



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION – MAKHANDA)**

**CASE NO.:2099/2022**

**Matter heard on: 19 September 2022**

**Order delivered on: 30 September 2022**

**Reasons provided on: 7 October 2022**

In the matter between: -

**INTERCAPE FERREIRA MAINLINER (PTY) LTD**

**Applicant**

And

**THE MEC FOR TRANSPORT, EASTERN CAPE**

**1<sup>st</sup> Respondent**

**THE MINISTER OF TRANSPORT**

**2<sup>nd</sup> Respondent**

**PROVINCIAL COMMISSIONER, EASTERN CAPE,  
SOUTH AFRICAN POLICE SERVICE**

**3<sup>rd</sup> Respondent**

**NATIONAL COMMISSIONER, SOUTH AFRICAN  
POLICE SERVICE**


**4<sup>th</sup> Respondent**

**THE NATIONAL PUBLIC TRANSPORT REGULATOR**

**5<sup>th</sup> Respondent**

**THE EASTERN CAPE PROVINCIAL  
REGULATORY ENTITY**

**6<sup>th</sup> Respondent**

(1) REPORTABLE: YES	
(2) OF INTEREST TO OTHER JUDGES: YES	
(3) REVISED.	
 ..... Signature	7 October 2022 ..... Date

---

**REASONS FOR ORDER**

---

**SMITH J:**

**Introduction**

[1] On Friday, 30 September 2022, I granted an order, inter alia, declaring the MEC for Transport, Eastern Cape and the Minister of Transport obligated to take positive steps 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, and that they have failed to fulfil that obligation. I also granted certain consequential structural relief in terms of section 172(1) of the Constitution and indicated that the reasons for my decision would follow. The following then are my reasons for granting both the declaratory relief and the structural interdict.

[2] The applicant, Intercape Ferreira Mainliner (Pty) Ltd (Intercape), is a long-distance bus operator. Since 2015, it has been the victim of widespread and ongoing acts of violence and intimidation throughout the country. During this time, Intercape has lodged more than 150 criminal cases with the South African Police Services (the SAPS); more than 70 of those in the Eastern Cape. It is not disputed on the papers

that the violence is not random, but part of a deliberate strategy on the part of certain taxi associations. The violence is aimed at intimidating and coercing Intercape into agreeing to the unlawful demands of those taxi associations, which, amongst others, are that Intercape must reduce its prices and the number of buses operating on different routes and must pay levies to operate in certain areas.

[3] Intercape's dogged refusal to agree to those unlawful demands were met with further acts of violence directed at their buses, drivers and passengers. One of these incidents led to a fatality, and the instigators of the violence have succeeded in establishing 'no-go zones', making it impossible for Intercape to operate in certain areas, in particular, Cofimvaba, Butterworth, Engcobo, Tshomo and Idutywa.

[4] Intercape contends that the MEC and the Minister (the first and second respondents, respectively) have failed in their constitutional and statutory duties in terms of the National Land Transport Act, 5 of 2009 (the Transport Act) to intervene and put an end to the violence. It has accordingly launched these proceedings for the following relief:

- (1) Declaring that the MEC and the Minister have an obligation to take positive steps 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;
- (2) That these measures may include, but not necessary limited to, those contemplated in the Transport Act, such as;
  - (a) Developing systems to improve land transport law enforcement in terms of section 85 (1) of the Transport Act;
  - (b) Appointing inspectors in terms of section 86 of the Transport Act;

- (c) Declaring that certain areas constitute areas in which exceptional measures may be taken in terms of section 91 (1) of the Transport Act; and
- (d) Giving notice in terms of section 91 (2) of the Transport Act that one or more routes or ranks in that area are closed off for a type of public transport service and that any operating licence or other permit authorising services on a closed route or closed rank is suspended.

(3) Declaring that the MEC and the Minister have failed to take positive steps 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.

[5] It also seeks a structural interdict directing the MEC and the Minister, within 10 days to:

- (a) In consultation with the SAPS and the National and Provincial Commissioners, 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; and
- (b) Present the action plan on oath to this court and Intercape, together with an indication of the time periods in which the steps outlined in the action plan will be taken.

[6] The Eastern Cape Provincial Regulatory Entity and the National Public Transport Regulator, established in terms of sections 23(1) and 20(1) of the Transport Act, were cited as third and fourth respondents, respectively. The Provincial and National Commissioners of the SAPS were cited as fourth and fifth respondents, respectively. No substantive relief is sought against any of those respondents.

[7] Neither the Minister nor the MEC has bothered to file answering or confirmatory affidavits. Instead the Director-General, on behalf of the national department, and the Provincial Director: Operator Licences and Permits in the Department of Transport (the Provincial Director), on behalf of the provincial department, have purported to file affidavits on their behalf. The result is that harrowing allegations regarding brazen acts of criminality, governmental indifference and – even more concerning – an MEC’s acquiescence in criminal conduct, remain unchallenged. This is indeed a troubling aspect of this case. The applicant’s case is founded not only upon allegations that the Minister and the MEC have failed to exercise powers vested in them by the Constitution and the Transport Act, but Intercape has also made serious allegations against the MEC, namely that she attempted to coerce it into acceding to taxi associations’ unlawful demands. The explanation provided by the Provincial Director is that the former MEC, Ms Tikana-Gxothiwe, had been removed from her position and could not be persuaded to file an affidavit. This conduct must be deprecated. The fact that an MEC or a Minister resigns or is removed from her post does not relieve her of the duty to provide explanations for any decisions or administrative acts taken by her during her tenure, particularly where the legality thereof is challenged in a court of law. This requirement is consonant with the constitutional imperative of accountable governance. In any event, there is no indication that the current MEC has distanced himself from the alleged irregular conduct of the former MEC, or from her blatant failure to comply with her statutory obligations. Instead, there has been a half-hearted attempt to argue that a few ineffectual measures taken by the department constitute substantial compliance with the provisions of the Transport Act. The Minister has also unfortunately decided to remain silent in the face of allegations that he has haughtily dismissed Intercape’s desperate pleas for intervention in the crisis by adopting the attitude that it is an Eastern Cape problem.

[8] In a case where the court is required to pronounce upon the propriety of the exercise (or failure) by a public official of powers vested in him or her by the Constitution or a statute, the task of the court will be considerably complicated if the latter does not provide an explanation for the assistance of the court. Invariably in such cases the court must, as a first issue, determine whether or not by granting the requested relief it would be in breach of the doctrine of separation of powers. An explanation by the responsible official as to why he or she decided to adopt a particular

course of action would undoubtedly serve to assist the court in determining that issue. If such an explanation establishes a rational basis for the decision, even where the court does not agree with the course of action, it will be loath to interfere, out of deference for the separation of powers.

[9] In *Kallil NO v Mangaung Metropolitan Municipality and Others* 2014 (5) SA 123 (SCA) at para 30, the Supreme Court of Appeal held that:

“The function of public servants and government officials at national, provincial and municipal level is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance. “

Courts must therefore not ignore this type of behaviour and must show their disapproval through appropriate costs orders. I shall return to this issue later when I deal with the question of costs.

### **The facts**

[10] The violence and intimidation against Intercap have a long and unfortunate history. It started in 2015 with the intimidation of Intercap's drivers, when perpetrators would demand that they produce their operating licences. A failure to comply resulted in them being prevented from picking up or dropping off passengers in certain areas, on threat of physical harm or death.

[11] When the violence escalated towards the end of 2019, the Minister purported to intervene by attending a meeting in the Eastern Cape on 11 October 2019, where a task team was formed to engage all stakeholders and report back to him. However, it is common cause that nothing came of that attempted intervention.

[12] On 15 October 2019, a meeting was held at Idutywa, which was attended by members of the SAPS, a municipal representative and representatives of the department. Although it was decided at that meeting to develop and implement a joint operational plan, there is no evidence that such a plan had ever either been devised or implemented.

[13] The escalating violence prompted Intercape to launch an application for an interdict mandating the SAPS to intervene and prohibiting the taxi associations from interfering with Intercape's operations. However, it did not proceed with that application because the Covid 19 nationwide lockdown effectively served to stem the violence, albeit only temporarily.

[14] The violence, however, flared up again during 2021. This time the taxi associations became more brazen. They now openly demanded that Intercape and other long-distance bus operators: must restrict the number of buses operating from certain towns; have their operating licences amended in order to reflect a timetable that is acceptable to the taxi associations; increase their prices to levels stipulated by the taxi associations; and pay cash levies to operate on certain routes.

[15] Intercape's refusal to accede to these demands resulted in an unprecedented escalation of the violence. Between January 2021 and February 2022, serious acts of violence and intimidation were perpetrated against Intercape's drivers and passengers. These were, amongst others: drivers being held at gunpoint and forced to abandon passengers; perpetrators preventing drivers from picking up or dropping off passengers in certain areas; blocking of routes and threatening to assault drivers if they proceeded along certain routes; shooting and wounding of a passenger; assaults on bus drivers; impounding of a bus which had been stopped at a taxi blockade; and shooting incidents involving Intercape buses.

[16] The following interventions occurred during this period:

- (a) On 21 March 2021, after one of Intercape's drivers was forced at gunpoint to abandon his passengers, a meeting was held between the representatives of the provincial department and the South African National Taxi Council

(SANTACO). At that meeting SANTACO was requested to ensure that their members desist from taking part in criminal conduct.

- (b) At a meeting held on 1 April 2021, and attended by members of the SAPS, the provincial department and Intercape, the taxi associations demanded that Intercape conform to an agreement which had purportedly been reached to implement certain pricing structures. Its refusal to agree thereto led to further violence.
- (c) At a meeting held on 16 April 2021, SANTACO expressed concern about the pricing structures of the long-distance bus operators. No attempt was made to address the ongoing violence. Instead, SANTACO again reiterated their demand for the bus operators to increase their prices.
- (d) Another meeting was held on 15 July 2021 between the provincial department, Uncedo Taxi Association, Border Alliance Taxi Association, the Idutywa SAPS and Mbashe Municipal Traffic Department. Again no attempt was made to address the violence. Instead, only the concerns of the taxi associations were discussed.
- (e) Sometime during the early part of 2021, a provincial structure, namely ProvJoints, which comprised representative from various provincial departments, established a Priority Committee on Transport. There is also no evidence that this committee has achieved anything other than to meet on a few occasions.

### **Intercape's requests for intervention**

[17] The ongoing violence and disruptions of its operations prompted Intercape to address no less than six letters to the MEC and the Minister, respectively, imploring their intervention. On 24 February 2022, its attorneys wrote to the Minister, the MEC and copied the Eastern Cape Provincial Regulatory Entity, pleading for their urgent intervention in the form of a co-ordinated effort and detailed action plan. The National Department of Transport responded on the Minister's behalf, stating that he

considered the matter an Eastern Cape issue and that he was awaiting a response from the Eastern Cape MEC. No further responses had been forthcoming, either from the Minister or the MEC. In the meantime, the violence continued unabated. On 4 March 2022 and at the Cape Town Airport, an Intercape driver was seriously injured when he was shot in the neck and leg. In response to this incident, roadblocks were set up for five days. On 22 March 2022, and at Cradock, a passenger on one of the Intercape buses was injured in the face when the bus was stoned. On the same route eight long distance buses were stoned; some of them belonging to Intercape.

[18] On 28 March 2022, at a meeting attended by various taxi associations from across the country, Intercape was told in no uncertain terms that the only way to resolve the crisis was to agree to increase their prices and reduce the frequency of their services, as demanded by the taxi associations. On 11 and 13 April 2022 stoning incidents occurred in Queenstown and Idutywa respectively. During the latter incident a passenger sustained a head injury and had to be attended to by paramedics.

[19] During that time Intercape was also subjected to intimidation and harassment by representatives of the CODETA (the Cape Organization for Democratic Taxi Associations) at its Cape Town depot. In a subsequent meeting with that association, the Intercape CEO, Mr Johann Ferreira, was told in no uncertain terms that it 'had to pay' in order to make the problem go away. He was also told that a failure to accede to the taxi associations' demands will be met with a campaign involving every single taxi association. Intercape refused to agree to those unlawful demands and the violence continued unabated. Over the next few days more Intercape buses were stoned and shot at. On 25 April 2022 a bus driver was shot while exiting the Intercape Cape Town depot. He died three days later.

[20] It appears that the SAPS were considerably more sympathetic to Intercape's plight, and the latter's engagement with the SAPS following these incidents of violence led to several initiatives, including the SAPS escorting buses traveling through hotspot areas. However, the violence flared up again as soon as those initiatives were stopped.

[21] On 27 May 2022, the taxi associations blockaded the N2 through Idutywa in an attempt to exert pressure on Intercap to comply with their demands. The blockade prompted the MEC to contact Mr Ferreira by phone. She told him that:

- (a) Intercap must urgently meet with the taxi associations in order to reach agreement regarding changes to its routes and fares; and
- (b) Until such time it had done so, Intercap was barred from travelling to certain specified areas.

[22] On 31 May 2022, Intercap's attorneys addressed another letter to the MEC in which they pointed out that her instructions to Intercap were incompatible with her statutory obligations and at odds with the efforts by law enforcement agencies to open up so-called 'no-go zones' created by taxi operators in the certain areas. They thus called upon the MEC:

- (a) Immediately to cease undermining the SAPS' efforts to ensure the safety of Intercap's buses, drivers and passengers in the Eastern Cape and, in particular, in the specified areas;
- (b) To share with Intercap and the SAPS the full details of her meeting with the representatives of the taxi associations responsible for the blockade, including the identities of the representatives and full details of their demands in order for the SAPS to investigate and arrest the perpetrators of the criminal acts; and
- (c) To comply with their statutory obligations and refrain from advancing the taxi associations' criminal activities.

The attorneys requested a response to the letter by 1 June 2020, but no such response was ever received.

[23] They thereafter addressed a further letter to the MEC on 5 June 2022, noting:

- (a) The MEC's lack of response and stating that she was in breach of her obligation to take reasonable steps to safeguard the rule of law and protect rights;
- (b) The MEC's failure to provide the requested undertaking underscored suspicions that she was intent on advancing the criminality which continued to be perpetrated against Intercape;
- (c) Not only was it required of the MEC not to undermine the SAPS ongoing efforts to protect Intercape's employees, passengers and busses, but she was also required to take positive steps to do so herself;
- (d) The Transport Act provides the MEC with a host of powers which may be exercised to give effect to her obligations under the Act; and
- (e) Intercape requested the MEC's undertaking that these steps would be implemented immediately. It also warned that unless it received a meaningful response to its request, it would be forced to approach the courts for appropriate relief.

[24] The MEC also did not respond to that letter and in the meanwhile the violence in the Eastern Cape continued relentlessly. On 4 June 2022, three shots were fired at one of Intercape's buses on the N6 in the Penhoek Pass between Queenstown and Jamestown. Fortunately, no one suffered any injuries. And on 5 June 2022, one of Intercape's buses was stoned on the R61 between Confimvaba and Engcobo. A rock thrown at the windscreen narrowly missed the driver and caused the bus to veer off the road. Although the driver was able to steer the bus back onto the road, 14 passengers sustained minor injuries and the driver had to be taken to the Mthatha hospital by ambulance. The bus was damaged with an estimated repair cost of several hundred thousand rand.

[25] Intercape's attorneys therefore addressed another letter to the MEC on 6 June 2022, in which they drew attention to the further incidents of violence, stating that if a satisfactory response was not received by 6 June 2022, they would approach the courts for appropriate relief without any further notice to the MEC. There was also no response to that letter.

[26] On 8 June 2022, the Provincial Director of Legal Services addressed a letter to Intercape's attorneys requesting an extension of 10 days within which to respond to the letter. He said the department needed an extension because it had to contact various stakeholders, including the SAPS, and thereafter brief the MEC before responding. Intercape's attorneys responded to that letter on 13 June 2022, agreeing to an extension until Friday 17 June 2022. However, no response was forthcoming.

[27] On 15 June 2022, Intercape's attorneys addressed another letter to the Minister wherein they gave him a detailed account of all the most recent incidents of violence. They also raised with him their concern about the MEC's conduct in advancing the unlawful demands of the taxi associations. They drew his attention to the various requests that had been addressed to the MEC, pleading for her intervention. In addition, they also drew the Minister's attention to his powers in terms of the Transport Act, in particular section 5(6), which empowers him to intervene when a province does not fulfil an executive obligation in respect of matters relating to public transport. They again called upon the Minister to intervene urgently in the Eastern Cape and to take the appropriate steps to ensure that the MEC discharge her obligations under the Transport Act. The minister also failed to respond to that letter. On 18 and 26 of June 2022, there were further incidents of violence in the Penhoek Pass, when Intercape buses were shot at. It instituted these proceedings on 5 July 2022.

[28] After the launching of the application, between 7 July 2022 and 23 August 2022, there have been further incidents of violence and shooting incidents involving Intercape buses. Once again drivers were intimidated, buses were shot at and on one occasion the driver had to swerve as a result of shots being fired at the bus, which caused the bus to veer off the road, thereby sustaining serious damage. In addition, drivers were prevented from picking up or dropping off passengers at certain areas on threat of violence. Needless to say, there was no effective intervention by either the

national or provincial governments. Instead, there was deafening silence – an ominous portent of the government’s lamentable indifference to an ongoing crisis that poses a serious threat to the safety of long-distance bus drivers and passengers. But, even more shocking is the undisputed evidence of an MEC pandering to rogue taxi associations and acquiescing in their criminal conduct. It is against this unfortunate factual matrix that I had to consider the applicant’s supplication for declaratory and structural relief.

### **The applicant’s contentions**

[29] The applicant contends that the Minister and the MEC are both under statutory and constitutional obligations to take positive steps to put reasonable and effective measures in place to provide for the safety and security of long-distance bus drivers and passengers in the Eastern Cape. They contend, in particular, that this obligation arises from the Transport Act, and in particular: section 5(4) g (ii) that requires the Minister to promote the safety of passengers; section 5(4) h (iv) that requires of the Minister to promote safe public transport; and section 85 (1) that requires the MEC to take active steps to develop systems to improve land transport law enforcement.

[30] The applicant contends furthermore that since several fundamental rights are impacted by the ongoing intimidation and violence – namely, the rights to freedom and security of the person, to freedom of trade, occupation and profession, and not to be deprived of property - the MEC’s and the Minister’s obligations under the Transport Act must be interpreted in a manner which promotes the spirit, purport and objects of the bill of rights (section 39 (2)) of the Constitution.

[31] Ms *Hofmeyr*, who together with Mr *Molver* appeared for the applicant, submitted that the mentioned fundamental rights place a positive obligation on the MEC and the Minister to take steps to secure the safety and security of long-distance bus drivers and passengers in the Eastern Cape. And in any event, the abovementioned provisions of the Transport Act require such positive conduct on the part of the MEC and the Minister in explicit terms. The Minister and the MEC are therefore manifestly obligated to take positive steps to ensure that such reasonable and effective measures are put in place.

The standard of reasonableness in this instance requires the conduct of the MEC and the Minister to fall within the range of possible conduct the reasonable functionary would have adopted in the circumstances. The test is context specific, in other words, what constitutes reasonable measures will depend on the circumstances of the case.

### **The Minister and the MEC's contentions**

[32] While admitting that they are obligated under the Transport Act to provide for the safety and security of long-distance bus drivers and passengers, both the MEC and the Minister assert that they have done what they were required to do in terms of the Act. Their assertion in this regard is based on the following contentions;

- (a) The Director and Director-General who filed affidavits on their behalf contend that providing for the safety and security of long-distance bus drivers and passengers falls beyond the limits of their legal obligations under the Act. The gist of the argument is that safety related obligations covered by the Transport Act are concerned with safety from a road traffic management perspective and not with safety issues that arise from criminal conduct. However, their counsel have correctly conceded that section 91 deal with criminal conduct in explicit terms and require the intervention of the Minister and the MEC, respectively, if the jurisdictional facts mentioned in that section are present.
- (b) Furthermore, they contend that the duty to ensure safety from the perspective of criminal acts is primarily that of the SAPS. This contention is also fundamentally unsustainable because the relevant provisions of the Transport Act explicitly place that obligation on the MEC and the Minister.
- (c) The Director-General contends that the Transport Act only requires the Minister to 'promote' the safety of Intercap operations, employees and passengers and not to 'ensure' it. In my view, since the provisions of the Transport Act unambiguously require the MEC and the Minister to act in a specific manner if the jurisdictional facts are present, this contention is without merit. Counsel for the Minister, Mr *Gajjar*, has understandably not pursued this contention during argument.

[33] While it is common cause that the MEC and the Minister have failed to take positive steps 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, the Provincial Director has asserted that the department has taken various steps in an attempt to quell the violence. I list those contended interventions hereunder and deal with them in turn:

- (a) The department has intervened in 2017 or 2018 by facilitating meetings between taxi and bus operators in response to complaints by taxi operators that bus operators were operating without lawful operating permits. However, apart from the fact that those efforts were four to five years ago and in response to complaints by taxi operators, they did not concern the current crisis and there is no indication that the MEC was involved.
- (b) During October 2019 the director was tasked to engage all stakeholders and report back to the Minister. There is, however, no indication that this intervention yielded any results and, more crucially, it also did not involve the MEC.
- (c) The province, in recognition of the need and obligation for co-operative government, has established the joint provincial structure known as ProvJoints. However, that structure was not established in response to the current crisis and the MEC was also clearly not involved in it.
- (d) The ProvJoints is alleged to have established a Priority Committee on Transport earlier this year. This is, however, an interdepartmental committee and there is no evidence that the MEC had anything to do with its establishment.
- (e) There were some meetings of the Priority Committee. There is once again no indication in the answering affidavit as to what was discussed in these meetings, what was resolved and what, if anything, had been done as a result thereof.

- (f) Four operational and other meetings were held between 14 March 2022 and 17 May 2022, which led to the compilation of a Joint Operational Deployment Plan involving the SAPS, provincial traffic officers and municipal traffic officers. There is also no suggestion that the MEC had anything to do with these meetings or the alleged resultant plans. Furthermore, the last meeting of this structure took place more than 3 months ago, yet Intercape has not been provided with a copy of those plans, despite the fact that they requested same in terms of Rules 35 (12) and (14) of the Uniform Rules of Court.

[34] The Director-General also mentions public statements which the Minister has made during October 2019, denouncing the violence and purporting to promote a climate of safety. Apart from the fact that all this happened almost three years ago, it is common cause that nothing came of this purported intervention. It is thus also clear that the Minister himself has done nothing to intervene in the crisis. The reason for the Minister's inaction is also clear. In his response to Intercape's request for intervention, he stated that he considers it to be a matter for the provincial government. It is thus manifest that he did not give any consideration to intervening and exercising his powers under the Transport Act in the light of the MEC's demonstrable failure to do so.

### **Discussion and findings**

[35] The Transport Act vests in the MEC and the Minister extensive powers to intervene decisively and effectively to ensure the safety of members of the public when there is violence, unrest or instability in any sector of public transport.

[36] Section 91 (1) provides as follows:

"If in any area in the relevant province the MEC considers that because of violence, unrest or instability in any sector of the public transport industry in the area or between operators in the area, the safety of: -

- (a) passengers using the relevant service; or
- (b) residents; or

(c) any other persons entering the area, has deteriorated to an unacceptable level, the MEC may, after consulting relevant planning authorities by notice in the *Provincial Gazette*, define the area and declare it to be an area in respect of which the notification prescribing the extraordinary measures contemplated in subsection (2) may be made.”

[37] In terms of section 86 of the Act, the MEC may appoint employees from the provincial department as inspectors to monitor compliance with the Transport Act in the province and to assist with the investigation and prevention of offences contemplated in section 90.

[38] Section 91 (2) (a) and (b) provide that the extraordinary measures that the MEC may put in place in a declared area include giving notice that one or more routes or ranks in that area are closed for operation by a specified public transport service and suspending the operating licence of any of the specified services at a closed rank or on a closed road. And in terms of subsection 9(5) the MEC may stipulate that a failure to comply with the notification will constitute a criminal offence and may prescribe certain penalties in respect thereof.

[39] Section 5(6) gives the Minister the power to intervene if the provincial executive or a municipality fails to fulfil its obligations in terms of the Transport Act. It provides as follows:

“When a province or municipality cannot or does not fulfil an executive obligation in terms of matter relating to public transport, the Minister may intervene by taking the appropriate steps to ensure that the fulfilment of that obligation, including issuing a directive to the provincial executive or municipal council, describing the extent of the failure to fulfil its obligation and stating any steps required to meet its obligations and the provincial executive or municipality must comply with such directive.”

[40] in *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 CC at par 189, the Constitutional Court held that the Constitution imposes a positive obligation on the state and its organs to provide appropriate protection to

everyone through laws and structures designed to afford such protection. Implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights, must be reasonable and effective.

[41] Section 195 of the constitution requires that public administration must be governed by the democratic values and principles entrenched in the constitution. These include responsiveness to people's needs, accountability of public administration and fostering transparency by providing the public with timely, accessible and accurate information.

[42] In *Rail Commuters Action Group and Others v Transnet t/a Metrorail 2005* (2) SA 359 (CC), at para 76, O' Regan J explained that: "the principle that government, and organs of state, are accountable for their conduct is an important principle that bears on the construction of constitutional statutory obligations..."

[43] In argument before me, Mr *Nepgen*, who appeared for the MEC, has submitted that in considering whether or not the MEC has taken adequate steps, I must have regard to the interventions undertaken by the provincial department. The basis for this argument is perhaps better understood when one considers the Provincial Director's explanation as to why the MEC has not invoked section 91 of the Transport Act. He says the following in this regard;

"The MEC has not utilized the extraordinary measures provided for in section 91 to date as the department does not consider the circumstances to justify the implementation of those extraordinary measures. This does not mean that it may not be used in the future should all other intervention measures and the co-ordinated efforts of the SAPS and other law enforcement and intelligence agencies do not curb the problem and there is a further escalation that meets the requirements in section 91. Section 91 is not a "silver bullet" that will suddenly resolve the issues as the measures provided therein are extraordinary and will impact multiple parties on multiple levels. If deemed necessary by all stakeholders, however, it will be implemented."

[44] This approach, which appears to be endorsed by the current MEC, evinces a fundamental misunderstanding of the MEC's powers. Section 91 states unambiguously that it is the MEC who must take the decision whether or not it is necessary to intervene if instability in the sector has deteriorated to an unacceptable level. At another level it evokes the more troubling inference, namely that the current MEC is also of the view that intervention can only be at the behest of the taxi associations and on their terms.

[45] The respondents also contended that the use of the word 'may' in sections 91 (1) and 91 (9) of the Transport Act means that the MEC and the Minister have a discretion whether or not to intervene. It is, however, established law that the use of the word 'may' in statutes does not imply that under circumstances where there is a positive duty on the functionary to exercise the power, he or she still has a discretion to refuse to do so. In *Premier, Gauteng, and others v Democratic Alliance and Others* 2022 (1) SA 16 (CC) the Constitutional Court held that:

"The framers of the constitution used the word 'may' in section 139 (1) to not merely confer a discretion, but a power coupled with a duty. The provincial government has a constitutional duty to intervene where a municipality cannot, or does not, fulfil its executive obligations. The purpose of the intervention is to enable the relevant provincial executive, in limited circumstances, to ensure the fulfilment of the executive obligation that the municipality could not or did not fulfil. In this constitutional scheme the provincial executive is fully entitled, if not obliged, to do what is necessary to ensure the fulfilment of executive obligations."

[46] In *Agri Eastern Cape and Others v MEC, Department of Roads and Public Works and Others* 2017 SA 383 (ECG), at para. 33, this court also interpreted the word 'may' in the applicable statute to denote a positive obligation on the relevant authorities to maintain provincial roads. In construing the applicable legislation, Roberson J said that: "[w]hen one considers some of the consequences of the failure to repair and maintain roads illustrated in the applicant's affidavit, fundamental rights basic education access health care are indirectly affected."

[47] I am therefore of the view that in appropriate circumstances, section 91 imposes a duty on the MEC to implement reasonable and effective intervention measures. In addition, the fact that the Minister is given the power under section 91 (9) to exercise the powers conferred on the MEC under sections 91 (1) to 91 (8), makes it clear that the MEC's powers must be exercised if circumstances so require. The corresponding duty imposed on the Minister is reinforced by section 5 (6) of the Transport Act, which empowers the Minister, in certain circumstances, to take the appropriate steps to ensure the fulfilment of the executive obligations by the province.

[48] I am of the view that the evidence clearly establishes that the MEC has failed to intervene in the current crisis in any meaningful way. Insofar as the Minister is concerned, the sum total of his contended intervention was to attend a single meeting in the Eastern Cape on 11 October 2019 where a task team was formed to engage stakeholders and report back to him. However, it was conceded in the answering affidavit that this intervention failed to yield a resolution and nothing of consequence has transpired subsequently.

### **The relief**

[49] Ms *Hofmeyr* has submitted that since it is clear that both the Minister and the MEC have fundamentally misconstrued their legal obligations in the face of the current crisis, it is important for this court to declare their legal obligations so as to guide future conduct. In support of this submission she referred to *Rail Commuters Action Group* (supra), at para 107, where the Constitutional Court recognised the unique role that declaratory orders can play in assisting 'in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values'.

[50] She submitted that the evidence establishes that the MEC and the Minister failed to fulfil their constitutional and statutory obligations under the Transport Act 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. Section 172 (1) (a) of the Constitution requires that conduct of this type must be declared inconsistent with the constitution. The applicant is thus requiring the court to exercise its just and equitable jurisdiction under section 172 (1) (b) of the constitution.

[51] The Constitutional Court has held that structural remedies are appropriate when the proper vindication of rights requires the court to play a supervisory role. They are of value because they enable 'courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed.' (*Rail Commuters Action Group* (supra), at para. 108).

[52] Ms *Hofmeyr* has advanced three reasons why a structural remedy should be granted in this case, namely;

- (a) It is common cause that Intercape's, its employees' and its passengers' fundamental rights have been infringed on an ongoing basis as a result of the intimidation and violence being perpetrated by elements of the taxi industry.
- (b) The facts of this case show that, unless the Minister and the MEC are directed to develop an action plan and to be pro-active in ensuring coordination between the various stakeholders, nothing will be done.
- (c) In the face of functionaries' complete failure to discharge their legal obligations, it is appropriate that they must be directed to develop the plan that is urgently needed, and to report to the court so that its adequacy can be assessed.

[53] The Director-General and the Provincial Director resisted the relief on two grounds. First, while conceding that there is an ongoing breach of Intercape's, its employees' and passengers' fundamental rights, they denied that such a breach was as a consequence of the provincial department's conduct or that the department has failed to fulfil its obligations towards Intercape. However, the relief sought is not against the department but rather based on the fact that the Minister and the MEC have persistently and unjustifiably breached their legal duties to intervene in the current crisis. They have also consistently failed to respond to various requests for intervention from Intercape. And it is manifest that nothing will happen if they are not compelled to comply with their constitutional and statutory obligations under court supervision.

[54] Second, they contend that the granting of structural relief will breach the constitutional imperative of separation of powers. This contention is also unsustainable. The relief sought by the applicant will do no more than to compel the Minister and the MEC to do what they are required to in terms of the Constitution and the Transport Act. The action plan that they will be required to present will be theirs and will be based on their own reasonable assessment of their resources and the exigencies of the prevailing circumstances.

[55] The Constitutional Court in *Rail Commuters Action Group* (supra), at para. 88, provided the following guidelines regarding what would constitute reasonable measures that must be taken by an organ of state:

“What constitutes reasonable measures will depend on circumstances of each case. Factors that would ordinarily be relevant would include the nature of the duty, the social and economic circumstances in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to core activities of the duty bearer – the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is threat to fundamental rights, the greater is the responsibility on the duty-bearer. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation.”

[56] In *Wildlife Society Of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa* [1996] 3 All SA 462 (Tk), the applicant applied for an order compelling the Minister to enforce the provisions of section 39(2) of Transkei Decree No 9 (Environmental Conservation), to stop the illegal allocation of land along the Wild Coast. Lamenting the ‘kid glove’ approach adopted by the Minister in the face of blatantly unlawful conduct, Pickering J said that:

'In these circumstances, where political support for legal action had to be first determined and where persons illegally allocating sites, sometimes in return for little more than a bottle of brandy, were to be requested to stop doing so, Applicant's averred sense of frustration at the lack of concrete action in terms of section 39 of the Decree becomes almost palpable. The overwhelming sense to be gained from a reading of the minutes of the Task Group is that of the slow and inexorable grinding of wheels across a bureaucratic landscape regardless of the urgency of the situation'.

Alas, in this case it is manifest that the 'grinding of the wheels' will not even begin unless the MEC and the Minister are enjoined by this court to comply with their constitutional and statutory obligations.

[57] Ms *Hofmeyr* has also submitted that this court must show its displeasure at the conduct of the Minister and the MEC in failing to file answering or confirmatory affidavits. 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. Finally, it would be remiss of me not to commend Mr Ferreira for his resolute resistance to unabashed official bullying. His company has paid dearly for this brave stance, but hopefully this judgment will also serve to vindicate his belief that it was the right thing to do.

[58] I was therefore of the view that the applicant had made out a case for the relief sought in the notice of motion as well as for costs to be awarded on the attorney and client scale.

  
J.E. SMITH  
JUDGE OF THE HIGH COURT

**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. GJ Gajjar  
: The State Attorneys  
: Whitesides Attorneys  
53 African Street  
MAKHANDA