**IN THE HIGH COURT OF SOUTH AFRICA,**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 12682/2018P

In the matter between:

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| **KLIPRIVER TAXI ASSOCIATION** | **FIRST APPLICANT** |
| **ANDILE HLATSHWAYO** | **SECOND APPLICANT** |
| **EMMANUAL SKHAKHANE** | **THIRD APPLICANT** |
| **NTOKOZO NXUMALO** | **FOURTH APPLICANT** |
| **THOKO MABASO** | **FIFTH APPLICANT** |
| **SANDILE INNOCENT NDLELA** | **SIXTH APPLICANT** |

and

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| **MEC FOR TRANSPORT, KWAZULU-NATAL** | **FIRST RESPONDENT** |
| **SIZWE TRANSPORT ASSOCIATION** | **SECOND RESPONDENT** |

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**ORDER**

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1. The first respondent's decision to suspend all taxi operations of the first applicant in terms of section 91 of the National Land Transportation Act 5 of 2009 as published in the Provincial Gazette of 10 October 2018, Provincial Notice 115 of 2018, is reviewed and set aside.
2. The first respondent is liable for the first applicant's costs, including that occasioned by the employment of two counsel, such costs to include the hearing on 12 December 2018.
3. In respect of case number 14210/17P, each party is to pay its own costs.
4. In respect of case number 10587/18P the first respondent is directed to pay the first applicant's costs.

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**JUDGMENT**

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**Chetty J**

[1] A cursory search on the internet regarding the taxi industry in South Africa reveals that there are more than 200 000 minibus taxis on our roads, employing more than 600 000 people, generating more than R90 billion every year, with 69 per cent of households using taxis. Minibus taxis are the most available and most affordable forms of public transportation, conveying 15 million commuters per day. Its existence is fundamental to our society.

[2] Given this background, it is an unfortunate concomitance that with the vast revenues generated by taxi operators comes a struggle for 'turf' or lucrative routes. In the midst of this all is the first respondent, the Member of the Executive Council for Transport, Safety and Community Liaison, KwaZulu-Natal ('MEC'), who is tasked with the implementation at a provincial level with the provisions of the National Land Transport Act 5 of 2009 ('NLTA') one of the objectives of which is to ensure transport safety and security. This power is derived from s 91(1) of the NLTA, which reads 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 services; 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.'

Section 91(2) further states that the MEC may, by notice in the Provincial Gazette, give notice that:

'*(a)* one or more or all the routes or ranks in such a declared area are closed for the operation of any type of public transport service, for the period stated in the notice;

*(b)* any operating licence or permit authorising any of the services referred to in paragraph *(a)* on a closed route or routes or at a closed rank or ranks in the declared area is suspended for the relevant period;

*(c)* subject to subsection (6), no person may undertake any of the services referred to in paragraph *(a)* on a closed route or routes or at a closed rank or ranks in the declared area or in terms of an operating licence or permit suspended as contemplated in paragraph *(b)* for the relevant period.'

[3] The manner in which the MEC has sought to achieve the objective of commuter safety in Ladysmith, KwaZulu-Natal, was to impose a suspension of the long distance taxi routes operated by the members of the first applicant (Klipriver Taxi Association – 'KTA') and the second respondent (Sizwe Transport Association – 'Sizwe'). The suspension of operations was the catalyst for the application launched in November 2018 in which KTA brought an urgent application seeking interim relief that suspension of taxi operations by the MEC, published in Provincial Gazette, Extraordinary, 10 October 2018, be uplifted. Pending the grant of interim relief, KTA sought to review and set aside the MEC's decision to impose the suspension. On 12 December 2018 after hearing argument from both counsel for the KTA and the MEC I granted an order lifting the suspension, pending the review application of the MEC's

decision of 10 October 2018. The matter was adjourned to 21 February 2019 before me.

[4] Prior to the present application being launched, a series of applications were brought by the KTA against the MEC and Sizwe in relation to its taxi operations in Ladysmith. By way of background, in June 2017 KTA under case number 6035/2017 obtained an interim order in this court interdicting members of Sizwe from intimidating KTA members who were seeking to utilize routes designated to the applicant association. In addition, Sizwe was interdicted from demanding payment from KTA members in exchange for them using the routes allocated to their own association. In addition, Sizwe was directed to produce any licences or permits issued to it, in which certain designated routes are described. The MEC was directed to enforce the routes assigned to the members of KTA and to take necessary steps to ensure that these routes were not used by Sizwe and its members. The MEC chose to abide the interim order, which was set down for confirmation on 7 November 2018. According to the KTA, Sizwe failed to obey the order resulting in a pattern of violence against it (KTA) continuing.

[5] Although the MEC disputes the allegation, KTA contends that the MEC failed to take any measures to implement the order of 8 June 2017 and instead resorted to suspend all operations of KTA and Sizwe (Ladysmith), as well as declaring *"emergency measures in the areas of Ladysmith and areas surrounding the Alfred Duma municipality*." This suspension was formally proclaimed in Provincial Gazette 123 of 2017, dated 21 November 2017 and issued in terms of s 91 of the NLTA. The notice indicates that the "*emergency measures*" taken by the MEC were intended to normalize transport services in the areas affected by violence, unrest, conflict and instability. It informed members of the public to make representations to the MEC as to why his decision should be reconsidered. KTA contends that the MEC adopted a sledge-hammer approach and instead of taking measures to control the manner in which taxi operations were being conducted in Ladysmith, the MEC opted to extinguish the problem by totally prohibiting their operations. KTA submitted that this facilitates an improper approach to the fulfilment of his obligations under the NLTA.

[6] According to KTA while the routes were suspended, members of Sizwe continued to operate on these routes in defiance of the order of June 2017 and without any action of the part of the MEC. At the same time, KTA proceeded to court with an application under case number 14210/2017P in which it challenged the validity of the 21 November 2017 proclamation on the basis that neither it nor Sizwe, the two entities directly affected by the suspension, were afforded an opportunity of making representations prior to the MEC making his final decision to impose the blanket suspension.

[7] Despite the contention of KTA that there had been no or very little taxi violence in the first half of 2018, the MEC by way of proclamation dated 11 June 2018, and acting in terms of s 91 of the NLTA again suspended taxi routes of KTA and Sizwe in Ladysmith and surrounding areas of the Alfred Duma Municipality. The period of suspension was extended for a period of six months from the date of the initial suspension. The notice also called upon affected and interested parties to make representations as to why the MEC's proclamation should be reconsidered.

[8] The proclamation by the MEC was again challenged by the KTA under case number 10587/2018P. KTA contends that as a result of the proclamation, life in the area of Ladysmith had grounded to a halt with the cessation of taxi operations, although the MEC takes the view that the suspension only pertained to long distance routes which is the subject matter of a dispute between KTA and Sizwe. As such, according to the MEC, there is no disruption to the lives of local commuters in Ladysmith. This dispute of fact, if there is one, does not prevent the adjudication of this application on the papers.

[9] On 18 September 2018 Lopes J granted interim relief calling upon the MEC and Sizwe to show cause why, pending a review of the proclamation dated 11 June 2018, the suspension of taxi operations in Ladysmith should not be lifted. The court ordered that the suspension only take effect from 12 October 2018 to enable the MEC to comply with the procedural framework envisaged in ss 91(3) to (9) which reads as follows:

‘(3) Before making the notice in terms of subsection (2), the MEC must cause a notice to be published in the prescribed manner, stating -

*(a)* in summary form the nature and purpose of the proposed regulations;

*(b)* the route or routes and rank or ranks which are proposed to be closed, or that it is proposed to close all routes and ranks in the declared area;

*(c)* the period for which the proposed regulations will be in force;

*(d)* that interested or affected parties may request reasons for the proposed regulations;

*(e)* that any interested or affected persons are entitled to make representations;

*(f)* the time within which representations may be made, which may not be less than 24 hours;

*(g)* the address to which representations must be submitted, and

*(h)* the manner in which representations must be made.

(4) The MEC must consider any representations received under subsection (3) before making a regulation under subsection (2).

(5) The notification contemplated in terms of subsection (2) may provide that a contravention thereof or a failure to comply therewith constitutes an offence, and may prescribe penalties in respect thereof which may be a fine, or imprisonment for a period not exceeding six months.

(6) The notification may provide for the issuing of temporary permits to operators of motor vehicles of specified types, to operate services on a closed route or routes or at a closed rank or ranks for the period of their closure in substitution of the forbidden services.

(7) After giving notice as contemplated in subsection (3), the MEC may, by notice in the *Provincial Gazette*, temporarily suspend any operating licence or permit insofar as it authorises public transport in a declared area on a route or routes or at a rank or ranks not closed in terms of the notice contemplated in terms subsection (2), for the period the MEC considers appropriate.

(8) The MEC may in a like manner and at any time amend the notification made in terms of subsection (1).

(9) The Minister may, after consulting the MEC and relevant planning authorities, exercise any of the powers of the MEC in this section.’

[10] As I understood his argument, Mr *Kemp SC* who appeared with Mr *Veerasamy* for the applicant, submitted that the proclamation of 11 June 2018 was procedurally flawed, and described it a ‘rolled-up’ suspension. It is well established that when interpreting legislation the “*words of the section are the starting point, but*

*they are to be considered in the light of their context, the apparent purpose of the provision and any relevant background material. A sensible meaning is to be preferred to one that leads to impractical results"*. See *Moyo & another v Minister of Justice and Constitutional Development & others* 2018 (2) SACR 313 (SCA) para [88] which endorsed the approach in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA). I agree with Mr *Kemp* that the legislative framework of s 91 of the NLTA envisages a process of notice to the public, consideration of any responses thereto by the MEC and the publication of the outcome.

[11] It is trite that in executing his legislative and constitutional obligations, a functionary such as the MEC is obliged to uphold the provisions of the Constitution and to ensure that administrative decisions are procedurally fair, reasonable, lawful and in accordance with the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). Following the order by Lopes J the MEC, in an attempt to comply with the two-stage process for which he had been criticised in the earlier application, published a notice on 20 September 2018 that he intended invoking the provisions of s 91 of the NLTA in light of the following factors:

'1. The need to preserve the safety of the community, operators and their employees.

2. The ongoing instability relating to long distance taxi routes between the Klipriver Taxi Association and the Sizwe Transport Taxi Association (Ladysmith);

3. The failure of the operators, particularly the leadership of both associations, to find an amicable resolution and commitment to peaceful operations of the contested routes.

The above named area has suffered violence and experienced a high mortality rate due to minibus taxi related violence.'

[12] The MEC further gave notice in terms of s 91(2) of his intention to suspend the long distance routes and operating licences registered to KTA and operated by members *who hold dual membership* between Klipriver and the Sizwe Transport taxi Association. The notice further proposed that the suspension shall operate for a period of six months, commencing on the date of publication in the Gazette and to remain in force "*until the abovenamed associations enter into an agreement to operate the contested routes peacefully*".

[13] In reply KTA submitted a detailed response recognizing that there have been incidents of violence, such as the Chairman of the KTA being attacked and shot at in February 2015, followed by attacks against its office bearers and members. The pointed stressed was that these attacks have been directed only against members of KTA, whose routes the MEC is proposing to suspend. The MEC, in other words, was seeking to punish the very same victims of the taxi violence. To the extent that the MEC referred in the notice to the high mortality rate being attributable to the taxi violence, KTA pointed out that to their knowledge, there have been no reported incidents of violence at taxi ranks, and that the violence appeared to have occurred outside of these areas.

[14] Reference was also made to the MEC attributing the death of 11 passengers in a minibus taxi accident to taxi violence. It was clarified that in this particular instance, an official of KTA was shot at and lost control of his vehicle, which collided with another vehicle conveying several schoolteachers and a male passenger. The MEC, it was contended, was under a misapprehension that these deaths were attributable to taxi violence as opposed to an accident. It also dispelled any suggestion that the taxi violence was due to a family feud or 'faction fight' between the Mabaso and Gamded families belonging to the rival taxi associations.

[15] In so far as the contention of ongoing strife between members of the KTA and Sizwe, it was pointed out that this has nothing to do with the conduct of members of the KTA but rather that members of Sizwe, without being in possession of any permits entitling them to do so, were utilising routes allocated exclusively to KTA, in violation of an order of court. In addition, the previous suspensions imposed by the MEC prohibited taxi operations on long-distance routes operated by both KTA and Sizwe. While KTA has respected the extraordinary measures imposed, the members of Sizwe have continued regardless. As such, the suspension only operates adversely against KTA, depriving its members from earning an income. The representations to the MEC sketched the wider impact that the ban has for the community in Ladysmith, and the presence of wide spread support in the local community for lifting the ban. KTA also proposed a number of recommendations in an attempt to assist the MEC in achieving the objectives of the NLTA, including

motivating why dual membership of taxi associations is not a cause for concern or a contributing factor to the violence.

[16] Without reverting to KTA following their representations, the MEC proceeded on 10 October 2018 to suspend the long-distance of routes and taxi operations of both KTA and Sizwe on the basis that they had found no amicable resolution to the ongoing conflict. The notice made reference to the death of a member of one of the disputing associations, which it was submitted justified the invocation of the extraordinary measures under s 91 of the NLTA. As a consequence the MEC resolved that the suspension would operate for a period of six months from the date of publication in the Provincial Gazette and shall remain in force *"until the abovenamed taxi associations enter into an agreement to operate the contested routes peacefully*".

[17] On 18 October 2018 attorneys representing KTA gave the MEC notice of their intention to challenge the suspension and suggested that all three earlier applications pertaining to the suspensions should be heard together with the impending review.

[18] The issue of dual membership between KTA and Sizwe is cited in the notice of 20 September 2018 as a basis for the suspension. This is also apparent from the answering affidavit of Herbert Ntuli on behalf of the MEC in which it is stated that KTA has 581 members with operating licences and Sizwe has 52. Of the latter, 22 hold dual membership with KTA. It is pertinent to point out that in terms of s 53 of the KwaZulu-Natal Interim Minibus Taxi Act 4 of 1998 which regulates the manner in which permits are granted and issued, the following is provided:

'(1) All minibus taxi permits shall from the date of the commencement of this Act be -

*(a)* route-based; or

*(b)* area-defined.

(2) The period of validity of minibus taxi permits granted in terms of the legitimisation process shall be prescribed by regulation.

(3) After the commencement of this Act -

(*a*) no minibus taxi permit describing the service to be rendered in terms of a radius shall be issued by the Board; and

(*b*) no minibus taxi permit transfer shall be permissible except a permit transfer -

(i) from an operator's deceased estate; and

(ii) between members of the same association: provided that the transfer has been authorised by the association and any challenge contemplated in section 50 has been resolved.'

[19] In light of 22 members of Sizwe holding dual membership, the MEC considered that this has caused animosity amongst KTA members themselves describing the violence as "*an internal dispute between siblings*". In light of the dual membership, the MEC says that it is not possible to distinguish who is a member of which association and therefor one cannot exclude the possibility of violence directed by members of KTA against their own.

[20] KTA is adamant that the issue of dual membership is not a cause for conflict and in any event was an irrelevant consideration taken into account by the MEC in imposing the suspension. Mr *Kemp* relies on the unreported judgment by Koen J in *Klip River Taxi Association v Sizwe Taxi Association & others* (Case No. 6035/2017P, 7 November 2018). In that matter an interdict was sought, inter alia, preventing Sizwe from demanding payment from KTA's members to ultilise routes allocated exclusively to KTA by the Department of Transport. The learned judge said the following on the issue of dual membership:

'The first respondent has opposed the application on the basis that many of the members of the applicant [are] also being members of the first respondent. The fact that that may be so does not in my view in anyway stand in the way of the relief in paragraph 1.1.2 being confirmed.'

[21] In so far as the relief that Sizwe be interdicted from demanding that members of KTA utilise passenger lists bearing the name of the Sizwe Taxi Association, the latter took the view that this was not an issue in dispute as membership of both associations are the same. In dealing with this aspect, Koen J stated that the issue dual membership, whether "*in totality or even partially*", was in his view irrelevant. The Court refused to interdict Sizwe in other respects complained of, but these are not relevant to this application. While I accept that Koen J found the issue of dual

membership to be irrelevant, I do not elevate it to the status contended for by Mr *Kemp*, suggesting that this argument has been finally *"banished*".

[22] I have carefully perused the Record of Decision filed by the MEC and I am unable to locate any authority for the prohibition of dual membership by an individual taxi operator, save for clause 6.4 of the South African National Taxi Council (SANTACO) Constitution, which provides that dual membership is proscribed, save with the written consent of SANTACO. The standard conditions to the granting of operating licences oblige individual members to respect the Constitution of the association at all times. Clause 9 of the conditions provides for a holder to operate on a "*common route in terms of a reciprocity agreement in terms of section 88 of Act 22 of 2000 with other Bus / Taxi Associations, the permit shall lapse should he or she breach such reciprocity agreement*".

[23] Section 65 of the NLTA which deals with the operating licences for long-distance services, provides that the transportation board shall determine the routes, ranks, terminals and picking up and drop off points for taxis, as well as days of operation including the requirement that passengers may not be picked up or dropped off en-route unless the operator has reached agreement with the relevant transport authorities and municipality and with the taxi associations operating locally in the area.

[24] There is nothing, either in statute or contract that appears to prohibit dual membership. To the extent that the MEC, for reasons which are not quite apparent from the papers before me, believes that the issue of dual membership is something that he ought to root out from the taxi industry, he is certainly not entitled to use the provisions of s 91 of the NLTA to achieve this objective. The purpose of the extraordinary measures catered for in s 91 are clearly intended to address violence, unrest or instability in the taxi industry. Dual membership of associations finds no application. The decision of the MEC, for these reasons, renders it liable to being set aside in terms of s 6(2)(a)(i) of PAJA.

[25] Apart from there being no evidence of such dual membership being a contributing factor to the violence between the associations, I am in agreement with

Mr *Kemp* that this is an irrelevant factor which the MEC took into account in imposing the suspension of the long distance taxi routes. The conclusion that dual membership may have given rise to "*internal strife*" within the KTA, on my reading of the documents forming the Record of Decision, is based on speculation. Despite much being made of the issue of dual membership in the answering papers, the notice issued on 10 October 2018 is silent on the issue of dual membership.

[26] An equally glaring omission from the notice of 10 October 2018 is that the MEC states that the "*long distance routes and operating licences of the minibus taxi operators listed hereunder are temporarily suspended*". The notice however is deficient and lends itself to be set aside on the grounds of vagueness in as much as it does not specify *which* of the routes of KTA or Sizwe are suspended from operation, or whether all of their respective routes are hit by the proclamation.

[27] The remaining ground of attack was directed at the MEC imposing a suspension of operations for a period of six months, but that it was to remain in force "*until the abovenamed taxi associations enter into an agreement to operate the contested routes peacefully*". The notice does not specify which of these routes are those being "*contested*" by the two associations. It was further contended by KTA that the imposition of a suspension designed to force a settlement agreement between the two associations was irrational and not authorised by the NLTA. In *Minister of Defence and Military Veterans v Motau & others* 2014 (5) SA 69 (CC) it was held that a rationality review is *"about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved*". The point stressed by Mr *Kemp* is that KTA is the registered taxi association in respect of KTA routes. Sizwe has been issued its operating licences, which authorise and restrict its members to conveyance only on certain routes. The imposition of a "*settlement*", according to KTA, can only occur if KTA is forced into giving up certain taxi routes which have been lawfully allocated to it. Counsel for the KTA submitted that Sizwe has had "*imperialistic designs*" on the KTA associated routes and all that KTA asks is for the MEC to implement the law to ensure that the respective associations adhere to the routes allocated to it. To the extent that the setting aside of the MEC's suspension would only benefit Sizwe and its members in the sense that

they will continue to operate unlawfully on routes allocated to KTA, the latter are resigned to accept this position.

[28] The flaw in the MEC suspending KTA from making use of its long distance routes is that these have been lawfully allocated to it by the Department of Transport. There is nothing before me to suggest that KTA has violated a condition of the licence issued to it, or infringed the operation of the allocated routes. No basis exists to interfere with an entity acting lawfully. Further, to the extent that the MEC believes that this measure can reduce the levels of violence in the industry, all the evidence points to the members of KTA being killed or attacked. On the other hand, all signs point to Sizwe in seeking to lay claim to routes already allocated lawfully to KTA. It is not the members of Sizwe who are under attack in the violence that has taken place.

[29] If the MEC wished, for whatever reason, to revoke or limit the licences and operating routes allocated to KTA, his relief must lay in an application to court. In essence, his actions amount to penalizing a party who is behaving (on the face of it) lawfully, and potentially rewarding a party who is behaving unlawfully. It should be noted that despite the weight of allegations against it, there is no opposition to the application by Sizwe. The allegations against it are undisputed.

[30] The task of regulating the industry to ensure that operators comply with the conditions of the licences is the domain of the MEC. The failure of the MEC to discharge these functions cannot be a justification to continue suspending long distance routes. The issue raised by KTA is whether the "*settlement*" conditions imposed by the MEC are an illegal exercise of his powers under s 91, and ultra vires, and constitute a basis for review under ss 6(2)(e) and (f) of PAJA. In exchange for peace in the industry, KTA contends that it is being obliged to surrender whole or part of its routes to Sizwe, who have no lawful right thereto. All of this is accorded a veneer of legality by the MEC exercising powers under s 91.

[31] Mr *Mthembu*, who appeared with Ms *Mazibuko* for the MEC, submitted that while the MEC acted in terms of ss 91(1) and 92 of the NLTA in taking steps to quell the violence in the taxi industry in Ladysmith, his powers in so acting were not confined to s 91. This argument is premised on the grounds that the MEC has

implied powers to take the steps which he has. In *Road Accident Appeal Tribunal & others v Gouws & another* 2018 (3) SA 413 (SCA) the Court stated the following in relation to a party seeking to rely on an implied power where the express provisions of the statute provide no basis for the action taken:

'[27] As stated above, the general rule is that express powers are needed for the actions and decisions of administrators. As pointed out by Professor Hoexter, implied powers may, however, be ancillary to the express powers or exist either as a necessary or reasonable consequence of the express powers. Furthermore, the author goes on to state that "a court will be more inclined to find an implied power where the express power is of a broad, discretionary nature – and less inclined where it is a narrow, closely circumscribed power". Where the administrative action or decision is likely to have far-reaching effects, it is less likely that a court will in the absence of express provisions find implied authorisation for it.' (Footnotes omitted).

[32] Professor Hoexter in *Administrative Law in South Africa* 2 ed (2012) at 44, captured the essence of the concept of implied power somewhat differently in stating:

'Thus "what is reasonably incidental to the proper carrying out of an authorised act must be considered as impliedly authorized". Just as the power to make omelettes must necessarily include the power to break eggs, so the power to build a dam may include the power to expropriate property or to remove silt'.

Schreiner JA in *Mustapha & another v Receiver of Revenue, Lichtenburg & others*, 1958 (3) SA 343 (A) at 347D-G in the pre-constitutional era said the following of the exercise of public power:

'Although a permit granted under sec. 18 (4) of Act 18 of 1936 has a contractual aspect, the powers under the sub-section must be exercised within the framework of the Act and the regulations which are themselves, of course, controlled by the Act. The powers of fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a state official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the Statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the sub-section is challenged the Courts must interpret the provision, including its

implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised. . .' (References omitted).

The views of Schriener JA were more recently endorsed by the Supreme Court of Appeal in *South African National Parks v MTO Forestry (Pty) Ltd & another* 2018 (5) SA 177 (SCA).

[33] The language in s 91 of the NLTA clearly delineates the circumstances and purposes for which the MEC make invoke a suspension of routes, which the statute describes as "extraordinary measures". Section 91(1) expressly considers the grounds for invoking the extraordinary measures and the outcome that these measures must achieve. Taking into account the language of the legislation; the breadth of the express powers accorded to the MEC and the context of the provision, I am of the view that there is nothing in the statute from which one may infer that the powers sought to be exercised by the MEC to impose a ban in perpetuity or until the two associations reach an amicable settlement, is reasonably incidental to the express powers in s 91. Section 91(7) provides that the MEC may 'temporarily suspend any operating licence". What the MEC is seeking to achieve through s 91 by his "conditions" cannot be considered as "incidental" to his express powers. If the parties for whatever reason, despite their best efforts, fail to reach agreement, the ban takes on a permanent nature. That could never have been the intention of the legislation nor contemplated as an implied power of the MEC. *Hoexter* at 45 notes with reference to *Mokoena v Commissioner of Prisons & another* 1985 (1) SA 368 (W) that the power to regulate does not include the power to prohibit.

[34] If the legislature wished to have broadened the scope of the powers of the MEC in s 91 it would have said so. Words cannot be read into a statute by implication unless the implication is a necessary one, in the sense that without it, effect cannot be given to the statute as it stands (see *Rennie NO v Gordon & another NNO* 1988 (1) SA 1 (A) at 22E-G; *American Natural Soda Ash Corporation & another v Competition Commission & others* 2005 (6) SA 158 (SCA) para 27). In *Dempsey* 1988 (3) SA 19 (A) at 38B-D the court held

'Any statutory function can, after all, only be validly performed within the limits prescribed by

the statute itself, and, where a fact or a state of affairs is prescribed as a precondition to the performance of the function (a so-called jurisdictional fact), that fact or state of affairs must obviously exist and be shown to have existed before it can be said that the function was validly performed. (Cf *Roberts v Chairman, Local Road Transportation Board and Another (1)* 1980 (2) SA 472 (C) at 476 H-477A; S *v Ramgobin and Others* 1985 (3) SA 587 (N) at p 590I-591C.)'

See also *Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC) para 192 where it was held:

'This court has adopted the view that "words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands". In addition, such implication must be necessary in order to "realise the ostensible legislative intention or to make the [legislation] workable".

Similarly, where the surrounding circumstances point to the fact that words were deliberately omitted or if the implication would be inconsistent with the provisions of the Constitution or the statute, words cannot be implied. To this must of course be added the settled principle of constitutional construction which is this: where a statute is capable of more than one reasonable construction, with the one construction leading to constitutional invalidity, while the other not, the latter construction, being in conformity with the Constitution, must be preferred to the former, provided always that such construction is reasonable and not strained'. (Footnotes omitted)

[35] I am accordingly not persuaded that the MEC has implied powers to act in the manner in which he did or for the purposes of brokering a truce between the KTA and Sizwe, with this imposed as a pre-requisite for the resumption of normal taxi operations in Ladysmith.

[36] The thrust of the MEC's opposition is predicated on the number of deaths resulting from what he terms as a "dispute" between KTA and Sizwe members. While it is common cause that the killings and attacks have been primarily of and against members of the KTA, there is no acceptance by KTA that this is due to a "dispute" between the two associations. Earlier on the MEC attributed this as a 'faction fight' between the Mabaso and Gamede families. The consistent complaint of KTA is that Sizwe have unlawfully operated on routes accorded only to KTA.

[37] The condition imposed by the MEC for the reinstatement of normal business is that the two associations must enter into an agreement to operate the contested routes "peacefully". In other words, the MEC is compelling KTA to surrender a part or all of its routes which have been lawfully awarded to KTA. As set out above, there is no foundation for the MEC to exercise his powers under s 91 with the outcome of a "settlement" as a legitimate objective. Aside from being *ultra vires* his powers under s 91, the MEC's use of the suspension as a tool to compel an agreement offends against the principle of legality.

[38] Over and above the legal impediments to the actions of the MEC, factually the KZN Department of Transport's Provincial Regulatory Entity ('PRE') issued an advisory memorandum dated 29 May 2018 to the MEC which pointed out that after the lifting of restrictions allowing for the operation of local taxi routes in Ladysmith, and despite KTA and Sizwe not having been able to resolve their "dispute", the *"killings have slowed down to almost a halt*". This undermines the MEC's assertions of a high death toll from the violence. Notwithstanding, it recommended to the MEC that the suspensions be extended for a further six months. This essentially allows for a temporary suspension to take on a permanent character for as long as KTA resist giving up lawfully allocated routes in favour of Sizwe, who have no lawful entitlement to operate these long distance routes. Their routes are solely from Ladysmith to Johannesburg. This same sentiment finds expression in the report of the PRE in June 2018, with the reasoning being that the only way to register an agreement between KTA and Sizwe is to continue the suspension until the desired outcome is achieved.

[39] The high water mark of Mr *Mthembu's* argument is a reliance on *Durbsinvest (Pty) Ltd v Town and Regional Planning Commission, Kwazulu-Natal & others* 2001 (4) SA103 (D) at 107F-H where Majid J made the following observations in relation to a review of administrative action:

'1. The review of an administrative decision of an organ of the Executive gives rise to a constitutional enquiry.

2. In any such enquiry the first question to be asked is whether the decision complained of is, objectively speaking, rationally related to the purpose for which the power was given.

3. If it was, and the decision was arrived at *bona fide* and within the authority and jurisdiction of the body whose decision is being enquired into, the Court cannot interfere with the decision merely because it disagrees with it.'

[40] The problem facing the MEC is that while his actions in imposing the suspension may have been well intentioned and bona fide, he does not get past the first hurdle of justifying that his action in suspending the taxi operations are rationally related to the objectives contained in s 91 of the NLTA. The MEC's reliance on *Durbsinvest* does not assist his cause.

[41] Moreover, a record of the consultation which the MEC had with representatives in the taxi industry and with the community, issued by the PRE dated October 2018, does not advance his cause in opposing the relief sought by KTA. His measures only serve to adversely affect the residents of Ladysmith, whose interests he has an obligation to protect and promote. The suspension adversely affects KTA and its members whose livelihoods have been severely impacted by the suspension. He accepts in paragraph 4.6 of the advisory statement that "*he has never alleged that Klipriver is the source of the problem or its cause in any way*". Elsewhere in the statement he acknowledges that his measures have caused suffering to the "*very people he is so keen to support*". If it were up to him, the statement continues, "*he would lift this suspension in its entity*".

[42] What then informs the persistence by the MEC that KTA and Sizwe must engage in negotiations to resolve their impasse? As I have already concluded, the imposition of such a condition is unlawful and unjustifiable. The MEC regards the outcry by KTA over the suspension simply as a concern over financial loss. This is by no means an irrelevant consideration by KTA members who depend on their taxis being operational, especially when the MEC in his statement espouses the virtues of the industry's 'resilience in the face of hostilities' and his drive to promote the policy of 'Radical Economic Transformation". At the heart of such a policy would, of necessity, be the right to a livelihood.

[43] In defence of the contention that the MEC arrived at his decision to impose the suspension of taxi operations despite the representations of KTA imploring him

not to, counsel for the MEC relied on *Head, Western Cape Education Department & others v Governing Body, Point High School & others* 2008 (5) SA 18 (SCA) para 10 where Hurt AJA stated"

'…The law is now clear that, in exercising this discretion, the HoD is required to act reasonably and, by taking into account all of the relevant factors and considering the competing interests involved, to arrive at a decision which strikes a "reasonable equilibrium". The court has no power to review this decision purely because there may be another, perhaps better, "equilibrium" which could have resulted by attributing more weight to some factor or factors and less to others. If that struck by the decision-maker is reasonable, then it must stand.' (Footnotes omitted)

[44] I am not persuaded that this decision finds application to the facts of this matter. This is not a situation where the MEC was faced with a variety of options at his disposal. The enquiry in s 91 is whether objective grounds exist to invoke the extraordinary measures for which the legislation provides. This is distinct from where a decision maker is choosing one option from a variety available to him or her, acting reasonably in so doing. This is also not a case in which the court can be said to be usurping the role of the executive or falling foul of the separation of powers principle. In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 9 the following was stated:

'Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'

[45] The role of the court in reviewing the decision of the MEC to implement an indefinite suspension of taxi operations in Ladysmith until the disputing associations are able to come to an agreement, and which can only result from KTA having to unlawfully surrender routes lawfully allocated to it, is not an exercise of the court preferring a different decision to that of the MEC. The power exercised by the MEC is sourced in legislation, making his decision administrative in nature and subject to

PAJA. The review by KTA concerns the lawful exercise of public power and is rooted firmly on the ground that the MEC acted contrary to the behests of the statute, acted ultra vires, irrationally and arrived at a decision which is at odds with the principle of legality.

[46] This is a case of holding the decision maker accountable for his actions which have far reaching implications for the affected community, as well as for the taxi operators whose livelihoods are affected from what could ostensibly amount to an indefinite suspension of their routes. The argument of an infringement of the doctrine of separation of powers is without foundation and falls to be rejected. Perhaps the most glaring reason to find in favour of KTA is that a law abiding party is being forced, purportedly under the guise of legislation, to part with what has been lawfully allocated to it. It is akin to putting the proverbial gun to the head of the applicant in exchange for allowing it to lawfully conduct its business. Such a scenario cannot be condoned by the courts.

[47] In regard to costs, three applications in total were launched by KTA against the measures taken by the MEC and the invocation of extraordinary measures under s 91 of the NLTA. In case number 6035/17P the MEC was cited and relief was sought against him to enforce the provisions of the operating licences issued to KTA and Sizwe. That matter was eventually finalised on 7 November 2018 where Koen J granted certain interdictory relief and ordered Sizwe to pay half of KTA's costs. In case number 14210/17P KTA brought an urgent application challenging the suspension of taxi routes in terms of the decision taken by the MEC. The matter came before court on 18 December 2017 when the matter was referred to the opposed roll. The matter did not proceed further in light of the suspension imposed running its full course of six months. No order has been granted to date in respect of costs of that application. KTA submits that it was obliged to launch that application in light of the unlawful steps invoked by the MEC. That matter was not fully argued and has become of academic interest at this stage. I am in agreement with Mr *Mthembu* that in the exercise of my discretion, the proper order that should follow is that each party should pay its own costs in case number 14210/17P.

[48] Under case number 10587/18P KTA again challenged the procedure followed by the MEC in implementing a suspension of taxi routes pursuant to s 91. Lopes J granted interim relief, but deferred the lifting of the suspension to enable the MEC to comply with the procedure envisaged in s 91. I am advised that the order was taken after full argument being presented on the issue of the legality of the so-called 'rolled up' suspension notice. In those circumstances, I am satisfied that KTA had been substantially successful and that it should be entitled to costs in respect of the application. In so far as the present application, despite the MEC's contention that the application papers repeated much of what had been stated in the previous applications, KTA cannot be faulted for this approach as the history of the matter traverses the various proclamations issued by the MEC in terms of s 91. I am not persuaded by the argument that KTA's intention was to 'rake up' unnecessary costs against the MEC. Where a functionary sets out to invoke measures in terms of an empowering statute, particularly extra ordinary measures such as those in s 91 which have far reaching consequences, it is incumbent on the functionary to act in a manner that is procedurally fair and lawful. I see no reason why costs should not follow the result.

[49] I the circumstances the order I grant is the following:

1. The first respondent's decision to suspend all taxi operations of the first applicant in terms of section 91 of the National Land Transportation Act 5 of 2009 as published in the Provincial Gazette of 10 October 2018, Provincial Notice 115 of 2018, is reviewed and set aside.
2. The first respondent is liable for the first applicant's costs, including that occasioned by the employment of two counsel, such costs to include the hearing on 12 December 2018.
3. In respect of case number 14210/17P, each party is to pay its own costs.
4. In respect of case number 10587/18P the first respondent is directed to pay the first applicant's costs.

**M R Chetty**

Appearances

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| Date of judgment reserved: | 21 February 2019 |
| Date of judgment: | 14 June 2019 |