



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

Case No.: 1013/2023
Date Heard: 20 September 2023
Date Delivered: 6 February 2024

In the matter between:

INTERCAPE FERREIRA MAINLINER (PTY) LTD

Applicant

and

MINISTER OF POLICE

First Respondent

**NATIONAL COMMISSIONER,
SOUTH AFRICAN POLICE SERVICE**

Second Respondent

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

Third Respondent

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

Fourth Respondent

**PROVINCIAL COMMISSIONER, KWA-ZULU NATAL,
SOUTH AFRICAN POLICE SERVICE**

Fifth Respondent

**PROVINCIAL COMMISSIONER, GAUTENG,
SOUTH AFRICAN POLICE SERVICE**

Sixth Respondent

**PROVINCIAL COMMISSIONER, NORTH-WEST,
SOUTH AFRICAN POLICE SERVICE**

Seventh Respondent

**NATIONAL HEAD OF THE DIRECTORATE FOR
PRIORITY CRIME INVESTIGATION**

Eighth Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Ninth Respondent

HEAD OF THE INVESTIGATING DIRECTORATE

Tenth Respondent

JUDGMENT

RONAASEN AJ:**Introduction****General**

[1] The following words are attributed to the late Robert Kennedy, a former attorney-general of the United States of America:

“We know that we cannot live together without rules which tell us what is right and what is wrong, what is permitted and what is prohibited. We know that it is law which enables men to live together, that creates order out of chaos. We know that law is the glue that holds civilization together.”

[2] The intention of our Constitution is surely that it is designed to be the legal “glue” which is required to hold a functioning society together. If, however, its imperatives and laws enacted to give effect to those imperatives are not adhered to, are not applied, or are simply ignored, society, which is meant to function for the benefit of all its members, becomes unstuck.

[3] Central to this opposed application are the constitutional obligations imposed on the South African Police Service ("the Police") in terms of section 205(3) of the Constitution, to the following effect:

"The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[4] The essential issues to be determined are whether, on the facts before me,

4.1. the Police have lived up to their constitutional obligations; and

4.2. if not, the relief I should grant to ensure that they do.

The parties to this application

[5] The applicant is Intercape Ferreira Mainliner (Pty) Ltd. It describes itself as one of the country's foremost long-distance bus operators ("Intercape").

[6] The first respondent is the national Minister of Police ("the Minister").

[7] The second to the seventh respondents are the national and provincial commissioners of the South African Police Service for the provinces of the Eastern Cape, the Western, KwaZulu-Natal, Gauteng and the North West, respectively ("the Commissioners").

[8] The eighth respondent is the national head of the Directorate for Priority Crime Investigation ("DPCI").

[9] The ninth respondent is the National Director of Public Prosecutions.

[10] The tenth respondent is the head of the investigating directorate of the ninth respondent.

[11] All respondents opposed the application. No relief is sought by Intercap against the ninth and tenth respondents and Intercap, at the hearing of the application, confirmed that it was not seeking relief against these respondents and advised, if successful, that it would not seek costs from them.

Brief summary of the facts underlying the application and the relief sought by Intercap

[12] I shall, below, in greater detail deal with the facts relied upon by Intercap to support its application and the respondents' response.

[13] Intercap contends that for several years, during the conduct of its operations, it has been subjected to widespread, ongoing and well-documented acts of intimidation and violence at the hands of the taxi industry.

[14] The alleged acts of violence and intimidation are numerous and severe. During 2022 Intercap's buses were shot at 23 times. On one of these occasions a bus driver was fatally wounded. In the early part of 2023, prior to the launching of this application, further shootings occurred with some of Intercap's passengers having been wounded and hospitalised as a result of gunfire directed at the buses. The buses have also been targeted by rock-throwing.

[15] The acts of violence and intimidation experienced by Intercape and its passengers are not random. The ongoing criminality, so Intercape submits, is part of an organised scheme by taxi operators who have demanded that Intercape and other long-distance bus operators adapt their prices, limit the number of buses operating on particular routes, amend their timetables to ensure that all buses depart Eastern Cape towns prior to noon every day and cease operations entirely in certain towns.

[16] The apparent aim of the countrywide orchestrated attacks on buses is to drive long-distance bus operators out of certain parts of South Africa, thereby enabling taxi operators to monopolise transport routes in those areas. This, as Intercape contends, clearly establishes a pattern of racketeering activity and constitutes organised crime as statutorily contemplated.

[17] At the time when this application was launched Intercape had lodged 165 criminal complaints with the Police in respect of acts of violence and intimidation allegedly perpetrated against its drivers, passengers and buses. Despite this not a single person is under arrest for these offences and no prosecutions are imminent or pending.

[18] Intercape says it was constrained to bring this application out of desperation after a year of engagement with the respondents had proved fruitless. The application is a final attempt to get the police to take Intercape's complaint seriously so that further acts of criminality against members of the public who rely on Intercape's services may be prevented.

[19] Thus, Intercape seeks orders declaring that in respect of the 165 offences reported by it at the time of the launching of this application:

- 19.1. the Police have failed to comply with their duties in terms of section 205 (3) of the Constitution, particularly in their duties to investigate and prevent the offences;
- 19.2. the provincial Commissioners have failed in their statutory obligations to report the offences to the DPCI as instances of organised crime, as required by section 16(4)(b) of the South African Police Service Act, 68 of 1995 ("the SAPS Act"); and
- 19.3. the DPCI has failed investigate and prevent the crimes as instances of national priority offences, as required by section 17D(1)(a) of the SAPS Act.

[20] Intercape, furthermore, asks for mandatory relief requiring the Police, the Commissioners and the DPCI to investigate the alleged offences and thereafter to prepare reports on the findings of the investigations to be shared with the ninth respondent, this court and Intercape.

Related litigation

[21] In *Intercape Ferreira Mainliner (Pty) Ltd v The MEC for Transport, Eastern Cape and Five Others*, a judgment of this court in case number 2099/2022, Smith J, on 30 September 2022, granted an order at the instance of Intercape declaring the MEC for Transport, Eastern Cape and the Minister of Transport to be obligated to take positive steps to ensure that reasonable and effective measures were put in place to provide for the safety and security of long-distance bus drivers and passengers in the Eastern Cape Province and that they had failed to comply with this obligation. Smith J also granted

consequential structural relief in terms of section 172(1) of the Constitution in terms of which the MEC and the Minister were directed to take steps to comply with their obligation.

[22] The provincial commissioner of the Police in the Eastern Cape Province and the national commissioner were cited as the third and fourth respondents, respectively, in case number 2099/2022. Although the relief granted was principally directed at the transport authorities, those authorities were directed to pursue their obligations in terms of the order of this court in conjunction with the Police.

[23] Smith J furnished reasons for the order on 7 October 2022 in which he confirmed that:

- 23.1. since 2015 Intercap had been the victim of widespread and ongoing acts of violence and intimidation throughout the country orchestrated by the taxi industry;
- 23.2. during this time Intercap had lodged more than 150 criminal cases with the Police, 70 of which related to acts of violence and intimidation perpetrated in the Eastern Cape Province;
- 23.3. it was not disputed by the parties to the application that the violence was not random, but part of a deliberate strategy on the part of certain taxi associations. The violence was aimed at intimidating and coercing Intercap into agreeing to the unlawful demands of those taxi associations, which included the demands that Intercap reduce its prices and the number of buses operating on various routes and had to pay levies to the taxi associations to operate in certain areas;

23.4. Intercape's refusal to accede to these unlawful demands led to further and increased acts of violence directed at the buses, drivers and passengers, which included the death of a driver. The instigators of the violence succeeded in establishing "no-go zones", making it possible for Intercape to continue operating in certain areas in the Eastern Cape Province.

[24] In view of the alleged failure by the transport authorities to submit an adequate action plan to address the ongoing violence and intimidation against Intercape buses as envisaged in the order of Smith J in case number 2099/2022, Intercape, on 13 June 2023, under the same case number, approached Smith J for a rule *nisi* in terms of which:

- 24.1. the MEC and Minister for Transport were required to prepare a revised action plan that would meet the objectives of Smith J's initial order;
- 24.2. specific issues, raised by Intercape, would be incorporated in the plan;
- 24.3. interim relief was sought against the Police in terms of which the Police were directed to implement the existing action plan by maintaining a visible police presence in "hotspot" areas and providing police escorts along certain routes when requested to do so by Intercape.

[25] After hearing argument Smith J granted Intercape a rule *nisi*, which included the interim interdict sought against the Police. The rule was made final on 22 August 2023.

[26] In his second judgment Smith J emphasised that his earlier order had been premised on unrefuted evidence of a protracted and sustained campaign of violence against

Intercape undertaken by rogue taxi associations and which had placed the lives of Intercape Bus drivers and passengers at risk. See *Intercape Ferreira Mainliner (Pty) Ltd v The MEC for Transport, Eastern Cape and Five Others* [2023] ZAECKMKHC 91 (22 August 2023) at [2].

Consideration of the facts relied on by Intercape to support its application

General

[27] The factual background against which I must determine this application is largely identical to the factual background which confronted Smith J in respect of the two judgments authored by him.

[28] Intercape's case is based on unrefuted evidence of an ongoing campaign of violence and intimidation committed against its passengers, bus drivers and buses at the instigation of the taxi industry. The conduct described is not confined to a specific area but occurs countrywide. The principal issue in dispute between the parties, particularly between Intercape and the Police respondents, is rather the adequacy of the Police's response to Intercape's complaints and whether the Police have met their constitutional obligations in their response to Intercape's litany of well-documented examples of the violence and intimidation.

Intercape's engagement with the taxi industry

[29] The orchestrated nature of the taxi industry's campaign against long-distance bus operators is illustrated by Intercape's fruitless attempts to engage with representatives of the taxi industry.

[30] The outcome of a series of negotiations involving Intercape and various representatives of the taxi industry, during March and April 2022 can be summarised as follows:

30.1. rather than the engagements serving as a platform to resolve differences, they were utilised by the representatives of the taxi industry to threaten long-distance bus operators, including Intercape, with ongoing violence unless the operators acceded to certain demands;

30.2. the demands made of the long-distance bus operators to resolve issues, namely, to stop the violence, can only be described as extortionate and included:

30.2.1. an immediate increase in their prices in accordance with the pricing structure determined by the taxi associations;

30.2.2. an amendment of the departure timetables to ensure that all buses departed towns in the Eastern Cape before noon, daily;

30.2.3. a restriction requiring each operator to operate only two buses per day throughout the Eastern Cape;

30.2.4. the maintenance of a single price throughout the year with no price fluctuations in accordance with demand;

30.2.5. restrictions in terms of which bus operators were not allowed to stop in various towns; and

30.2.6. the payment by Intercape of the sum of R5 million to two taxi associations to ensure its continued operations in the Western Cape.

[31] It became apparent during the engagements that the representatives of the taxi industry, who were clearly attempting to extort compliance from long-distance bus operators. were acting on behalf of an organised movement intent on putting the long-distance bus operators out of business.

[32] The timing of attacks on Intercape's buses coincided with its engagements with the taxi industry which gave an indication that the industry was using the violence in an endeavour to intimidate Intercape to secure compliance with its extortionate demands.

Intercape's engagements with the Police

[33] In its founding affidavit Intercape, in great detail, sets out particulars of five requests made to the Police for their urgent investigation of its complaints. Despite Intercape's assistance, by providing the Police with extensive concrete evidence of acts of intimidation and violence Intercape's engagements with the Police bore no fruit.

[34] In respect of the 165 cases opened by Intercape with the Police, no significant investigations have occurred, no-one is under arrest and no prosecutions have ensued.

[35] There were some effective interventions by the Police in the form of protective measures, patrols and the escorting of buses. These interventions have, however proved to be wholly deficient, in isolation. At best, according to Intercape, they served to mitigate some of the symptoms of the campaign of organised crime pursued by the taxi industry against long-distance bus operators, but they did nothing to remedy or

address the underlying cause of the ongoing intimidation and violence. In any event the Police did not persist with the interventions.

[36] Despite Interscape having furnished the Police with an extensive amount of evidence and having throughout made itself available to assist the Police with their investigations and despite the Police's assurance that Interscape's complaints would be investigated no meaningful investigation has occurred.

[37] Of particular concern is the failure by the Commissioners to refer any investigations to the DPCI as matters of organised crime which requires investigation at a national level, utilising the specialised skills of that body. In so doing the Commissioners have acted in breach of their obligations in terms of section 16(4)(b) of the SAPS Act.

Interscape's engagement with the DPCI

[38] Interscape contends that the criminal conduct underlying the violence and intimidation against its operations constitute organised crime and falls within the definition of a "*pattern of racketeering activities*" as defined in section 1 of the Prevention of Organised Crime Act, 121 of 1998 ("POCA") read with Schedule 1 of POCA.

[39] The further contention is that the DPCI's involvement in the investigation is therefore required, as:

39.1. the pattern of racketeering activity bears the characteristics of serious organised crime on a national scale; and

39.2. the DPCI is best equipped to deal with offences on this extensive scale, as this is its speciality and, furthermore, its statutory obligation in terms of sections 17B and 17D of the SAPS Act. This Act also empowers the DPCI to utilise a multi-disciplinary approach involving the cooperation of relevant government departments and institutions.

[40] Startlingly Intercap's three motivated written requests for it to become involved, were ignored by the DPCI. It would later transpire that DPCI's command structure was unaware of Intercap's requests.

Intercap's engagement with the National Prosecuting Authority ("the NPA")

[41] The only really positive result of Intercap's engagement with the NPA was an acknowledgement by its functionaries that the issue concerned organised crime, which required investigation at a national level.

[42] During the process of its engagement with the NPA, Intercap came to the shocking realisation (confirmed by the provincial heads of the DPCI in the Eastern Cape, Western Cape and Gauteng) that the DPCI was completely unaware of the issue facing long-distance bus operators and in particular Intercap. This despite Intercap's written entreaties, on three occasions, to the DPCI.

[43] Of the 165 cases opened by Intercap with the Police only a tiny fraction have received the attention of the NPA and no prosecutions were underway at the time of the launching of this application. More disquieting was the fact that it was apparent that

the Police had been trying to investigate and the NPA had been trying to prosecute Intercape's complaints as individual stone-throwing cases and not as part of the campaign of organised crime levelled against Intercape by the taxi industry - something Intercape was at pains to make clear all along with reference to relevant statutory provisions and offences created in terms of those provisions.

[44] Thus, the seemingly positive response received by Intercape from the NPA at a national and local level, in fact, did not translate into any positive action either nationally or locally.

[45] As matters stood, at the time of the launching of this application, it therefore remained uncertain whether there would be any coordination of the investigative and prosecutorial processes in respect of the offences reported by Intercape to the Police, at a national level.

Overview of the Police respondents' response

General

[46] The Police's response must be viewed against the background of their acceptance in their principal opposing affidavit that:

46.1. Intercape brought its application under case number 2099/2022 in this court (referred to above) in view of the ongoing violence being perpetrated against it and its passengers;

- 46.2. this court in case number 2099/2022 accepted the uncontested version of Intercape that there was a deliberate strategy on the part of certain taxi organisations to intimidate and coerce the applicant into agreeing to their unlawful demands regarding the fixing of the prices the payment of “levies”;
- 46.3. their vision is to create a safe and secure environment for all people in South Africa; and
- 46.4. their mission is to prevent anything that may threaten the safety and security of the citizens of any community and that this includes an obligation to investigate any crimes that threaten the safety and security all any such community and to ensure that criminals are brought to justice. They accept that they are required to participate in the process of addressing the root causes of crime.

Points in limine

[47] Although the Police respondents raised a number of points *in limine*, only two still require consideration (both of which I shall address later) namely:

- 47.1. the contention that this court lacks jurisdiction in respect of the fourth-seventh respondents;
- 47.2. the existence of certain disputes of fact as to the extent to which the Police had investigated Intercape’s complaints, which precluded Intercape from commencing these proceedings by way of a notice of motion.

Response on the merits of Intercape's application

[48] Essentially the Police contend that, subject to constraints beyond their control, they are complying with the constitutional imperatives imposed on them by section 205 of the Constitution. Any failure to do so can principally be attributed to a lack of resources.

[49] Their response can be summarised, as follows:

- 49.1. their acceptance of the situation, detailed in paragraphs 46.1 and 46.2, above;
- 49.2. the contention that Intercape is not entitled to priority policing, to the exclusion of other deserving parties;
- 49.3. the fact that the Police are constrained by a lack of resources;
- 49.4. the assertion, supported by a table of examples, that incidents of crime reported by Intercape are being investigated, but as individual crimes and not as forming part of an overall strategy of organised crime involving an orchestrated campaign of intimidation against Intercape by the taxi industry;
- 49.5. the contention that, therefore, the incidents of crime reported by Intercape do not fall within the purview of the DPCI.

[50] It is important to note that the Police respondents' opposing affidavits were deposed to prior to the second of Smith J's judgments under case number 2099/2022, referred to above, in terms of which the Police were ordered to implement his earlier order (action

plan) which had been premised on unrefuted evidence of a protracted and sustained campaign of violence against Intercape undertaken by rogue taxi associations and which had placed the lives of Intercape bus drivers and passengers at risk. Their opposing affidavit must accordingly be read bearing this in mind.

Legal principles

Jurisdiction

[51] The *causae continentia* rule is to the effect that where a cause of action arises across territories, a court will have jurisdiction in respect of the entire matter if it has jurisdiction over some parties to that cause of action. The essence of the rule is one of convenience - where an issue can be determined and disposed of before one judge it should not serve before multiple judges in various jurisdictions. *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* 1962 (4) SA 326 (A) at 332-333.

[52] It is not contended by any of the respondents that any other division of this court has jurisdiction over all the parties to this application on the basis of any other recognised ground of jurisdiction. See *D Pistorius* – Pollak on Jurisdiction, 2nd edition at p 26.

[53] This rule is intended to avoid the uncertainty which could arise from a multiplicity of judgments and is no doubt what the legislator had in mind when framing the provisions of section 21(2) of the Superior Courts Act, 10 of 2013, in the following terms:

“A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause of action in relation to which such court has jurisdiction

or who in terms of a third party notice became a party to such cause, if the said person resides or is within the area of jurisdiction of any other Division.”

General duty on Police to investigate crimes reported to them

[54] In confirming the Police’s constitutional obligation to investigate crimes reported to them, the Constitutional Court in *AK v Minister of Police* 2023 (1) SA 321 (CC) at [91] adopted the following general principles gleaned from the jurisprudence of the European Court of Human Rights:

“The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident including, inter-alia, eyewitness testimony and forensic evidence. A requirement of promptness and reasonable expedition is implicit in this context. Any deficiency in the investigation which undermines the capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness.”

[55] This judgment sets the standard against which the duty of the Police to investigate crime must be measured and, in particular, emphasises that:

- 55.1. a proper investigation requires the Police to follow up on all reasonable leads (at [84]);
- 55.2. the victim of a crime has no obligation to investigate the crime itself, as this would relieve the Police of a responsibility that is theirs only (at [85]).

[56] The Constitutional Court, in *AK*, at [95] then went on to describe the obligation of the South African Police Service's duty to investigate crime, as follows:

"The police are under a duty to act promptly and expeditiously, and they must furthermore take all reasonable measures which are available to them in the circumstances. It is not sufficient that they mobilise resources at hand, they must also deploy those resources diligently and effectively. They must act with haste. They must take appropriate steps to secure the available evidence, including eyewitness accounts, potential leads and suspects and they must subject all relevant evidence to forensic analysis. They must never act in a cavalier manner or display indifference to the plight of women in the position of the applicant."

Salient provisions of POCA and the SAPS Act

[57] In POCA a pattern of racketeering activities defined as meaning the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 of that Act.

[58] Section 16 of the SAPS Act is found in chapter 6 of that Act, which deals with organised crime, and reads like this:

"16 National prevention and investigation of crime

- (1) Circumstances amounting to criminal conduct or an endeavour thereto, as set out in subsection (2), shall be regarded as organised crime, crime which requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof.
- (2) Circumstances contemplated in subsection (1) comprise criminal conduct or endeavour thereto-

- (a) by a person, group of persons or syndicate acting in-
 - (i) an organised fashion; or
 - (ii) a manner which could result in substantial financial gain for the person, group of persons or syndicate involved.
- (b)
 - (i) by a person or persons in positions of trust and making use of specialised or exclusive knowledge;
 - (ii) in respect of the revenue or expenditure of the national government; or
 - (iii) in respect of the national economy or the integrity of currencies;
- (c) which takes on such proportions or is of such a nature that the prevention or investigation thereof at national level would be in the national interest;
- (d) in respect of unwrought precious metals or unpolished diamonds;
- (e) in respect of the hunting, importation, exportation, possession, buying and selling of endangered species or any products thereof as may be prescribed;
- (f) in more than one province or outside the borders of the Republic by the same perpetrator or perpetrators, and in respect of which the prevention or investigation at national level would be in the national interest;
- (g) in respect of which the prevention or investigation requires the application of specialised skills and where expedience requires that it be prevented or investigated at national level;
- (h) which a Provincial Commissioner requests the National Head of the Directorate for Priority Crime Investigation, referred to in section 17C (2), to prevent or investigate by employing expertise and making resources available at national level and to which request the National Head of the Directorate for Priority Crime Investigation accedes in accordance with the approved policy guidelines;
- (i) in respect of which the investigation in the Republic by the Service is requested by an international police agency or the police of a foreign country;

- (iA) in respect of the commission of any alleged offence mentioned in the Schedule;
or
 - (j) in respect of which the prevention or investigation by members under the command of a Provincial Commissioner will detrimentally affect or hamper the prevention or investigation of circumstances referred to in paragraphs (a) to (iA).
- (2A) For the purpose of subparagraph (a) (i), '**organised fashion**' includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics.
- (3) In the event of a dispute between the National Head of the Directorate for Priority Crime Investigation and the National Commissioner or the National Head for Priority Crime Investigation and a Provincial Commissioner regarding the question whether criminal conduct or endeavour thereto falls within the mandate of the Directorate, the determination by the National Head of the Directorate for Priority Crime Investigation in accordance with the approved policy guidelines, shall prevail.
- (4) (a) Notwithstanding the provisions of subsections (1), (2) and (3), the Provincial Commissioner shall be responsible for the prevention and investigation of all crimes or alleged crimes committed in the province concerned.
- (b) Where an investigation of a crime or alleged crime reveals that the circumstances referred to in subsection (2) are present, the Provincial Commissioner shall report the matter to the National Head of the Directorate for Priority Crime Investigation as soon as possible.
- (c) The National Head of the Directorate for Priority Crime Investigation may, after consultation with the Provincial Commissioner concerned, notwithstanding the presence of the circumstances referred to in subsection (2), direct that the investigation or any part thereof, be conducted by the Provincial Commissioner.

- (5) All members of the Service shall cooperate with one another in accordance with the principles provided for in Chapter 3 of the Constitution of the Republic of South Africa, 1996.”

[59] Section 17B of the SAPS Act recognises the need to establish a Directorate to prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption. That directorate is the DPCI.

[60] Section 17D(1) of the SAPS Act goes on to provide that the functions of the DPCI are to prevent, combat and investigate such national priority offences which are in the opinion of the national head of the directorate necessary to be addressed by the DPCI.

Declaratory and structural relief

[61] The alleged failure by the Police to fulfil their constitutional obligations must be addressed through the mechanisms envisaged in section 172 of the Constitution. Section 172(1)(a) requires that any failure in this regard must be declared inconsistent with the Constitution. Concomitantly such a declaration requires a court to exercise its just and equitable jurisdiction in terms of section 172(1)(b).

[62] The Constitutional Court in respect of a breach of constitutional rights, in *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721 (CC) at [106], expressed itself as follows:

“Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature

of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both a mandamus and the exercise of supervisory jurisdiction.”

[63] The judgment of the Constitutional Court in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2 SA 359 (CC)) enjoyed prominence in the first of Smith J’s two abovementioned judgments. It is apposite to refer to paragraph [107] thereof, which reads:

“It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.”

Discussion and application of principles

General

[64] In the opposing affidavit filed by the third respondent it is acknowledged that Intercape’s application under case number 2099/2022 was precipitated by “*the ongoing violence*” directed against its buses, drivers and passengers. The following is then stated on the behalf of the third respondent (and incorporated by reference into the affidavits of the other Police respondents) in respect of Smith J’s first judgment:

"[93] The court accepted the uncontested version of the applicant that there was a deliberate strategy on the part of certain taxi organisations to intimidate and coerce the applicant into agreeing to unlawful demands including the reduction of ticket prices and for levies to be paid. The court further accepted the uncontested version that there was one fatality in the Western Cape in April 2022 as a result of the violence. I point out that there are no reported fatalities in the Eastern Cape relating to the applicant and its operation."

[65] Thus, the Police respondents accept that:

- 65.1. the facts on which I must determine this application are largely the same as the facts which confronted Smith J in respect of his two judgments; and
- 65.2. Intercape's case is based on unrefuted evidence of an ongoing campaign of violence and intimidation committed against its passengers, bus drivers and buses at the instigation of the taxi industry. The campaign is not confined to a specific province or area but occurs countrywide.

[66] Therefore, the main issue in dispute between Intercape and the Police respondents concerns rather the extent and adequacy of the Police's response to Intercape's complaints and whether the Police have lived up to their constitutional obligations in responding to the complaints.

[67] I have summarised the Police respondents' response to Intercape's case in paragraph [49], above. Central to that response is the assertion that incidents of crime reported by Intercape are being investigated, but as individual crimes are not as forming part of an overall strategy of organised crime involving an orchestrated campaign of

intimidation against Intercape by the taxi industry. Given this it is contended by the Police respondents that they have met their constitutional obligations. It is on this aspect that this case turns and must be determined.

[68] In my view any dispute of fact as to the extent and adequacy of the investigations being conducted by the Police is immaterial. For purposes of this judgment, I am prepared to accept that the Police have and are investigating some incidents of crime reported to them by Intercape. At issue is the fact that whilst the Police accept that the version of Intercape that it is the victim of a deliberate and countrywide strategy on the part of certain taxi organisations to intimidate and coerce it into agreeing to their unlawful demands (and it has been found by this court to be the case in case number 2099/2022) their response is not tailored to such acceptance in circumstances where reports of crime are continuing to be investigated as individual and unrelated incidents.

[69] Intercape's uncontested version of the criminal activity directed towards it by the taxi industry and the factors on which Smith J's second judgment under case number 2099/2022 was premised, point to:

- 69.1. a pattern of racketeering activity as defined in POCA;
- 69.2. the existence of the circumstances envisaged in sections 16(2) and (2A) of the SAPS Act;
- 69.3. the necessity by the Police to act in terms of section 16(4)(b) of the SAPS Act by referring the matter to DPCI; and

69.4. the necessity for the DPCI to fulfil its statutory functions.

[70] The limited extent to which the Police have, to date, investigated complaints emanating from Intercap are not indicative of compliance with their obligations in terms of the Constitution, as:

70.1. no prosecutions have resulted from the investigations;

70.2. the Police tend to blame Intercap for the lack of evidence presented to the Police, which ignores the obligations on the Police to investigate incidents of crime reported to them;

70.3. the unlawful conduct has not abated, despite the second of Smith J's orders in case number 2099/2022, which resulted in further proceedings regarding the enforcement of that order late last year; and

70.4. the refusal by the Police (including the DPCI) to recognise and comply with statutory provisions in POCA and the SAPS Act, designed to give effect to the imperatives reflected in section 205(3) of the Constitution.

Jurisdiction

[71] I have accepted (as indeed did Smith J in case number 299/2022) that it is uncontested that Intercap is the subject of an ongoing campaign of violence and intimidation committed against its passengers, bus drivers and buses. It is a single campaign which targets Intercap countrywide. The campaign fits the mould of a pattern of racketeering

activity as defined in POCA and organised crime as contemplated in section 16 of the SAPS Act. The existence of the campaign is acknowledged by the Police and the prosecuting authorities and this acknowledgement triggers, *inter alia*, the provisions of section 16(4)(b) of the SAPS Act.

[72] The campaign is one cause of action, which manifests itself countrywide. I am thus satisfied, in terms of section 21(2) of the Superior Courts Act, that I have jurisdiction over all the Police respondents.

Conclusion in respect of appropriate relief

[73] The Police have consistently suggested that Intercap seeks favourable treatment - something Smith J in the first of his two above-mentioned judgments described as a “*constant refrain*”. Smith J dispelled this notion in emphatic terms in his first judgment. Nothing new has been advanced to suggest that I should depart from Smith J’s findings in this regard. I am satisfied that in respect of these proceedings, too, the focus is on the safety and security of long-distance bus drivers and passengers and the buses in which they are conveyed.

[74] On the facts advanced by Intercap and taking into account the contentions of the Police respondents, I am satisfied that the Police are not meeting their constitutional and statutory obligations and that therefore Intercap has established a case for declaratory relief.

[75] In my view circumstances, such as the fact that the campaign of violence against Intercape has continued unabated, requiring a second order from Smith J in case number 2099/2022 confirm the necessity also for structural/mandatory relief.

[76] Intercape is therefore entitled to the relief sought in terms of the notice of motion.

Costs

[77] Intercape's notice of motion is silent on the question of costs. In its heads of argument, however, it indicated that it was seeking costs against the respondents who opposed this application, and the question of costs was argued before me by the parties. When the matter was argued it was accepted by all parties that the failure of the notice of motion to mention the question of costs was an oversight.

[78] There is no reason why costs should not follow the result of my order. Given the obvious complexity of this matter and the fact that all parties employed at least two counsel, the costs attendant on such employment are warranted.

Order

[79] I therefore make the order set out below:

- 1. It is declared, in relation to the 165 instances of intimidation and violence perpetrated against the applicant's ("Intercape's" or "Intercape", as the case may be) buses, drivers and passengers and the cases Intercape has opened in this*

regard (as set out in the schedule attached as annexure "FA3" to the founding affidavit) ("the crimes") that:

- 1.1 the South African Police Service ("the Police") failed to investigate and prevent the crimes as required in terms of section 205(3) of the Constitution of the Republic of South Africa, 1996;*
- 1.2 the third to seventh respondents ("the Provincial Commissioners") have failed to report the crimes to the National Head and Directorate for Priority Crime Investigation ("the DPCI") as instances of organised crime, crime which requires national prevention or investigation, and/or crime which requires specialised skills in the prevention and investigation thereof, as required in terms of section 16(4)(b) of the South African Police Service Act, 68 of 1995 ("the SAPS Act"); and*
- 1.3 the DPCI has failed to investigate and prevent the crimes as instances of national priority offences as required in terms of section 17D(1)(a) of the SAPS Act.*

2. The Police are directed to:

- 2.1 investigate each of the crimes to enable the effective prosecution of each crime individually;*
- 2.2 submit a report to the National Director of Public Prosecutions ("the NPA") within 60 days of this order detailing all steps taken and progress made in*

investigating each of the crimes and the status of each investigation, to enable the NPA to coordinate the investigation and prosecution of each of the crimes individually; and

2.3 submit a confidential copy of the report to the Court and to Intercape.

3. The Provincial Commissioners are directed to:

3.1 report to the National Head of the DPCI those cases opened by Intercape in respect of the crimes which reveal the presence of organised crime, crime which requires national prevention or investigation and/or crime which requires specialised skills in the prevention and investigation thereof;

3.2 submit a report to the Investigating Directorate within 30 days of this order confirming that they have reported the relevant cases as directed; and

3.3 submit a confidential copy of the report to the Court and to Intercape.

4. The DPCI is directed to:

4.1 investigate the cases reported to it to enable the effective prosecution thereof as instances of at a collective level, as national priority offences, and specifically as organised crime;

4.2 submit a report to the Investigating Directorate within 60 days of this order detailing all steps taken and progress made in investigating the cases and

the status of its investigations, to enable the Investigating Directorate to coordinate the investigation and prosecution of these cases as national priority offences; and

4.3 submit a confidential copy of the report to the Court and to Intercape.

5. Should Intercape consider, having regard to the confidential reports to be filed in terms of paragraphs 2.3, 3.3 and 4.3 respectively, that the Police, the Provincial Commissioners and/or the DPCI have failed to comply with any of their obligations under this order or otherwise to give effect to this order, Intercape shall be entitled to set the matter down for further hearing on duly supplemented papers to seek such further relief as may be necessary.

6. The first-eighth respondents, jointly and severally, the one paying the other to be absolved, are directed to pay Intercape's costs of this application, including the costs attendant on the employment of two counsel and the costs of the interlocutory application on the question of joinder.



O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances: K Hofmeyr SC, A Molver and SA Karim for the applicant,
instructed by Adams and Adams, Pretoria c/o Huxtable Attorneys,
Makhanda (Mr O Huxtable)

A Rawjee, X Nogantshi and AN Masiza for the first – eighth respondent instructed by the State Attorney, Gqeberha c/o Whitesides Attorneys, Makhanda (Mr G Barrow)

A Beyleveld SC and M Morgan for the ninth and tenth respondents instructed by the State Attorney, Gqeberha c/o Whitesides Attorneys, Makhanda (Mr G Barrow)