***REPORTABLE***

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

**CASE NO. 10968/2001**

In the matter between:

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| **THE RAIL COMMUTER ACTION GROUP** | First Applicant |
| **LESLIE DAVID VAN MINNEN** | Second Applicant |
| **JANE LINDSAY STYER** | Third Applicant |
| **JUDIN RUDLUFF BEUDINE COULSEN** | Fourth Applicant |
| **RAYMOND JOHN LOVE** | Fifth Applicant |
| **HESTER FOUCHÉ** | Sixth Applicant |
| **MIRIAM MURIEL ADOLF** | Seventh Applicant |
| **BERENDINA SUSANNA FULLER** | Eighth Applicant |
| **ZOLANI CHRISTIAN MATYENI** | Ninth Applicant |
| and | |
| **TRANSNET LTD t/a METRORAIL** | First Respondent |
| **THE SOUTH AFRICAN RAIL COMMUTER CORPORATION LTD** | Second Respondent |
| **THE MINISTER OF TRANSPORT** | Third Respondent |
| **THE MINISTER OF SAFETY & SECURITY** | Fourth Respondent |
| **THE MINISTER OF SAFETY & SECURITY FOR THE WESTERN CAPE** | Fifth Respondent |

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JUDGMENT : 6 FEBRUARY 2003

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**DAVIS et VAN HEERDEN JJ:**

## *Introduction*

On Friday, 8 June 2001 at approximately 19h00, Juan van Minnen ('*Juan*'), then a final year electronic engineering student at the Cape Technicon, was a passenger in a first-class carriage of a suburban commuter train on the Cape

Town-Simon's Town line, travelling from Rondebosch to Fish Hoek, where he resided. Somewhere between Kenilworth and Wynberg stations, Juan was repeatedly stabbed by an unknown person. As a direct consequence of the injuries sustained by him, he died the following day. It is common cause that this incident occurred during the so-called '*evening off-peak period*', after 18h00 when numbers of security staff on commuter trains in the Western Cape are significantly reduced and ticket sales and checks not generally carried out.

On 28 June 2001, a public meeting was held at the Fish Hoek Civic Centre to address what was referred to as '*Metrorail crime*'. Mr Martin Frylinck, who deposed to the main founding and supplementary founding affidavits on behalf of the applicants, attended this meeting, the objective of which was '*to impress upon first respondent that the public has had enough of crime on trains and wanted immediate action*'. At this meeting, the first applicant (the Rail Commuter Action Group, hereinafter referred to as '*RCAG*'), described by Frylinck as a '*voluntary association*', was formed, and a committee consisting of nine '*volunteers*' was established. This committee was instructed by those present at the meeting to '*take first respondent and other responsible parties to task*' and a report-back meeting was convened for 31 July 2001.

On 11 July 2001, RCAG and the second applicant (the latter being the father of Juan van Minnen) appointed lawyers '*to investigate legal action and relief on behalf of the commuting public*'.

On 31 July 2001, a second public meeting was held to give RCAG the opportunity to report on progress made. This meeting was attended by Mr André Harrison ('*Harrison*'), the Regional Manager of the Western Cape Region of the first respondent's Metrorail business, who deposed to the main answering affidavit on behalf of the first respondent. According to the transcript of '*written notes*' taken at this meeting, it appears that the mandate of the RCAG committee was '*to take Metrorail to task*'. The minutes record further that '*there are ten volunteers on the committee*'. Frylinck informed the meeting that the RCAG committee had '*instructed a legal team to investigate the possibility of legal action against Transnet/Metrorail by the group or individual victims*' and, by a show of hands, the persons present at the meeting indicated overwhelming support for the proposed institution of such legal proceedings.

The applicants have now approached this court for both declaratory and mandatory relief against the respondents, based on alleged duties of care owed by the respondents to rail commuters in the Western Cape to protect the lives and property of such commuters against the criminal activities of third parties on commuter trains and train stations. The respondents have allegedly breached these alleged duties in a variety of different ways. In summary, the applicants contend that the relief sought by them rests on '*three primary pillars*': firstly, a statutory pillar arising from the application of certain provisions of the Legal Succession to the South African Transport Services Act 9 of 1989, as amended ('*the SATS Succession Act*'); secondly, a delictual pillar, based upon the principles of Aquilian liability, as underpinned and expanded by the Constitution of the Republic of South Africa Act 108 of 1996 ('*the Constitution*'); and thirdly, a contractual pillar sourced in the contract of carriage concluded between the first respondent as the provider of commuter rail services in the Western Cape and all fare-paying passengers.

The first respondent is Transnet Ltd ('*Transnet*'), a public company established by the Minister of Economic Co-ordination and Public Enterprises pursuant to the provisions of sections 2 of the SATS Succession Act. Upon its incorporation, the State became its only member and shareholder (section 2(2)). Metrorail is one of several business divisions of Transnet. It operates and maintains the commuter railway network in five urban regions, the Western Cape being one of such regions.

The second respondent, the South African Rail Commuter Corporation Ltd ('*the SARCC*') is a corporation created in terms of section 22 of the SATS Succession Act and registered in terms of the Companies Act 51 of 1973. Under section 25(3) of the SATS Succession Act, all the issued shares of the SARCC are also held by the State. The affairs of the SARCC are managed by its Board, all the members of which are '*appointed and dismissed*' by the third respondent, the Minister of Transport (section 24(1)). The latter is also vested with the right, under section 23(6), to issue '*directives clarifying, elaborating upon or giving specific content to the objectives of the SARCC*'. The establishment of, and relationship between, Transnet and the SARCC will be discussed in greater detail below.

The fourth respondent is the Minister of Safety and Security, cited in his capacity as the member of Cabinet charged with the responsibility for policing, in terms of section 206(1) of the Constitution. This section also provides that the fourth respondent must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces, as determined by the provincial executives.

The correct title of the fifth respondent (cited in the papers as the Minister of Safety and Security for the Western Cape) is the Member of the Executive Council for Community Safety: Western Cape Province. In terms of section 206(4), the fifth respondent is the provincial executive responsible for policing functions in the Western Cape Province, as assigned to him in terms of national legislation and allocated to him in the national policing policy. It would appear that commuter trains and train stations are policed by the members of the South African Police Service ('*SAPS*'), acting in the course and scope of their employment in terms of the South African Police Service Act 68 of 1995 ('*the SAPS Act*'), and the regulations made under section 24 of that Act under the responsibility of the fourth respondent. These policing functions are monitored in the Western Cape Province by the fifth respondent, acting in terms of section 206(3) and 206(4) of the Constitution. The policing functions rendered by members of the SAPS in respect of commuter trains and train stations, as well as the powers and duties of the fourth and fifth respondents in this regard, will also be set out in greater detail below.

## *The institution of the present proceedings*

On 6 August 2001, prior to the institution of the present proceedings, the applicants' legal representatives served '*letters of demand*' on all the respondents, requesting access to wide-ranging information and documents described under fourteen different categories. After an exchange of correspondence between the applicants and the various respondents relating to the furnishing of documents, the first and second respondents furnished to the applicants '*the first tranche of documents*' on 4 September 2001, later waiving payment of their initial demand for R11 754.00 in respect of costs incurred in providing such documents.

On 27 December 2001, the original notice of motion, founding papers and annexures were served on all five respondents. As appears from the original notice of motion, the relief initially sought was of both an interim and final nature. An order compelling early discovery pursuant to Uniform Rule of Court 35(1),

read together with Rule 35(13), was also sought. This early discovery related to '*all documents and tape recordings relating to any matter in question in this application (whether such matter is one arising between the Respondents and Applicants or not) which are or have at any time been in the possession or control of respondents, including but not limited to all such matters and items specified in Annexure A*' to the notice of motion. To a large extent, the information and documentation listed in the said Annexure A was the same as that sought by the applicants in the abovementioned correspondence.

The parties subsequently reached an agreement which was made an order of court by Hlophe JP on 12 February 2002. This order makes provision, *inter alia*, for postponement of the hearing of the application and for what the parties called '*informal discovery*'. That part of the order providing for '*informal discovery*' reads as follows:

'*2. Respondents make informal discovery by not later than 12h00 on 28 February 2002 of all documents and tape recordings relating to any matter in question in this application (whether such matter is one arising between the Respondents and Applicants or not) which are or have at any time been in the possession or control of Respondents; including but not limited to all such matters and items specified in annexure "A" to the Notice of Motion.*

*3. Respondents make available for inspection to Applicants' attorneys, one indexed set, itemized descriptively in chronological order, of all documents and tape recordings so discovered by not later than 12h00 on 28 February 2002.*'

The order also provided for the further conduct of the proceedings, including the delivery by the applicants of supplementary founding affidavits, following

compliance by the respondents with the provisions relating to '*informal discovery*'.

Respondents duly complied with the above-cited paragraphs of the court order. Although documents in respect of which legal privilege was claimed were not furnished to the applicants, the '*informal discovery record*' made available to the applicants amounted to a total of some 55 000 pages. In the letters under cover of which such documentation was made available to the applicants, the attorneys acting for the first and second respondent, and for the third respondents, respectively, recorded that '*our clients do not accept that your clients are legally entitled to these documents, or all of them, nor do our clients accept that your clients would be entitled to any costs in connection with the obtaining or perusal of such documents, or all of them.*'

Only the first, second and third applicants were cited when the application was initially instituted, the third applicant ('*Styer*') having been the victim of a criminal attack perpetrated against her on 30 June 2000 at approximately 18h00 whilst she was commuting from Cape Town to Retreat. As a result of the said attack, Styer sustained various injuries (including head injuries), as a consequence of which she has allegedly lost 30% hearing in one ear and now has to use a hearing aid. When, pursuant to the court order made by agreement between the parties on 12 February 2002, the applicants filed supplementary founding papers on 28 March 2002, the applicants purported to join six further applicants in these proceedings. Of these six further applicants, the seventh applicant ('*Adolf*') and the eighth applicant ('*Fuller*') are the widows of persons who were killed during a criminal incident that occurred on a commuter train on the evening of Monday 18 June 2001 on the Bellville-Unibell line. The remaining applicants (the fifth applicant ('*Love*'), the sixth applicant ('*Fouché*') and the ninth applicant ('*Matyeni*')) are, like Styer, allegedly the victims of violent crimes perpetrated while they themselves were commuting on various different lines.

The first and second respondents contest the propriety of the procedure adopted to bring the fourth to the ninth applicants before this Court. They also dispute many of the factual allegations made by the applicants in regard to the precise circumstances under which Juan van Minnen and Messrs Adolf and Fuller were killed, and Styer, Love, Fouché and Matyeni were injured, as a result of incidents occurring on commuter trains. According to the applicants, however, the voluminous papers before this Court make it abundantly clear that citizens of and visitors to the Western Cape are falling victim to violent and serious crime at an alarming rate and on an ongoing basis on rail commuter facilities in the Province. The applicants contend that, in the light of the relief sought by them, there are no

material disputes of fact incapable of resolution on the papers and that, save where factual disputes raised by the respondents are demonstrably without any foundation, the applicants have approached these proceedings on the basis of the respondents' factual versions, together with such facts as are common cause on the papers.

The relief sought by the applicants has undergone several permutations since the institution of these proceedings. Prior to engaging with the merits of the application, we were called upon at the outset of the hearing to consider an application made by the applicants to effect certain further amendments to their notice of motion, as already amended. This application was opposed by the first, second and third respondents. Moreover, first, second and third respondents submitted that, should the amendments be allowed, the hearing of the merits of the application should be postponed in order to afford these applicants the opportunity to file supplementary affidavits. With the exception of one '*new*' prayer, which was abandoned by the applicants, the application to amend was granted and the Court refused to postpone the hearing. Before setting out our reasons in this regard, it is necessary briefly to consider the historical background to the provision and policing of commuter rail services, with particular reference to the Western Cape.

## *Historical framework*

Prior to October 1986, the entire function of monitoring law and order on stations was performed by the South African Railways Police Force ('*the Railway Police*'), a dedicated armed force established under section 43 of the South African Transport Services Act 65 of 1981, which force was regulated and controlled by the South African Transport Services ('*SATS*') itself.

During October 1986, it was resolved that the Railway Police should cease to exist and operate as an independent self-regulated force. Pursuant to this resolution, the Railway Police Force was dissolved and the members of this force were transferred to the South African Police Service, in terms of the transfer of the South African Railways Police Force to the South African Police Act 83 of 1986 ('*the Transfer Act*'). The incorporation of the Railway Police into the South African Police Service resulted in an increase of the latter by approximately 6 500 members. However, SATS lost control of police functions on its premises and henceforth had to rely on the South African Police, a separate department, to

maintain law and order. In this manner, the specialised services of the Railway Police, and their expertise, were lost to SATS - this appears to have created certain security problems, resulting in an increase in general lawlessness (this was one of the findings of the Committee of Enquiry into Train Violence, appointed by the Goldstone Commission of Enquiry regarding the Prevention of Public Violence and Intimidation established in terms of Act 139 of 1991, to be dealt with more fully below).

During the period 1985 to 1991, carrier services were provided by SATS as a common carrier, including but not limited to rail commuter services. Following the recommendations of the De Villiers Report on the South African Transport Services, published in July 1986, government policy on transport services changed, requiring (*inter alia)* the transport market to be deregulated as far as possible, and the SATS to be converted into a undertaking pursuing profit and liable to taxation. The Legal Succession to the South African Transport Services Act 9 of 1989 implemented (with some modifications), the recommendations of the De Villiers Report, as accepted by government, creating a mechanism to privatise SATS and to separate the uneconomic rail commuter services from the more profitable carrier services.

The SATS Succession Act provided for the establishment of a public company (which on 1 April 1990 became known as Transnet Ltd) and of the SARCC as successors to the legal interests of the SATS. The entire commercial enterprise formerly conducted by the SATS was transferred to Transnet as a '*going concern*' including, with one important exception, all the assets previously owned and controlled by the SATS. The exception related to those assets referred to in section 25 of the SATS Succession Act, comprising all assets presently used to render commuter services, as well as substantial portions of stations and railway track. The SARCC became the owner of those assets. The enterprise transferred consisted of various divisions or business units, including Portnet, South African Airways and others. It also included Spoornet, a division through which the SATS provided a commuter service to the public at that time.

The SARCC was established with '*the main object and the main business*' of ensuring that rail commuter services '*are provided within, to and from the Republic in the public interest*' (see section 23(1) of the SATS Succession Act). Under section 15(1), Transnet is obliged to provide, at the request of the SARCC, a rail commuter service '*that is in the public interest*'. It is clear from section 15(3) and following of the Act that Transnet and the SRCC are enjoined to conclude a contract setting out the terms under which the said rail commuter service is to be provided by the former. The SARCC duly '*requested*' Transnet to render '*the service*' and the first contract concluded between the parties in this regard was signed on 13 September 1990. Pursuant to this agreement (called a

'*Bedryfsooreenkoms*'), Transnet accepted the responsibility to provide rail commuter services in the Republic with effect from 1 April 1990. While the agreement made provision for an agreed remuneration for the services to be rendered thereunder, it did not make provision for non-operational commuter safety and security.

During 1992, Transnet and the SARCC, acting under and pursuant to the 1990 agreement, concluded a second agreement (called a '*business agreement*'). Payment of remuneration (the subsidy) under this agreement was '*input*' based, in that the SARCC was obliged to reimburse Metrorail for all expenses incurred by the latter upon production of proof of payment and upon the SARCC being satisfied that it was an expense which was necessarily or reasonably incurred in the rendition of the service. As this, in effect, introduced an '*open- ended*' liability, it apparently made financial planning and provision of funding a difficult task. With reference to a resolution made by the State Security Council on 15 October 1990, this agreement distinguished between the '*public*' and the '*non-public*' components of the business of the SARCC. The policing of the '*public component*' was recorded as being the responsibility of the South African Police and included the maintenance of law and order, and the prevention of crime, on stations and trains. As regards the '*non-public component*', the 1992 business agreement recorded that Transnet was responsible for the security of the '*non-public component*' of the business of the SARCC, such services to be rendered for an agreed fee. Security with regard to the '*non-public component*' entailed mainly the protection of property and cash, and ensuring the safety of staff, but also included, as '*secondary*' tasks, the protection of commuters and the combating of crime on trains, stations and station platforms, the enforcement of the prohibition of weapons on trains, as well as ticket verification at access points and on trains.

This distinction between the public and non-public components of the SARCC's business was also highlighted by the Committee appointed in 1991 by the Goldstone Commission to investigate violence committed on trains in the Southern Transvaal. While the Committee's investigations into train violence were focused on a specific area and were conducted in the context of political violence on trains, the following extracts from the recommendations made by the Committee in its interim report (endorsed by the Commission on 8 July 1992) warrant mention:

> '*14.2 …The Committee feels that the function of guarding access control points at stations on a full-time basis is not a SAP function. This function could more practically be performed by the SARCC.*

*Accordingly, we support the suggestion by Major-General Bester that consideration be given to the creation of a guards corps, recruited from the community and employed by the SARCC. These recruits should receive proper police training. Their duty should be to secure access to the stations. (They should not be ticket controllers.) They should be in a distinctive uniform and be under the control of the manager of Spoornet Security Services…*

*14.7 Because the SARCC is unable to generate sufficient funds to provide the necessary safety measures, the Committee's recommendations will be rendered ineffective unless sufficient funds are made available. The Committee accordingly recommends that the Government give urgent assistance in this regard…*

*14.10 The Committee recommends that the main objective and aim of the SARCC … namely,* "to provide rail commuter services" *should be extended to include the provision of reliable, safe and cost-effective commuter services which meet the reasonable needs and standards of the community. This would place greater emphasis on the duty to ensure the safety of commuters.*'

The Committee's final report became available on 6 May 1993. It correctly recorded, at the outset, that the SARCC accepted its interim recommendations. The main project mentioned by the Committee in its final report related to the creation of a dedicated Metro Security Guard or Force. It was envisaged that this Force would ultimately (by 31 May 1995) consist of some 4 500 members. However, despite the alleged tireless efforts of both the first and second respondents from June 1992 to the present date, a dedicated Rail Guard has not yet been created. It appears from the papers before this Court that the reintroduction of a police force of some kind to guard railway property and commuters has been discussed by the present Cabinet since 12 June 2001. From affidavits deposed to by the Minister of Transport and by the Minister of Safety and Security, respectively, and filed shortly before the hearing of this matter, it would seem that Cabinet has in principle decided to establish a security division, probably to be established within the SAPS, which will focus upon, *inter alia*, the rendering of protection services in the railways sector. It is evident that there are a number of political hurdles still to be crossed before any final decision by Cabinet on this matter can be made and that the creation of the contemplated division is nowhere near as '*imminent*' as the affidavits filed on behalf of the SARCC would seem to suggest.

## *The Service Agreement*

During or about 1997, the first and second respondents jointly created a task

force to '*thrash out*' a new agreement to replace the existing 1992 Business Agreement referred to above. Although this agreement ('*the Service Agreement*') was only signed during August 2000, its effective date was 1 April 1999 and the terms thereof were implemented from the latter date. The provisions thereof covered the period 1 April 1999 to 31 March 2003, during which period Metrorail has the exclusive right to operate commuter rail services. The agreement provides that, in consideration for the performance of '*the agreed services*', the SARCC shall pay to Metrorail '*contract payments for each year of the Basic Term*'. The *quantum* of the (annual) contract payments appear from Annexure 13 to the Service Agreement. The SARCC receives the subsidy referred to in Annexure 13 directly from the National Department of Transport ('*NDOT*'), which subsidy is paid over on a monthly basis. At the present time, each monthly instalment amounts to approximately R93 million.

Under clause 10.10 of the Service Agreement, Metrorail '*shall be responsible for providing security services to the extent of their responsibility in terms of the operations of the Agreed Services and the SARCC's Service Property inside the Operational Area, subject to the provisions of any applicable law and negotiations with Government, SARCC and the South African Police Services (SAPS) in defining security responsibilities between business entities and authorities, as more fully described in Annexure 6.*'

It is important to note that, as stated in the Preamble to the Service Agreement, the agreement is '*based on concessioning principles*' and one of the express objectives of the Agreement is to '*provide acceptable security for passengers and railway employees*'.

The provisions of Annexure 6 to the Service Agreement deal with security. As with the 1992 Business Agreement, the security plan is structurally divided between obligations related to a public and an non-public component. The

former relates to security obligations in relation to commuters, whereas the latter appears to relate predominantly to assets (income and personnel). Under the heading '*Non-public Component*', paragraph 5.2.1 of Annexure 6 provides that '*Metrorail would be responsible for securing the non-public component of the services with specific emphasis on*', *inter alia*, '*the performance of access control in accordance with applicable legislation and based on the needs/requirements of each region*', and '*containing crime within the crime index parameters agreed on*'.

As regards the '*public component*', paragraph 5.3.1 of Annexure 6 records that –

> '*The responsibility for securing the public component of the SARCC's business rests with the SA Police Services in terms of section 5 of the SA Police Act, 1985 or revisions. Metrorail will be required to play a supportive and/or complementary role in support of the SAPS to maintain law and order on stations and on trains as defined in clause 3.1 and the Legal Succession Act, Act No 9 of 1989.*'

It is specifically recorded in paragraph 5.3.2 that Metrorial '*is mandated and will be funded to deploy own resources as well as contracted Security guards to protect the public component of the business (crime prevention and crime control) … Should proposals for a specialised rail police structure succeed, this section of the agreement will be renegotiated and adjusted to reflect the cost savings.*'

The SARCC is obliged to perform a supervisory or '*watchdog*' function in respect of security services. In so doing, it utilises, *inter alia*, the device of a '*Metrorail National Crime Index*' – calculated in relation to the incidence of '*an agreed selection of the more serious crimes*'. In terms of paragraph 7 of Annexure 6, Metrorail's performance in providing security services '*will be determined by the trends in the index, as well as the index in relation to the South African Police Services Index for the same agreed selection of the more serious crimes for the surrounding areas. Should the indices indicate that there are negative trends, the SARCC may audit the resources applied by Metrorail to provide a secure environment and compare these resources against those resources on which the contract amount was based. Should there have been a reduction of resources or*

*the cost thereof the SARCC may impose penalties.*'

The second respondent's case is that it has '*ensured*' (and continues to ensure) the provision of commuter services '*in the public interest*', as required by the SATS Succession Act. It contends that it has achieved this through the conclusion of the Service Agreement and further continues to '*ensure*' the provision of commuter services '*in the public interest*' by executing its watchdog functions under such agreement. The first respondent's case is that it has responded to the '*request*' to provide commuter services '*in the public interest*', firstly by concluding the Service Agreement and, having done so, secondly by continuing to perform in accordance with the terms thereof. Both the first and the second respondents deny that they are not complying, alternatively substantially complying, with their respective obligations under the Service Agreement.

## *The applicants' application to amend the notice of motion*

The relief finally sought by the applicants is as follows (the passages in respect of the amendments sought at the outset of the hearing are emphasised):

'*1. It is declared that the manner in which the rail commuter services in the Western Cape are:*

*1.1 operated by the First Respondent;*

*1.2 controlled and funded by the Second Respondent;*

*insofar as the provision of proper and adequate safety* ***and security*** *services and the control of access to and egress from rail facilities used by rail commuters in the Western Cape are concerned, is not in the public interest as contemplated in section 15(1) (insofar as First Respondent is concerned) and section 23(1) (insofar as Second Respondent is concerned), of the Legal Succession to the South African Transport Services Act, No. 9 of*

*1989, as amended (*"the SATS Succession Act").

2. *It is declared that the manner in which the rail commuter services in the Western Cape are:*

   *2.1 operated by the First Respondent;*

   *2.2 controlled and funded by the Second Respondent;*

   *2.3 policed by the South African Police Service;*

   *2.4 monitored by the Fifth Respondent*

   *insofar as the provision of proper and adequate safety* ***and security*** *services and the control of access to and egress from rail facilities used by rail commuters in the Western Cape are concerned, is wrongful, unlawful and in violation of the constitutional rights of rail commuters to life, to freedom from all forms of violence from private sources,* ***to human dignity, freedom of movement and to property****.*

3. *It is declared that the First Respondent* ***has a contractual obligation to convey fare-paying passengers safely and securely on commuter rail services in the Western Cape.***'

[Prior to the amendment sought, Prayer 3 read as follows:

'*3. It is declared that the First Respondent is in breach of its contractual obligations towards:*

*3.1 Juan van Minnen, the minor deceased son of the Second Applicant; and*

*3.2 the Third and further Applicants (or their breadwinners where applicable);*

*by reason of its failure to convey Juan van Minnen and the Third and further Applicants (or their breadwinners where applicable) safely to their destinations on the said rail commuter service in terms of its contractual obligations to do so, which obligations include the provision of proper and adequate safety services, and by reason of its failure to control access to and egress from the rail commuter facilities used by rail commuters in the Western Cape.*']

'*4. It is declared that:*

*4.1 The First and Second Respondents have a legal duty to protect the lives and property of members of the public who commute by rail, whilst they are making use of the rail transport services provided by the First and Second Respondents;*

4.2 *the First and Second Respondents are in breach of the said duties, in that they have negligently failed to provide and/or fund proper and adequate safety* ***and security*** *services and and/or by their failure to control access to and egress from rail commuter facilities used by rail commuters in the Western Cape.*'

[The unamended Notice of Motion also contained a prayer numbered 4.3, which read as follows:

'*4. It is declared that:*

*.....*

*.....*

4.3 *A causal connection exists between such negligent breach of the said duty and any damages suffered by the Second and further Applicants which they are able to prove in any action timeously instituted against First and Second Respondents.*'

This prayer 4.3 was abandoned in terms of the amendment sought.]

'*5. The Respondents are directed forthwith to take all such steps* ***(including interim steps)*** *as are reasonably necessary to put in place proper and adequate safety* ***and security*** *services which shall include, but not be limited to, steps to properly control access to and egress from rail commuter facilities used by rail commuters in the Western Cape,* ***in order to protect those rights of rail commuters, as are enshrined in the Constitution, to life, to freedom from all forms of violence from private sources, to human dignity, freedom of movement and to property****.*

*6. The First to Third Respondents are directed to ensure that between them and the institutions for which they are responsible, jointly and severally, the one paying the others to be absolved,* ***an adequate amount is allocated towards the provision of proper and adequate safety and security services, including but not***

***limited to services to ensure control of access to and egress from commuter services in the Western Cape.***'

[Prior to the amendment sought, Prayer 6 read as follows:

'*6. First to Third Respondents are directed to ensure that between them and the institutions for which they are responsible, jointly and severally, the one paying the others to be absolved, an amount of not less than R15,2 m per annum is allocated towards the provision of proper and adequate safety services, included but not limited to services to ensure control of access to and egress from rail commuter services in the Western Cape, subject to such amount being adjusted annually in the light of the security situation prevailing from time to time.*']

'7. ***In the alternative to paragraphs 1, 2, 4, 5 and 6 above and only in the event that the relief claimed in such paragraph is not granted:***

*The First and Second Respondents are directed,* ***within such time as the Honourable Court may order,*** *to comply strictly with and give effect to all such terms and conditions contained in the current and future operational, business and/or other agreements between first and second respondents dealing with the provision, monitoring and funding of safety and security services for its staff, the public and commuters making use of rail facilities within the Western Cape, provided always that the terms and conditions contained are and remain in the interest of the public as contemplated in the SATS Succession Act.*

8. ***The First and Second Respondents are interdicted and restrained from permitting commuter rail passengers to travel on the commuter rail network in the Western Cape in any carriage which has doors which do not function.'***

[Prior to the amendment sought, Prayer 8 read as follows:

'*8.* *Until such time as the Respondents have complied with the order contained in paragraph 5 above:*

*8.1* *the First Respondent is interdicted and restrained from operating any train on the Western Cape rail commuter service which is not staffed with at least three guards and one conductor;*

8.2 *the First Respondent is interdicted and restrained during all hours from permitting any train on the Western Cape rail commuter service to stop at any station or platform which is not manned with personnel responsible for and capable of providing proper and adequate safety services and providing control of access to and egress from rail commuter facilities used by the public and rail commuters.*']

'*9.* ***First Respondent is interdicted and restrained from operating rail commuter services in the Western Cape otherwise than in accordance with the terms of its general operating instructions.***

10 [Formerly Prayer 9] *It is confirmed that the applicants were entitled to early discovery in terms of Rule 35(1).*

***11 Granting leave to Applicants to approach the Honourable Court on the same papers, amplified insofar as is necessary, within such period as the Honourable Court may think fit, for such further orders as may be necessary if Respondents fail to have due regard to and implement the terms of Prayer 5,***

***alternatively the terms of Prayer 7, and in any event if Respondents fail to have due regard to and implement the terms of Prayers 8 and 9.***

12 [Formerly Prayer 10] *Directing the Respondents, jointly and severally, the one paying the others to be absolved, to pay the Applicants' costs of suit, such costs to include the costs attendant upon the engagement of the services of three counsel.*'

In their written objection to the proposed amendments to the Notice of Motion, filed in terms of Rule 28(3), the first and second respondents objected to all the amendments sought by the applicants, with the exception of the proposed deletion of the previous prayer numbered 4.3 and the proposed insertion of the words '*and security*' after the word '*safety*', wherever such latter word appeared in the prayers. However, in argument before this Court, the first and second respondents focused their objections on those proposed amendments which, in their view, would have the effect of '*introducing*' the issue as to whether the terms of the Service Agreement (in contradistinction to '*the manner*' in which services are provided thereunder) constitute compliance with the statutory obligations imposed upon the first and second respondents by the SATS Succession Act. Furthermore, the first and second respondents also persisted with their objection to the application for the introduction of additional prayers in relation to operational safety, with specific reference to the relief claimed in relation to '*open train doors*' and the alleged failure by the first and second respondents to comply with '*general operating instructions*'.

The objection made on behalf of the third respondent to the proposed amendments was directed solely at the proposed '*new*' prayer 8. Mr **Albertus SC**, who appeared together with Mr **Paschke** on behalf of third respondent, submitted (in our view, correctly) that, in view of the fact that the applicants' case, as formulated in their founding and supplementary founding affidavits, was based

upon crime-related conduct and threats by third parties to the security of the persons of rail commuters - rather than upon operational safety issues - the third respondent was not afforded the opportunity to place factual material before this Court detailing the difficulty in preventing and combating vandalism (especially as regards train doors) on the rail commuter service and the measures that have been taken by the State in this regard. Mr **Albertus** pointed out that, without full details being placed before the Court as to the practical ramifications of the interdict sought (eg the number of commuter trains which would be immediately affected by the interdict; the possible necessity of removing many (if not all) commuter trains in the Western Cape from operation for an indefinite period of time; and the constant negative impact upon commuters), the Court was not in a position properly to consider the potential prejudice which may be suffered by the third respondent, should this aspect of the applicant's application for an amendment be granted.

In reply, Mr **Viljoen SC,** who appeared together with Mr **Hoffman SC** and Mr **Dippenaar** on behalf of the applicants, informed the Court that, in view of the possible negative consequences for rail commuters should a large number of commuter trains have to be withdrawn from operation were the '*new*' prayer 8 to be granted, the applicants were abandoning the said prayer. Whether or not the applicants should be ordered to pay any costs incurred by the third respondent in objecting to this aspect of the proposed amendment of the Notice of Motion, as was submitted by Mr **Albertus**, will be considered at a later stage.

Mr **Du Plessis SC,** who together with Mr **Jamie SC and** Ms **Cowen** appeared on behalf of first and second respondents, argued that the main purpose of the proposed amendments, including the attempted relegation of the relief claimed in prayer 7 (in respect of compliance with the provisions of, *inter alia,* the Service Agreement in unamended form) to an alternative prayer, was to create a basis

for the applicants '*to assail*' the security provisions of the Service Agreement. According to Mr **Du Plessis**, the applicants made no clear and unambiguous attempt in their founding papers to challenge the provisions of the Service Agreement and these founding papers contain no criticism in regard to the propriety or reasonableness of the security regime contained in the Service Agreement. This being so, the first and second respondents were allegedly not called upon to, nor did they purport to, meet a case which would require them to justify or substantiate the existing security regime created under the Service Agreement, or to sustain submissions as to why the Service Agreement in its present format constitutes due compliance with their statutory obligations.

With reference to cases such as *Administrator, Transvaal & Others v Theletsane & Others* 1991 (2) SA 192 (A) at 195J-196E, *Government of the Republic of KwaZulu-Natal & Another v Ngwane* 1996 (4) SA 943 (A) at 948J-949D, *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (8) BCLR 1048 (T) at 1057G-1058C, *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds & 'n Ander* 1997 (8) BCLR 1066 (T) at 1076B-D, and *South Peninsula Municipality v Evans & Others* 2001 (1) SA 271 (C) at 280I-282H, Mr **Du Plessis** contended that the issue of the adequacy of the contents of the Service Agreement in its present format – in particular the security regime created in Annexure 6 thereto – had not been properly raised by the applicants in their founding affidavits. Instead, the applicants impermissibly sought to raise this issue in their replying affidavits, predominantly by reference to the affidavit deposed to by Professor Dunne, a chartered statistician ('*Dunne*'). In the applications to strike out matter filed on behalf of the first and second respondents, and the fourth and fifth respondents, respectively (to be dealt with below), these respondents requested the Court to strike out the whole of Dunne's affidavit, as also the vast majority of the paragraphs in the applicants' replying affidavits referring to, or relying upon, Dunne's affidavit. This part of the respondents' applications to strike was based on the ground that this material constituted inadmissible new matter in reply which, if admitted, would occasion these respondents irreparable prejudice, unless they were afforded the opportunity to deal therewith by way of further affidavits. The arguments advanced on behalf of the first and second respondents in support of this part of their striking-out application were substantially the same as those advanced in regard to the applicants' application to amend.

In essence, the complaint of the first and second respondents is that the allegations made by the applicants in their founding and supplementary founding affidavits were not such as to '*alert*' the respondents to the attack now being made upon the propriety and reasonableness of the security regime contained in Annexure 6 of the Service Agreement. According to the respondents, had they been made aware of the attack on the security plan contained in the Service

Agreement by appropriate allegations in the founding affidavits, they would have been in a position to answer this attack – '*by placing comprehensive factual material before this Honourable Court in regard to the* ***modus operandi*** *of the task force (including the considerations (budgetary and otherwise) which prompted them to draft the Service Agreement (and more particularly Annexure 6 thereto) in its present form',* and would also have been able to '*demonstate to this Honourable Court the reasonableness of their decision at the time to cast the security provisions in a particular mould*'.

The first and second respondents argued further that, had they been made aware of the attack on the **content** of the Service Agreement (in particular the security plan contained in Annexure 6 thereto) by allegations appropriately made in the founding affidavits, they would have been in a position to '*buttress their case*' by producing expert evidence in justification of the terms of the security regime decided upon by the task force. Thus, should the proposed amendments in this regard be allowed, and their application to strike out the relevant paragraphs from the applicants' replying affidavits not succeed, the first and second respondents would suffer irreversible prejudice in that the Court would determine the merits of the application without hearing the first and second respondents in regard to the facts and circumstances to which the task force applied '*its collective mind*' in '*moulding*' the present security regime.

It is trite that it is in the nature of motion proceedings that the affidavits constitute not only the pleadings, but also provide all the evidence upon which the application must be decided. The general rule is, therefore, that '*an applicant must stand or fall by his founding affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of the facts stated there, because those are the facts that the respondent is called upon either to affirm or to deny*' (see Van Winsen, Cilliers & Loots *Herbstein & Van Winsen : The Civil Practice of the Supreme Court of South Africa* 4th ed (1997) at 364-366 and the authorities there cited). However, as convincingly argued by applicants' counsel, the flaw in the reliance by the first and second respondents upon this '*general rule*' is the suggestion (repeated in several different guises in the answering affidavits filed on behalf of the first and second respondents) that the applicants' founding and supplementary founding affidavits do **not** include any challenge to the legality/propriety of the Service Agreement concluded between the first and second respondents (and, in particular, to the reasonableness of the safety and security provisions contained therein).

A careful perusal of the applicants' founding and supplementary founding affidavits reveals that, from the outset, the applicants' main complaint was

directed against the manner in which the first and second respondents had carried out, and continue to carry out, the statutory obligations imposed upon them in terms of the SATS Succession Act. As indicated above, this Act requires the first respondent to provide, and the second respondent to ensure the provision of, rail commuter services '*in the public interest*'. So, while the applicants' complaints are based on broader grounds than simply an analysis and criticism of the security provisions contained in the Service Agreement concluded between the first and second respondents (including the statistical basis for the monitoring by the second respondent of the first respondent's performance in this regard), the founding affidavits certainly raise - and are obviously understood by the first and second respondents to raise – the issue of the legality and reasonableness of the contractual provisions relating to safety and security. Thus, for example, in the initial founding affidavit deposed to by Frylinck on behalf of the applicants, under the heading '*Unlawful Conduct*', the applicants complain in specific terms that the first and second respondents:

> '*In concluding the operational contract referred to above, failed to make any or proper and adequate provision for the allocation and funding of security services including but not limited to control of access to and egress from rail commuter services. In contracting as aforesaid first and second respondents created dangers which have become apparent over the years, which notwithstanding security amendments and security additions to agreements have not been effected or enforced by either first, second or third respondents.*'

Mr **Du Plessis** argued that the above-cited reference in the founding affidavit to '*the operational contract referred to above*', read in its proper context, was a reference to the 1990 operational agreement between the first and second respondents, and **not** a reference to the existing Service Agreement. This contention is not, however, born out by the answering affidavits deposed to by Harrison and by Mr Jacobus van Niekerk (the consultant Executive Manager: Finance of the SARCC, hereinafter referred to as '*Van Niekerk*') on behalf of the first and second respondents, respectively. In this regard, Harrison's response to

the above-cited allegations in the founding affidavit reads as follows:

> '*It is denied that first and second respondents,* ***in concluding the Service Agreement****, failed to make any or proper and adequate, alternatively reasonable, provision for the allocation and funding of security services*' (our emphasis).

In similar vein, Van Niekerk, in his response to the criticism directed by the applicants against the security provisions contained in the contracts concluded between the first and second respondents, also denies all shortcomings in the contracts complained of, and specifically denies that '*the provisions of Annexure 6* [to the Service Agreement] *and the execution thereof are unreasonable*'. Van Niekerk states further that:

> '*The allegations relating to generalised shortcomings in regard to the terms of contracts concluded between first and second respondents are denied. The second respondent disputes in particular that the* ***Service Agreement presently in force*** *suffers from any of the shortcomings listed therein*' (our emphasis again).

The applicants' founding and supplementary founding affidavits further contain various pertinent allegations concerning the failure by the first and second respondents to keep proper data, their lack of proper statistics or an infrastructure to compile such statistics, and the absence of '*a solid base of empirical knowledge*' upon which crime patterns and trends should be based. In response to these allegations, Harrison's answering affidavit contains a fairly

lengthy exposition of the manner in which statistics are compiled in terms of the security plan contained in the Service Agreement, and the detection of trends and possible deviations using the Metrorail National Crime Index. Van Niekerk's answering affidavit also contains an analysis of the manner in which statistics are obtained, checked and verified by and on behalf of the second respondent, and the so-called '*continuous monitoring* [by the first and second respondents] *of crime incidents to ensure speedy detection of* "negative trends" *as postulated,* ***inter alia****, under clause 7 of the security provisions in Annexure 6*'.

Both the first and second respondents rely heavily on the report of a number of experts, which reports are annexed to the main answering affidavit deposed to (on behalf of the second respondent) by Van Niekerk. These include reports compiled by a Professor Pienaar ('*Pienaar*'), a transport economist; a Mr Page ('*Page*'), a senior researcher employed at the CSIR–Transportek, a South African Government parastatal institution engaged in transport research and development, and allegedly an expert in the field of crime and crime prevention on public transport; and by a Mr Oeschger ('*Oeschger*'), a management consultant specialising in security management and security assessment. In the affidavit deposed to by him, Pienaar states specifically that his '*instruction herein*' was, *inter alia*, to furnish his '*views on whether the concessioning agreement presently in force between the second respondent … and the first respondent (and more particularly its business unit engaged in the rendition of commuter services under the style* "Metrorail") *… upon a proper consideration thereof creates a framework within which a reasonable commuter service can be delivered and in particular whether the security needs of passengers have been addressed thereunder on a reasonable and effective basis*'.

Page states that the objectives of his '*expert witness assessment*' are, *inter alia:*

- '*To consider the methods utilised to compile criminal incident statistics, and more particularly the passenger security provisions in Annexure 6 and Annexure 8 of the Agreement between the parties;*

- *To furnish an opinion in regard to the reasonableness of the Security Plan referred to in section 3.5 of this report and the execution thereof by Metrorail and the SARCC …*'.

A very large part of Page's expert report is devoted to a close analysis of the methodology used by Metrorail and the second respondent under the Service Agreement (and more particularly Annexures 6 and 8 thereof) to collect data, and to monitor trends with a view to detecting deviations which may occur from the bench mark set in Annexure 6.

Oeschger also purports to analyse and evaluate the provisions of Annexure 6 of the Service Agreement between Metrorail and the SARCC, concluding that '*the security plan contained therein provides a reasonable basis of operation for the provision of security services.*'

On an analysis of the applicant's founding affidavits and the answering affidavits deposed to on behalf of the first and second respondents, we are of the view that, despite their protestations to the contrary, the first and second respondents were indeed sufficiently alerted to the fact that part of the case they were called upon to meet related to the **reasonableness** of the security provisions contained in Annexure 6 to the current Service Agreement, including the question of whether the Service Agreement makes provision for '*a statistically sound system of data-monitoring, data-analysis and consequent timeous procedures of decision-making, which can satisfy reasonable expectations to ensure public commuter safety and security in the sense of protection from crime, in the rail commuter environment*'.

It is this latter question which forms the basis for Dunne's affidavit, as annexed to the applicant's replying affidavits. As indicated above, the main basis for the objections raised by the first and second respondents to the applicant's application to amend in this regard was that the applicants had **not** properly raised criticisms in regard to the reasonableness/propriety of the security plan in the Service Agreement in their founding affidavits, but had rather sought to do so in reply, predominantly through the affidavit deposed to by Dunne. It was also on this basis that Mr **Du Plessis** argued that, should the application for the amendment of the Notice of Motion be allowed, the hearing of the matter should be postponed in order to afford the respondents the opportunity to file

supplementary affidavits.

As pointed out by Mr **Viljoen**, the applicants were not in law required to anticipate that the terms of the Service Agreement (and in particular, the security plan contained in Annexure 6 thereof), the fact of its conclusion and the contention that the first and second respondents are not in breach of their obligations thereunder, would (in essence) be the respondents' whole answer to the applicant's attack on the manner in which rail commuter services in the Western Cape are operated by the first respondent and '*controlled and funded*' by the second respondent.

The respondents argue that the case made out by the applicants in their founding affidavits and the relief claimed by them in terms of prayer 7 (in its original form) are to the effect that the first and second respondents must be compelled forthwith to comply with the strict terms of, *inter alia*, the Service Agreement. This argument fails, however, to take into consideration the express terms of the proviso to prayer 7, which proviso makes it clear that, from the outset, the applicants were relying on '*the interests of the public*' as the standard against which the '*terms and conditions contained in the current and future operational, business and/or other agreements between first and second respondents dealing with the provision, monitoring and funding of safety and security services for its staff, the public and commuters making use of rail facilities within the Western Cape*' should be measured by this Court.

In their answering affidavits, the first and second respondents effectively raise - as an entire defence to the applicant's complaints - the provisions of the security dispensation contained in the Service Agreement concluded between them, and their alleged compliance (or substantial compliance) with the obligations imposed upon them under such dispensation. Moreover, several of the experts relied upon by the respondents deal in considerable detail with the alleged reasonableness of the security system contained in the Service Agreement. In the light hereof, we are of the view that the applicants **were** entitled, in their replying affidavits, to comment and enlarge upon such facts and to take issue with the stance adopted by the respondents in this regard.

As regards the objection raised by the first and second respondents in relation to the proposed '*new*' prayer 9, the respondents contended that the applicants did not make out any case in their founding affidavits that the first and second respondents had failed to comply, in any material respect, with their obligations under the Service Agreement in relation to operational safety.

Once again, a proper analysis of the applicant's founding affidavits reveals clearly that the applicants **did** indeed from the outset challenge certain failures by

the respondents to comply with standard operating instructions in relation to rail commuter services. Thus, in his supplementary founding affidavit, Frylinck pointed out that –

> '*Commonly prescribed practice of the past by conductors of First Respondent entailed that they would control the departure of trains from platforms. The responsible conductor would physically check that all passengers have safely boarded the train and then blow a whistle as an indication to the driver that he may electronically from his seat close all doors before departure. In terms of the regulations of the said Act these doors and electrical installations should be maintained at all times. As indicated before the said practice by conductors is no longer being implemented.*'

In his answering affidavit, Harrison expressly denied, on behalf of the first respondent, that '*the practice outlined in this paragraph by guards is no longer being implemented*', and referred specifically to the first respondent's standard operating instructions to the effect that '*a train may not be set into motion until the driver has been given the signal by the conductor or guard that it is safe for him to do so.*' Similarly, in the affidavit deposed to by Mr Carver ('*Carver*'), a mechanical engineer employed by the second respondent from 1991 to 1994 as senior engineer (rolling stock), by the first respondent from 1994 to 1999 as executive manager (business operations), and now an independent consulting engineer to the railway industry – which affidavit is annexed to the answering affidavit deposed to by Van Niekerk on behalf of the second respondent – there is considerable reference to Metrorail's general operating instructions in relation to the procedures to be followed by staff when defective doors are observed. It is clear from the papers before this Court that, for various reasons, the general operating instructions, particularly in relation to defective doors, are frequently not complied with. There does not, however, appear to be any dispute between the parties that, in order to ensure the safety of commuters, the general operating instructions **are** applicable and **should** be complied with. In the circumstances, it

is difficult to see what prejudice will be suffered by the respondents should the proposed amendments to the Notice of Motion in this regard be allowed.

In the light of the considerations set out above, we were of the view that the objections raised by the first and second respondents to the applicants' proposed amendments to the Notice of Motion were not well-founded and that the application for amendment should succeed. We also concluded that the arguments advanced on behalf of the first and second respondents in support of their request for a postponement of the matter so as to enable them to file supplementary affidavits, more particularly to deal with the content of Dunne's affidavit, could not be accepted. Accordingly, we granted the applicants' application to amend, with the exception of the proposed '*new*' prayer 8 which, as indicated above, was abandoned by Mr **Viljoen** in reply.

## ***Respondents' application to strike out matter***

Very shortly prior to the hearing of this application (indeed, in respect of the third respondent and of the fourth and fifth respondents, on the day before the commencement of the hearing), applications to strike out a large number of the passages contained in the applicants' founding, supplementary founding and replying affidavits were filed on behalf of the first and second respondents, the third respondent, and the fourth and fifth respondents, respectively. The various respondents also sought to strike out certain of the annexures to the applicants' affidavits, including certain of the affidavits accompanying those deposed to by Frylinck on behalf of the applicants. The motivation advanced by the different respondents for the striking-out applications may conveniently be dealt with in the following four categories: (i) inadmissible hearsay evidence; (ii) irrelevant and opinion evidence; (iii) allegations referring to discovered documents not annexed to the applicants' affidavits, and (iv) '*new*' matter allegedly raised by the

applicants only in their replying affidavits.

*(i) Inadmissible hearsay evidence*

The applicants attached to their founding affidavits a large number of press reports published in various newspapers, allegedly revealing the severity of crime-related incidents on rail commuter trains and the lack of proper action in response thereto by the various respondents over the last decade. Frylinck submitted that a perusal of these reports indicated that:

'*49.1 Crime is rife on suburban commuter rail facilities in the Western Cape;*

*49.2 Access control to such facilities and security services for such facilities are conspicuous by their absence;*

*49.3 Promises for more and better security made over several years have not materialised;*

*49.4 Respondents have neither the will nor the capacity to prevent crime on rail facilities if the present organisational structures and budgeting for safety is allowed to continue;*

49.5 *The stark reality is that without this Honourable Court's intervention, applicants verily believe that respondents will do*

*nothing effective to ameliorate the parlous position of suburban rail commuters.*'

All the respondents applied to strike out these numerous press reports, as also the references made to such reports by the applicants in their founding and supplementary founding affidavits, on the grounds that this material constituted inadmissible hearsay evidence which had not been confirmed on oath and which prejudiced the respondents.

Applicants' counsel argued that the hearsay evidence tendered by the applicants in the form of such press reports and the references thereto, was not put forward in order for the Court to accept that each report was correct in all its details, but simply to support the applicants' contention that the frequency and type of crime committed on trains in the Western Cape in recent years was '*extraordinary and a cause of anxiety to every commuter*'.

However, as was argued on behalf of the respondents, it is clear from the passages in the founding affidavits referring to and dealing with the press reports that the applicants **do** attempt to rely upon the press reports to make a number of factual inferences and conclusions in support of their case. Moreover, despite the reference made by applicants' counsel to the court's discretion to admit hearsay evidence, in terms of the provisions of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, no attempt was made by applicants' counsel to deal specifically with any of the factors referred to in section 3(1)(c) to demonstrate that it would be in the interests of justice for such hearsay evidence to be admitted in the present proceedings. This section provides that:

'*3.(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –*

*a) …*

b) …

*c) The court, having regard to –*

*i) the nature of the proceedings;*

*ii) the nature of the evidence;*

*iii) the purpose for which the evidence is tended;*

*iv) the probative value of the evidence;*

*v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*

*vi) any prejudice to a party which the admission of such evidence might entail; and*

*vii) any other factor which should in the opinion of the court be taken into account;*

*is of the opinion that such evidence should be admitted in the interests of justice.*'

(See, in this regard, Schwikkard et al *Principles of Evidence* (1997) 157-161;

Schmidt & Rademeyer *Schmidt : Bewysreg* 4 ed (2000) at 476-481, and the various authorities cited by these writers.)

As was pointed out by Mr **Du Plessis**, the press reports relied upon by the applicants cover a lengthy period, stretching from March 1996 to November 2001. Not all of the reports deal with criminal attacks on rail commuters, nor do they all deal with incidents in the Western Cape. No attempt is made by the applicants to indicate to the Court how the reports were assembled, how complete such reports are, and (in particular) whether any specific area, type of crime or period was focused upon in compiling such reports. Furthermore, no attempt is made by the applicants to put these press reports, purportedly dealing with the incidents of crime on trains and train stations in the Western Cape, in the context of crime elsewhere in the Western Cape during the same period. Thus, for example, no indication is given of the total number of incidents of crime (including non-commuter train-related crime) that were reported by the newspapers in question over the same period of time as that covered by the reports upon which the applicants seek to rely.

In the absence of any proper attempt made by the applicants to '*contextualise*' the press reports relied upon and the inferences sought to be drawn by them from such press reports, we are of the view that the applicants have not made out a proper case for the admissibility of such hearsay evidence. Accordingly, as far as the press reports and the various passages referring to such press reports are concerned, we conclude that the applications to strike out should succeed and that the relevant portions of the applicant's papers should be disregarded.

*(ii) Irrelevant and opinion evidence*

In the applicant's founding and supplementary founding affidavits, fairly lengthy references are made to the findings and recommendations of the Committee appointed by the Goldstone Commission of Enquiry regarding the Prevention of Public Violence and Intimidation established in terms of Act 139 of 1991, to enquire into train violence in the Southern Transvaal ('*the Goldstone Committee*'). Furthermore, in the applicants' supplementary founding affidavits,

relatively detailed references are made to the findings and recommendations of the Moseneke Joint Committee of Enquiry appointed (during 1996) to enquire into the death of 16 commuters and the injury of 80 commuters caused by a passenger stampede which occurred at Thembisa station in the early morning hours on 31 July 1996.

The first and second respondents, as also the third respondent, applied for the striking out of all references to the findings and recommendations of both committees, on the grounds that such findings and recommendations constituted irrelevant and opinion evidence. In this regard, the respondents argued that the findings and recommendations of the Goldstone Committee were irrelevant to the present proceedings, as the events in question had occurred more than a decade ago, in the context of a high level of political violence committed on trains and train stations, more particularly in the Southern Transvaal.

Similarly, the respondents submitted that the findings and recommendations of the Moseneke Joint Committee were irrelevant to these proceedings, as the incident in question was not related to criminality on rail commuter trains, and the contents of the report produced by the Committee dealt with fare evasion and access control only insofar as this was relevant to the deaths and injuries caused during the passenger stampede in question. The respondents pointed out that, in formulating its report, the Committee focussed on the causes of this **specific** incident and the related fare evasion practices, and formulated recommendations in regard to appropriate responses to such practices. Fare evasion and access control was not considered by the Committee in the context of **general** criminality on rail commuter trains and train stations.

In the answering affidavits filed on behalf of the first and second respondents, extensive reference is made to the background to, and the findings of, both the Goldstone Committee and the Moseneke Joint Committee of Enquiry. The respondents deal comprehensively with the context in which both such committees were appointed, the subject matter of their investigations and the recommendations made by the committees. In this way, the respondents '*contextualise*' the references made by the applicants to the work of both committees, and, to the extent necessary, rectify perceptions which may have been created by the manner in which the applicants dealt with the findings of both committees in their founding affidavits. This being so, whilst it is obviously so that the evidentiary weight to be given to the references made by the

applicants to the work and recommendations of these two committees will necessarily be limited by the context in which the committees were appointed and in which they formulated their recommendations, we are nevertheless of the view that these passages are not entirely irrelevant to the present proceedings and that the respondent's application to strike out such passages should not succeed.

*iii) References to discovered documents not annexed to the applicants' affidavits*

In their supplementary founding affidavit, the applicants referred fairly extensively to documents forming part of the so-called '*informal discovery record*' made available by the respondents to the applicants, in compliance with the court order made by agreement between the parties on 12 February 2002. The applicants indicated that they had paginated the discovered documents in colour-coded files, numbering each file in accordance with the indexes provided by the respondents. They stated further that, in instances where they referred in the supplementary founding affidavit to sources and/or documents not annexed to such affidavit, they would for purposes of identification simply refer '*to the relevant file, item and the page number of the discovery record*'.

In this regard, the respondents submitted that all the allegations made by the applicants referring to discovered documents which were not attached to the applicants' affidavits should be struck out, contending that the proper approach in motion proceedings is to annex documentation relied upon in affidavits to such affidavits and, if the originals are not annexed to such affidavits, to have the originals available for inspection by the Court. The respondents referred in this regard, *inter alia*, to *Commercial Union Assurance Company of South Africa Ltd v Van Zyl & Another* 1971 (1) SA 100 (E) at 105A-E, and *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 83C-D.

However, as was convincingly argued by applicant's counsel, all the documents here in issue were discovered by the respondents themselves and, if any citation from any such documents required clarification or was misrepresented by the applicants, the respondents simply had to refer to the document in issue, annex it (or the relevant extract therefrom) to the answering affidavits and record their criticism of the applicants' use of the document in question. It is clear from the papers before this Court that the respondents had no difficulty whatsoever in identifying and dealing adequately with all of the documents in the '*informal discovery record*' utilised by the applicants in the manner complained of. For this reason, we are of the view that the respondent's application to strike out a number of passages from the applicants' supplementary founding affidavits on this basis should not succeed.

*iv) New matter raised in reply*

The passages in, and supporting documentation annexed to, the applicants' replying affidavits which the respondents sought to have struck out on the basis that this constituted '*new matter*' introduced by the applicants for the first time in reply – resulting in potential prejudice to the respondents which could not be cured unless they were afforded the opportunity to deal therewith by way of further affidavits – fall into five main '*categories*' and will be dealt with under such categories.

The first category encompassed the submissions made by Page (one of the experts relied upon by the first and second respondents) at the public hearings (held in February 2002) by the Parliamentary Portfolio Committee on Transport under the chairmanship of Mr Jeremy Cronin MP, which Committee was mandated to consider the draft National Railway Safety Regulator Bill prepared by the National Department of Transport. The unedited transcript of the submissions made by Page to such Committee was furnished to the applicants' attorneys by the liaison officer of the said Portfolio Committee and was annexed to the applicants' replying affidavits. One of the applicants' attorneys (Mr Theron) and other representatives of the applicants attended the public hearings and the

first applicant also made fairly substantial submissions to the members of the Portfolio Committee. A copy of the written submissions made by the first applicant was annexed to the applicants' supplementary founding affidavit. Mr Theron deposed to an affidavit (annexed to one of the replying affidavits deposed to by Frylinck), in which he confirmed the correctness of the allegation (made by Frylinck) that the unedited transcript of Page's submissions accurately reflected what Page had in fact stated to the Portfolio Committee.

In his replying affidavit, Frylinck pointed out that certain of the submissions made by Page before the Committee appeared to be at variance with the contents of the '*expert report*' prepared by Page on behalf of the first and second respondents, and annexed (in the form of an affidavit) to Van Niekerk's answering affidavit. Thus, Page had submitted to the Committee that problems exist with the form of data recorded by the SAPS concerning incidents of crime on rail commuter trains, and the manner in which Metrorail subsequently attempts to correlate such data. So, while the SAPS data base requires an exact crime location, this is not possible in respect of crime committed on moving trains. Furthermore, Page had submitted that, while the commuter rail provider and the SAPS should keep comparable statistics, this is in fact not the case. Page also referred, in his submissions to the Portfolio Committee, to the problems created by the non-existence of an independent body responsible for the assimilation of the Metrorail statistical data, stating that statistics '*… must be collected independently; because you may well find out we are only given numbers that organisations want us to see.*' In his view, as expressed to the Portfolio Committee, it was necessary *'… to validate all the information that is submitted by network operators*'.

These concerns with the collation, use and reliability of criminal incident statistics used by Metrorail and the SARCC were, by and large, not addressed in Page's expert report, despite the fact that his mandate in preparing such report was '*to provide expert witness services with respect to, **inter alia**, the use of criminal incident statistics compiled by Metrorail*'. The conclusion reached by Page in his expert report was that '*the system used* [by Metrorail and the second respondent under the Service Agreement] *to monitor trains with a view to detecting deviations which may occur from the benchmark in Annexure 6 and the formulation and carrying out of **ad hoc** action plans on regional level appear to operate reasonably. The security plan in relation to methodology applied to collate data, to detect deviations and to address same may be open to criticism, but cannot be rejected as unreasonable, incoherent or inflexible.*'

Applicants' counsel contended that, confronted with Page's expert testimony on behalf of the first and second respondents, the applicants were clearly entitled to have regard to the statements made by him before the Portfolio Committee which

appeared to deviate from, or to be at variance with, his analysis and conclusions in his expert report. Reference to Page's submissions to the Portfolio Committee had been made by the applicants in their founding affidavits and the respondents were adequately alerted to the applicants' reliance upon various statements made by Page before the Portfolio Committee. As argued by applicants' counsel, the applicants could not reasonably have been expected to know, when their founding affidavits were prepared, that they would in due course be confronted with an expert report by Page containing certain conclusions apparently inconsistent with his submissions before the Portfolio Committee.

As these apparent contradictions impact upon the '*veracity*' and reliability of Page's views, we agree with applicants' counsel that it is appropriate for the applicants to place before the Court, albeit in their replying affidavits, the transcript of Page's evidence before the Portfolio Committee and to point out, in their replying affidavits, the alleged contradictions between such evidence and the stance adopted by Page in his expert report. For this reason, we are not prepared to accede to the respondents' request that this material be struck out.

As indicated above, the second major '*category*' of material affected by the respondents' striking out applications was the whole of Dunne's affidavit, as also the vast majority of the paragraphs in the applicants' replying affidavits referring to, or relying upon, Dunne's affidavit. Here too, the argument advanced on behalf of the respondents in support of this part of their applications to strike out was that this material constituted inadmissible new matter in reply which, if admitted, would occasion the respondents irreparable prejudice, unless they were afforded the opportunity to deal therewith by way of further affidavits.

We have already dealt with these arguments in the context of the objections raised by the respondents to major parts of the applicants' application to amend. We thus need do no more than refer to our reasoning set out above in support of our conclusion that, correctly construed, Dunne's affidavit and the references thereto in the applicants' replying affidavits cannot properly be characterised as '*new matter*' impermissibly raised in reply. This being so, we are of the view that the respondents' applications to strike out this category of material should not succeed.

It should, perhaps, also be pointed out that the replying affidavit deposed to by Frylinck, to which Dunne's affidavit was annexed, was served upon the respondents on 24 July 2002, more than a month prior to the commencement of the hearing of the application. As pointed out above, many of the aspects dealt with in Dunne's report – in particular, the statistical methodology followed by the first and second respondents under Annexure 6 to the Service Agreement; the reliability of the statistics forming the basis of such methodology; the methods of

collection of data and analysis thereof by the first and second respondents – had been dealt with in considerable detail by Harrison and by Van Niekerk in their answering affidavits, as also by the various experts relied upon by the first and second respondents.

The respondents failed to make any real effort to '*plead over*' by responding to the substance of the contents of Dunne's report and the references to such report in the applicants' replying affidavits. Instead, the first and second respondents served upon the applicants, very shortly prior to the commencement of the hearing, an exceptionally voluminous application to strike out matter and, at the same time, filed and served a further affidavit by Harrison, stating, *inter alia*, that the respondents were unable to respond to the issues raised by Dunne's affidavit in the time available and would suffer irreparable prejudice should this material be permitted. In this affidavit, Harrison indicated that Page had in the interim taken up a position in the United States and was, accordingly, no longer available to the first and second respondents and that, in order to comment adequately on Dunne's report, the first and second respondents would have to instruct a new expert witness.

We do not find this response very convincing. As discussed above, counsel for the respondents argued that they required a postponement to deal with the issues raised by Dunne's affidavit, as they needed (*inter alia*) to place '*comprehensive factual material before this Honourable Court in regard to the* ***modus operandi*** *of the task force (including the considerations – budgetary and otherwise – which prompted them to draft the Service Agreement (and more particularly Annexure 6 thereto) in its present form*'. In view of the fact that both Harrison and Van Niekerk served on the task force, and that both deal extensively in their answering affidavits with the context in which the work of the task force was carried out, there does not seem to be any good reason why the respondents were **not** able to make the aforementioned '*comprehensive factual material*' available to the Court prior to the hearing of the application. (See in this regard, Van Winsen et al *op cit* 372-373, and the authorities cited by these writers.)

Next, the first and second respondents, as also the third respondent, seek to have struck out from the applicants' replying affidavits a number of passages in which the applicants allege that the first respondent is obliged to, in effect, apply a policy of '*cross-subsidisation*' amongst its various business divisions by, for example, utilising the profit which it makes from other business divisions to improve rail commuter security services in its Metrorail division. In view of our conclusions regarding the relief sought by the applicants in terms of prayer 6 ('*the funding relief*'), it is not really necessary for us to deal in any detail with this aspect of the respondents' application to strike out. Suffice it to say that an

analysis of the papers before this Court supports the conclusion that these passages are indeed new matter impermissibly raised by the applicants in reply and that the striking out applications relating to these passages should, in our view, succeed.

In the answering affidavit deposed to by Van Niekerk on behalf of the second respondent, Van Niekerk disputed the *locus standi* of the first applicant to obtain any of the relief sought by it in the present proceedings. This challenge to the first applicant's *locus standi* was echoed by Harrison in the answering affidavit deposed to by him on behalf of the first respondent.

In the applicants' replying affidavit, Frylinck disputed this challenge to the first applicants' *locus standi* and alleged that the Congress of South African Trade Unions ('*COSATU*') supported the present application and had embarked on strike action because of its dissatisfaction with the security situation on rail commuter trains. In support of this allegation, an unsigned affidavit deposed to by a Mr A J Ehrenreich ('*Ehrenreich*'), allegedly the Regional Secretary for the Western Cape Region of COSATU, was annexed to this replying affidavit of the applicants. In Ehrenreich's affidavit, he makes the statement that COSATU has more than 260 000 affiliated members in the Western Cape and that, if spouses and dependants are taken into account, the number of people whose broad interests COSATU represents is at least four to five times that number. According to Ehrenreich, COSATU supports the '*efforts of the above Applicants to achieve improvement in the rail commuter services in the Western Cape*'. COSATU does not, however, formally join these proceedings, as it '*prefers to bring pressure to bear on the authorities to improve the situation in a different way*'.

The first and second respondents applied for the striking out of the references in the applicants' replying affidavits to this '*support by COSATU*', as also for the striking out of Ehrenreich's affidavit, contending that this was new matter tendered in reply, the admission whereof would occasion prejudice to the first and second respondents unless they were afforded the opportunity of dealing therewith by way of further affidavits.

With reference to cases such as *Nahrungsmittel GmbH v Otto* 1991 (4) SA 414 (C) at 418D, *Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd* 1994 (1) SA 569 (C), and *Moosa & Cassim NO v Community Development Board* 1990 (3) SA 175 (A), applicants' counsel argued that it is the practice in this Division to allow an applicant whose *locus standi* is assailed by a respondent in answering affidavits to remedy any possible deficiency in such *locus standi* in reply. While these cases provide some support for the applicants' submissions in this regard, we are of the view that, particularly in the light of the fact that the affidavit deposed to by Ehrenreich was unsigned (and was, moreover, expressed in relatively broad and general terms), the respondents' objections to these passages are well-founded and that the application to strike out this matter should succeed.

Finally, the respondents sought to have struck out from the applicants' replying affidavits certain passages referring to the training levels and competency of contracted security guards (falling into various grades ranging from Grade A to Grade E). This part of the respondents' application to strike out was also directed at two further affidavits annexed to the applicants' replying affidavits, one of which was deposed to by a Mr Van der Merwe ('*Van der Merwe*'), one of the attorneys acting for the applicants, and the other deposed to by a Mr Mponoana ('*Mponoana*'), the National Training Manager of the Private Security Industry Regulatory Authority ('*SIRA*'), the statutory body regulating all private

security guards.

It appears from these affidavits that only ten days training is required to be accredited as a Grade D guard and that no minimum scholastic requirements are set. It also appears that it is not permissible to issue firearms to Grade D guards, and that only a guard trained to and accredited as Grade C or a higher grade, as specified by SIRA, may be allowed to carry a firearm. According to Mponoana, Grade D guards are only basic security guards capable of performing unsophisticated guarding functions such as access control and patrolling. Applicants also annexed to their replying affidavits various posting sheets relating to private security guards contracted by Metrorail, from which it appears that, in a number of instances, firearms **were** issued to Grade D guards contracted to provide security on rail commuter trains and stations. The respondents contended that these passages, as also the affidavits by Van der Merwe and Mponoana, were new matter impermissibly raised in reply and had to be struck out.

We disagree with this submission. A perusal of the answering affidavit deposed to by Harrison makes it clear that the firearm competency of security guards was raised by Harrison himself and that the impugned passages in the applicants' replying affidavits sought to deal with the allegations made by Harrison in this regard. Moreover, in a further affidavit deposed to by Harrison, he purports to deal with the applicants' allegations on this aspect, annexing to his affidavit a

copy of a letter obtained from one Mr K Matroos ('*Matroos*'), allegedly the manager of the Law Enforcement Division of SIRA, in which Matroos reports to confirm that '*a registered security officer Grade D is permitted to handle a firearm in the performance of his duties provided that such a security officer is in lawful possession of the firearm*'. As the firearm competency and general training of contracted private security guards was thus an issue raised by Harrison on behalf of the first respondent, and as the applicants' allegations in this regard have purportedly been dealt with by Harrison in a further affidavit, we are of the view that allowing this material in the applicants' replying affidavits to stand will occasion no prejudice to the respondents. The respondents' application to strike out in this regard is accordingly not granted.

## ***Standing of the applicants***

Mr **Du Plessis** submitted that first applicant had no *locus standi* to seek the relief sought in that it had failed to establish that it is a *universitas personarum*; that is a body possessed with the characteristics of a *universitas* and, more particularly, an entity capable of possessing rights and which has perpetual succession. Further, first applicant had failed to establish that it had a membership or that it had a constitution. (See, in this regard, *Interim Ward S 19 v Premier, Western Cape Province* 1998 (3) SA 1056 (C) at 1060F.)

In *African National Congress and Another v Lombo* 1997 (3) SA 187 (A) at 195-196, Corbett CJ held that in order to determine whether a voluntary association is a *universitas*, it is necessary to look in the first instance at its constitution and, if it is not possible to determine by reference to the constitution, either from its express terms or by way of implication, that the association was a *universitas*, regard must be had to the nature of and the objects of the association.

On the basis of this test, Mr **Du Plessis** submitted that the first applicant had failed to establish that it was a *universitas* and that, accordingly, it had not shown that it had the requisite *locus standi*.

**Mr Du Plessis also attacked the standing of the second applicant. He submitted that the second applicant did not seek any relief in a representative capacity, ie relief on behalf of another person, entity, group or class. Second applicant did not allege that he was a commuter or that he intended to become a commuter and that he thus entertained an apprehension of personal harm when travelling on commuter trains.**

Mr **Viljoen** conceded that the common law which antedated the Constitution had a restricted approach to *locus standi*. However, he contended that section 38 of the Constitution '*had 'radically extended the common law rule of standing*'. Counsel referred in this regard to (*inter alia*) *McCarthy v Constantia Property Owners Association* 1999 (4) SA 847 (C) at 854H and *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E) at 618E-619F.

In *Ngxuza's* case (*supra*), Froneman J concluded that the starting place to determine the question of standing was the Constitution and, in particular, section 38 thereof, which section '*introduces far-reaching changes to our common law of standing*' (at 618J). Froneman J went on to say:

> '*Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach. The principle of legality*

*implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in* a *number of respects. A wide range of persons may be affected by the case. The emphasis will often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality*' (at 619B-D).

Even before the introduction of section 38 of the Constitution, our courts had shown a willingness to take a less restrictive approach to standing in so-called public interest litigation. Thus in *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (C) at 400F-401G, Grosskopf J (as he then was) held that, where a township scheme introduced in terms of the Township Ordinance 33 of 1934 (C) was intended not necessarily '*to operate… in the general public interest, but in the interest of the inhabitants of the area covered by the scheme, or at any rate those inhabitants who would be affected by a particular provision',* the latter would have *locus standi* (at 401B-H).

Mr **Viljoen** argued that, in the present dispute, although first applicant is not a *universitas personarum*, it is a voluntary association. It was constituted at a public meeting called to give public expression to grave concern about the death of the son of second applicant who was killed on a train travelling between Kenilworth and Wynberg on the Cape Town/Simonstown railway line. First applicant was formed by members of the public who, as Mr Frylinck described in his founding affidavit, had '*had enough of crime on trains and wanted immediate action*.'

Second applicant is the father of the late Juan van Minnen who was killed on a train. Third, sixth and ninth applicants were victims of crimes committed on the railways which are run by first respondent, having been subjected to robbery, assault and theft while passengers on commuter trains. Fourth applicant lost his

right arm at the shoulder joint and his right leg to the knee as a result of a violent attack while he was a passenger on the train. Fifth applicant lost both his legs after being flung from the open door of the train on which he was a passenger. Acts of violence were committed against the spouses of seventh and eighth applicants while the former were passengers on a train, such acts resulting in their deaths. Ninth applicant was robbed while a passenger on a train, thereafter was stabbed twice in the face and thrown forcibly from a train window.

First and second respondents contend that second to ninth applicants' cases should be dismissed with costs in view of the plainly foreseeable factual disputes that have arisen in the papers, particularly with regard to the cause of the injuries sustained by third, fourth, fifth and ninth applicant. Further, first and second respondents contend that fourth to ninth applicants have failed to establish an interest in declaratory relief which is more than merely academic and hence of practical consequence.

In our view, the first part of this attack is predicated on the erroneous premise that the relief sought by applicants was based on a delictual claim that must be brought properly by way of an action grounded in delict. As will become apparent from the analysis of the relief sought, a number of prayers can appropriately be determined by this court on a proper application of the principles dealing with motion proceedings.

Furthermore, the relief which applicants seek is to ensure the provision of a safe rail commuter service in which violent attacks on passengers are prevented. On the case made out by applicants concerning the lack of safety on the trains, the relief is most certainly designed to have a practical effect. Third to sixth and ninth applicants have been directly affected by violence on the train. Second applicant was indirectly affected by virtue of the death of his son, while seventh and eighth applicants have lost their husbands and, moreover, have to travel to work daily on the trains along the same line as that on which their husbands were killed. First applicant was formed in order to ensure that action would be taken to prevent further loss of life and injury to the rail commuter population. Indeed, first

applicant has received recognition from a senior member of first respondent. It was common cause that first respondent's regional manager, Harrison, attended a meeting with members of first applicant where he sought to communicate the first respondent's attitude to violence on trains operated by the first respondent (acting on the '*request*' of the second respondent).

The relief which the applicants seek from this court is in part dependent upon the provisions of the Constitution. Where applicants rely on the common law, they seek to employ the Constitution in order to expand the range of common law rights enjoyed by them. Furthermore, as Mr **Viljoen** submitted, applicants seek to hold respondents accountable to the class of persons who use commuter trains in the Western Cape.

Viewed within this context, a restrictive approach to the standing of a voluntary association as might previously have been adopted, is incompatible with the spirit, purport and objects of section 38 of the Constitution. An association of concerned citizens, formed to express concern about the conditions of public facilities such as the rail commuter service in the Western Cape, approaches the court for relief on behalf of an affected constituency, being passengers. In our view, a strict adherence to the requirements of a *universitas personarum* is incompatible with the spirit of the Constitution, which seeks to ensure that persons '*who are most lacking in protective and assertive armour*' be afforded the opportunity of obtaining relief from our courts (see *Permanent Secretary***,** *Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at para 12).

A voluntary association formed to protect the rights of a vulnerable constituency and with the object of holding a public body accountable to the public should, it seems, not be subjected to unnecessary restrictions before being heard by our courts. As Kruger AJ observed in *Highveldridge Residents Concerned Party* v *Highveldridge TLC and Others* 2002 (6) SA 66 (T) at para 24, to restrict voluntary associations in the way they are restricted by way of common-law requirements '*would equally be contrary to the ideal of a vibrant and thriving civil society which actively participates in the involvement and development of a rights culture pursuant to the rights enshrined in the Bill of Rights*'. Schwartz *et al* express a similar view:

> *'If a plaintiff with a good case is turned away merely because he is not*

> *sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest. Litigants are unlikely to spend their time and money unless they have some real interest at stake. In the rare cases where they wish to sue merely out of public spirit, why should they be discouraged?'*

(Schwartz, Wade & Prosser *Cases and Material on Torts* (10 ed, 2000) at 570.)

For these reasons, we are of the view that applicants in general and first applicant in particular have standing to approach the court for the relief as set out in the notice of motion.

We now turn to consider the relief sought by applicants as set out in the various prayers to their notice of motion.

## ***Prayer 1: The provision of a rail commuter service 'in the public interest'***

In terms of prayer 1 of the notice of motion, the applicants seek a declaration that the manner in which the rail commuter service in the Western Cape is operated by first respondent and controlled and funded by second respondent is not in the public interest, as contemplated in section 15(1) and section 23(1) of the SATC Succession Act, insofar as the provision of proper and adequate safety and security services and the control of access to and egress from rail facilities used

by rail commuters in the Western Cape are concerned.

Section 23(1) of the SATS Succession Act provides that:

> '*The main object and the main business of the Corporation* [second respondent] *are to ensure that, at the request of the Department of Transport or any local government body designated under section 1 as a transport authority, rail commuter services are provided within, to and from the Republic* ***in the public interest***' (our emphasis).

Section 15(1) of the SATS Succession Act in turn stipulates that the first respondent *'shall provide, at the request of the Corporation* [second respondent] *or a transport authority, a service that is* ***in the public interest***' (again our emphasis).

The term '*public interest*' is thus required to do much of the work in giving meaning to first and second respondents' statutory obligations. In giving content to the term '*public interest*', Mr **Viljoen** referred to Black's *Law Dictionary* where this term is defined as '*the general welfare of the public that warrants recognition and protection. Something in which the public as a whole has a stake, especially an interest that justifies governmental regulation*'.

In *Ex Parte North Central and South Central Metropolitan Sub-Structure Councils of the Durban Metropolitan Area and Another* 1998 (1) SA 78 (LCC) at 83E, Moloto J referred with approval to the definition of '*public interest*' in *The New Shorter Oxford English Dictionary* Volume 2 (1993), where '*public interest*' is defined to include '*the common welfare*'.

By contrast Mr **Albertus** submitted that the requirement to conduct a commuter rail service '*in the public interest*' meant nothing more than that a train service must be provided for the benefit of the general public, in the sense that such

service allowed members of the public access to an affordable and reliable mode of public transport.

In our view, this narrow definition of '*public interest*' is inappropriate within the context of the present dispute. While the term '*public interest*' may not be capable of precise definition, the use of the phrase is to our mind designed to ensure that first and second respondents adopt a policy which promotes the general welfare of the public which uses the public facility in question, in this case the railway service. (See in general R Flathman *The Public Interest* (1966) at 82.)

In *Mohammad Raihan v Uttar Pradesh* AIR 1956 A ll 594 at 595, an Indian Court held that the words '*public interest*' as employed in the Motor Vehicles Act of 1939, meant the interest of the public which uses the relevant mode of transport and not the public in general. In the present case, the public who are in need of public transport are entitled to demand that their needs be met by a service which adequately protects their security and safety. Manifestly, it is in the public interest that public transport be provided which adheres to reasonable standards of safety, security and reliability.

Given this interpretation of public interest, it is possible to analyse the relief which applicants seek from this court in terms of prayer 1 of the notice of motion. In particular, applicants demand that respondents provide proper and adequate safety and security on trains, including control of access to and egress from rail facilities used by rail commuters in the Western Cape. It is applicants' case that the failure to so provide by respondents means that the rail service is **not** operating or being operated in the public interest, as is required by the relevant provisions of the SATS Succession Act. The applicants rely on a number of different aspects of the rail commuter service to support this contention.

*(i) Access and egress control*

In his founding affidavit, Frylinck cogently describes the absence of access and egress controls on a number of railway stations in the Western Cape. Harrison concedes that '*stations were largely unmanned for access control purposes*' in what he described as '*off-peak periods*'.

In essence, first and second respondent's case is that access and egress control

will not curb crimes and that such control at all Western Cape stations is neither economically nor practically viable. Mr **Du Plessis** submitted that applicants laboured under an erroneous perception that crime could be minimised effectively by means of the exercise of adequate access and egress control. In this connection, he referred to the affidavit deposed to by Van Niekerk on behalf of second respondent. Van Niekerk averred that second respondent was '*satisfied that the measure of access control is sufficient for its predominant purpose, ie to increase fare revenue'*. Van Niekerk further emphasised that *'it is erroneous to assume that the eradication of fare evasion will prevent or minimise crime. All the available evidence and experience point the other way'.*

The argument that access and egress control is designed to eradicate fare evasion rather than the control of crime was supported by a number of experts who deposed to affidavits in support of first and second respondents. Thus, Oeschger stated that:

> '*If the purpose of access and egress control is to eliminate the carrying of dangerous weapons, it will be totally ineffectual. The only logical and effective way to ensure the absence of dangerous weapons on stations and trains is to close the system entirely and to conduct bodily searches of all commuters, a process which in itself is impractical and inherently dangerous. This means that all stations must be securely fenced as well as the entire track, covering hundreds of kilometres.*

*To maintain a closed security system, access at all stations in South Africa must be similarly controlled, resulting in a massive and costly security operation*'.

In addition Oeschger claimed that such a system would be impractical and dangerous. According to him:

> '*Bodily searches of 175 000 commuters twice per day, or even the use of turnstiles at all access control points, will result in massive delays in the transportation schedule. It can be expected that long queues will be formed by rail commuters who generally have to travel long distances and*

*are therefore in a hurry to reach their destinations. Given the current impatience of commuters with any delays it can be expected that violence and the destruction of property will follow.*'

Carver, in turn stated that:

'*The issue of closing off the existing system is one that commuter railways all over the world have faced or are currently facing. Efforts at closing the system are almost without exception for the reduction of fare evasion. I am not aware of a single system anywhere in the world that has been closed off primarily to eradicate crime. The costs of system closure increase exponentially with the reduction of fare evasion and often a level of fare evasion of say 5% is chosen as a target to aim for as a tolerable level taking the costs of closure and benefit from extra ticket sales into account. This implies that most railways tolerate a certain level of fare evasion. An expectation of complete closure and zero fare evasion is unobtainable in most cases in commuter railways …*'.

By contrast, Mr Johann Nortjé ('*Nortjé*'), a director in the Legal Department of the South African Police Service, who deposed to the main answering affidavit on behalf of the fourth and fifth respondents, conceded that access and egress control **did** have a role to play in the curbing of crime. As he said, '*whilst proper access and egress controls would ameliorate the situation, such controls would not necessarily prevent criminals from gaining access to trains and stations and committing crime'.*

In dealing with the problem of crime on the rail network in the Western Cape,

Nortjé stated that:

> '*I am informed by Captain van Breda of the commuter unit that many of these railway stations have no or inadequate access control. There is also a severe problem with overcrowding on trains, particularly during peak hours.*
>
> *Captain van Breda further informs me that the doorways between carriages are permanently sealed off. The aforementioned conditions make it extremely dangerous for an armed policeman to be in the carriage without police back-up.*'

In response to Frylinck's contention that, instead of applying proper access control, the first respondent employs the practice of police and defence force '*blitzes*' on the trains, Nortjé said the following:

> '*Blitzes have occurred, often at the request of the first respondent. The efficacy thereof is, however, questionable in view of the fact that a search may be conducted between two railway stations and at the very next railway station criminal elements might find their way onto the train.* ***In the absence of proper and adequate access and egress control***, *these blitzes have assisted with the policing of trains'* (our emphasis).

Nortjé also states that, while '*access and exit control at railway stations and acting as security guards do not form part of policing duties*', '*the police are fully aware that access control on railway stations has an impact on crime.*'

It is important to note that the applicants' case was not based on a claim that proper control of access to and egress from stations and trains would eradicate **all** crime on the trains. Yet, to a very large extent, that is the defence which has been offered by respondents. By contrast, applicants contend that there is a need for access and egress control to **reduce** crime on the trains. This contention enjoys support from the affidavit deposed to by Nortjé who indicates that the absence of access and egress control significantly increases the problem

of policing of trains.

It is of some relevance that most stations in the Western Cape already have facilities to control access and egress, although these facilities are unmanned. Thus, Van Niekerk stated that '*most stations in the Western Cape are enclosed and furnished with barriers and turnstyles. The reason why electronic access control has not been implemented similarly appears from the Carver Report.*'

In his affidavit Carver states the following in this regard*:*

> '*Access control systems have also been developed through a number of prototypes up to production level and the proven design has been incorporated into all new and upgraded stations where high volumes of commuters are handled. The latest development occurring currently is the imminent tender issue for an electronic ticketing system that will be used in conjunction with an automatic reading system at the access controlled turnstyles. Introduction of this system is expected to further control the ingress and egress of persons into and out of the system and should reduce fare evasion and ticket fraud even further.*'

Although Carver goes on to deny that access control can effectively be used '*as a stratagem to curb or minimise crime on stations and trains*', his affidavit supports applicants' contention that the basic infrastructure for the implementation of access and egress control already exists, as does the technology to ensure an efficient system.

*(ii) Safety*

In his supplementary founding affidavit, Frylinck refers to the overcrowding of trains. In support of this allegation, he attached to the affidavit two photographs which revealed a number of passengers being transported on moving trains while

holding on precariously to the outside of the carriages. These trains were clearly proceeding at some speed without all the doors having been closed.

Harrison replies to Frylinck's allegations in this regard as follows:

'*I deny that trains operated by First Respondent travel* "without any doors whatsoever". *In the Western Cape and in other parts of the country some commuters (generally during peak times) practice the unacceptable habit of keeping, or forcing, doors open after trains are set into motion. The precise manner in which Metro Rail train doors operate appears fully from the Carver report…...*'.

The relevant passage from Carver's affidavit thus referred to by Harrison reads as follows:

'*The air pressure in the door operating cylinders has to be regulated to avoid causing injury to persons caught in the doorway while closing and to allow the doors to be forced open to free a trapped person. This feature designed with the safety of the commuter on the one hand* [sic] *is often abused by unruly elements in the coach who hold the door open with a foot placed at the base of the door in the open position or even force the door open from the inside while travelling.*

*Doors of this original type are also susceptible to theft and vandalism and at times doors are vandalised, removed and thrown off en route necessitating the train to be cancelled at its terminal station if doors are*

*missing'.*

In reply to these contentions by Harrison, the applicants referred to the testimony given by Page, on 20 February 2002, to the abovementioned Parliamentary Sub-Committee on Transport dealing with the National Railway Regulator Bill, an unedited transcript of which was (as indicated above) appended to Frylinck's replying affidavit. As already stated, Page was an expert who deposed to an affidavit on behalf of first and second respondents in the present dispute. His testimony to Parliament, however, supports the allegations made by Frylinck in his supplementary founding affidavit and in the supporting photographs referred to above.

Page told the Portfolio Committee that:

'*Some of the criminal elements on the railways are due to the breakdown of some safety aspects such as holes in fences or fences removed. Train doors, which are forever open and windows that cannot close. Now windows that are broken within these elements in safety* [sic] *have sometimes given opportunities to criminals to undertake or to commit criminal activities on railways, so there is a need to have a holistic approach to rail safety by including railway security*.'

The importance of trains running with closed doors was also emphasised by Page in his testimony before the Portfolio Committee:

'*In most cities where they have commuter trains the trains cannot move without then one of the doors is open* [sic]*. So all the doors must be closed before the train moves because it is comprising safety, but it is completely reverse in South Africa* [sic]*. Trains are moving with all the doors open. I have been told, yes passengers deliberately force the doors*

*open, but the mere fact that the train is moving with all the doors open, it is a compromise on the passengers' safety* [sic].'

*(iii) Security*

**In his founding affidavit, Frylinck noted that the incidence of crime on rail commuter services in the Western Cape was extremely high and '*takes the form of murder, culpable homicide, robbery, rape, assault, theft, malicious damage to property intimidation, possibly a variety of statutory offences …'.* He also referred to first and second respondents having recorded statistics of 457 serious crime incidents for the period 1 April 1998 to 31 March 1999. Furthermore, '*assuming Harrison's admissions to be correct, the position has now deteriorated considerably*'.**

**In reply, Van Niekerk denied that crime on commuter rail facilities in the Western Cape was disproportionately high, particularly when viewed within the context of national crime statistics as well as in relation to crime patterns in other regions named. According to Van Niekerk, the Western Cape was one of the regions with the lowest crime rate. Further, '*the negative pattern which manifested itself in the Western Cape during the second term of last year was noticed, addressed and duly rectified within a matter of months when the deviation which had manifested itself again***

***returned to normal…*'.**

In support of these allegations, Van Niekerk referred to a table contained in Oeschger's affidavit comparing criminal activity on a national level to rail transit criminal incidents for the period January to September 2001. This table reads as follows:

**Criminal activity on a national level compared to rail transit for the period January to September 2001**

| **Category of Crime** | **National Incidents 2000** | **Rail Transit Incidents** | **Percentage of National Incidents** |
|---|---|---|---|
| **Murder** | **15457** | **71** | **0,4%** |
| **Theft** | **404256** | **837** | **0,2%** |
| **Robbery (aggravated & other)** | **141029** | **635** | **0,4%** |
| **Malicious Damage to Property** | **100681** | 335 | **0,3%** |
| **Assault (gbh)** | **192750** | **207** | **0,1%** |
| **Rape** | **37556** | **18** | **0,04%** |

The figures apart, a critical element of the first and second respondents' response to applicants' complaints regarding crime on trains was to refer to the so-called '*Crime Index*' which they employ. The nature of this Index and its role in the curtailment of crime on commuter railways is of key importance to the arguments about safety and hence it requires particular examination.

According to Van Niekerk, first and second respondent jointly created a task force during 1977 to develop a '*fresh*' agreement in terms of which first respondent would provide a commuter service '*in the public interest*', as required by the SATS Succession Act. Van Niekerk described the process thus:

> '*Members of the task force were experienced, well qualified and seasoned business- and railway men who knew the nature of the*

*business and had the benefit of the continued exposure thereto…The work of the task force was carried out over a period of more than two years. The intention of the participants was to thrash out,* ***inter alia,*** *the best operational and security plan possible in the circumstances. Every word, phrase and provision was carefully weighed and considered. The lode star which was followed by the task force was to create a dispensation which would serve the interests of the commuting public and also comply fully with the strictures imposed by the Succession Act.'*

The provisions of Annexure 6 to the Service Agreement deal specifically with security. This part of the agreement contains a number of obligations, some of which are imposed upon first respondent as operator of the commuter rail service, and others which rest upon second respondent as '*supervisor*'. In terms of clause 7 of the Annexure, first respondent binds itself to perform in accordance with a security index '*based on an agreed selection of the more serious crimes as reflected in the present Metrorail National Crime Index*'. Clause 6.1 provides that crime is to be measured and benchmarked against a specific operating environment. All incidents would be measured in frequency per 100 000 commuters conveyed per month. In terms of Addendum 2 to Annexure 6, the Metrorail National Crime Index referred to was determined according to the following formula:

'*Divide the total number of incidents by the total number of actual* [**paid** – see further below] *journeys and multiply by 100 000 to bring it in line with the national SAPS format based on 97/98 statistics used to determine the National Crime Index*.'

In his affidavit Van Niekerk set out the operation of the '*New Crime Index*' (referred to in the said Addendum 2) as follows:

'[T]he formula dealt with above is further explained. It reveals also that the

parties have set a "target" *to reduce crime at a rate of 5% during the subsistence of the agreement i.e. by starting with an index of .682 the aim is as follows: 99/2000 - .648; 2000/2001 - .615 and 2002/2003 - .555*', etc.

In essence, therefore, the Index is the barometer by which respondents are supposedly able to assess whether the measures adopted to deal with security and safety of passengers are successful or are in need of change.

Based upon this Index, first and second respondents deny that their obligation to reduce crime as contained in Annexure 6 to the Service Agreement has been breached. The experts who deposed to affidavits on behalf of the respondents supported the coherence of the plan as contained in Annexure 6. Thus, Page suggested that the index is '*not flawless or perfect. In my view however it is a reasonable, logical*, *coherent and flexible plan*', and concluded that '*the methodology used by Metrorail and the second respondent under the Service Agreement …is one that is not entirely free from criticism and leaves scope for improvement. It is nonetheless a reasonable methodology*'.

Oeschger expressed a similar view of the plan which incorporated the security provisions of Annexure 6, stating that it made '*provision for the rendition of a reasonably safe service'*.

Serious questions were, however, raised about the efficacy of Annexure 6 and the Metrorail National Crime Index by Professor Dunne who (as discussed above) deposed to an affidavit on behalf of applicants. Dunne makes three critical points. Firstly, he refers to the Crime Index having a '*declared explicit base line April 1998 to March 1999…. and a target of 5% reduction per year is adopted'.* The baseline indicated a rate of 682 serious crimes per 100 000 paid commuter trips. Dunne describes this as a baseline '*or an initial level from which there is an expectation or promise of consequential improvement. The adoption of a particular value of the Index as baseline does not imply that the base represents an acceptable or balanced state of affairs*'.

Dunne contends that the initial adoption of a figure of 682 serious crimes per 100 000 paid commuter trips as a base line was an arbitrary figure which in itself constituted an unacceptably high level of serious crime on the commuter train service. This point of departure '*allows Metrorail to focus only on the limited*

*achievement or circumstances of not falling to deeper levels of unpalatability*'.

Dunne also comments upon the target of a 5% reduction of crime per year. He remarks that this reduction would be achieved '*if the number of current non-commuters switching to Metrorail increases the denominator by 5.26% (i.e. journeys increase by a factor 100/95), even if the number of crimes on Metrorail remains exactly the same in all categories*'.

Thirdly, Dunne criticizes the comparison drawn between crime levels on trains and crime levels in the broader community. In order to illustrate his argument, he assumes that commuters spend two hours on average per return journey, as compared with twelve to fourteen hours in other locations in the community. Thus, '*we might assume a multiplicative factor of say six or seven to adjust for commuter active time contrasts within the two environments (Metrorail and other) and a further conservative factor between 100 and 200 for the contrasts in relevant extent of spatial areas of Metrorail and SAPS data collection*'. Dunne qualifies these assumptions by saying that '*the choice of these factors is conceded to be arbitrary, but I claim not extravagant*'.

Dunne then seeks to illustrate the problem with the Index by the use of the following assumptions:

> '*The import of only making time and space adjustments to fairly compare risks of Metrorail area with SAPS area counts might involve a composite multiplicative factor between 600 = (6 x 100) and 1200 = (6 x 200). This factor has not yet taken into account the SAPS focus on the entire commuting population, of which the Metrorail commuters are only a fraction Assume a conservative but arbitrary factor of say 7. This number 7 would be consistent with one eighth of the citizenry using Metrorail and seven-eighths using other modes or none at all. A further factor (up to 1.4) might apply to adjust for weekends of commuters who travel only on weekdays. Suppose we admit 1.2 conservatively.*'

The consequence of all these assumptions is then illustrated by Dunne as follows:

> '*Thus a notion of the consequentiality of Western Cape reported commuter victim Metrorail crime frequencies at their current and acquiesced levels, derived from adjustments for time, space and population usage, may be associated with a large factor for comparability with SAPS frequencies, and possibly even a factor as high as 5 000, derived from (6 x 100 x 7 x 1.2). I am not intending that this number be interpreted literally as a conversion factor, but to illustrate that even 9 murders of commuters in 10 months… over a small fraction of the surface area that is only fleetingly occupied in a given day by a minority proportion of the Western Cape population, does serve to indicate a substantive safety and security problem'.*

On these assumptions, **nine murders** in ten months on Western Cape trains translates into **45 000 murders** in the general population of the Western Cape over the same period. According to Mr **Viljoen**, Dunne's analysis illustrates the unreliability of the model of the Metrorail National Crime Index, as well as of the statistics upon which respondents have sought to rely to show that their current policy has maintained crime on commuter trains and stations within acceptably defined levels.

*(iv) Policing*

**According to Mr Viljoen, first and second respondents have known for years of the withdrawal (in October 1986) of dedicated police support from, *inter alia*, commuter trains, but have not adequately responded to it. In his**

**affidavit Page says the following:**

> '*In October 1986, the SARHP was amalgamated with the South African Police (SAP). The SARHP was a dedicated formal police service specifically focussed on safeguarding South African railway operations (freight, mainline and commuter) from criminal activity. According to a memorandum compiled by the Metrorail/SAPS Working Committee in 1999, the merger created a void in security provision and saw an increase in theft, vandalism, intimidation, robberies, attacks on commuters and unsafe conditions on trains and stations in general. Discussions with number of persons have indicated that the SARHP was an effective force in curtailing security infringements on railway operations in South Africa.*'

The new SAPS (after the SAP and SARHP merger) embarked on certain restructuring policies which, in reality, meant a process of gradual withdrawal of dedicated police protection from commuter trains. First and second respondents realized, even prior to the conclusion of the Service Agreement, that the developments within the SAPS would have a negative impact on their ability to provide services. Thus, in the Service Agreement itself, it is stated that: '*As a result of the devolution of policing powers to Provincial Commissioners, the SAPS commenced with a gradual withdrawal from the rail commuter system in order to address other higher police priorities*.'

In 2001 a further reduction in support from the SAPS occurred. The dedicated Commuter Patrol Unit of the SAPS in the Western Cape was decreased from approximately 200 members, its complement during the first half of 2001, to the present level of 38 members, stationed at Cape Town railway station. Their replacement by way of security guards was not without problems. Thus, for example, Harrison points out that, apart from the powers conferred by the Control of Public Access to Buildings and Vehicles Act 53 of 1985, first respondent's security guards have limited powers of arrest and search, namely the powers of ordinary citizens.

**It is also important to point out that Annexure 6 to the Service Agreement expressly contemplated a responsibility to be borne by first respondent in ensuring the safety of rail commuters and that such obligation would have a clear financial implication. Thus, as indicated above, clauses 5.3.1 and 5.3.2 of Annexure 6 provide as follows:**

> '***5.3.1 The responsibility for securing the public component of the SARCC's business rests with the SA Police Services in terms of Section 5 of the SA Police Act, 1985 or revisions. Metrorail will be required to play a supportive and/or complementary role in support of the SAPS to maintain law and order on stations and on trains as defined in clause 3.1 and Legal***

***Succession Act, Act No. 9 of 1989.***

***5.3.2 Metrorail is mandated and will be funded to deploy own resources as well as contracted Security guards to protect the public component of the business (crime prevention and crime control). The cost thereof is shown separately in the Contract Amount. Should proposals for a specialised rail police structure succeed, this section of the agreement will be renegotiated and adjusted to reflect the cost savings'*** **(our emphasis).**

According to Mr **Viljoen**, the training of contracted security guards is poor, the great majority being only Grade D level guards, as reflected in the many guard posting sheets annexed to the affidavit deposed to by Harrison on behalf of the first respondent. In counsel's submission, these guards are inadequately trained to render an effective service in the public interest. Mr **Viljoen** submitted that the inferiority of the training of contracted security guards was demonstrated by the following:

1. Shooting incidents have occurred, where members of the public were seriously injured by contracted security guards.
2. Disputes with '*rented security guards arise on a daily basis and have to be attended to on a day-to-day basis*'.
3. The position is exacerbated by firearms being impermissibly issued to and used by Grade D security guards.
4. No minimum scholastic requirements are set for contracted security

guards.

5. The training syllabi of guards do not include any training to exercise the duties associated with conductors or the safety procedures as described by Carver.

According to an affidavit deposed to by Mr Jeremia Makokoane ('*Makakoane*'), the Deputy Director-General in the NDOT, on behalf of the third respondent, a Cabinet decision was taken in 2002 (reported in the Cape Argus of 24/4/2002) '*to establish a security force to improve transport security*'; in other words, to reconstitute some form of railway police. According to Makokoane, this decision was taken (*inter alia*) because of '*Government concern……as regards the security of the transport sector*'.

Similar statements are contained in the draft National Rail Transport Policy of May 2002: '*While railway operators have to develop strategies to minimise and prevent crime, government will through a new division of the South African Police Services … provide reasonable security for railway passengers ..*'.

It would appear that, in themselves, these are acknowledgements of the deficiency of the present system of security and the need to introduce an improved security force.

***Conclusion***

Given the definition of public interest which we have adopted, the evidence appears to favour applicants' argument. Such evidence includes the absence of effective access and egress control; the fact that trains run with open doors; and a very high level of crime which is only regarded as acceptable because respondents employ a questionable statistical index. In short, the service which is presently operated by first respondent in the Western Cape and supervised by

second respondent does not in our view meet the standards of a service run in the public interest.

## *Prayer 2: Whether respondents are in breach of the constitutional rights of rail commuters*

For reasons set out below, this prayer stands to be properly analysed together with prayer 4.

## *Prayer 3 : Whether first respondent has a contractual obligation to convey fare-paying commuters safely and securely on commuter rail services in the Western Cape*

It appears to be common cause that the only express terms governing the '*contract of carriage*' between the first respondent and every fare-paying rail commuter are contained in the Metrorail Services Book, a copy of which is annexed to the answering affidavit deposed to by Harrison on behalf of the first respondent. This Metrorail Services Book is a relatively lengthy document containing information on a wide variety of issues, including general information regarding the legal relationship between Metrorail and the SARCC, and the manner in which commuter rail services are operated in the various metropolitan areas of the Republic; different '*classes*' of rail commuter travel; booking fees; withdrawal or confiscation of tickets; different types of tickets; how tickets are

issued and where they are to be purchased; the tendering and checking of tickets; the consequences of travelling on Metro trains without a valid ticket; fares; animals and pets; the prohibition of smoking in certain passenger carriages; the access to and exit from platforms; the curtailment of and alterations to train services; various goods and items the transportation of which is prohibited on rail commuter trains; and the SATS Succession Act and its legal implications (including the offences created under item 12 of Appendix 1 to the Act).

Under the section headed '*Conditions of Transportation*' (clause 17), it is provided that '*Metrorail undertakes to transport commuters against payment of the applicable fare, in terms of the provisions of the Act* [ie the SATS Succession Act] *and/or regulations and subject to such conditions or requirements which may be prescribed from time to time in this Services Book or any annexure hereto*'. Clause 16 of the Metrorail Services Book, to which reference is made on the reverse side of every ticket issued to a fare-paying commuter, states (under the hearing '*Transportation of Passengers : Liability of Metrorail*') that '*Metrorail is only liable for the death or injury of a commuter which is caused by the negligent or deliberate actions of Metrorail and/or its employees*'.

The only allegations made in the applicants' founding affidavits in support of the '*contractual duty*' which now forms the subject of prayer 3 are as follows:

'*63. It is an express term of the contract of carriage which First Respondent concludes with commuters (such as Juan and Third Applicant), that First Respondent will not be liable for any death, injury or loss, unless the same was caused by the negligence of its employees.*

*64. It follows both as a matter of law and as a proper construction of the express terms that First Respondent is under a contractual duty*

*to conduct the carriage of rail commuters in a manner which is not negligent.*

65. *Having contracted on that basis, First Respondent has exposed itself to claims of a delictual nature in cases in which its negligence or that of its servants acting within the course and scope of their employment are wrongfully the cause of harm to third parties such as Juan and the individual Applicants. First Respondent has not, on any approach to the terms of its standard contract of carriage contracted out of liability for the delicts of it and its servants acting within the course and scope of their employment.*'

In argument before us, Mr **Viljoen** contended that the first respondent's alleged contractual obligation must be imported into the contract of carriage between the first respondent and each fare-paying commuter by way of a tacit term. Counsel accepted the correctness of the argument advanced by Mr **Albertus** (on behalf of the third respondent) that the question as to whether or not such a tacit term could be said to be part of the contract of carriage had to be answered by the application of the so-called '*officious bystander*' test.

A tacit term or term implied from the facts was described by Corbett AJA (as he then was) in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial*

*Administration* 1974 (3) SA 506 (A) at 531H-532C as follows:

> '… An unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had be drawn to their attention'.

(See also *Strydom v Duvenhage NO & 'n Ander* 1998 (4) SA 1037 (SCA) at 1044B-E; as well as Kerr *The Principles of the Law of Contract* 6 ed (2002) 354-370, Van der Merwe et al *Contract : General Principles* (1993) 196-200, and the other authorities cited by these writers.)

South African courts are, in general, slow to import a tacit term into a contract. As indicated, the standard test for considering the existence of a tacit term is '*that of the hypothetical bystander, sometimes described as officious or inquisitive and at other times, with more tolerance, as imaginative*' (see Kerr *op*

*cit* 356). This test was expressed as follows in the judgment of Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom)* 118 LG 479 at 483 (in a passage which has frequently been approved and adopted by the courts in this country):

> '*You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties:* "What will happen in such a case?" *they would both have replied:* "Of course, so and so. We did not trouble to say that; it is too clear".'

Citing this passage from the *Reigate* case, Corbett AJA described the approach as follows in the *Alfred McAlpine* case (*supra*) at 532H-533B:

> '*The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.*'

However, as indicated by Corbett AJA, while the alleged unexpressed term must be compatible with the articulated intention of the parties (as appears from the express terms of the contract between them), it is not necessary for the importation of a tacit term to prove that the parties **actually** directed their minds to the particular term when they were negotiating the contract. In the words of Nienaber JA in *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136I:

> '*A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one.*'

(See further in this regard *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 236H-237A; as also Christie *The Law of Contract* 4 ed (2001) 195-197, and the other authorities referred to by this writer.)

It is also important to note that any tacit term sought to be imported must be capable of clear and exact formulation and, in applying the '*officious bystander*' test, the parties to the contract must be assumed to be acting honestly and reasonably (see, for example, *Greenfield Engineering Works (Pty) Ltd v NKR*

*Construction (Pty) Ltd* 1978 (4) SA 901 (N) at 909E; Christie *op cit* 196-197).

The court obviously cannot '*make a contract*' for the parties and has no power to supplement or add to the contract between the parties by importing a term which they would have been wise to agree upon, but did not – '*the fact that the suggested term would have been a reasonable one for them to adopt or that its incorporation would avoid an inequity or a hardship to one of the parties, is not enough. The suggested term must, in the first place, be one which was necessary as opposed to merely desirable, to give business efficacy to the contract; and, what is more, the Court must be satisfied that it is a term which the parties themselves intended to operate if the occasion for such operation arose, although they did not express it*' (per Colman J in *Techni-Pak Sales (Pty) Ltd v Hall (supra)* at 236E-G).

Applying these fairly stringent principles to the fact of the present case, we are of the view that the applicants have **not** succeeded in showing that the contractual obligation contended for in terms of prayer 3 should legitimately be imported as a tacit term into the contract of carriage between the first respondent and its fare-paying '*customers*'. As pointed out above, the contract of carriage is regulated by the provisions of the SATS Succession Act and by the express terms set out in the Metrorail Services Book. While it might well be so, as contended by applicants' counsel, that both the SATS Succession Act and the terms set out in

the Metrorail Services Book must be interpreted against the background of the common law of carriage in South Africa, it is nevertheless important to remember that one of the express terms governing the contract of carriage is that the first respondent **only** incurs contractual liability for the death or injury of a commuter **if** this was caused by the negligent or deliberate actions of Metrorail and/or its employees. The first respondent is, therefore, contractually obliged to conduct the carriage of rail commuters in a manner in which neither it nor its employees, acting within the course and scope of their employment, are negligent. This is certainly **not** the same as '*a contractual obligation to convey fare-paying customers safely and securely on commuter rail services*' – it is abundantly clear on the papers before us that, with the best will in the world, the first respondent is not able, particularly in the South African context, to ensure a totally crime-free rail commuter service, nor can it reasonably be expected to do so. In our view, it cannot be said that the tacit term contended for by the applicants (as postulated in prayer 3), is a provision to which the first respondent, as one of the parties to the contract of carriage, would have given a prompt and positive assent, had the hypothetical bystander posed the relevant question in this regard. It follows that, to our mind, the applicants have not shown that they are entitled to the relief claimed under prayer 3.

## *Prayer 4: Whether first and second respondents have a legal duty to protect the lives and property of members of the public who commute by rail*

As regards prayer 4.1, Mr **Viljoen** submitted that a legal duty allegedly imposed upon first and second respondents to protect the lives and property of commuters was sourced primarily in a statutory duty to operate a service in the public interest. It was also to be found in a constitutional duty which required respondent to protect the rights to life and property of commuters. A further source of the duty was located in the contract of carriage concluded by first respondent with all fare-paying passengers and in particular the tacit term that commuters be carried in safety and security. Finally, Mr **Viljoen** referred to a delictual duty imposed upon first and second respondent, which duty was expanded by the Constitution.

As regards prayer 4.2, Mr **Viljoen** contended that the '*breach of the said duties*' (ie the duties referred to in prayer 4.1) by the first and second respondents consisted of two vital omissions of a systemic nature on the part of such respondents: firstly, their collective failure to do no more than the bare minimum required of them by the Service Agreement in the face of an '*ever-rising tide of crime on their trains*'; and secondly, the fact that the content of the security provisions of the Service Agreement fall so woefully short of what is reasonably needed in any proper safety and security system, which has to function in a society in which police services are under-resourced and under-manned and '*a culture of violent criminal activity is the order of the day*'.

According to the applicants, these two systemic omissions form the source of the negligence of which they complain insofar as prayer 4.2 is based on delict. Mr **Viljoen** argued that, as prayer 4.2 (like prayer 4.1) also stands on '*three other legs*', however, none of which posits negligence as a requirement for the alleged breach of the alleged statutory, contractual or constitutional duty in question, the applicants are entitled to the relief claimed in prayer 4.2 **without** the word

'*negligently*' if the Court were not to be satisfied that the first and second respondents could be held to be delictually liable based on the abovementioned two omissions.

From counsel's submissions in this regard, it is seemingly evident that the basis for the relief sought in prayer 4.2 is similar to that asked for in terms of prayer 2.

Prayer 2 is framed in extremely wide terms, effectively seeking an order that the respondents have directly '*violated*' (breached) a range of rail commuters' constitutional rights. In our view, the findings by this Court which would be required to justify the relief sought in prayer 2 (read together with prayer 4.2, which is discussed below) would run perilously close to constituting (*inter alia*) a finding that the respondents were delictually liable vis à vis '*rail commuters in the Western Cape*', notwithstanding that this dispute had been brought to court by way of motion proceedings. A piecemeal approach to delictual liability whereby this Court decides, on motion, that respondents are (in the abstract, as it were) delictually liable to applicants and another court, after the conclusion of a trial, determines the nature and extent of such damages, should not be encouraged. In our view, the only relief which can be sourced in (*inter alia*) the Constitution and which is properly sought in these kind of proceedings is that contained in prayer 4.l.

The basis of the defence offered by first and second respondents turned on the conclusion and the contents of the abovementioned Service Agreement signed in August 2000. According to Mr **Du Plessis**, the Service Agreement was negotiated by a team of experts. During this process, the provisions of adequate passenger security '*ranked extremely high*' on the priority list of the experts who drafted the Agreement. Mr **Du Plessis** submitted that the applicants had not alleged in their founding papers that Annexure 6 to the Service Agreement (ie the (the security provisions agreed upon between first and second respondents) were either inadequate or unreasonable.

To the extent that the relief sought by applicants is predicated upon the Service Agreement, Mr **Viljoen** submitted that the implementation of the agreement gave rise to a rail service which unreasonably jeopardised both the life and property of commuters. For the reasons already advanced, the absence of any access or egress control, the evidence that trains routinely transport commuters while the doors of the train are open and the unacceptably high level of crime on trains justified a conclusion that, whatever the merits of the Service Agreement **in principle**, the manner in which the service had been operated **in practice** was not in the public interest.

For this reason, the question arises as to what positive obligations are to be born

by first and second respondents; that is, the nature of the obligations that are not necessarily to be found in the express terms of the Service Agreement.

Section 39(2) of the Constitution mandates courts to have regard to the spirit, purport and object of the Bill of Rights (Chapter 2 of the Constitution) when interpreting any legislation and when developing the common law. Recently the Supreme Court of Appeal has developed our law of delict in accordance with this provision. In *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 SCA at para 31, Cameron JA held that: '*The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central role in realising our constitutional vision of open, uncorrupt and responsive government*'.

Following on this *dictum*, Nugent JA in *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA) at para 20 stated the following:

> '*But while the utility of allowing public authorities the freedom to conduct their affairs without the threat of actions for negligence in the interest of enhancing effective government, ought not to be overlooked, it must also be kept in mind that in the constitutional dispensation of this country the state (acting through its appointed officials) is not always free to remain passive. The State is obliged by the terms of section 7 of the 1996 Constitution not only to respect but also to* "protect, promote and fulfil the rights in the Bill of Rights", *and section 2 demands that the obligations imposed by the Constitution must be fulfilled*.'

(See also *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).)

More recently, in *Van Eeden v Minister of Safety and Security* [2002] 4 All SA

346 (SCA), the Supreme Court of Appeal dealt with an action brought by an appellant who was assaulted and raped by a dangerous serial rapist who had escaped from police custody. Following an attack upon her by this person, appellant instituted a delictual action for damages against the State on the basis that the police owed her a legal duty to have taken all reasonable steps to have prevented the assailant from escaping from lawful custody and causing her harm.

Vivier ADP referred to the South African Police Service Act 68 of 1995, where the functions of the police are set out to include the maintenance of law and order and the prevention of crime. Thus, '*the police service is thus one of the primary agencies of the State responsible for the discharge of its constitutional duty to protect the public in general and women in particular against the invasion of their fundamental rights by perpetrators of violent crime'* (at para 16). In finding the conduct of respondent's employees to have been wrongful and, hence, that the respondent was liable for damages, Vivier ADP commented as follows:

> '*An important consideration in favour of recognising delictual liability for damages on the part of the State in circumstances such as the present is that there is no other practical and effective remedy available to the victim of violent crime. Conventional remedies such as review and mandamus or interdict do not afford the victim of crime any relief at all. The only effective remedy is a private law delictual action for damages*' (at para 19).

In arriving at this finding, the Supreme Court of Appeal emphasized that it had followed the Constitutional Court's decision in *Carmichele* (*supra)***,** namely that '*a public interest immunity absolving the respondents* [agencies of the State] *from liabilities that they might otherwise have in the circumstances of that case, would be inconsistent with our Constitution and its values*' (at para 20).

Of particular significance to the present dispute was the finding of Vivier ADP that the requirement of a special relationship between a plaintiff and defendant as an absolute prerequisite for imposing legal duties in delict '*can, in the light of the State's constitutional imperatives… no longer be supported. To do so would mean that the common law does not adequately reflect the spirit, purport and objects of the Bill of Rights*' (at para 23).

In the present case, second respondent, in terms of section 23(1) of the SATS

Succession Act, must ensure that rail commuter services are provided within, to and from this country. It is further enjoined to do so '*in the public interest*'. First respondent is similarly enjoined, in terms of section 15(1) of the SATS Succession Act, upon request of (*inter alia*) second respondent to '*provide a commuter service that is in the public interest*'. The Service Agreement between the first and second respondents was concluded under Chapter IV of the SATS Succession Act. The provisions thereof will remain operative until 31 March 2003. Hence, for the purposes of this dispute, the underlying obligations of first and second respondent are to be located in the SATS Succession Act.

**These obligations imposed upon first and second respondent in terms of the SATS Succession Act are similar to those imposed upon respondent in the *Van Eeden* case (*supra*) in terms of the South African Police Service Act of 1995. In *Van Eeden* (*supra*), it was held that the police owed a legal duty to appellant to act positively in order to prevent the escape of a dangerous criminal who was likely to commit further sexual offences against women in the event of his escape. In the context of the present dispute, commuters enjoy a constitutional right to life (section 11 of the Constitution), as well as a constitutional right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources (section 12 (1)(c) of the Constitution).**

**As discussed above, it was held in the *Van Eeden* case (*supra*) that the appellant had no practical and effective remedy available other than a claim in delict. In the circumstances of this case, commuters who are subjected to violent crime which jeopardises their right to life and their right to**

**freedom and security of their person, are effectively also remediless unless it can be said that a legal duty exists whereby first and second respondent must act to minimise the extent of violent crime and lack of safety on the commuter rail service. Thus, in our view, applicants have made out a case for the relief sought by them in terms of prayer 4.1.**

For the reasons set out above in respect of prayer 2, however, we are not inclined to grant the relief sought in prayer 4.2. Applicants have brought these proceedings on motion, yet they ask this Court to find (in the abstract, as it were) that the respondents' conduct was and is negligent. A prayer of this kind must be sought by way of a delictual action, rather than by the back door of a prayer for a declarator. Furthermore, abstract relief of this kind should not generally be granted - a finding of negligent conduct should only follow upon a careful examination (during the course of a trial) of the evidence provided by the parties.

The purpose of the relief sought in prayer 4.2 can only be to determine (in advance) the principles that would be necessary for a later decision about damages. Frylinck acknowledges as much in his supplementary founding affidavit:

> **'122.1 What is sought is acceptance that First Respondent can *be held_liable for damages due to crime by third parties on trains in terms of prayer 4.1. That principle was not accepted by***

***First and Second Respondents before, but appears now to have been, by the contents of the affidavit of Van Niekerk. (I have dealt with the topic in the affidavit already filed in reply to his affidavit).***

***122.2 It is true that the relief sought in the Notice of Motion went further and sought in prayers 3, 4.2 and 4.3 a ruling that the Applicants who had suffered harm by criminal assaults on trains did so as a result of First and Second Respondents' breach of their legal duty to them. In the light of such Respondents' denial of, in effect, the very fact that the death and injuries in question were caused by criminals, it is accepted that applicants cannot insist on an order in terms of these prayers, on the papers '*** **(emphasis added).**

In our view, to grant the kind of relief sought in prayer 4.2 would, at this stage, neither be justified, nor appropriate.

## *Prayer 5: Whether the respondents are to be directed to take all such steps as are reasonably necessary to put in place proper and adequate safety and security services*

**Mr Du Plessis submitted that, even assuming that sections 15 and 23 of**

**the SATS Succession Act imposed an obligation on first and second respondents to take steps to secure the physical and bodily integrity of commuters, it did not impose obligations as '*to the manner*' in which this security was to be provided, nor did it set a bench mark against which '*the manner*' in which security was in fact provided could be objectively tested. The Service Agreement had been concluded by seasoned '*railway men*' and was expressly designed to ensure the provision of a safe and efficient commuter service. A court should be reluctant to intervene in the determination of whether the measures adopted by the first and second respondents to comply with such duties were reasonable, as a wide range of measures could reasonably be adopted by such respondents. When seeking to analyse whether respondents had complied with these obligations, a court should not seek to prefer one set of possible (reasonable) measures above another.**

**In support of this submission Mr Du Plessis cited the following *dictum* of the Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) at para 38:**

> '***Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and***

***focused role for the courts, namely to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to an evaluation. Such determinations of reasonableness may in fact have budgetary implications but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance'.***

**Mr Du Plessis also referred to the affidavit deposed to by Harrison who averred that the remuneration payable (by second respondent) to first respondent for services rendered was determined by the Service Agreement. Thus, first respondent had to operate within a fixed and limited budget. Regional Budgets were evaluated by first respondent's head office on an ongoing basis and, within the limited flexibility contained in the budget, security allocations had increased over the duration of the contract period in the Western Cape.**

The cost of security was budgeted at slightly less than 10% of the total budget. In his affidavit, Harrison set out the amounts spent on security over the first three years of the agreement (that is, since 1998) as follows:

Year 1 R 94,402,618.00 or 5.4% of turnover;

Year 2 R170,122,423.00 or 6,01% of turnover;

Year 3 R145,872,313,00 or 7.32% of turnover.

**Harrison also stated that the Western Cape's security budget for the year 2002/2003 was R41 million excluding the cost of its own security personnel. As the '*fixed cost elements*' of the first respondent's business (including infrastructure, rolling stock, regional office and elements of the operations budget) for 2002/2003 total R434 million (of a total budget of R489 million), this meant that almost 80% of the variable cost of the business would be expended in 2002/2003 on security.**

In summary, the defence raised by first and second respondent against the relief sought by applicants (on the assumption that the latter had discharged the onus of showing that there was a legal duty imposed upon respondents) turned on the reasonableness of the Service Agreement. Significant amounts of money had been employed for security purposes and a court should be reluctant to impose its conception of safety upon first and second respondents and grant relief which could have hidden financial consequences.

**In an argument directed to a similar conclusion, Mr Albertus referred to the well known concept of judicial polycentricity initially articulated by Professor Lon Fuller in 'Forms and Limits of Adjudication' (1978) 192**

***Harvard Law Review*** **353. To illustrate his argument, Mr Albertus cited a passage from a commentary on Fuller's article by John Allison:**

> **'*From the perspective of the adjudicator, Fuller's analysis requires judicial restraint. To avoid exceeding the limits of its own competence, a court confronted with a significantly polycentric dispute must refrain from two kinds of activism. First, the court must not change the law where an appreciation of repercussions is required for sensible legal development. Secondly, insofar as the court has a choice under existing law, it must avoid choosing a legal solution that necessitates an appreciation of complex repercussions*'. (See Allison 'The procedural reason for judicial restraint' 1994 *Public Law* 452 at 455.)**

The problems of polycentricity must clearly act as important constraints upon the adjudication process, particularly when the dispute has distributional consequences. But polycentricity cannot be elevated to a jurisprudential mantra, the articulation of which serves, without further analysis, to render courts impotent to enforce legal duties which have unpredictable consequences. We will return to this aspect below, with particular reference to the first and second respondents.

**As regards the third respondent, Mr Albertus contended that, inasmuch as the third respondent is not implicated in the '*declarators*' sought by the applicants under prayers 1 to 4, all of which (according to counsel) deal with the alleged duty to take care, it is doubtful whether a positive finding against any of the other respondents in respect of any of these prayers will provide a basis for the '*interdictory relief*' sought against (*inter alia*) the third respondent in terms of prayers 5 and 6. Mr Albertus submitted that the applicants had not made out a case against the relevant respondents, in respect of any of the declarators sought by them, on any of the grounds alleged by them. Counsel argued further that, even if the Court were to find that the applicants had made out a case against the relevant respondents as regards any of the said declarators, however, applicants had not made out a case against the third respondent for either of the interdicts sought in respect of the said respondent.**

**We will deal below with the relief sought in terms of prayer 6. As regards prayer 5, the problem that we have with the submissions of Mr Albertus resides in the inter-relationship between the first, second and third respondents, both in terms of the National Land Transport Transition Act 22 of 2000 ('*NLTTA*') and the draft**

**National Rail Transport Policy ('*the draft policy*') released by the NDOT**

**during May 2002 and apparently still in the process of finalisation, as also in terms of the SATS Succession Act. As pointed out by Makakoane in the affidavit deposed to by him on behalf of the third respondent:**

> **'*Whilst the NLTTA and the draft policy contemplate the devolution of commuter rail functions to provinces and/or local authorities, with local integrated transport plans determining the future of urban commuter rail services, commuter rail is, however, still managed nationally with national approval required for the aspects of local transport plans that affect commuter rail services. Accordingly, the challenge, until commuter rail services are devolved upon provinces and/or local authorities, is to allow and reconcile local commuter rail priorities with national level decision-making.*'**

**Insofar as commuter rail services are '*managed nationally*', the Minister is responsible for such '*national management*'. This is apparently also the situation in terms of the existing White Paper on National Transport Policy dated September 1996 (a copy of which is annexed to Makokoane's affidavit), which policy will apparently be substantially reviewed once the '*new*' draft policy is finalised.**

As indicated above, the first respondent, a public company, was established

pursuant to the provisions of section 2 of the SATS Succession Act and, upon its incorporation, the State became its only member and shareholder (section 2(2)). In terms of section 2(3) of the said Act, the Minister of Public Enterprises exercises the rights of the State as shareholder of the first respondent. Metrorail is one of the several business divisions of the first respondent, operating and maintaining the commuter railway network throughout the country.

**The second respondent is a corporation created in terms of section 22 of the SATS Succession Act and registered in terms of the Companies Act 51 of 1973. In terms of section 25(3) of the SATS Succession Act, the sole shareholder of the second respondent is the State and the rights to such shareholding are exercised by the third respondent. Moreover, while the affairs of the second respondent are managed by a Board of Control, all the members of such board are '*appointed and dismissed*' by the third respondent (section 24(1)). The third respondent also has the right (under section 23(6)) to '*issue directives*', in respect of a specific financial year of the second respondent, '*clarifying, elaborating upon or giving specific content to the objectives of the Corporation* [the second respondent]'. Section 24(7) provides that the second respondent's Board of Control '*shall ensure that any directive issued under section 23(6) is taken into consideration in the management of the affairs of the corporation during***

***the financial year concerned*'.**

Section 30 of the SATS Succession Act provides as follows:

'***The Minister*** **[the third respondent]** ***may, by Notice in the Gazette, promulgate regulations that are not in conflict with this Act, in connection with –***

**a)** ***the activities, powers, functions and duties of the Corporation*** **[the second respondent]*, the Board of Control or a member of the Board of Control;***

*b)* *…*

c) …

*d)* *the limitation or prohibition of the exercise of the capacity or powers of the Corporation;*

*e)* *the conditions or restrictions subject to and the manner in which the Board of Control shall manage the affairs of the Corporation;*

*f)* *…*

**g)** ***any matter considered desirable for the purpose of the realisation of the objects of the Corporation.*** **'**

**Also as discussed above, the second respondent's main object and**

**business under the SATS Succession Act is essentially to ensure the provision of rail commuter services within, to and from South Africa in the public interest, at the request of (*inter alia*) the Department of Transport (section 23(1) of the SATS Succession Act). Upon an proper interpretation of the provisions of section 15(1) of the said Act, the second respondent is obliged to discharge this obligation by, *inter alia*, concluding an agreement with the first respondent setting out the terms under which the said rail commuter services are to be provided by the first respondent in the public interest. The current Service Agreement, signed during August 2000 but effective as from 1 April 1999, was concluded under Chapter IV of the SATS Succession Act and the provisions thereof will remain operative until 31 March 2003. While the Service Agreement provides that, after this initial period of 4 years, commuter rail concessions will be open to competitive tender, it appears from the expert reports annexed to the second respondent's answering affidavit (in particular, Page's report) that several recent events have tarnished the policy of privatisation/concessioning of public assets as being in the public interest. It would appear from the papers before this Court that the '*vision*' of commuter rail concessions (other than the '*concession*' existing with Metrorail in terms of the Service Agreement) has been '*put on hold*' for the time being.**

**It is also clear from the papers that, until the finalisation of the draft National Rail Transport Policy (dated May 2002) - which policy envisages (*inter alia*) a consolidation of the operations of the first and second respondents into a single institution that operates, manages and owns assets; the devolution of commuter rail operations and infrastructure functions to local government; the creation of a new regulatory regime with enhanced economic and management functions, which regulatory regime will be independent of operators/service providers in the railway sector and will be directly accountable to the Minister of Transport; as also the establishment of a separate and independent (operational) Railway Safety Regulator (as set out in the abovementioned Railway Safety Regulator Bill) - the future legal framework within which commuter rail services will be provided is in a state of some uncertainty.**

In the light of the interrelationship between the first and second respondents, and the second and third respondents, as set out above, it is clear that the implementation of any order given in terms of prayer 5 against the first and second respondents would, of necessity, require the direct involvement of the third respondent and of the NDOT. This being so, we are of the view that, should we be disposed to grant relief of the nature sought in terms of prayer 5 in respect of the first and second respondents, such relief must also encompass the third

respondent.

The further question arises as to whether relief of the nature sought in terms of prayer 5 should be granted in respect of the fourth and fifth respondents.

**In our view, the answer must be in the negative. The essential basis upon which we have found in favour of applicants against first, second and third respondents is to be found in the duties imposed upon first and second respondents pursuant to sections 15 and 23 of the SATS Succession Act, as interpreted in accordance with the spirit, purport and objectives of the Constitution. No such direct statutory duty is imposed upon fourth and fifth respondents. To hold fourth and fifth respondents liable, this Court would in effect be imposing a duty upon these respondents which would be sourced only in the broad principles of the Constitution, as opposed to a direct statutory duty designed to protect a specific constituency such as applicants. It was on this latter basis that the judgments of the Supreme Court of Appeal in *Van Duivenboden* (*supra*) and *Van Eeden* (*supra*) must be read.**

Furthermore, as is abundantly clear from the affidavit deposed to by Nortjé on behalf of the fourth and fifth respondents, such an order could have a wide range

of unforeseen consequences for the administration of policing in the country; in short, extending the relief to embrace fourth and fifth respondents would represent a very clear example of a decision with polycentric implications.

**As pointed out by Nortjé, the SAPS in the Western Cape (as in the other provinces) has a fixed establishment. The allocation of more police to trains and railway stations will, of necessity, result in a loss of manpower elsewhere. There is a manpower shortage in the SAPS generally and a 33.45% shortage at police station level in the Western Cape, although it is at police station level where the main function of crime prevention occurs. In line with the provincial strategy (Strategic Plan : Operational Focus, 1 April 2001 to 31 March 2002) adopted by the SAPS in the Western Cape (extracts of which are annexed to Nortjé's affidavit), a conscious policy decision has been taken to, *inter alia*, reprioritise police services and address under-resourced areas and priority crimes. There is an enormous need for policing services in many localities apart from commuter trains and stations and the national and provincial policing policy has been determined accordingly. In so determining the national policy, the fourth respondent has had to have reference to all the inhabitants of the Republic, as well as the policing needs and priorities of the provinces. The applicants have not made out a case that the policy decisions taken in this**

**regard, nor the implementation thereof, are not rational, taken lawfully and directed to proper purposes. In our view, it is clear from the papers before us that these are the kind of '*quintessential policy decisions involving calculations of social and economic preference*', which are much more suited to decision by elected representatives than by the Judiciary (see Woolf et al *De Smith, Woolf & Jowell's Principles of Judicial Review* (1999) 494; see also *Kolbatschenko v King NO and Another* 2001 (4) SA 336 (C) at 356C-357B and the other authorities there cited).**

**Mr Hodes, who appeared together with Ms Williams on behalf of fourth and fifth respondents, referred to the affidavit of Nortjé deposed to on behalf of these respondents. In his affidavit Nortjé claimed that access and egress control at railway stations does not form part of the responsibility of the SAPS; that the fourth respondent was not a party to the agreements concluded between first and second respondents; that the police could not perform guarding duties; that crimes on railway stations and trains are minimal when compared to other areas within the police stations precincts, and that no evidence had been produced to show that fourth and fifth respondents had the requisite funds to improve the level of policing on commuter trains and stations, or that such lack of funds was attributable to '*serious mismanagement*'. None of these claims was contested by**

**applicants.**

In the light thereof, there is neither a statutory nor an evidential basis for finding that fourth and fifth respondents have the kind of obligation vis à vis the applicants which would support an order against such respondents along the lines envisaged in terms of prayer 5.

**A legal duty imposed upon first and second respondents should be adjudicated thus: In the light of all the circumstances of the particular case, have these respondents infringed the interest of the applicants in an unreasonable manner? Reasonableness therefore becomes the critical concept. This being so, the test for reasonableness employed, albeit in a different context, by Yacoob J in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 44 is of particular relevance to the present dispute:**

> '***Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be***

***reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise …..Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test'*** **(our emphasis).**

This Court is not required to prefer a particular plan over another. It is enjoined to test whether the manner in which first and second respondents have conducted the operation of the commuter rail service in the Western Cape is reasonable when viewed within the context of the evidence which has been placed before it. In this process of adjudication, the Court applies a concept of reasonableness. If the conduct of the respondents fails the test of reasonableness, a remedy must be fashioned. In undertaking this task, the Court works with concepts with which, and operates in a framework within which, it traditionally functions.

**The further question arises as to the financial implications of any duty imposed upon respondents. Respondents contend that courts should not seek to '*rewrite*' the budgets of organs of State. Much of the evidence provided by applicants concerning the nature of the national budget is of**

**little assistance. Courts deal with reasonableness and justification, not with the rearrangement of budgeting items. But there is some evidence which does provide a guideline to the financial implications of imposing a remedy. In a supplementary affidavit, Frylinck makes reference to an article which appeared in the Cape Times of 8 August 2002 in which Harrison was quoted as saying that '*In a perfect world Metrorail would need to spend R150 m. per year on security which would see a four-person security team on each train, a minimum of four security guards at stations and the manning of all station gateways.*'**

Respondents were afforded an opportunity by applicants' attorney to comment on this public statement. The following passages from the reply of first respondent's attorney dated 14 August 2002 are particularly relevant:

> '***Mr Harrison advises that the comments attributed to him, while accurate, have been taken out of context. The context in which the comments were made, and in particular the comments pertaining to expenditure of R150 million in respect of security, was vandalism and more particularly damage to, and theft of, carriage windows, which is referred to at some length in the Cape Times article of Friday 8 August 2002.***
>
> *Mr Harrison's remarks were also reported in the Cape Times on the same*

*day and it is notable that there is no reference in this report to expenditure of R150 million or to increased security measures as a result thereof. In summary, Mr Harrison was not asked about the provisions of a closed security system and the cost thereof. His answer, appearances notwithstanding, was not intended to convey the cost of such a system. Furthermore the amount of R150 million was an estimate and was not intended to be an accurate calculation of the costs involved in combating vandalism as aforesaid.'*

**Even on the basis of this reply, however, it would appear that the R150 million represented '*an estimate*' by the Regional Manager of the Western Cape region of First Respondent's metrorail business of the cost of providing for '*a four-person security team on each train, a minimum of four security guards at stations and the manning of all station gateways*'..**

**Furthermore, as Mr Hoffman pointed out, there does appear to be considerable agreement on the sum required for the provision of access and egress control consisting only of adequate staffing of commuter trains and stations in the Western Cape. Thus, at the abovementioned second public meeting held on 31 July 2001, Harrison presented a business plan dealing with, *inter alia*, the cost of increased numbers of security personnel**

**on the so-called '*Southern Line*', ie the line between Cape Town and Simonstown. It appears from this plan that the estimated annual cost of increased security on this line was in the region of R3,269 million. At the same meeting, in response to a question posed by a member of the audience relating to the cost of providing the same level of security for '*the entire Cape Metrorail system as had been envisaged for the Simonstown line*', Harrison allegedly performed a '*rough mental calculation*' and arrived at a figure of in the order of R15,2 million. According to Harrison's affidavit, this figure –**

> **' …*related solely to the provision of additional security personnel to patrol trains, platforms and stations. It did not include provision for operational or capital expenditure in respect of increased access and egress control … It also did not envisage a security presence at each and every access and egress point at each and every station. Must importantly, it did not take into account the non-capital expenditure, ie the cost to employ sufficient numbers of additional staff which would be required by an intensification of access control.***
> **'**

**While all this may be so, Mr Hoffman nevertheless contended that Harrison's figure of R15,2 million per annum for the Simonstown line**

**equates to about R150 million per annum for the whole Western Cape. Furthermore, Oeschger estimates the costs in this regard as follows:**

> **'*To ensure that the system is closed and all access points are controlled the following calculation will provide a fair reflection of cost.***

***If there were an average of three access points per station and one exit point, it entails the deployment of approximately 20 security officials per station per 24-hour period. With 117 stations in the Western Cape region alone, the uniformed security compliment controlling access will result in the deployment of 2 340 security officials at a monthly cost of approximately R11.9 million (SOB Grade C at R5 076.00 per month) or R140 million per annum.*** **'**

**As Mr Hoffman pointed out, Oeschger's estimate equates fairly closely to Harrison's '*estimate*' as reflected in the Cape Times article dated 8 August 2002 (thereafter described by Harrison in a supplementary affidavit dealing with this article as a '*wild guess*' and a '*thumb suck*') of R150 million per annum, '*which would see a four-person security team on each train, a minimum of four security guards at stations and the manning of all station gateways.*'**

**Addressing the funding implications of the relief sought in terms of prayer 5, Mr Viljoen emphasised that as first respondent had made a profit in the year ending 31 March 2002 of R3,34 billion, it could more than adequately cover the additional amount of R150 million to provide a security system within the context of '*a perfect world'*. As was argued by the first and second respondents, comparisons between a consolidated profit figure for the group and Harrison's '*estimate*' may not be an accurate manner in which to assess affordability of a remedy. Harrison's estimate of R150 million does however provide some guidance to the Court as to the financial consequences of a remedy being provided to applicants. Further, any relief granted must of course be tailored to minimise an unreasonable drain on the respondents' purse.**

**Another financial aspect that should not be left out of consideration is the potential increase in the first respondent's fare revenue as a result of more effective access and egress control. According to Harrison, the Western Cape region presently has the highest '*cost coverage ratio*' of all the Metrorail regions. With reference to an analysis of the first respondent's census figures over a period of three years, performed during July 2000 by an '*independent consultancy*' (Mercer), Harrison alleged that the fare**

**evasion rate in the Western Cape as a whole was in the order of 18%, while that of the Southern line was 13%. However, as pointed out by Frylinck in his replying affidavit, the so-called '*Mercer analysis*', a copy of which is annexed to Harrison's affidavit, is not supported by any further details and it is difficult, if not impossible, to deduce from such analysis how the conclusions reached by the Mercer consultancy were reached. Moreover, as Dunne cogently contends in his affidavit, the so-called '*Mercer analysis*':**

> **' … cannot claim to be a professional piece of work as its frame of reference and applicability, and consequent analysis, are unspecified. The frequency of such "census" *activity is not recorded. While the logistics of monitoring 100 stations on a given day* [as was apparently done by the Mercer consultancy] *is a substantial challenge, there is a need for sufficient additional information to allow independent verification by Metrorial of the efficacy of the commuter counting exercise, and of the subsequent inferences.***

***Mercer appears as a substantial beneficiary of Metrorail business, running between some ten and twenty million Rands annually. On the basis of the information supplied …, the issue of added value from the exercise remains a truly open question …* '.**

**As already discussed above, Dunne illustrates that the ratio construction of the Metrorail Crime Index as frequency per 100 000 (paid) journeys has the effect of allowing the crime frequency to grow as the number of fare-paying passengers increases, while the Index remains constant. Thus, if the Western Cape fare evasion is at 18% as claimed by Harrison using the '*Mercer analysis*' (July 2000), eliminating this level of fare evasion will cause the regional Crime Index to fall by 22%, with no absolute change in crime counts or frequencies. Moreover, as pointed out by Dunne, Harrison in his affidavit accepts a historical 1995/1996 fall in fare evasion from 41% to 21% in the Western Cape. This change in itself alters the fare-paying group of commuters from 59% to 79%, for the purposes of the denominator used in the Metrorail Crime Index. For such a denominator change, the Metrorail Crime Index would give the appearance of having been reduced by almost 34%, again with no absolute change in crime counts or frequencies.**

**In the affidavit deposed to by Greyling in reply to Van Niekerk's answering affidavit, Greyling illustrates, using actual figures disclosed in the relevant Metrorail corporate report (for the year ending 31 March 2001), as subjected to self-evident calculations, that there was a shortfall of some 79.72 cents per passenger trip, evidencing a total loss of some R390 million for the**

**2001 financial year end. This fare shortfall would arise as a combination of fare-invasion, fraud and error, but in total amounts to some 52% of the actual fare revenue generated and accounted for by Metrorail for the year ended 31 March 2001. In the result, it would appear that there is a shortfall of over half of the actual Metrorail fare revenue accounted for in a single year.**

Both Van Niekerk and Harrison dispute that intensified access control will be viable and sustainable or that it will indeed increase fare income, bearing in mind that a large proportion of the public is allegedly unable to pay any fare whatsoever and that the SARCC and, more particularly, Metrorail are continually subjected to pressure to provide commuter services entirely free of charge. At the same time, however, Van Niekerk concedes that it is evidently in the financial interest of Metrorail to increase ticket sales, since its enterprise is entitled to retain the full

thereof –

> '***In the result access control is an important mechanism to curb fare evasion and hence to increase income generated from ticket sales. The Succession Act enjoins Metrorail to conclude an agreement under which a*** **"reasonable profit"** ***and a*** **"reasonable cash"** ***flow can be attained and maintained. It is thus clear that control of access***

***presents itself as a useful tool to achieve the aforesaid goals.***'

Moreover, as is convincingly argued by Dunne in his affidavit:

` '***It appears to be eminently reasonable to argue that effective access and egress control and elimination of fare evasion will be associated directly and indirectly with two likely phenomena, increased public confidence in the Metrorail services and increased Metrorail income ...***

*The effect of elimination of fare evasion on fare income is substantial, and can be surprisingly large in percentage terms. Assume for simplicity either a common fare, or a common frequency of fare evasion in all fare classes. The table below details the effect, as a percentage of current fare income, of moving from the stated percentage of current commuters not paying, to zero evasion:*

| | | | | | |
|---|---|---|---|---|---|
| Reduced Evasion % | **5.0** | 10.0 | 20.0 | 30.0 | 50.0 |
| Income Increase % | **5.2** | **11.1** | **25.0** | 42.8 | 100.0 |

***Increased Metrorail income may well result in further available funds allocated to the effective crime control strategies and to interventions that ongoing crime necessitates.***'

While it is obviously not possible to say what additional income would be generated for Metrorail if more effective access control is properly applied and a greater number of commuters obliged to pay to travel by commuter train, it is, in our view, sufficiently evident from the papers before us that enhanced and more effective access control will indeed result in increased fare-revenue and in the generation of further funds for the purposes of the Metrorail business as a whole. Some of these funds can then potentially in turn be used to cover the cost of more effective crime control strategies.

In summary, despite the respondents' contentions to the contrary, the financial evidence placed before this Court provides, in our view, no support for the argument that affordability alone is an obstacle to the granting of prayer 5 in respect of the first, second and third respondents.

## ***Prayer 6: Allocation by first to third respondents of adequate funding towards provision of proper and adequate safety and security services***

In support of this prayer, applicants referred to affidavits deposed to by Mr Allan Greyling, a chartered accountant, and by Mr David Roodt, an economist. They sought to show, by way of economic and accounting analyses of the financial

statements of first and second respondent and the national budget, that adequate financial resources were available to fund the provision of improved security for commuters.

**We have already observed that this approach to relief is, in our view, somewhat misconceived in that, in effect, it purports to reverse the approach which should be adopted by the Courts. As the Constitutional Court said in *Minister of Health and Others v Treatment Action Campaign & Others* (1) 2002 (10) BCLR 1033 (CC) at para 99:**

> **'The primary duty of courts is to the Constitution and the law, "which they must apply impartially and without fear, favour or prejudice". *The Constitution requires the State to* "respect, protect, promote, and fulfil the rights in the Bill of Rights". *Where State policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction***

***should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.'***

**This Court is required to determine whether there is a legal duty upon respondents in this case to provide improved security and safety for rail commuters. In the event that a duty is found to exist, respondents must find the resources to fulfil their legal duty. If this Court goes further, as indeed applicants seek, and makes a specific order as to the allocation of funding required to fulfil respondents' legal obligations by way of (*inter* alia) a '*judicial analysis*' of first and second respondents' financial statements and the national budget, it may very well have crossed the line mandated by the doctrine of separation of powers. Courts cannot act as a surrogate Ministry of Finance and seek to rewrite national budgets. Admittedly, courts grant orders that have financial implications, but they must then give the relevant public body a margin of appreciation as to how to fulfil its legal duties. To once again cite the words of the Constitutional Court in the *Treatment Action Campaign & Others (1)* case (*supra*) at para**

**38:**

> '***Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve constitutional balance.***' **(Our emphasis)**

The relief which we propose to grant takes careful account of this approach.

## ***Prayer 8 (previously prayer 9, prior to the abandonment of the prayer numbered 8, as set out in the amended Notice of Motion, and the consequent renumbering of the prayers previously numbered 9 to 12) : Whether first respondent should be 'interdicted and restrained from operating rail commuter services in the Western Cape otherwise than in accordance with the terms of its general operating instructions'***

As indicated above in the context of the applicants' application to amend, it appears to be common cause between the parties that, in order to ensure the

safety of commuters, the Metrorail General Operating Instructions **are** applicable and **should** be complied with by the first respondent. Indeed, the expert affidavit deposed to by Carver on behalf of the first and second respondents deals with certain aspects of such General Operating Instructions, without giving any indication that such instructions are not in fact being complied with. Furthermore, Harrison specifically refers, in the answering affidavit deposed to by him, to certain of the first respondent's standard operating instructions in a manner which makes it clear that, as far as Harrison is concerned, such operating instructions **are** being implemented by the first respondent.

In light of the above, it is not surprising that, once the applicants' application to amend was granted in respect of this proposed '*new*' prayer 8 (previously the proposed '*new*' prayer 9), none of the respondents raised any serious objection to the granting of this prayer. In our view, the applicants have adequately demonstrated that compliance with the basic tenets of the Metrorail General Operating Instructions has the definite potential to diminish the very real dangers to which rail commuters are exposed (as appears from the papers before us), and, accordingly, this prayer should be granted.

***Prayer 9 (previously prayer 10, prior to the abandonment by the applicants of the proposed 'new' prayer 8 and the consequent renumbering of the prayers previously numbered 9-12) : Whether the applicants were entitled to early discovery in terms***

***of Rule 35(1)?***

The applicants sought, in their original Notice of Motion, leave to compel discovery by the respondents before the close of pleadings, and their Notice of Motion incorporated by reference a Notice to Discover in terms of Rule 35(1). The applicants now seek (in terms of Prayer 9) an order confirming that they were entitled to early discovery in terms of rule 35(1) of the Uniform Rules of Court.

As pointed out above, subsequent to the launch of the present proceedings, the parties reached an agreement which was made an order of court by Hlophe JP on 12 February 2002. This order provided, *inter alia*, for what the parties called '*informal discovery*'. To recap, the relevant part of the order reads as follows:

> '*Respondents make informal discovery by not later than 12h00 on 28 February 2002 of all documents and tape recordings relating to any matter in question in this application (whether such matter is one arising between the Respondents and Applicants or not) which are or have at any time been in the possession or control of Respondents, including but not limited to all such matters and items specified in Annexure* "A" *to the Notice of Motion.*'

The manner in which this order came to be made is dealt with in an affidavit

deposed to by the first and second respondents' attorney (Mr Du Preez), annexed to the answering affidavit deposed to by Van Niekerk on behalf of the second respondent. Du Preez points out that, on 6 August 2001, the applicants' attorneys requested in writing certain information and documents from each of the respondents. On 8 August, Harrison, acting on behalf of the first respondent, indicated in writing that, while the first respondent was prepared to co-operate with the applicants and their legal team, he had forwarded this request to '*our legal department*' for further attention. On 17 August 2001 the attorneys acting for the first and second respondents indicated to the applicants' attorneys in writing that their clients were '*doing their utmost to collate the documents as soon as possible*', and undertook that the applicants' attorneys would be kept informed of progress in respect of the collation and availability of the documents. Respondents' attorneys subsequently suggested that the applicants initially be furnished with copies of the documents requested in respect of the Western Cape only, and the costs of collating the documents were set out in this communication. At the same time the applicants were informed that the first and second respondents requested a meeting to discuss the documents and/or information requested by the applicants.

Subsequently, the first and second respondents furnished to the applicants the so-called '*first tranche of documents*' on 4 September 2001, later waiving their initial demand for payment of the sum of R11 754.00 in respect of the costs

incurred in providing such documents.

According to the respondents, neither the applicants nor their legal representatives accepted the invitation (made by the respondents' attorneys on behalf of the first and second respondents) to meet to discuss the documents requested by the applicants, despite the fact that first and second respondents were at all times quite willing to co-operate fully in furnishing such further documentation as may be required.

Mr **Du Plessis** pointed out that, in requesting information and documents from the respondents, the applicants did not follow the procedure stipulated in terms of section 11 of the Promotion of Access to Information Act 2 of 2000 ('*the Information Act*') (which Act came into operation on 9 March 2001). The applicants also did not, at any time, seek to invoke the provisions of sections 78 to 82 of this Act in respect of non-disclosure, or inadequate disclosure, of documents, and therefore did not exhaust their internal appeal procedures, as provided for in sections 74 to 78 of the Act.

In essence, the respondents contended that the applicants were not entitled to approach this Court in the manner adopted by them for relief in relation to discovery, as they had not exhausted their remedies in terms of the Information Act. The respondents argued that all of the documents ultimately furnished to

the applicants (some 55 000 pages) would in any event have been made available to the applicants, even in the absence of the institution of the present proceedings, albeit at the applicants' expense. There was accordingly no need whatsoever for the applicants to formally approach the Court in this regard and, for this reason, the respondents had made it quite clear that they only agreed to the '*informal discovery*' part of the order made (by agreement) on 12 February 2002 on the basis that such agreement was without prejudice to their entitlement to contend that it was unnecessary for the applicants to approach the Court for a discovery order, and indeed, that this *modus operandi* was precluded by the provisions of the Information Act.

With reference to cases such as *Moulded Components & Rotomoulding South Africa (Pty) Ltd v Coucourakis & Another* 1979 (2) SA 457 (W) at 470D, respondents' counsel submitted that discovery in motion proceedings is extremely unusual and is ordered only in exceptional circumstances. Thus, for example, situations where a Court may direct such discovery are where there are reasonable grounds to doubt the correctness of allegations in an affidavit or where the facts are peculiarly within the knowledge of the party being required to make discovery.

The applicants were obliged to set out their case properly in their founding papers and were not, according to the respondents, entitled to seek early

discovery in order to assist them to do so. Applicants' constitutional right of access to information held by the State (public bodies) should have been exercised by making use of the procedure set out in the Information Act, albeit that, in terms of section 22 of this Act, the applicants would then have been obliged to pay the costs incurred by the respondents in making the documents available to them.

The problem which we have with these submissions made by the respondents is a relatively simple one. Firstly, this would appear to be the kind of case where the applicants could **not** reasonably or realistically have been expected to make out a proper case in their founding affidavits without access to voluminous background information and knowledge pertaining to the internal affairs and structures of the respondents (especially the first and second respondents). This background information, as is clear from the papers before this Court, is certainly such as was peculiarly within the knowledge of the respondents. Not only are the procedures set out in the Information Act regulating access to information and/or documents held by public bodies cumbersome and time-consuming, but it has also never been suggested by any of the respondents that **they** were in an position to make available to the applicants the manuals containing (*inter alia*) '*a description of the subjects on which the body holds records and the categories of records held on each subject*', as prescribed by section 14 of the Act. Without such manuals, it is difficult to envisage how the applicants would have had

sufficient details at their disposal to facilitate a request for access to the records of the respondents, in the manner prescribed by section 11 of the Act. Furthermore, section 7 of the Act makes it clear that it does not apply to records requested for civil proceedings after the commencement of such proceedings. In this regard, the relevant parts of section 7 read as follows:

> '*7. (i) This Act does not apply to a record of a public body or a private body if –*
>
> *a) that record is requested for the purpose of criminal or civil proceedings;*
>
> *b) so requested after the commencement of such criminal or civil proceedings, as the case may be;*
>
> c) *the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.*'

As submitted by applicants' counsel, the purpose of section 7 is seemingly to prevent the Information Act from having any impact on the law relating to discovery or compulsion of evidence in civil and criminal proceedings (see, in this regard, Currie & Klaaren *The Promotion of Access to Information Act Commentary* (2002) 52-54). It would appear that an order for discovery before the close of pleadings may legitimately be made by a Court in a situation where there are exceptional circumstances which require such discovery in order to

ensure the proper prosecution of the proceedings (see, in this regard, Erasmus et al *Superior Court Practice* (1993, with looseleaf updates) B1-251. A perusal of the papers before this Court reveals that the early discovery made by the respondents, in terms of (*inter alia*) the relevant part of the order made by Hlophe JP on 12 February 2002, was appropriate and contributed a great deal to facilitating the proper prosecution of these proceedings. We are according of the view that, **in the light of the nature of, and in the circumstances of, this particular case**, the applicants were entitled to request early discovery and that Prayer 9 should be granted.

***Prayer 10 (previously prayer 11, prior to the abandonment by the applicants of the proposed 'new' prayer 8 and the consequent renumbering of the prayers previously numbered 9-12): Whether the applicants should be granted leave to approach the Court on the same papers, amplified in so far as is necessary, within such period as the Court may think fit, for such further orders as may be necessary if respondents fail to have due regard to and implement the terms of prayer 5, alternatively the terms of prayer 7, and in any event if respondents fail to have due regard to and implement the terms of prayer 9?***

In view of the nature of the relief which we intend to grant to the applicants under

Prayer 5, the procedural relief sought in terms of Prayer 10 is rendered superfluous. We therefore do not intend to make an order in terms of Prayer 10.

## *Costs*

As regards the costs of the applicants' application to amend the Notice of Motion, which application was opposed by the first, second and third respondents, the applicants clearly succeeded in this application in respect of both the first and second respondents. The applicants are therefore entitled to an order that the first and second respondents pay their costs of the application to amend.

As far as the third respondent is concerned, however, the objection made on behalf of the third respondent to the proposed amendments was directed **solely** at the proposed '*new*' Prayer 8 (ie the interdict to prevent commuter rail passengers from travelling on the commuter rail network in the Western Cape in any carriage which has doors which do not function). As discussed above, the third respondent objected to the proposed '*new*' Prayer 8 on the grounds that, in view of the fact that the applicants' case, as formulated in their founding and supplementary founding affidavits, was based upon crime-related conduct and threats by third parties to the security of the persons of rail commuters, rather than upon complaints relating to operational safety, the third respondent was not afforded the opportunity to place factual material before this court detailing the difficulty in preventing and combating vandalism (especially as regards train doors) on the rail commuter service and the measures that have been taken by the State to address the issue of the operational safety of rail commuters. Mr **Albertus** argued (in our view, correctly) that, without full details being placed

before the Court as to the practical ramifications of the interdict sought, the Court was not in a position properly to consider the potential prejudice which may be suffered by the first respondent, should this aspect of the applicants' application for an amendment be granted.

In reply, Mr **Viljoen** then withdrew the applicants' application to amend insofar as it related to the introduction of the '*new*' Prayer 8. Counsel did not concede that the applicants were not entitled to the relief sought in terms of such prayer. However, because it was stated in open Court on behalf of the third respondent that the commuter rail services in question could potentially not be maintained if the prayer were to be granted, Mr **Viljoen** withdrew the said prayer on the grounds that it was clearly not in the interests of the body of commuters for whom relief is sought in these proceedings to be deprived of large parts, if not all, of the rail commuter services in question. Whatever the applicants' motivation for the ultimate withdrawal of the application to amend in respect of the proposed '*new*' Prayer 8, the fact remains that the third respondent's opposition to this aspect of the applicants' application to amend was successful and, in our view, the applicants should be ordered to pay any costs incurred by the third respondent in objecting to this aspect of the proposed amendment of the Notice of Motion, as was submitted by Mr **Albertus**.

As regards the applications to strike out matter filed, very shortly prior to the hearing of the application, on behalf of the first and second respondents, the third respondent, and the fourth and fifth respondents, respectively, it should be clear from what we have said above that these applications were substantially unsuccessful. The applicants are therefore clearly entitled to an order that all five respondents, jointly and severally, pay the costs incurred by the applicants in respect of the applications to strike out matter. Furthermore, as was cogently argued by Mr **Viljoen**, we are of the view that, considering the manner in which such applications were brought (ie on the eve of the hearing of the application, in a very voluminous form, and with little, if any, attempt properly to motivate the various aspects of the applications to strike out), such costs should be on the scale as between attorney and client.

In respect of the substantive relief sought by the applicants in these proceedings, it should be clear from what we have said above that the applicants have been substantially successful as regards the first, second and third respondents. They are therefore entitled to an order that these three respondents be held liable, jointly and severally, for the applicants' costs in this regard, such costs to include the costs of the '*informal discovery*' and the earlier postponements of this matter.

The situation is, however, different as regards the fourth and sixth respondents. As discussed above, the applicants have not satisfied this Court that they are

entitled to any of the substantive relief sought in respect of the fourth and fifth respondents. It is true that the issues raised in these proceedings are of considerable importance, not only to the litigants involved, but also to the public in general. In *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC), Ackermann J, speaking for the Constitutional Court, stated that:

> '… one should be cautious in awarding costs against litigants who seek to enforce their consitutional right against the State, particularly where the constitutionality of the statutory provisions is attacked, lest such orders have an unduly inhibiting or "chilling" *effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be …*'

(at para 30).

(See further in this regard De Waal et al *The Bill of Rights Handbook* (4 ed, 2001) 120-122, and the other authorities cited by these writers.)

By agreement between the parties, the hearing in this matter took place over five full court days, divided so that two days were allocated to applicants and the remaining three days allocated to the respondents. During the course of the argument presented by Mr **Hodes** on behalf of the fourth and fifth respondents,

on the fourth day of the hearing, Mr **Hodes** made a tender in open court to the applicants, to the effect that, should the applicants withdraw the application insofer as it related to the fourth and fifth respondents, the latter respondents would not seek any order as to costs against the applicants. This tender was rejected by Mr **Viljoen** on behalf of the applicants, necessitating the continued participation of the fourth and fifth respondents (and of their legal representatives) in the hearing. In view of these facts, and despite the public interest nature of this litigation, we are of the view that, subject to what we have said above about the costs of the striking out application made by the fourth and fifth respondents, such respondents are entitled to an order that the applicants be held jointly and severally liable for such respondents' costs of this application, the one paying the other to be absolved, and that such costs should include the costs of the '*informal discovery*', and of the earlier postponements of this matter.

## ***Relief***

In the light of the findings in favour of applicants regarding prayers 1, 4.1 and 5, what remains to be considered is the nature of the relief to be granted to applicants, particularly in the light of the analysis of the relief sought in prayer 5. In *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at para 96 and *Minister of Health and Others v Treatment Action Campaign and Others (I)* 2002 (10)

BCLR 1033 (CC) at para 129, the Constitutional Court recognised the existence of a structural interdict requiring respondents to revise its existing policy and to submit a revised policy to a court to enable such court to satisfy itself that the policy was consistent with the duties imposed upon respondents. As the court said in the *Treatment Action Campaign* case (*supra*) at para 129:

> '***In appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary*** **.'**

In the context of this dispute, an appropriate order must direct first and second respondents to bring about reform of the commuter rail service so as to fulfil their legal duties to provide a rail commuter service which is in the public interest. Given the need to enforce that legal duty in terms of the principle of reasonableness, considerable latitude must be given to respondents to effect changes to the running of the service in order to bring it within the objective of promoting the public interest.

For these reasons, the order we make should not be at all prescriptive about the solutions which respondents are called upon to implement in order to discharge

their obligations. We would say provisionally, however, that the papers before the Court support the conclusion that some measure of access and egress control, some steps to minimise the incidence of trains running between stations while the door of such trains remain open, some steps to repair broken windows in the trains, and an improved system of security would constitute the bare minimum if first and second respondents are to fulfil their legal obligations.

***Order***

***1. It is declared that the manner in which the rail commuter services in the Western Cape are:***

***1.1 provided by the first respondent, and***

***1.2 the provision thereof ensured by the second respondent***

***insofar as the provision of proper and adequate safety and security services and the control of access to and egress from rail facilities used by rail commuters in the Western Cape are concerned, is not in the public interest as contemplated in section 15(1) (insofar as first respondent is concerned) and section 23(1) (insofar as second respondent is concerned), of the Legal Succession to the South African Transport Services Act 9 of 1989 as amended.***

***2. It is declared that the first and second respondents have a legal duty to protect the lives and property of members of the public who commute by rail, whilst they are making use of the rail transport services provided and ensured by, respectively, the first and second respondents.***

***3. It is ordered as follows:***

***3.1 The first, second and third respondents are directed forthwith to take all such steps (including interim steps) as are reasonably necessary to put in place proper and adequate safety and security services which shall include, but not be limited to, steps to properly control access to and egress from rail commuter facilities used by rail commuters in the Western Cape, in order to protect those rights of rail commuters as are enshrined in the Constitution, to life, to freedom from all forms of violence from private sources, to human dignity, freedom of movement and to property.***

***3.2 The several respondents are directed to present under oath a report to this Court as to the implementation of paragraph 3.1 above within a period of four months from the date of this order.***

***3.3 The applicants shall have a period of one month, after***

***presentation of the aforegoing report, to deliver their commentary thereon under oath.***

**3.4** ***The respondents shall have a further period of two weeks to deliver their replies under oath to the applicants' commentary*.**

***4. First respondent is interdicted and restrained from operating rail commuter services in the Western Cape otherwise than in accordance with the terms of its general operating instructions.***

***5. It is confirmed that the applicants were entitled to early discovery in terms of Rule 35(1) of the Uniform Rules of Court.***

***6. It is ordered that:***

***6.1 The first and second respondents shall, jointly and severally, pay the applicants' costs in respect of the applicants' application to amend the Notice of Motion, including the costs of three counsel.***

***6.2 The applicants shall, jointly and severally, pay the costs incurred by the third respondent in objecting to the applicants' application to amend***

***the Notice of Motion, including the costs of two counsel.***

***6.3 The first and second respondents shall, jointly and severally, pay the costs incurred by the applicants in respect of the application to strike out made by the first and second respondents, such costs to include the costs of three counsel and to be taxed on an attorney and client scale.***

***6.4 The third respondent shall pay the costs incurred by the applicants in respect of the application to strike out made by the third respondent, such costs to include the costs of three counsel and to be taxed on an attorney and client scale.***

***6.5 The fourth and fifth respondents shall, jointly and severally, pay the costs incurred by the applicants in respect of the application to strike out made by the fourth and fifth respondents, such costs to include the costs of three counsel and to be taxed on an attorney and client scale***

***6.6 Subject to paragraphs 6.1 to 6.5 above, the first, second and third respondents shall, jointly and severally, pay the costs incurred by the applicants in these proceedings, including the costs of the 'informal discovery' and of the earlier postponements of this matter, and including the costs of three counsel.***

**6.7** ***Subject to paragraphs 6.1 to 6.6 above, the applicants shall, jointly and severally, pay the costs incurred by the fourth and***

***fifth respondents in these proceedings, including the costs of the 'informal discovery' and of the earlier postponements of this matter, and including the costs of two counsel.***

……..
**D M DAVIS**

……..
**B J VAN HEERDEN**