IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISON, MAKHANDA)

Case No: 2099/2022
Date of hearing: 12 July 2023
Judgment delivered on: 22 August 2023

In the matter between:

INTERCAPE FERREIRA MAINLINER (PTY) LTD **APPLICANT**

and

THE MEC FOR TRANSPORT, EASTERN CAPE **FIRST RESPONDENT**
THE MINISTER OF TRANSPORT **SECOND RESPONDENT**
PROVINCIAL COMMISSIONER, EASTERN CAPE SOUTH AFRICAN POLICE SERVICES **THIRD RESPONDENT**
NATIONAL COMMISSIONER, SOUTH AFRICAN POLICE SERVICES **FOURTH RESPONDENT**
NATIONAL PUBLIC TRANSPORT REGULATOR **FIFTH RESPONDENT**
EASTERN CAPE PROVINCIAL REGULATORY ENTITY **SIXTH RESPONDENT**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

…… **……**
Signature **Date**

JUDGMENT

Smith J

Introduction

[1] On 30 September 2022, I granted an order directing the Minister of Transport and the Eastern Cape MEC for Transport, in consultation with the South African Police Services (the SAPS), and the Eastern Cape Provincial Regulatory Entity, to develop ‘a comprehensive plan on the steps they intend taking to ensure that reasonable and effective measures are put in place to provide for the safety and security of long-distance bus drivers and passengers in the Eastern Cape’. I also ordered them to indicate the time periods within which the steps outlined in the action plan will be taken and to present it on oath to the court.

[2] The order was compelled by: (a) unrefuted evidence of a protracted and sustained campaign of violence against the applicant (Intercape) undertaken by rogue taxi associations and which has placed the lives of Intercape bus drivers and passengers at risk; and (b) my finding that the MEC and the Minister failed to fulfil their constitutional and statutory obligations under the National Land Transport Act 5 of 2009 (the Transport Act), to ensure that the abovementioned measures are put in place.

[3] In terms of paragraph 6 of the order, Intercape was entitled, within 10 days of its presentation, to respond on oath to the action plan and to set the matter down for hearing regarding the adequacy of the plan.

[4] The Minister filed an application for leave to appeal and declared in no uncertain terms that he did not intend to participate either in the conceptualisation or

implementation of the action plan. This prompted Intercape to launch an application for an order in terms of section 18 of the Superior Courts Act 10 of 2013, implementing the order pending any application for leave to appeal or the outcome of an appeal. The Minister, after having filed his answering affidavit, withdrew his opposition to the section 18 application and the order was accordingly granted on an unopposed basis. The Minister's application for leave to appeal was also subsequently dismissed.

[5] The action plan was subsequently developed and filed by the MEC without the Minister's involvement. Understandably, Intercape was not appeased and, contending that the plan was manifestly inadequate, it delivered an affidavit setting out the alleged deficiencies and inviting the MEC to prepare a revised plan. It furthermore declared itself willing to engage further with the MEC to clarify its criticisms of the plan and to assist in the finalisation of the revised plan. It stated, however, that if those engagements did not yield the desired results, it would set the matter down for argument regarding the adequacy of the plan, as envisaged in terms of paragraph 6.1 of the order.

[6] During December 2022, Intercape and its attorneys met with representatives from the MEC's and the Minister's offices, as well as the SAPS officials, to discuss the contended deficiencies of the plan. At that meeting the Provincial Department presented an updated version of the plan. According to Intercape, the update was little more than a single amendment to the plan by adding another column setting out progress allegedly achieved in its implementation during December 2022. Intercape also contended that an updated version of the Implementation Schedule submitted by the National Department did not address their criticisms of the plan and instead substituted specific implementation dates and allocations of responsibilities to specific functionaries or entities with vague and ambiguous clauses.

[7] Plagued by ongoing attacks on its buses and being of the view that there were no reasonable prospects of further engagement with the MEC and the Minister bearing any fruit, Intercape set the matter down for hearing regarding the adequacy of the plan.

[8] The matter came before me on 13 June 2023, when Intercape sought an order, in the form of a *rule nisi*, enjoining the MEC and the Minister to prepare a revised plan that would meet the objectives of the initial order and issuing directives in respect of specific issues that they need to incorporate into the plan. It also sought an interim order directing the SAPS to implement the existing action plan (which incorporated the Implementation Schedule), by maintaining a visible police presence in 'hotspot' areas and providing police escorts along certain routes when requested to do so by Intercape. After hearing argument, I granted a *rule nisi*, returnable on 12 July 2023, and incorporating the interim interdict against the SAPS.

Adequacy of the action plan

[9] In my view, the action plan developed by the MEC does not accord with the purpose and objective of the court order and therefore requires fundamental reconsideration. The fact that the Minister did not participate in the development of the plan despite having been explicitly ordered by the court to so, is itself a compelling reason why it must be revised. The MEC's assertion that the Minister has subsequently considered and endorsed the plan cannot constitute sufficient compliance with the court order. The Minister was enjoined to participate in the development of the plan and her attempt to rely on an *ex post facto* endorsement thereof is not sufficient. In developing the action plan, it would have been crucial for the Minister to consider the extent to which it may be necessary for her to exercise the extensive powers vested in her by the Transport Act. In addition, she also has powers to step into the shoes of the MEC in the event of the latter failing to exercise his statutory powers and functions. Since she may well be required to hold the MEC accountable, it was remiss of her to allow the MEC to develop the plan on his own.

[10] It is manifest that by directing the MEC and the Minister to present a plan that will put in place reasonable measures to ensure the safety of long distance bus drivers and passengers, the court required of it to present a scheme that, at the very least: (a) demonstrates reasonable appreciation of the nature and exigency of the circumstances it is intended to address; (b) sets out implementable measures and key interventions aimed at curbing the violence and attacks on buses and passengers; (c) sets realistic timelines for the implementation of such measures; (d)

states how those measures will be implemented with specific reference to the statutory framework and exercise of the MEC's and the Minister's powers under the Transport Act; (e) allocates duties and responsibilities to identifiable functionaries or governmental entities; (f) allocates resources to facilitate the implementation of the necessary measures; and (g) contains a strategy for engagement and corporation with other relevant governmental and law enforcement agencies.

[11] The action plan filed by the MEC is manifestly bereft of any such specificity and is instead replete with deliberately vague and ambiguous phrases regarding implementation dates and responsible functionaries. Such generalisations and obfuscation will make it virtually impossible for the court to exercise its oversight function effectively.

[12] That the action plan and its implementation have been woefully inadequate to ensure the safety and security of long-distance bus drivers and passengers, is irrefutably demonstrated by the relentless continuation of serious and violent attacks on Intercape's buses after its implementation. Between January and May 2023, Intercape has lodged at least 30 criminal complaints relating to violence and intimidation against its drivers and passengers. These incidents include the stoning of buses, prevention of bus drivers from loading and off-loading passengers, intimidation of drivers and passengers, buses being shot at, and a passenger struck by a bullet. The incidents were all marked by brazenness and impunity on the part of the perpetrators, who were apparently emboldened by the lack of visible policing. These events also serve to confirm my view that a vague action plan, which lacks the specificity mentioned above, will send the unfortunate message to perpetrators of the unlawful acts that the authorities do not intend to use their extensive statutory powers to quell the violence. Paradoxically, for this reason it might be better to have no action plan at all.

[13] In the reasons for the order, provided on 7 October 2022, I made serious findings against the Minister and the current MEC's predecessor. At paragraph 57, I said the following:

‘As mentioned, not only has the MEC not bothered to file an affidavit explaining the reasons for her inaction, but she has also tried to bully the applicant into agreeing to the unlawful demands of the taxi associations. The Minister has also not bothered to file either an answering or confirmatory affidavit. His failure to do so was clearly also based on his belief that he did not owe Intercape any explanation. His rather curt reply to Intercape’s request for intervention to the effect that the problem is that of the MEC, evinces a clear and fundamental misunderstanding of his constitutional and statutory obligations under the Transport Act. In my view their conduct is deserving of a punitive costs order.’

[14] I sanguinely assumed — perhaps with the benefit of hindsight, rather naively — that those findings would have encouraged the MEC and the Minister to remedy the serious and unfortunate consequences resulting from the dereliction of their constitutional duties and to devise an action plan that would clearly have demonstrated their determination to quell the violence. Regrettably, the contrary is true. Perhaps my message was just not understood, or perhaps, like that solitary, frustrated ‘Traveller’ in Walter de la Mare’s supernatural poem, *The Listeners*, I was also constrained to deliver my message through a closed door in the optimistic hope that the ‘host of phantom listeners’ hiding inside would take heed. Well, I am determined to make sure that I am not misunderstood again. The interim order that I granted on 14 June 2023, and which I intend to confirm, is more unequivocal and requires the MEC and the Minister to specify, in measurable terms, *inter alia*: the date from which and the frequency with which the measures will be implemented; the functionaries, governmental agencies or departments that will be responsible for their implementation; the planned key interventions in respect of ‘no-go zones’; the exercise of statutory powers; and the appointment of a task team to oversee and monitor the implementation of the action plan.

Separation of powers

[15] Both Mr *Nepgen* and Mr *Rorke* SC, who appeared for the MEC and the Minister respectively, attempted to convince me that the terms of the envisaged order will breach the separation of powers. To his credit Mr *Rorke* did not endeavour to defend the action plan. He conceded that the order required the Minister to participate in its development and that his failure to do so means that the court is at liberty to reconsider its viability. He submitted, however, that paragraphs 3.3 and 3.4

of the interim order go beyond what is permissible in terms of judicial powers. He argued that the action plan is polycentric and policy laden in its formulation and the court must thus recognise that it has limited capacity to tell the State how it should do its job. For this submission he relied on a plethora of Constitutional Court cases in which that Court emphasised the importance of judicial deference in appropriate circumstances.

[16] Mr *Rorke's* argument regarding the state of the law on this important issue was delivered in his usual logical and compelling style. I can find no fault with his analysis of the applicable legal principles, but it was his application of those principles to the facts of this matter that was demonstrably wrong. Paragraph 3.3 of the order leaves it to the MEC and Minister to decide on the dates and frequency of intervention measures but orders them to specify those in the action plan. And paragraph 3.4 does no more than to require them, *inter alia*, to consider the key intervention strategies mentioned in Intercape's affidavit, explain why they cannot be implemented and provide details regarding efforts to secure the additional resources required for their implementation.

[17] It is indeed so that courts must tread warily when making these types of structural orders. They are invariably laden with polycentric issues and the danger of a court overreaching judicial powers always looms large. However, the converse is also true. It is often overlooked that the separation of powers doctrine cuts both ways. It is the courts' constitutional obligations to declare the law, ensure that constitutional principles are upheld by all arms of government and to hold the executive accountable. Courts would be failing in their constitutional duties if they are paralysed by timorous aversion to holding the executive accountable for fear of encroaching upon the powers of another arm of government. I am nevertheless mindful of all those important constitutional imperatives, and I was cautious to ensure that the order does not encroach upon the constitutional powers of the MEC, the Minister or the SAPS, for that matter.

[18] Ms *Hofmeyer* SC, who appeared for Intercape, has correctly submitted that I have, in any event, already ruled on this issue in my reasons for the initial order. As envisaged in that order, my judicial responsibility requires that I exercise my

supervisory functions, part of which being the evaluation of the plan's adequacy. But more importantly, the order does no more than to compel the MEC's and the Minister's compliance with their constitutional and statutory obligations. The order has been carefully framed not to instruct them either to exercise or refrain from exercising their statutory duties, but rather to compel them to consider whether it would be appropriate for them to do so, given the prevailing circumstances. And given the fact that the court is exercising its supervisory functions in respect of the structural relief, it is entitled to require them to provide reasons why they have not deemed it appropriate to exercise those powers.

[19] A related issue is the defence proffered by the MEC to justify the lack of detail in the action plan, namely that the disclosure of further details would compromise the safety of those functionaries that are responsible for the implementation of the plan and render them 'open to exploitation by criminal elements if it were made public'. If that is indeed the case, then he must place the information before the court and ask that it be sealed and not made public. Orders of that nature are issued by courts on a regular basis. Supervisory orders require of courts to play an active role in ensuring that they are enforced. Thus, nothing but full disclosure of the relevant facts by organs of State will suffice to enable courts to play that role effectively. (*Pheko v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa Amicus Curiae)* 2016 JDR 1357 (CC))

Allocation of necessary resources

[20] The aforementioned reasoning also applies to the injunction that the MEC and the Minister must consider allocating the necessary resources to facilitate the implementation of the action plan. They are required to make a reasonable assessment of their available resources, given the exigencies of the situation. And the court is entitled to demand from them more than a bald assertion regarding resource constraints. In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at 405A-B, O'Regan J said that the standard of reasonableness 'requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and

appropriate in the overall context of their activities'. An organ of State is accordingly required to provide the court with the necessary information to enable it to determine the reasonableness of the steps taken. (*Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC))

[21] In *Mwelase and Others v Director-General, Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) para 48, the Constitutional Court held that 'when egregious infringements have occurred, the courts have little choice in their duty to provide effective relief. That was so in *Black Sash I*, and it is the case here. In both, the most vulnerable and most marginalised have suffered from the insufficiency of governmental delivery'. In my view the facts of this case cry out for such 'effective relief'.

Allegations of preferential treatment

[22] The insinuation that Intercape is seeking preferential treatment primarily to protect its commercial interests, has been a constant refrain in this and the main application. This unfounded assertion is both wrong and unfortunate. It has regrettably also been used by the SAPS as an excuse for not performing their constitutional duties. But, before I wash my hands in the proverbial basin of absolution, like the Roman governor, Pontius Pilate, did centuries ago, I must explain why that insinuation is demonstrably wrong and dangerous.

[23] These proceedings have, from the start, been focussed on the safety and security of long-distance bus drivers and passengers in the Eastern Cape. While the prospect of financial losses must remain a worrying issue for Intercape, from the court's point of view, it has always been the real and present danger to passengers and bus drivers that informed both the urgency with which the matter was heard and the form of the orders issued. It is regrettable that the SAPS have latched onto this argument to justify its opposition to an action plan that requires visible police presence at hotspot areas and the provision of police escorts along certain routes when requested by Intercape. It boggles the mind why it is so difficult for a law enforcement agency to appreciate that when armed assailants take potshots at moving buses, deleterious consequences inevitably ensue, and sooner than later

people will suffer serious injuries and, heaven forbid, may even lose their lives. There can therefore be little doubt that the mandatory interdict sought against the SAPS is, together with the other measures envisaged in terms of the revised action plan, necessary to ensure the safety and security of long-distance bus drivers and passengers in the Eastern Cape.

Does the Implementation Schedule form part of the action plan?

[24] The MEC and the SAPS contend that the version of the action plan that must be evaluated by the court is the original one, excluding the Implementation Schedule. They argue that paragraph 6.2 of the original order envisages that Intercape may set the matter down for argument regarding the adequacy of the action plan presented by the MEC. The order does, however, not refer to the Implementation Schedule, or so they argued.

[25] Apart from the fact that this argument appeared to have been divined out of thin air, it is also unsustainable because it was manifestly never envisaged that the plan would be a stagnant document. This argument is also undoubtedly advanced because the plan would be considerably less exacting for the SAPS if the schedule is excluded.

[26] The undisputed facts, however, show that at all material times the parties were *ad idem* regarding the scope of the action plan, and in particular insofar as it incorporated the Implementation Schedule. At a meeting held during December 2022, only the National Department's delegation requested time to consider the updated Implementation Schedule proposed by Intercape. The SAPS were represented at the meeting and did not raise any objections to the updated schedule. The National Department subsequently, after proposing revisions to the schedule, accepted that it would form part of the action plan. There has thereafter been extensive correspondence between Intercape's attorneys and the other role players, which evince the common understanding that Intercape's requests for intervention by the SAPS were based on the action plan as supplemented by the Implementation Schedule.

[27] More importantly though, it was by virtue of that schedule that the SAPS agreed to assume the obligations to maintain a police presence at the loading points in ‘hotspot’ areas and to provide escorts along certain routes when requested to do so by Intercape. Thus, the obligations that the SAPS are required to undertake in terms of the interim order in any event already formed part of the action plan. The temporary interdict therefore did nothing more than to require the SAPS to do what the action plan already obliged them to do.

[28] It is therefore not necessary for me to consider the other arguments proffered by SAPS relating, *inter alia*, to resource constraints and jurisdictional and geographical challenges in the implementation of the schedule. In the event, the envisaged order does no more than to confirm the SAPS’ constitutional obligations and wherever those challenges may arise, they must be overcome by coordination and collaboration with other law enforcement agencies in a manner that can be provided for in the revised action plan.

Costs

[29] The interim order reserved costs for argument and determination on the return date. In my view, the applicant has clearly been substantially successful and there can thus be no reason why costs should not follow the result.

Order

[30] In the result I am of the view that Intercape has made out a proper case for the relief sought in the notice of motion.

[31] The following order accordingly issues:

> The *rule nisi* is hereby confirmed with costs, including the costs of two counsel, where so employed.

_____

JE SMITH

JUDGE OF THE HIGH COURT

MAKHANDA

Appearances

Counsel for the Applicant	:	Adv. *K Hofmeyr* SC with Adv. *A Molver*
	:	Adams & Adams Attorneys
	:	c/o Huxtable Attorneys
		26 New Street
		MAKHANDA
Counsel for First Respondent	:	Adv. *JJ Nepgen*
	:	The State Attorneys
	:	c/o Whitesides Attorneys
		53 African Street
		MAKHANDA
Counsel for Second Respondent	:	Adv. *S Rorke* SC with Adv *GJ Gajjar*
	:	The State Attorneys
	:	Whitesides Attorneys
		53 African Street
		MAKHANDA
Counsel for Third and Fourth Respondents:		Adv *A Rawjee*
	:	The State Attorneys
	:	Whitesides Attorneys
		53 African Street
		MAKHANDA