IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – MAKHANDA)

CASE NO.:2099/2022

Matter heard on: 14 December 2022

Judgment delivered on: 10 January 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 SERVICE	**Third Respondent**
NATIONAL COMMISSIONER, SOUTH AFRICAN POLICE SERVICE	**Fourth Respondent**
THE NATIONAL PUBLIC TRANSPORT REGULATOR	**Fifth Respondent**
THE EASTERN CAPE PROVINCIAL	**Sixth Respondent**

REGULATORY ENTITY

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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Signature **Date**

JUDGMENT: LEAVE TO APPEAL

SMITH J:

[1] The second respondent (the Minister), applies for leave to appeal against paragraphs 2, 3 and 5 of my order delivered on 30 September 2022, and in respect of which reasons were provided on 7 October 2022. He applies for leave to appeal only insofar as those orders relate to him.

[2] In terms of the order I have, *inter alia*, declared that the first respondent (the MEC) and the Minister are required 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 declared that they have failed in their statutory and constitutional obligations to cooperate with the South African Police Services and to coordinate their efforts with them.

[3] I furthermore directed the MEC and the Minister, in consultation with others, to develop an action plan on the steps they intend taking to ensure that appropriate measures are put in place to provide for the safety and security of long-distance bus drivers and passengers, and to present the action plan to the Court, on oath, together

with an indication of the time periods within which steps outlined in the action plan will be taken.

[4] The Minister seeks to appeal against those paragraphs on two grounds, namely that: (a) the Court erred in requiring him and the MEC to act jointly in circumstances where the National Transport Act, 5 of 2009 (the Transport Act) does not allow them to do so; and (b) the obligations imposed by the declaratory relief are stated in 'overbroad terms which are not tethered to the language of the Transport Act itself' and therefore requires of the Minister to exercise statutory powers in a manner not provided for in the Act.

[5] Notwithstanding the Minister's application for leave to appeal, the MEC has prepared the draft action plan within the prescribed time periods and has agreed to continue with the implementation thereof pending the outcome of the Minister's application for leave to appeal and any appeal for which leave may be granted.

[6] The Minister's refusal to participate in the preparation of the action plan pending the outcome of his application for leave to appeal compelled the applicant in the main application (Intercape) to bring an application in terms of section 18 of the Superior Courts Act, 10 of 2013 (the Superior Courts Act) for an order directing the operation and execution of the order pending any appeal or application for leave to appeal (the section 18 order). The Minister, while initially opposing the application, subsequently capitulated and agreed to the order. I consequently granted the section 18 order prior to the hearing of the application for leave to appeal on 14 December 2022. The fact that the order was granted by agreement between the parties has certain implications for the Minister's application for leave to appeal. I shall revert to this issue later.

[7] In terms of section 17 (1) of the Superior Courts Act, the Minister was required to convince the Court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration, and that the issues are not of such a nature that the decision sought will have no practical effect.

[8] In respect of the first ground, the Minister contends that sections 5 (6) and 91 (9) of the Transport Act allows him to intervene only when the MEC has failed to take appropriate steps to exercise his or her powers in terms of the Act. He asserts that he

is only allowed to act in the MEC's place and stead after consulting with the latter. The Transport Act does not confer any powers on him and the MEC to act collectively or jointly. The Court consequently erred in requiring him and the MEC to act collectively or jointly in circumstances where the Transport Act does not confer such powers on either of them, or so the argument went.

[9] Ms *Hofmeyr*, who appeared for Intercape, submitted that, on a reasonable construction, the order does not require the Minister and the MEC to exercise any powers under the Transport Act collectively or jointly. The declaratory relief simply provides that both of them have the 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 passengers and drivers in the Eastern Cape, and that those measures 'may include' the exercise of the relevant provisions of the Transport Act. The order does therefore not compel the Minister or the MEC to exercise any particular powers under the Transport Act, nor does it require that they must do so collectively or jointly. On the contrary, the order makes it clear that sections 85, 86 and 91 of the Transport Act are but some of the measures that they may implement in giving effect to the overarching duty to ensure the safety and security of long-distance bus drivers and passengers in the Eastern Cape.

[10] I agree with this submission. It is established law that court orders must be construed in the context of the reasons provided in the judgment. In *International (South Africa) v MWRK Accountants and Consultants* (113/2017) [2022] ZA(12 April 2022), at paragraph 26, the Supreme Court of Appeal held that court orders must be interpreted together with the reasons provided in the judgment, and that both the reasons and the order must be read as a whole to ascertain the court's intention. (See also *Eke v Parsons* 2016 (3) SA 37, at para 29 (CC))

[11] When the impugned paragraphs are construed in accordance with those prescripts, it is clear that there is nothing in the language of the order that suggests that the Minister and the MEC must act jointly in invoking powers provided for in terms of the Transport Act or to exercise their respective powers under the Act in a manner not sanctioned by it. The order does therefore not require them to exercise their

powers collectively or jointly, but only enjoins them individually to consider exercising such powers in terms of the Act, and if circumstances so demand.

[12] I must say, however, that the Minister's resistance to cooperation with the provincial authorities is rather surprising, particularly having regard to the fact that our constitutional dispensation is founded upon the principle of cooperative governance. Nevertheless, while the Minister and MEC must individually decide whether circumstances exist which require them to invoke powers vested in them by the above-mentioned sections, there is nothing in the Transport Act that prohibits them from acting jointly to facilitate the efficacious implementation of any measures to achieve the objectives of the Act, in this case being the preparation and implementation of an action plan. By way of example, the Minister may be able to provide necessary resources for the implementation of the action plan in terms of his powers under section 29 of the Transport Act, which empowers him to provide funds necessary to give effect to policy or to achieve the objectives of the Act.

[13] And having regard to the Minister's opposing affidavit in the main application, it is manifest that he was of the same view. He had declared himself willing, 'upon receipt of an invitation, to discuss, deliberate and add to the Department's voice in support of such plan of action which may be needed to be formulated to address not only the applicant's concerns but also the concerns of all those impacted in the sector by the acts of criminality and violence by competing operators in the sector'. He also drew attention to assistance that he provided to the Western Cape MEC of Transport in dealing with the dispute, and declared that the national government is willing 'to reinforce the efforts of the province and ensure an intergovernmental, multidisciplinary and targeted approach to safety, which is the only way to restore law and order in the taxi industry'.

[14] In respect of the second ground of appeal, the Minister contends that the wording of paragraphs 2.1 and 2.2 of the order 'is overbroad and not tethered to the language of the Transport Act'. In respect of paragraph 2.1, he says that the obligations imposed by the declaratory order are 'stated in general and overbroad terms which are not tethered to the language of the Transport Act itself' and thus require him to act in a manner in respect of which no powers have been conferred on him. And in respect of paragraph 2.2 of the order, he contends that the Court has erred in using the phrase

'such measures may include, but not necessarily be limited to', resulting in the obligations imposed by the declaratory order being stated in overbroad terms.

[15] In my view there are no reasonable prospects of another court upholding these contentions. Ms *Hofmeyr* has correctly argued that the order flows directly from the recognition in the judgment that the Minister has statutory and constitutional obligations 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 their passengers. In this regard the judgment followed the approach adopted in various Constitutional Court decisions. She referred in particular to the fact that the judgment makes it clear that the relief sought by the applicant will do no more than compel the Minister and the MEC to do what they are required to do under the Constitution and the Transport Act. Moreover, the applicant did not only rely on the obligations imposed by the Transport Act but also those imposed on the Minister directly under the Constitution and the Bill of Rights.

[16] In the event, Intercape's contention that the Minister's capitulation in the section 18 application renders the appeal moot, is compelling. Ms *Hofmeyr* argued that even if the appeal were to succeed, it would have no practical effect or result and would fall to be dismissed on this ground alone in terms of section 16 (2) (*a*) (*i*) of the Superior Courts Act. The granting of the section 18 order means that the Minister is now compelled to participate in the formulation and implementation of the action plan, with all the coordination and cooperation required for its successful implementation. The formulation of the plan is already at an advanced stage and its finalisation and implementation are imminent. Thus, by the time the appeal will be heard, the action plan would have been finalised and probably substantially implemented. The appeal will therefore have no practical effect or result in that the Minister would already have acted in accordance with those parts of the order that he wishes to challenge on appeal. There are also no other compelling reasons why leave should nevertheless be granted, as contemplated in terms of section 17 (1) (*a*) (*ii*) of the Superior Courts Act.

[17] I am accordingly of the view that the appeal has no reasonable prospects of success. The application for leave to appeal is accordingly dismissed with costs, including the costs of two counsel.

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JE 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 Second Respondent	:	Adv. GJ Gajjar
	:	The State Attorneys
	:	Whitesides Attorneys
		53 African Street
		MAKHANDA