Department should any injuries be sustained during the course of such maintenance activities.

- 5.2 Therefore, the Department would request to engage with the Agri EC, to explore an appropriate mechanism whereby farmers may perform work on their roads, initially at their own cost, subject to certain conditions being met.”

[29] To avoid repetition, I shall not set out Agri EC’s report in response, which consisted mostly of a proposed order, because the proposed order was to some extent contained in the applicants’ draft order presented when the application was heard. With regard to the alleged cost of re-gravelling at R500 000 per kilometre, a quotation for an average cost of R200 000 per kilometre was annexed to Agri EC’s report.

[30] The applicants’ draft order was in the following terms:

- “1. That the document marked Annexure “A” to the First and Second Respondent’s report dated the 13<sup>th</sup> of June 2016 (annexed hereto marked Annexure “A”) which sets out the work planned for 2016 / 2017, in respect of the roads identified on Annexure “A” hereto, is hereby made an Order of Court.
2. That the First and Second Respondents are ordered to put in place within sixty days of the date of this Order Integrated Routine Maintenance contracts for gravel and surface roads, which contracts are to be renewed on a continuous cycle, thereby ensuring that for 80% of the road network, a Contractor is in place at all times.
3. The First and Second Respondents are hereby ordered to implement the suggested “*fast response in house maintenance*” facility within sixty days of the date of this Order, to address situations where floods or other natural disasters require immediate intervention in respect of the roads identified by the Applicant.
4. The First Respondent is ordered, within ninety days of the date of this Order, to expedite a competitive bidding process for external Contractors who will be involved in the repair of roads reflected in Annexure “A” hereto.
5. It is ordered that the following mechanism be implemented by the First and Second Respondents to allow individual farmers to perform work on their own roads and subject to the following conditions, namely :
  - 5.1 urgent repairs to a farm road are justified if :
    - 5.1.1 the damage to the road is such that the individual farmer is precluded from engaging in economic activity, alternatively :
    - 5.1.2 there is an inability to utilise the road at all;



- 5.2 when a farm road becomes unserviceable or deteriorates into a poor condition such as makes driving unsafe or causes damage to any motor vehicle, an individual farmer may take steps to ensure that the road is repaired on the following conditions :
- 5.2.1 a representative from the First Respondent shall be notified of a need for the First Respondent to inspect the road within a period of one month;
  - 5.2.2 if a representative of the First Respondent does not attend on the road, the individual farmer may proceed in terms of the provisions of paragraph 5.2.3.1 *infra*;
  - 5.2.3. if a representative of the First Respondent attends on the road to inspect same and agrees that the road condition is poor such as to warrant repair work, then :
    - 5.2.3.1 the individual farmer must obtain two independent quotes from Civil Contractors to undertake the work, such quotations to be itemised in regard to rates, work to be undertaken, costings and similar detail; and
    - 5.2.3.2 the said independent quotations shall be sent to the First Respondent by fax and registered post, alternatively by service by the Sheriff of the district on an Official of the First Respondent, with a request that the First Respondent approve one of the quotations within a period of one month of receipt of the quotations; and
    - 5.2.3.3 if no response is received from the First Respondent, the individual farmer requiring repairs to the road is authorised to select one of the quotations in his sole discretion, and to proceed with the necessary civil works, and to pay the Civil Contractor who performs the works; and
    - 5.2.3.4 after the work has been completed, the First Respondent will again be given a period of one month to inspect the roadworks (after being notified by fax and registered post); if no inspection is held by the Official of the First Respondent, the First Respondent shall be deemed to be satisfied with the quality of the work done and to assume liability for all aspects of the work;
    - 5.2.3.5 if a dispute arises as to the need for repair work to be performed on the road at all, the decision as to whether the road requires repairs is referred to the Chairman of the Civil Engineers Association for the district in question, whose decision can be reviewed at the instance of either party, by a further referral to a Senior Advocate of five years' experience or more, whose decision shall be final;
- 5.3 if the First Respondent regards both quotations to be excessive, the First Respondent shall have the right to submit its own quotation, drawn up by an

- approved independent Civil Contractor within one month, failing which the individual farmer can select an appropriate quotation in his sole discretion;
- 5.4 if the First Respondent does submit a quotation, the First Respondent's quotation must constitute a financial saving and must further be assessed with the same standards of construction and extent of works as is set out in the previous two quotes;
- 5.5 in the event of the First Respondent providing a quotation for the works, the individual farmer will initially pay the Civil Contractor for the work;
- 5.6 the First Respondent shall inspect the completed work within one month of being advised of such completion – if no inspection is held the standard of the work will be deemed to be in order and the First Respondent will accept liability for the road;
- 5.7 if the First Respondent does inspect the works and concludes that the works is not up to standard, the First Respondent shall give reasons for this contention within one month, whereafter the decision shall be reviewable by the Civil Contractor concerned, who will either remedy the works, or be exonerated from any further work, depending on the outcome of the review;

#### **REFUND OF EXPENSES TO THE INDIVIDUAL FARMER**

- 5.8 as a member of the First Applicant, the individual farmer will be entitled to refund of any costs paid for road repairs by compliance with the following procedure :
- 5.8.1 the member of Agri EC shall file a copy of this Order of Court, duly supplemented by proof of compliance with the terms of the Order *supra*, on which documentation the individual farmer will be entitled to a judgment in the total sum of his expenditure, together with costs of obtaining such judgment on a scale as between attorney and client;
- 5.8.2 the individual farmer will only need to approach Court for a refund of his total expenditure in the event that the First Respondent does not refund his total expenditure, together with interest thereon at the legal rate within one month of being requested in writing by fax and registered post, for such a refund;

#### **URGENT REPAIRS**

- 5.9 in the event that any individual farmer requires repair to any access road as a matter of urgency, and in particular within forty-eight hours of the road falling into disrepair, the following conditions shall apply :
- 5.9.1 the individual farmer shall be entitled, initially at his own cost, to take all urgent steps to ensure that the work is performed and the road is repaired;

- 5.9.2 after repair the individual farmer shall submit to the First Respondent :
- 5.9.2.1 proof by way of two independent invoices obtained before the work was commenced, as to the reasonable cost of repair; and
  - 5.9.2.2 a motivation to the First Respondent as to why the repair was required as a matter of urgency; and
  - 5.9.2.3 evidence as to the condition of the road in question such as to render the repairs urgent : such evidence can be produced, *inter alia*, by way of photographs, and/or by way of affidavit from third parties as to their refusal to utilise the road and the commercial impact on the individual farmer;
  - 5.9.2.4 after the repair, the provisions relating to the inspection of the road by the First Respondent for repairs to unserviceable roads / roads in poor condition shall apply;
- 5.10 if repairs to roads have to be effected urgently but on a temporary basis only, then the individual farmer shall be entitled to initiate the procedure for repairs to unserviceable / roads in poor condition referred to above;
- 5.11 after the lapse of the inspection period afforded to the First Respondent to satisfy itself that the road has been repaired up to an acceptable standard, the First Respondent shall be afforded a reasonable period of ninety days within which to pay the total of expenditure incurred by the individual farmer to repair the road;
- 5.12 it is further agreed that the First Respondent shall pay interest at the legal rate should payment in respect of repairs to the road not be made within ninety days;
- 5.13 if payment is not made within ninety days the individual farmer shall be entitled to utilise the procedure referred to above for obtaining a judgment together with interest and costs on an attorney and client scale;
6. It is ordered that :
- 6.1 the First Respondent shall finalise service level agreements and route maintenance contracts referred to in the second paragraph (unnumbered) of the First and Second Respondent's report, with Local Municipalities within six months of the date of this Order, for all affected roads, where the First Respondent is not providing maintenance and repair services, and to file copies of such agreements with the Court, to enable the Applicant to determine the responsible repairer for each affected road;
  - 6.2 the First Respondent is ordered to provide a timetable of work to be undertaken on the Provincial road network under Integrated Routine Maintenance contracts (IRM) within six months hereof, and to ensure that such works are commenced within six months;

- 6.3 the First Respondent is ordered to provide full details as to which roads are to be :
- 6.3.1 resealed; and
  - 6.3.2 rehabilitated;
- as per paragraph 3 (unnumbered) of the First and Second Respondent's report, and to ensure that such resealing and rehabilitation work is commenced within six months;
- 6.4 the First Respondent is ordered to provide full details as to what steps it has taken to reduce its own costings, and to obtain additional funding from Central Government, in order to enhance the alleged 32% funding levels, referred to in paragraph 4 (unnumbered) of the First and Second Respondent's report.
- 6.5 the First Respondent implement the IRM contracts within six months of the date of this Order;
- 6.6 the First Respondent provide detail as to the duties and responsibilities of each Contractor appointed for repairs to 80% of the network, and what steps can be taken by affected individuals if the Contractor does not perform his contractual obligations;
- 6.7 the First Respondent provide details as to the difference between responsibilities of "*in-house construction activities*" on the one hand, and "*fast response in-house maintenance*" on the other, in situations requiring immediate intervention; and
- 6.7.1 whether this is intended to refer to Municipal construction activities / maintenance; and
  - 6.7.2 what different regime will apply in urgent natural disaster scenarios, which did not apply earlier?
- 6.8 the First and Second Respondent file a report with this Court within one month of the date hereof as to the basis upon which it is suggested that re-gravelling costs approximately R500 000.00 per kilometre.
- 6.9 the First and Second Respondents submit a report identifying Civil Contractors undertaking re-gravelling work in the Eastern Cape, and providing a survey of their prices;
- 6.10 any external Civil Engineer undertaking roadwork who is ascertained to be colluding with others to secure a tender at uncompetitive rates, shall be permanently excluded from further work on the Eastern Cape road network.
7. The First Respondent is directed to provide within thirty days an explanation as to what attempts have been made to lobby for an improved budget for the repair and maintenance of critical infrastructure.
8. That this application is further postponed to the 15<sup>th</sup> of December 2016.
9. That the First and Second Respondents file a report, on or before the 10<sup>th</sup> of December 2016, to advise the Court as to progress made in respect of the implementation of the

aforesaid Orders and/or provide full details as to any reasons for delay in the implementation of such Orders.

10. That the First and Second Respondents, jointly and severally the one paying the other to be absolved pay the costs of this application, such costs to include all reserved costs of the previous postponements of this matter.”

[31] It will be noted that the draft order drew largely on the material contained in the respondents’ report.

[32] Surprisingly and disappointingly, and in spite of Smith J’s order which was granted by agreement, when the matter was heard the respondents reverted to some extent to the negative sentiment reflected in Davies’ affidavit. The submission was made that a structural interdict was incompetent and that there was no constitutional or statutory basis for seeking such an interdict. Reference was again made to the permissive language of s 3 of the Roads Act.

[33] In my view there was a constitutional and statutory basis for seeking the interdict. Part A of Schedule 5 of the Constitution provides for the functional areas of exclusive provincial legislative competence, one of which is provincial roads and traffic. In terms of s 125 (2) (a) of the Constitution, the Premier, together with the other members of the Executive Council, exercises executive authority by implementing provincial legislation in the province. When one considers some of the consequences of the failure to repair and maintain roads illustrated in the applicants’ affidavits, fundamental rights such as basic education and access to health care are indirectly affected. With regard to the permissive language of s 3 of the Roads Act, I refer to the judgment in *Schwartz v Schwartz* 1984 (4) SA 467 (A) where Corbett JA (as he then was) said the following at 473I-474 E:

“A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, *inter alia*, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised. (See generally *Noble and Barbour v South African Railways and Harbours*, 1922 AD 527, at pp 539-40, citing *Julius v The Bishop of Oxford*, (1880) 5 AC 214; *South African Railways v New Silverton Estate, Ltd*, 1946 AD 830, at p 842; *CIR v King*, 1947 (2) SA 196 (A), at pp 209-10; *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd*, 1961 (2) SA 467 (A), at pp 478-80, 502-4.) As was pointed out in the *Noble and Barbour* case (*supra*), this does not involve reading the word "may" as meaning "must". As long as the English language retains its meaning "may" can never be equivalent to "must". It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power.”

[34] In my view s 3 of the Roads Act encompasses an obligation to use the power. Roads and road traffic fall within the exclusive legislative competence of the province. No person or authority other than the MEC has the power to repair and maintain roads, unless the MEC or his delegate concludes an agreement with that person or authority to take over responsibility for a provincial road (s 4 of the Roads Act). The various consequences of a failure to maintain and repair the farm roads, as detailed above by various farmers, illustrate the importance of road maintenance and repair in many respects which are in the public interest: rural development; employment opportunities; education of children; agricultural commerce; communication; access by and to emergency services; and physical safety. The submission that the section imposes no duty on the MEC cannot be sustained.

[35] It is clear therefore what the constitutional and statutory obligations of the respondents are, and that their performance of those obligations is deficient.

[36] In any event, the order of Smith J stands and incorporates an agreement to provide reports which will provide the material for a court order. The parties submitted their reports in accordance with the order and it was not for the respondents to attempt to reverse those steps which had been taken.

[37] The respondents' alternative stance was to propose a draft order of their own and to criticise aspects of the applicants' proposed order contained in their report. The respondents, in spite of an opportunity to do so, never directly engaged with the applicants' draft order which was made available to them. I shall deal with those criticisms when I consider the applicants' draft order.

[38] The respondents' draft was in the following terms:

- "1. The application for a structural judicial supervision order is refused with costs.
2. The Third, Fifth, Sixth, Seventh, Eighth and Ninth Applicants' claims for reimbursement and payment for the alleged road and motor repairs is dismissed with costs.
3. The Respondents and the relevant members of the Respondents' Department shall hold regular public meetings with the Applicants and inform the public and other stakeholders of the progress being made to address the backlog of roads maintenance and repairs in the severely affected areas in the Province of the Eastern Cape.
4. The Respondents' Department shall allow the Applicants to work on provincial roads at their own costs and liability, subject to such conditions as may be mutually agreed on, taking into account the relevant provisions of the Eastern Cape Roads Act, prevailing construction health and safety legislation and Departmental norms and standards.
5. As an alternative to paragraphs 1 and 2 hereof, each party to pay his or her own costs."

[39] In *Minister of Health and others v Treatment Action Campaign and others* (No 2) 2002 (5) SA 721 (CC) at para [113] the following was said:

“South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation.”

And in *Pheko & Others v Ekurhuleni Metropolitan Municipality & Others* (No 3) 2016

(10) BCLR 1308 at para [1] Nkabinde J said:

“Supervisory orders arising from structural interdicts ensure that courts play an active monitoring role in the enforcement of orders. In an appropriate case, this guarantees commitment to the constitutional values of accountability, responsiveness and openness by all concerned, in a system of democratic governance. By granting the structural interdict a court secures a response in the form of reports and thereby prevents a failure to comply with the positive obligations imposed by its order. Generally, the court’s role continues until the remedy it has ordered in a matter has been fulfilled.”

[40] In their highly instructive and oft-quoted paper *Mandatory Relief and Supervisory Jurisdiction: when is it appropriate, just and equitable* 2005 SALJ 325, Roach and Budlender at 331-334 identify three sets of circumstances where a structural interdict is warranted. The first is where “it is necessary to secure compliance with a court order”<sup>2</sup>. The second is “where the consequences of even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective compliance.” The third is “where the mandatory order is so general in its terms that it is not possible to define with any precision what the government is required to do.”

The authors expand on this third category as follows:

“General orders may be made either because of the nature of the duty involved (for example, a duty to act reasonably), or because the court is anxious to leave the government with as much latitude as possible to decide precisely how it will comply with its constitutional obligations. In such a situation, it is in the interests of all that the government is required to place its plan before the court or at least to make its plan known to the public within a certain time period. The applicant is then in a position to analyze the government’s plan and place its contentions before the

---

<sup>2</sup> With reference to *Minister of Health v Treatment Action Campaign (supra)* at para [129].



court or, if no reporting back to the court is required, to raise such concerns in the political process and civil society, and if necessary through further litigation. This approach to structural relief has some benefits to governments. It may provide governments with a timeline to follow. The approval of a plan by the court can allow the government to move forward with the implementation of its plan secure in the knowledge that implementation will constitute compliance with its obligations. The court can make an order which is as non-intrusive as possible on the choices which the elected government makes, because it can be secure in the knowledge that this will not be an invitation to non-compliance but rather an invitation to the government to formulate a plan in order to achieve compliance with the Constitution.”

[41] I now consider the applicants’ draft order. I shall start by considering the respondents’ various criticisms of and objections to the order proposed in the applicants’ report. This proposed order was not identical to the applicants’ draft order and I shall only deal with those criticisms/objections which relate to the draft order. I shall list the criticisms under the heading of each paragraph of the draft order in numerical order.

[41.1] Paragraph 1

As I understand the criticism, the difficulty here is that funds and projects might need to be re-prioritised for budgetary reasons or disaster situations at short notice. I think that this difficulty will be remedied by the provision in the order that the respondents report to the court about progress in implementing the order. In such a report they may provide details of such budgetary or disaster situations which may arise after the making of the order.

[41.2] Paragraph 2

The respondents maintain that procurement time frames are not determined by the Department and may depend on factors such as litigation during the tender process. Further, contracts may terminate due to non-performance by a

contractor. The respondents themselves in their report provided in terms of Smith J's order, stated that 80% of the road network would be covered by integrated routine maintenance contracts, and that such contracts would be part of a continuous cycle. Should the problems they mentioned occur, again such problems could be included in the progress report. However I think that the period of 60 days within which to "put in place" the contracts is too short, considering the procurement process. It would be more appropriate to allow the same 6 month period proposed for the service level agreements and route maintenance contracts.

[41.3] Paragraph 5.1

The respondents stated that it is not possible to ascertain accurately when a farmer is precluded from engaging in economic activity. A financial analysis would be required in each case. I do not agree with this criticism. Each commercial farmer has his or her particular type of economic activity and it would be a simple exercise to determine whether or not the condition of the road was such as to preclude such activity. The examples contained in the 2<sup>nd</sup>, 4<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> applicants' affidavits illustrate such an exercise.

The respondents further stated that the phrase "the inability to use the road at all" needs to be more specific, for example the type of vehicle which cannot use the road should be specified. I intend to adjust the wording of this part of the draft order.

The respondents went on to say that 75.64% of all unpaved roads are in a poor to very poor condition and therefore the vast majority of unpaved roads could be classified as in need of urgent repairs. I do not think that this criticism is warranted. The circumstances in which urgent repairs are dealt with in the draft order are narrowly defined.

[41.4] Paragraphs 5.2 – 5.7

This part of the order was criticised as being a piecemeal procurement process which would be impractical to administer. Its effect would be to hand over a significant portion of the Department's budget to farmers and bypass the normal procurement procedures. The maintenance activities of the Department rely on conditional grant funding and it is highly unlikely that the National Department of Transport, which is the custodian of the grant, would allow such a significant portion of the budget to be allocated in this manner.

In my view there are sufficient safeguards in these paragraphs of the draft order to avoid their perceived effect. The MEC is given the opportunity to inspect the particular road and is not prevented from appointing a contractor through the normal procurement procedures. In the event of a dispute about the need for repairs, the dispute will be referred to an independent body. The respondents themselves in paragraph 5.2 of their report proposed that a mechanism be explored whereby farmers could perform work on their roads, initially at their own cost, subject to certain conditions. Paragraph 4 of their draft order proposes that the Department would conditionally allow the applicants to work on provincial roads at their own cost.

I do have a difficulty with paragraph 5.4 of the draft order. The requirement that the MEC's quotation must constitute a financial saving restricts the MEC in obtaining a quotation which, as the paragraph requires, must be assessed by the same standards of construction and extent of works in the quotations obtained by the farmer.

With regard to paragraph 5.7 of the order I do not think it appropriate for the contractor concerned to review his own work and it would be more appropriate for the same procedure as in paragraph 5.2.3.5 to be applied.

[41.5] Paragraph 5.8

The fear expressed here was that the refunding of expenses would lead to abuse. It was further stated that the Department had already shown that it cannot afford to maintain the roads to an acceptable standard. This is not a constructive response. However I have my own criticism of this paragraph, in that its effect is to bypass the usual procedure for enforcement of debt and prevents the MEC from defending a claim. Moreover a costs award is in the discretion of the court and a blanket order for attorney and client costs would be impermissible. I also do not think it appropriate in an order of this nature to impose a time period following demand after which the farmer is entitled to approach the court for relief. The order should allow for more flexibility, for example the individual farmer and the MEC might reach an agreement on the terms of reimbursement.

[41.6] Paragraphs 5.9 – 5.13

These paragraphs were criticised as fundamentally flawed in the same manner as paragraphs 5.2 – 5.7 and open to abuse because of the short timeframes involved. Urgent repairs are limited to the circumstances named in paragraph 5.1 of the draft order. Again in my view there are sufficient safeguards in these paragraphs to avoid abuse. However I do not think it appropriate to specify a time period within which the MEC should recompense the farmer, or that interest will run after that date. My criticism of the proposed method of recovery of the debt applies here as well.

[41.7] Paragraph 6.1

The respondents contend that the conclusion of a service level agreement with another organ of state is dependent on the willingness of that organ of state to enter into such an agreement, and the MEC cannot be ordered by the court to conclude such an agreement. I think there is merit in this objection and intend to vary the paragraph on this aspect. The respondents also complain that the restructuring of the in-house capacity will require an extensive process of staff consultation and re-arrangement of resources and it is not possible to allocate a timeframe for the process. Further, the allocation of human resources is not completely controlled by the Department because all appointments are subject to the approval of the provincial treasury and the Office of the Premier. In my view it is not unreasonable to prescribe a time frame and the time frame of six months contained in the paragraph is reasonable.

[42] Generally, the respondents complain that the proposed order is indefinite and does not allow the Department to change its maintenance strategy and the mechanism

to deliver that strategy. I think that this is a negative approach. The whole purpose of the application is to achieve an action plan to solve or alleviate a serious situation which has prevailed for years, a situation which the respondents themselves acknowledge. Their report provided in terms of Smith J's order, while providing material for an order, does not provide much of a strategy with regard to implementation and time frames. Their draft order really leaves matters in limbo. They need the impetus of a structural interdict to move forward in a strategic manner.

[43] In addition to the comments I have already made concerning the appropriateness of some parts of the applicants' draft order, I have some further concerns.

[43.1] Paragraph 6.2 can be accommodated in the progress report.

[43.2] Paragraphs 6.4 and 7 can be accommodated in the progress report, should the respondents wish to raise budgetary difficulties. I am reluctant to order the first respondent to report on efforts to obtain additional funding, if any, when provision of additional funding is dependent on another body.

[43.3] Paragraph 6.5 appears to be a repetition of paragraph 6.2.

[43.4] Paragraph 6.6 can be accommodated in the progress report. In addition I do not think it is for the respondents to advise a farmer of what steps he or she can take if a contractor does not perform his or her obligations.

[43.5] Paragraph 6.7 seems unnecessary and unwieldy. The respondents have stated in their report that they are phasing out in-house construction activities in favour of fast response in-house maintenance. Moreover this proposed maintenance scheme is catered for in paragraph 3 of the draft order.

[43.6] Paragraph 6.8 could be accommodated in the progress report.

[43.7] I do not think it would be fair to expect the respondents to provide details of contractors in the Eastern Cape, as provided for in paragraph 6.9. There is no reason why the applicants cannot obtain this information themselves.

[43.8] Paragraph 6.10 is not appropriate. Collusion with regard to tenders at uncompetitive rates, if uncovered, would be a matter for internal investigation or the subject matter of a review of administrative action in the event of a tainted award of a tender. Exclusion or otherwise of a particular contractor as a matter of policy falls more appropriately within the prerogative of the executive.

[44] I will also re-arrange the sequence of the paragraphs and the formulation of the orders.

[45] Otherwise I am of the view that the applicants' draft order is appropriate. At the risk of repetition, but it needs to be emphasised, much of the content of the applicants' draft order finds its source in the material provided in the respondents' report. The order is therefore in line with the respondents' professed plans. While it might seem that the part of the order dealing with repairs and maintenance carried out by farmers themselves is an intrusion into the province of the executive, the respondents' opened

that door in paragraph 5.2 of their report and paragraph 4 of their draft order. The order builds on those foundations. It is flexible and allows for the participation of the respondents.

[46] Although the order I propose to make contains time frames, I am of the view that this is a case where an earlier progress report to the court would be advisable. I refer to the extract quoted from the Roach and Budlender paper above and the circumstances where supervisory jurisdiction is warranted. The subject matter of this case fell within the third set of circumstances named by the authors. The obligations of the respondents with regard to road maintenance and repairs are extensive. There is a vast network of roads in the province, procurement processes have to be followed, service level agreements have to be concluded, budgets have to be prepared and allocated, and unexpected and emergency situations may arise. No-one suggests that the respondents' task is simple and free from difficulties. The reports ordered in terms of Smith J's order were "an invitation to the government to formulate a plan". This was a promising start, but the respondents attempted to reverse the progress made by asking for a dismissal of the application and by proposing, in the alternative, an unhelpful draft order. Their criticisms of the applicants' proposed order contained in the applicants' report displayed a negative and almost defeatist attitude. This conduct suggests that the respondents will not put their best efforts into complying with the order. Further, the consequences of a failure to comply with the order in the present case are self-evidently serious.

[47] Finally I deal with the costs of the application. Despite a promising start with Smith J's order, which was granted by consent, the respondents, as I have said,



attempted to reverse this progress and did not play their part as anticipated. The applicants have been substantially successful in the application. Their draft order has been substantially approved. Costs should follow the result.

[48] The following order will issue:

1. The first and second respondents are to implement the work planned for 2016/2017 as recorded in Annexure "A" to the first and second respondents' report dated the 13<sup>th</sup> of July 2016 ("the respondents' report") in respect of the roads identified in Annexure "A", which is annexed to this order.
2. The first and second respondents are to initiate a competitive bidding process for external contractors who will be involved in the maintenance/repair of roads identified in Annexure "A" hereto within ninety (90) days of this Order.
3. The first and second respondents are to finalise within six (6) months of the date of this Order Integrated Routine Maintenance contracts for gravel and surface roads, referred to in paragraph 1.2 of the respondents' report, insofar as such contracts relate to roads which fall within the subject matter of this application. Such contracts are to be renewed on a continuous cycle, thereby ensuring that for 80% of the road network, a contractor is in place at all times.

4. The first and second respondents shall finalise service level agreements with municipalities which are prepared to enter into such an agreement, alternatively corresponding agreements with other contractors, and route maintenance contracts referred to in paragraph 1.2 of the respondents' report, within six (6) months of the date of this Order, in respect of roads which fall within the subject matter of this application, where the first and second respondents are not providing in-house maintenance and repair services.
5. The first and second respondents are ordered to provide within ninety (90) days of this Order full details of which roads are to be resealed and rehabilitated as per paragraph 1.3 of the respondents' report, insofar as such roads fall within the subject matter of this application, and to ensure that such resealing and rehabilitation work is commenced within six (6) months of the date of this Order.
6. The first and second respondents are to implement the "fast response in-house maintenance" operation within ninety (90) days of the date of this Order, to address situations where floods or other natural disasters require immediate intervention in respect of the roads identified by the Applicants.

7. The following mechanism is to be implemented by the first and second respondents to allow individual farmers to perform work on the roads they use for their farming activities on the terms and conditions set out below:

- 7.1 urgent repairs to a farm road are warranted if:

- 7.1.1 the damage to the road is such that the individual farmer is precluded from engaging in economic activity, alternatively :

- 7.1.2 no vehicle of any type is able to utilise the road at all.

- 7.2 when a farm road becomes unserviceable or its condition deteriorates to the extent that it makes driving unsafe or causes damage to any motor vehicle, an individual farmer who uses that road may take steps to ensure that the road is repaired on the following conditions:

- 7.2.1 the first respondent or her authorised representative shall be notified that they are required to inspect the identified road within a period of thirty (30) days of such notification;

7.2.2 if a representative of the first respondent does not inspect the road within thirty (30) days of the notification, the individual farmer may proceed in terms of the provisions of paragraph 7.2.3.1 below;

7.2.3 if a representative of the first respondent inspects the road and agrees that the road condition warrants repair work, then :

7.2.3.1 the individual farmer must obtain two independent quotes from civil contractors to undertake the work, such quotations to be itemised in regard to rates, work to be undertaken, costings and similar detail; and

7.2.3.2 the said independent quotations shall be sent to the first respondent by fax and registered post, alternatively shall be served by the Sheriff of the district on the first respondent, with a request that the first respondent approve one of the quotations within a period of thirty (30) days of receipt by the first respondent of the quotations; alternatively the first

respondent, if she is not satisfied with the quotations, may submit her own quotation prepared by an independent contractor within thirty (30) days of receipt of the quotations. The first respondent's quotation must be in accordance with the same standards of construction and extent of works provided in the individual farmer's two quotations.

7.2.3.3 if no response is received from the first respondent within the prescribed time, the individual farmer who requires repairs to the road is authorised to select one of the quotations in his sole discretion, and to proceed with the work, and to pay the civil contractor who performs the work; and

7.2.3.4 after the work has been completed, the first respondent will be allowed a period of thirty (30) days after being notified by fax and registered post that the work has been completed, to inspect the repairs. If no inspection is held within the prescribed period, the first respondent shall be

deemed to be satisfied with the quality of the work done and to assume liability for the performance of the work.

7.2.3.5 If the first respondent does inspect the work and decides that it is not of the required standard, the first respondent shall give reasons to the individual farmer for this decision within thirty (30) days of the inspection. In the event of a dispute about the quality of the work, the dispute may be referred to the Chairman of the Civil Engineers Association for the district in question, whose decision, if necessary, may be reviewed by a Senior Advocate of not less than five years' experience in that capacity, whose decision will be final.

7.2.3.6 in the event of the first respondent providing a quotation for the works which complies with paragraph 5.2.3.2 above, the individual farmer will pay the civil contractor for the work;

7.3 If a dispute initially arises about the need for repair work to be performed on the road at all, the decision as to whether the

road requires repairs is referred to the Chairman of the Civil Engineers Association for the district in question, whose decision may be reviewed by a Senior Advocate of not less than five years' experience in that capacity, whose decision shall be final.

7.4 As a member of the first applicant, the individual farmer will be entitled to a refund by the first respondent of costs paid for road repairs, provided that the prescribed procedures set out in this Order have been followed. Following the conclusion of the prescribed procedures, the individual farmer may, subject to any agreement with regard to terms of payment, place the first respondent in *mora* by registered post. The individual farmer may thereafter institute an action, if necessary, for payment in a court of competent jurisdiction.

7.5 In the event that any individual farmer requires repairs to a road he or she is required to use in the course of his or her farming activities, as a matter of urgency, and in particular within forty-eight hours of the road falling into disrepair, the following conditions shall apply:

7.5.1 the individual farmer shall be entitled, initially at his own cost, to take all urgent steps to ensure that the work is performed and the road is repaired;

7.5.2 after repair the individual farmer shall submit to the first respondent :

7.5.2.1 proof by way of two independent quotations obtained before the work was commenced, as to the reasonable cost of repair; and

7.5.2.2 a motivation to the first respondent as to why the repair was required as a matter of urgency; and

7.5.2.3 evidence as to the condition of the road in question such as to render the repairs urgent : such evidence can be produced, *inter alia*, by way of photographs, and/or by way of affidavit from third parties as to their refusal to utilise the road and the commercial impact on the individual farmer;

7.5.3 after the repair, the provisions relating to the inspection of the road by the first respondent for



repairs to unserviceable roads / roads in poor condition shall apply;

7.5.4 after the lapse of the inspection period afforded to the first respondent to satisfy herself that the road has been repaired to an acceptable standard, the individual farmer may, subject to any agreement with regard to terms of payment, place the first respondent in *mora* by registered post, and thereafter, if necessary, institute an action for payment in a court of competent jurisdiction.

7.6 If repairs to roads have to be effected urgently but on a temporary basis only, then the individual farmer shall be entitled to initiate the procedure for repairs to unserviceable / roads in poor condition referred to in paragraphs 7.2 and 7.3 of this Order.

8. In addition to the report required to be filed in terms of paragraph 5 of this Order, the first and second respondents are to file a report to the court on or before 30 May 2017 in respect of the following:

8.1 Compliance with paragraphs 1, 2 and 6 of the Order.

- 8.2 Progress in respect of compliance with paragraphs 3, 4 and 5 of the Order, including particulars of contracts already concluded in respect of identified roads.
- 8.3 Reasons for any non-compliance or delays in progress in respect of compliance.
- 8.4 The basis on which it is estimated that the cost of re-gravelling is R500 000.00 per kilometre, as opposed to the estimate of R200 000.00 per kilometre.

9. Following receipt of the report, the applicants may set down the application before the presiding judge in respect of matters arising from the report to be filed in terms of paragraph 8 of the Order.

10. The first and second respondents are to pay the costs of the application, jointly and severally the one paying the other to be absolved, such costs to include all reserved costs of the previous postponements of this matter.

---

**J M ROBERSON**  
**JUDGE OF THE HIGH COURT**

**Appearances:**

**For the Applicants: Adv S H Cole, instructed by Netteltons Attorneys,  
Grahamstown**

**For the First and Second Respondents: Adv N J Sandi, instructed by Mili  
Attorneys, Grahamstown**