



**MINISTER
WATER AND ENVIRONMENTAL AFFAIRS
REPUBLIC OF SOUTH AFRICA**

Reference: LSA 126947

APPEAL DECISION

APPEAL AGAINST THE ENVIRONMENTAL AUTHORISATION GRANTED TO KWAZULU-NATAL DEPARTMENT OF TRANSPORT FOR THE PROPOSED UPGRADE OF THE SANI PASS ROAD, WITHIN THE KWAZULU-NATAL PROVINCE

1. INTRODUCTION

In terms of regulation 36 (1) of the Environmental Impact Assessment Regulations, 2010, published by Government Notice (GN) No. R. 543 of 18 June 2010 (EIA Regulations), regarding activities identified under section 24 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA), the Chief Director: Integrated Environmental Authorisations of the Department of Environmental Affairs (the Department) authorised KwaZulu-Natal Department of Transport, who is the holder of the EA as well as an appellant in this appeal (first appellant), on 2 July 2013, to proceed with the proposed upgrade of the Sani Pass Road, within the jurisdiction of Kwa Sani Local Municipality, KwaZulu-Natal Province.

2. BACKGROUND

Sani Pass has long been a trading route between Lesotho and South Africa, initially a foot and donkey path, which evolved into a track, followed by a gravel road with extensive cuttings in the steep and rocky upper reaches of the pass.

The need for the proposed upgrade of the Sani Pass Road is to further promote trade between South Africa and Lesotho.

To this end, a co-operation agreement was signed in 2005 between Lesotho and South Africa, with the intention of improving commercial, social and economic opportunities as part of an initiative to improve accessibility between South African Democratic Countries (SADC).

3 THE APPEAL

On 14 August 2013, the first appellant lodged an appeal against Condition 1 of the EA, and on 16 August 2013, Ezemvelo KZN Wildlife (second appellant), also lodged an appeal against Condition 1 of the EA granted to the applicant. These appeals were lodged in terms of section 43 (1) of NEMA.

Condition 1 of the aforementioned EA states that "*Authorisation is granted for the upgrade of Sani Pass Road with coordinates above, from Old Good Hope Trading Post to the summit of the Sani Pass at the Lesotho Border Post (total distance of 19km). The upgrading of the infrastructure by improving geometrics, upgrading drainage, retaining splash-throughs, constructing retaining walls and re-gravelling of the road (Alternative 3) is hereby approved.*"

Both appellants are of the view that alternative 5 (a hardened surface), should have been authorised by the Department instead of alternative 3.

4. DECISION

4.1 In reaching my decision on the appeal against the authorisation of the applicant to proceed with construction of the proposed project, I have taken the following into consideration:

4.1.1 Material information contained in the project file (12/12/20/1184);

4.1.2 The grounds of appeal submitted by the first and second appellants;

4.1.3 The response to the grounds of appeal submitted by Sani Wildlife and Environment Society of South Africa, an interested and Affected Party (I&AP);

4.1.4 The comments received from the Chief Directorate: Integrated Environmental Authorisations (CD:IEA), and the Chief Directorate: Protected Areas Systems Management (CD:PASM) of the Department on the grounds of appeal.

4.1.5 Recommendations from the internal appeals meeting of 3 February 2014, and the external appeals meeting of 28 February 2014.

4.2 Having considered the above information, and in terms of section 43 (6) of the NEMA, I have decided to uphold the appeals of both appellants, and accordingly amend Condition 1 of the EA as follows:

Authorisation is granted for the upgrade of Sani Pass Road with coordinates above, from Old Good Hope Trading Post to the summit of the Sani Pass at the Lesotho Border Post (total distance of 19km). The upgrading of the Road is hereby approved based on Alternative 5, i.e a hardened road surface.

4.3 The reasons for my decision are as follows:

4.3.1 THE GRAVEL ROAD REQUIRED BY ALTERNATIVE 3 WILL PERPETUATE THE REQUIREMENT FOR ON-GOING REGRAVELLING AND THE UNSUSTAINABLE PRACTICE OF MINING FOR ROAD QUARRY

The second appellant contends that a proposed gravel road will require regular maintenance and resurfacing, which will be perpetuated by the run-off from the road surface and the impacts of tyres on the gravel surface. The second appellant furthermore contends that it is estimated that the new road will need to be regravelled every two 2 years due to the increasing traffic volumes on Sani Pass and the proposed upgrade of the Sani border post to a commercial port of entry.

The second appellant further submits that the gravel road will be washed into the surrounding environment, drains and streams resulting in sedimentation and impacting the aquatic environment, this being the primary water catchment area, as well as the potential negative impacts arising from the perpetual mining of the quarry material. Alternative 5, the second appellant contends, will provide a low maintenance road, with little or no erosion potential.

The first appellant also contends that alternative 3 is not the most feasible option to address the issue of erosion and scour on the Sani Pass Road, as well as reducing the risk of the road being susceptible to flash flooding. The first appellant furthermore contends that during heavy rain conditions, the gravel material gets washed downstream, with the coarse material causing scour further down the road and the fine materials going into suspension and then being deposited as the velocity of flow dissipates. This, the first appellant contends, will ultimately cause a blockage in the storm water drainage systems to be constructed and increase the rate of siltation of the river, thus negating the effectiveness of the system, and reverting to the current problem of wash-down experienced on the Sani Pass road.

In response to this ground of appeal, the I&AP contends that the suggestion that the road would have to be regravelled every two years is completely unsubstantiated, and that in fact, a surface of this nature would last considerably longer than that, even if left completely unmaintained.

The I&AP furthermore notes that the final EIA report details some state of the art and impressive drainage techniques being planned for the Sani Pass, with none of these dependent on the surface being used for the road. This, they contend, will initially minimise the amount of material eroding off the road reserve and then capture the bulk of material which does erode.

The I&AP suggests that the most critical factor in the road, irrespective of the nature of the surface, would be the drainage systems, and in particular, the capture of material before it leaves the road reserve and enters the run-off systems and streams. The I&AP furthermore notes that the crucial aspect in the functioning of any such system is the regular clearing and maintenance of the drainage systems. This, they suggest, will be addressed by the employment of a dedicated maintenance team on the Sani Pass, as part of the project. A dedicated maintenance team, they contend, would ensure that if a drain or pipe was blocked, instead of nothing being done for months or even years, thereby leading to road scouring damage, the blockage would be cleared almost immediately and damage prevented.

In evaluating this ground of appeal, I note that the source of the gravel to be used for the road would have to be transported from a distance in excess of 30km, making this process extremely costly and unsustainable. I also take note of the climatic conditions of the area, with large amounts of rainfall experienced during the summer months, which will also further perpetuate the requirement for constant regravelling of the road. Furthermore, in addition to the quarrying of gravel being an unsustainable practice, there is also the potential that this practice will lead to the importing of foreign materials into the ecosystem, bringing with it potential detrimental impacts into the environment.

I have also noted that the EAP for the proposed project has indicated a preference for a hardened surface, taking into account environmental, social and economic factors. It is unfortunate, however, that the EAP presented Alternative 3 as a viable option during the EIA process, despite indicating a very strong preference for Alternative 5.

Equally important, is that the second appellant, as the conservation authority in the province, has indicated that Alternative 5 will have fewer detrimental impacts on the environment, whilst at the same time, providing greater economic and social benefits to the region as a whole.

As a result of the foregoing, and based on all relevant environmental, economic and social considerations, this ground of appeal is upheld.

4.3.2 THE RETENTION OF SPLASH-THROUGHS REQUIRED BY ALTERNATIVE 3 WILL INCREASE POLLUTION AND PERPETUATE THE WATER DAMMING AND SURFACE EROSION OF THE ROAD

The second appellant contends that part of the existing gravel road erosion problem has been related to water damming up and passing over the road and at existing splash-throughs, depositing rock and sediment and in many cases allowing the water to flow down sections of the road, thereby causing further erosion and damage.

The second appellant contends further that perpetuating the splash-throughs, which they contend will result from pursuing alternative 3, will further the erosion of the gravel road and result in sedimentation within the storm water and drainage structures. This, they contend, will require regular and active maintenance of the splash-through areas and storm water drains in a very remote environment.

The second appellant adds that they had worked closely with the engineering consultants for the EIA to ensure that the bridge structures proposed in Alternative 5 will create an almost maintenance free situation, by avoiding water flowing over the road surface, even in high flow situations, thereby keeping water-borne boulders and sediment within the drainage line. This, they conclude, will create a more sustainable and less environmentally impacting long term solution for the proposed road upgrade.

The second appellant furthermore contends that there is a real risk that vehicles driving through splash-troughs will be polluting the watercourse with oils and fuel washed from the vehicles, thereby affecting the aquatic organisms and biodiversity in and adjacent to the water

course. The first appellant furthermore contends that alien and invasive plants and seeds brought in from outside the uKhahlamba-Drakensberg Park World Heritage Site, have the potential to be washed off tires and undercarriages of off-road vehicles. Moreover, the second appellant contends that seeds washed into a flowing water course have a significantly greater dispersal range than those shaken loose and deposited on the road surface. This, the second appellant argues, is a significant biodiversity risk and supports alternative 5 as a better environmental practice than alternative 3.

In support of this ground of appeal, the first appellant also contends that splash-throughs must be maintained as part of the approved Alternative 3, and that this could lead to further scour of the river/stream, which could result in the non-usability of the road in the event of boulders being washed down and blocking the passage.

The first appellant contends further that during the summer thunder storms, these splash-throughs become impassable until such time as the level of water subsides. This, they contend, could have a serious impact on the road users in that they could end up being stranded for hours at a time.

The first appellant furthermore contends that the gravel surface will continue to create vehicle entrained dust impacts, as well as fugitive dust in strong wind conditions. The hardened surface, the first appellant contends, will have a limited impact on ambient air quality caused from dust during the construction phase of the project, but that the gravel surface will continue to create a dust nuisance for the lifespan of this surfacing option.

The first appellant concludes that splash-throughs also have the potential to introduce foreign materials into the water system as the vehicles pass through the water, thus impacting on the aquatic fauna and flora.

In response to this ground of appeal, the I&AP rejects the contentions of the first appellant, citing that the current road has only been impassable once in the last fifteen years, as a result of splash-throughs, and that in that instance, the situation only lasted 2-3 hours. This, they

contend, is attributable to the fact that the headwaters of all streams crossing the road are very short and the catchments steep, which results in water running off extremely quickly.

Splash-throughs, they contend, are the most effective way for water to get across a road with minimum damage, as unlike pipes, they cannot get blocked and cause damage to the road as a consequence. As long as the approaches are properly constructed, they contend that it would represent the perfect solution, in that it would be cheaper, as well as being aesthetically pleasing and therefore part of the tourist attraction of the road. In support of this argument, they point out that the "Elixir of Eternal Youth" splash-through is a perfect example, in that it is a major tourist attraction, particularly in the summer months, and that it is one of the most photographed sites on the pass.

The I&AP also argues that the bulk of the splash-throughs are either concreted or have a rocky under-surface, so erosion will not be an issue. Furthermore, the I&AP contends that the vast majority of the time, vehicles traversing splash-throughs will be covered only as deep as their tyres, and there will consequently be minimal negative impact on the issue of pollutants other than those which would in any event end up on the road.

The I&AP furthermore contends that in any event, any potential pollutants coming off vehicles which would end up on a gravel surface would equally end up on a hard surface, and that rainfall would wash such contaminants off the road in both cases.

In response to the first appellant's contentions in respect of dust impact, the I&AP contends that the impact of dust on Sani Pass has been completely overplayed. They contend further that one does not find road fringing vegetation caked with dust and that dust has never been cited as a problem on the road. This, they contend, can be attributed to the nature of the terrain, and the consequent low speeds which vehicles travel at.

In evaluating this ground of appeal, I note the potential for bringing in alien plant species into the ecosystem through splash throughs, as well as the greater degree of pollution that will occur as a result thereof. Furthermore, arguments on the basis of aesthetic factors, however

unsubstantiated, cannot supersede the adverse environmental impacts by way of increased pollution, which is foreseen, should alternative 3 be pursued.

Based on the foregoing conclusions, and taking all relevant environmental considerations into account, this ground of appeal is accordingly upheld.

4.3.3 THE FAILURE OF ALTERNATIVE 3 IN MEETING THE COUNTRY'S INTERNATIONAL OBLIGATIONS

The second appellant contends that it has an obligation to protect the intrinsic values of the area and to provide appropriate access to the area, to a broad range of visitors. The hard topping of the public road so that visitors with non 4x4 vehicles can also access the summit and enjoy the exceptional natural beauty, cultural heritage and biological diversity of the area, it contends, further supports this objective and commitment. Retaining a public gravel road that is almost exclusively accessible to 4x4 vehicles, and specifically recommends against 2x4 vehicles, the second appellant argues, will exclude a large number of potential visitors from experiencing Sani Pass and the summit. Alternative 5, they argue, does not prohibit 4x4 vehicles, however it does not protect their exclusive access to this significant public road.

The second appellant contends further that the decision taken by the Department to favour a gravel road not only provides continued exclusive use by the 4x4 community, but forces trade between South Africa and Lesotho to be conducted using expensive 4x4 vehicles and public transport, the costs of which are borne by the consumers and travellers.

The second appellant furthermore notes that in July 2006, the Sani Pass Road Upgrade was launched with the objective of providing access to the Maloti Drakensberg Transfrontier Conservation Area with the objective of fulfilling the SADC international transportation commitments, as well as to promote tourism in the region.

The second appellant also notes the obligation of the Department and Ezemvelo to protect the Ramsar site (wetland of international importance) from degradation. The erosion and sedimentation resulting from the existing Sani Pass road, it argues, has a negative impact on

the Ramsar qualities. Furthermore, they contend that salt is added to the gravel road surface in snow and ice conditions and that this dissolves and enters the surrounding World Heritage site and surrounding bodies, polluting and negatively impacting upon them. For this reason, the second appellant argues that alternative 5 has fewer long term erosion or sedimentation impacts, and improves on the existing situation, and for these reasons is preferred to alternative 3, which it argues will perpetuate the negative impacts of gravel road erosion, sedimentation and pollution potential from salt and splash-throughs.

In amplification of this ground of appeal, the first appellant contends that while the economic and avifauna studies identified a negative impact on tour operators, the studies did not consider the impact that would be caused to local rural communities, as well as the general public wishing to access the area for recreational purposes.

The first appellant furthermore alleges that the impact on tour operators was considered in isolation, which it alleges will result in the perpetuation of an almost "cartel-like situation". The road is currently for the use of 4x4 vehicles only, primarily because of the condition of the road, and the first appellant contends that should alternative 3 remain as the preferred alternative, the Sani Pass may well have to continue to be accessible only to 4x4 vehicles if safety becomes an issue.

In response to this ground of appeal, the I&AP points out that the declaration of intent signed by the governments of South Africa and Lesotho makes no mention of a hard surface for the Sani Pass, but instead refers to "developing a road infrastructure on corridors leading towards the two countries with a view to promote and/or strengthen the existing economic and tourist activity between the two countries and the implementation of the SADC Protocol on Transport, Communication and Meteorology". The I&AP maintains that alternative 3, coupled with a proper maintenance program will best achieve these ends.

The I&AP disputes the contention that the approval of alternative 3 suggests an "exclusive use" of the road by tour operators or anyone else, and suggests that if this was the intention of the Department, it would have approved alternative 1, which was to do nothing to the road.

The I&AP concedes that limited access, which is currently the case, is a problem which needs to be addressed, but suggests that by having an improved gravel surface, greater access to the road will be provided, while at the same time retaining the essential feel and "sense of place" of the Sani Pass. Alternative 5, they suggest, will lead to a total change in the sense of place and the Sani Pass will consequently lose its tourist appeal, which will also impact on the economy of the region due to a perceived decrease in tourism opportunities. However, the I&AP argues that should alternative 3 be followed, tour operators will see some drop off in business due to the fact that anyone with a sedan vehicle will be able to drive up the Pass themselves, but that this will be offset by the fact that the overall number of tourist to the area will likely remain the same as the Pass will retain its charm and tourist appeal.

Alternative 5, they argue, will still carry restrictions on the size and weight of vehicles allowed on the road, and with no trucks and buses to be allowed, they contend that there will not be a substantially greater degree of accessibility between the two options.

In evaluating this ground of appeal, I note that the main purpose of the upgrade of the Sani Pass Road is to enhance trading and tourism opportunities which will improve the economy and improve the livelihood of the people sustainably over a longer term. In this regard, I must stress that the potential negative economic impacts which may be experienced by the I&AP cannot supersede the economic benefits which will be experienced by a significantly greater proportion of people from both Lesotho and South Africa should a hardened surface be preferred.

The information before me also indicates that the Economic Impact Study (EIS) prepared by Imani Development (SA) (Pty) Ltd, in conjunction with Conningarth Economists FutureWorks assessed that the new road will result in increased trade between the countries and the potential for new investment opportunities. In addition, the road plays a significant role in the facilitation of the wool and mohair industry in Lesotho with the new road creating the opportunity for a 40% growth in this industry.

A gravel road, albeit an improved one, will still have restrictions on the use thereof, and will not result in the same economic and social benefits for the majority of the affected population as would be experienced by a hardened surface.

In light of the aforementioned considerations, I am of the view that a gravelled surface should not have been presented by the EAP as a viable alternative, and this ground of appeal is accordingly upheld.

4.3.4 THE IMPACT OF THE RESPECTIVE ALTERNATIVES ON AVIFAUNA AND VEGETATION IN THE AREA

Both the first and the second appellant contend that the impacts of the proposed project on bird populations, while undesirable, will have similar consequences, irrespective of whether alternative 3 or 5 is pursued. However, they both contend that once alternative 5 is constructed, the impacts will become minimal, whereas they will be ongoing for alternative 3, as a result of blasting and disturbance during gravel road maintenance.

The second appellant furthermore contends that a comparison of expected vegetation disturbance between alternative 3 and alternative 5 is likewise similar in extent and most severe during the construction phase. Alternative 3, however, they contend, will continue to significantly inhibit roadside vegetation growth and recovery during gravel road maintenance, through salting in snow conditions and dust settling on roadside vegetation during dry conditions.

In response to this ground of appeal, the I&AP contends that the impacts of the respective alternatives on avifauna and vegetation will not likely be the same, due to the fact that the scale of work required to prepare the road for an upgraded gravel surface will be significantly less than for a hard surface.

The I&AP contends further that one of the Sani Pass's unique features is the vegetation which fringes the road along its course, and this supports events such as the Sani Pass

Wildflower Walk and activities such as birding and botanical tourism, which they contend will be more severely impacted by the proposed alternative 5.

The I&AP also contends that birds on the Pass use this fringing vegetation heavily and if Alternative 5 is implemented, some of the fauna and/or avifauna will be destroyed. The I&AP adds that the "construction footprint" should be as narrow as possible, and if possible, no wider than the current road itself. This will also have the effect of minimising the amount of gravel required for construction.

In evaluating this ground of appeal, I am in agreement with the contention that the impacts of the proposed project on bird populations, as well as vegetation, will have similar consequences, irrespective of whether alternative 3 or 5 is pursued, and this ground of appeal is accordingly upheld.

2.4.6 THE COST OF THE RESPECTIVE ALTERNATIVES

The first appellant contends that the current cost estimate for the 19 kilometre surfaced option of road is R602 million, or R31,2 million per kilometre. The earthworks, stabilisation of embankments, retaining walls and drainage, they contend, are the major costs at R526.3 million, or R27,7 million rand per kilometre. The layer works and resurfacing for alternative 5 is estimated at R75 million, or 3,95 million per kilometre. The gravel costs for alternative 3, they estimate at R22,8 million, or R1,2 million per kilometre. The apparent saving, they contend, should alternative 3 proceed, will therefore be R52,24 million.

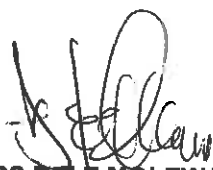
However, the first appellant contends that due to gravel loss, the road will have to be regravelled every two years, at an annual cost of R5,7 million per year at R300 000 per kilometre. Furthermore, they estimate annual maintenance costs of R5,6 million per year or R296 000 per kilometre, with an estimated total cost for implementing alternative 3 of R11,3 million per year. The first appellant contends that the apparent cost saving of R52,24 million will therefore be depleted in 4-6 years.

In response to this ground of appeal, the I&AP contends that in the draft scoping report at the end of 2009, the estimated cost of the entire project was R390 million, and that the estimate has now risen to R602 million. They contend further, that given the nature of the terrain and the fact that phase 1, which was planned as a 1 year project, took 6 years and significantly overran on budget, that a projected cost of anything under R1 billion is unlikely.

The I&AP also contends that the fundamental error in the projected cost assumptions by the first appellant is that the work and preparation would be the same for either alternative. This, they contend, is clearly not correct, and that this goes to the fact that the first appellant has never seriously considered alternative 3 or done any meaningful research on it. Furthermore, they contend that the experience gained from phase 1 clearly shows the significant difference in costs for the construction of a grave road, as opposed to a tarred road.

Furthermore, the I&AP rejects the notion that the road would have to be regravelled every two years as false, and suggests that the surface can be preserved for a far greater time if a dedicated maintenance team was appointed on a permanent basis, to ensure that the road is well maintained and free of damage.

In evaluating this ground of appeal, I note that I have been presented with vastly different cost projections from the first appellant and the I&AP, and that that in both instances, these estimates are largely speculative. However, I note that whilst the I&AP has expressed an unsubstantiated opinion in respect of this ground of appeal, the first appellant, as the applicant, is in a better position to provide cost estimates for the respective alternatives, and this ground of appeal is consequently upheld.



MRS B E E MOLEWA, MP

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS

DATE: 2014/05/13