REPORTABLE

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

Case Number 8232/2005

In the matter between:

THE RAIL COMMUTERS' ACTION GROUP	**First Plaintiff**
THE CONGRESS OF SOUTH AFRICAN TRADE UNIONS	**Second Plaintiff**
FORTY-NINE OTHERS	**Third to Fifty-first Plaintiffs**

and

TRANSNET LTD t/a METRORAIL	**First Defendant**
THE SOUTH AFRICAN RAIL COMMUTER CORPORATION LIMITED	**Second Defendant**
THE MINISTER OF TRANSPORT	**Third Defendant**
THE RAIL REGULATOR	**Fourth Defendant**

JUDGMENT DELIVERED THIS 25th DAY OF JULY, 2006.

THRING, J.:

This matter, or a matter closely related to it, has already come before three Courts. In 2001 an

application was launched in this Court which culminated in an order which was granted on the 6th February, 2003; the judgment is reported as Rail Commuter Action Group and Others v. Transnet Ltd. t/a Metrorail and Others (No. 1), 2003(5) SA 518 (C): I shall refer to the order made on that occasion as "the order made in this Court." The matter was then dealt with on appeal to it by the Supreme Court of Appeal; its judgments, delivered on the 29th September, 2003, are reported sub nomine Transnet Ltd. t/a Metrorail and Others v. Rail Commuters Action Group and Others, at 2003(6) SA 349 (SCA): I shall refer to the order made by the majority of that Court as "the order made in the Supreme Court of Appeal". Most recently the matter was dealt with by the Constitutional Court on appeal to it from the Supreme Court of Appeal. On the 26th November, 2004 the Constitutional Court delivered a unanimous judgment which is reported at 2005(2) SA 359 (CC): I shall refer to it as "the judgment of the Constitutional Court", and to the order made by it as "the Constitutional Court's order". The factual and procedural background of the matter appears in sufficient detail from these judgments, and it is unnecessary to repeat it here.

In this Court the then applicants sought, on motion, relief both of a declaratory and a mandatory or

interdictory nature. This Court granted much of that relief. Its order, in its relevant parts, reads as follows (at 591C- 592A):

> "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 s 15(1) (insofar as first respondent is concerned) and s 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, while 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 para. 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."

(There follow certain further orders in paragraphs 5 and 6 as to discovery and costs which are not material to the present proceedings.)

In the Supreme Court of Appeal the then first to third respondents were successful on appeal (this Court had declined to grant relief against the fourth and fifth respondents). The order made in the Supreme Court of Appeal reads (at 373 D-E):

> "1. The appeal of the first to third respondents is upheld and the applicants' cross-appeal is dismissed.
>
> 2. The applicants' appeal is dismissed.
>
> 3. Paragraphs 1 to 4 and 6 of the order of the Court below are set aside and the following order is substituted therefor:
> 'The application is dismissed'."

In a further appeal to the Constitutional Court the then applicants were partly successful, and partly unsuccessful. The Constitutional Court's order reads (at 411G – 412B (para [111])):

> "It is ordered that:
>
> 1. The application for leave to appeal is granted.

2. The appeal is upheld and the order made by the Supreme Court of Appeal is set aside, but the order of the High Court is not reinstated, save for paras 6.3, 6.4 and 6.5 of the High Court order dealing with costs.

3. It is declared that the first and second respondents have an obligation to ensure that reasonable measures are taken to provide for the security of rail commuters whilst they are making use of rail transport services provided and ensured by, respectively, the first and second respondents.

4. The first and second respondents are, jointly and severally, ordered to pay the costs of the applicants in these proceedings in the High Court, Supreme Court of Appeal and this Court, including the costs of the 'informal discovery' and the postponements in the High Court, but excluding the costs of the applications to tender further evidence in this Court, such costs to include the costs of three counsel."

After the Constitutional Court had delivered its judgment, and on the 24th August, 2005 the 51 plaintiffs in the present matter issued summons in this Court against the four defendants. I pause here to mention that whilst the first plaintiff and eight of the other plaintiffs were applicants in the proceedings in this Court in 2001 and were parties to the subsequent

appeals in the Supreme Court of Appeal and the Constitutional Court, to which I have referred, the rest were not; nor was the present fourth defendant a party in those proceedings.

In the present action the relief sought by the plaintiffs in their particulars of claim falls into two categories, Part A and Part B. In Part A they all seek an order in terms whereof:

> "1. It is declared that since 27 March 1997, the date on which the Third Plaintiff – Rajap's husband was injured, and up to the present time, First and Second Defendants have breached their obligations to take reasonable steps, respectively to provide for and ensure the safety and security of rail commuters whilst they are making use of rail transport services, in that they failed to take reasonable steps....."
>
> (There follows a description of 13 separate steps which the first and second defendants are alleged to have failed to take.)
>
> "2. It is ordered that:
>
> 2.1 First and Second Defendants are directed forthwith to take all such steps, as are reasonable necessary to put in place

proper and adequate safety and security services whilst commuters are making use of rail transport services in the Western Cape, provided and ensured by, respectively, First Defendant and Second Defendant, in order to protect the rights of commuters as are enshrined in the Constitution, which includes the rights to life, to freedom from all forms of violence from private sources, to human dignity, freedom of movement and to property.

2.2 Reasonable steps as referred to under par. 2.1 above shall include, but not be limited to the steps to address First and Second Defendants' failures listed from paras 1.1 to 1.13."

(There follow prayers for a so-called structural mandamus, prayers against the third and fourth defendants for orders compelling them to monitor and advise the first and second defendants in implementing the terms of paragraph 2, and prayers for costs and for alternative relief.)

The present action is brought as a class action. The plaintiffs say in their particulars of claim that they represent the interests, in the Western Cape, of certain train commuters.

In Part B each of the plaintiffs who is alleged to have been injured or otherwise adversely affected seeks damages in various amounts from the first and second defendants.

Without pleading over on the merits, the first and second defendants have delivered a special plea of res judicata to the plaintiffs' action, as regards the relief claimed by them in Part A. They aver that:

> "The judgment and order of the Constitutional Court were a final and definitive judgment and order on the merits of the matter, and the Constitutional Court was a competent court in respect of the matter."

and that:

> "The relief claimed by the Applicants in the CPD application, and the grounds therefor put up in the affidavits filed on behalf of the Applicants, are substantially the same as the relief claimed in part A of the prayers in the Particulars of the Plaintiffs' Claim in the present action, and the grounds therefor pleaded by the Plaintiffs in the action."

They pray that:

> ".....the claims set out in part A of the prayers of the Particulars of the Plaintiffs' Claim be dismissed, with costs."

The first and second defendants also delivered an exception to the plaintiffs' particulars of claim, but this has been abandoned.

They have also delivered an application to strike out certain matter from the plaintiffs' particulars of claim on the ground that such portions of the particulars of claim are vexatious and/or irrelevant, and that the first and second defendants are prejudiced thereby. The first and second defendants also apply for an order that separate trials be held in respect of each of the claims of the third to 51st plaintiffs inclusive for Part B relief.

Finally, there is a counter-application by 22 of the plaintiffs (called Group 2 plaintiffs in the papers) who had already instituted separate actions for damages when the present action was commenced, for consolidation of each of their respective actions with the present action.

What must now be dealt with are the special plea and the above-mentioned applications and counter-application.

The special plea of res judicata

In African Farms and Townships Ltd. v. Cape Town Municipality, 1963(2) SA 555 (AD) Steyn, C.J. succinctly stated the rule as follows at 562 C-D:

> "The rule appears to be that where a court has come to a decision on the merits of a question in issue, that question at any rate as a causa petendi of the same thing between the same parties, cannot be resuscitated in subsequent proceedings."

See, also, Horowitz v. Brock & Others, 1988(2) SA 160 (AD) at 178 H-J.

Cardinal to the success of the plea of res judicata is the defendants' contention that the judgment of the Constitutional Court was final or definitive of the issues which are now sought to be raised by the plaintiffs in seeking Part A relief. As was said by Hoexter, A.C.J. in S. v. Moodie, 1962(1) SA 587(AD) at 596 E-F:

> "....I am of opinion that in our common law the exceptio rei judicatae cannot succeed unless it is based on a final judgment on the merits."

See, also, Custom Credit Corporation (Pty.) Ltd. v. Shembe, 1972(3) SA 462 (AD) at 472 A-E. Thus a judgment or order which does not have the effect of settling or disposing of the dispute between parties with finality cannot found the exceptio rei judicatae. Such would be, in an action, an order of absolution from the instance: See Joubert, LAWSA, 2nd Ed. Vol. 9 paragraph 628. There was much debate during the argument before us as to whether an order dismissing or refusing a plaintiff's or an applicant's claim was final and definitive in its effect, or whether it was equivalent in its effect only to an order of absolution. However, in the view which I take of this matter it is not necessary to decide this question.

It is, of course, the judgment and order of the Constitutional Court which are of central importance in deciding the special plea. They must be properly construed so as to determine whether or not they finally or definitively disposed of the issues now raised in the

plaintiffs' particulars of claim. In Firestone South Africa (Pty.) Ltd. v. Genticuro AG., 1977(4) SA 298 (AD) Trollip, J.A. said at 304 D-E:

> "First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules."

Nicholas, A.J.A., as he then was, elaborated somewhat on this principle in Administrator, Cape and Another v. Ntshwaqela and Others, 1990(1) SA 705 (AD), where he said at 715F - 716C:

> "In Firestone South Africa (Pty.) Ltd. v. Genticuro AG., 1977(4) SA 298 (A) Trollip JA made some general observations about the rules for interpreting a Court's judgment or order. He said (at 304D-H) that the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the

Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it.

.....

.....the order with which a judgment concludes has a special function: it is the executive part of the judgment which defines what the Court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it.

It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

With these principles in mind, I turn to consider the judgment and order of the Constitutional Court.

Commencing with the order: it records and directs, inter alia, that the appeal against the judgment of the Supreme Court of Appeal is upheld, and that the order made by that Court is set aside. The latter order included a direction that paragraphs 1 to 4 and 6 of the order made in this Court be set aside, and that an order be substituted therefor that "the application is dismissed". The effect of the Constitutional Court's order, when it set aside the order made in the Supreme Court of Appeal, is, as a matter of logic, that the order made in this Court that the application be dismissed, as substituted by the Supreme Court of Appeal, was ultimately set aside by the Constitutional Court. What, if anything, was ordered by the Constitutional Court to be substituted for the dismissal order? The Constitutional Court reinstated certain portions of the costs order which had been made in this Court. It then proceeded to grant relief in paragraphs 3 and 4 of its own order, which relief was couched as relief granted by the Constitutional Court itself, in its own right, so to speak, rather than as relief which ought to have formed part of this Court's

initial order. As for the order originally granted in this Court, other than, as I have said, to order that certain portions of the order dealing with costs be reinstated, the Constitutional Court did not see fit to direct what order, if any, should be substituted for it. Instead it merely ordered that "the order of the High Court is not reinstated."

From this, logic leads one to the conclusion, at least prima facie, that the dismissal of the application as ordered by the Supreme Court of Appeal having been set aside, but the original order of this Court not having been reinstated (save in respect of certain portions of the order dealing with costs), nothing of the original order (save the aforesaid portions dealing with costs) was left standing by the Constitutional Court, and nothing was substituted for what had not been reinstated. A sort of vacuum was thus created. The net effect of the Constitutional Court's order would then be that (again save for the reinstatement of parts of the costs order) no order was made in this Court. This effect was, however, tempered by the order made by the Constitutional Court in its own right, as it were, in paragraphs 3 and 4.

Even if paragraph 3 of the Constitutional Court's order is construed as being, in effect, a reinstatement, with variations, of paragraph 2 of the order made in this Court (although it is couched in different and wider terms), the effect of the Constitutional Court's order remains that no order was made as regards any of the other relief initially claimed by the then applicants and granted in this Court.

That, as I say, seems to me, on analysis, to be the prima facie logical meaning and effect of the Constitutional Court's order. If this construction is correct, it cannot be said that the order is final or definitive of the issues which are now raised by the plaintiffs in their particulars of claim in seeking Part A relief. This is because, on this construction of the Constitutional Court's order, there has as yet been no final or definitive judgment on any of the relief, declaratory, mandatory or otherwise prayed for by the plaintiffs in Part A of their particulars of claim: even as regards the declaratory relief that the first and second respondents have an obligation to ensure that reasonable measures are taken to provide for the security of rail commuters, which was granted by the Constitutional Court in paragraph 3 of its order, the

plaintiffs do not now seek a repetition or variation of it; they merely plead it almost verbatim in section E of their particulars of claim, seek to add content and particularity to it, and allege, in section G, that the first and second defendants and/or their employees have breached their obligations in various respects.

So much for the order itself, as made by the Constitutional Court. I bear in mind, as I am enjoined to do by the judgment in Administrator, Cape and Another v. Ntshwaqela and Others, supra, loc. cit. that the order of a Court has a special function: it is the executive part of the judgment; it defines what the Court requires to be done or not done; and that, although it must undoubtedly be read as part of the entire judgment, and not as a separate document, if its meaning is clear and unambiguous it is decisive, and it cannot be restricted or extended by anything else stated in the judgment. To my mind, and for the reasons which I have mentioned, the meaning and effect of the Constitutional Court's order are logically clear and unambiguous, and the order does not, on the face of it, constitute a final or definitive decision of any of the issues now raised by the plaintiffs in their particulars of claim in seeking Part A relief.

However, Mr. Newdigate who, with Mr. Masuku, appears for the first and second defendants, contends that the Constitutional Court's order must be construed differently. With diligent care, eloquence and cogent persuasive force he has endeavoured to persuade us to find, in effect, that the Constitutional Court's order is tantamount to an order that, save for the declaratory relief granted by it in paragraph 3 of its order and the costs orders granted by it in paragraph 4 and reinstated in paragraph 2, all the relief which had been sought by the then applicants in this Court was, by implication, refused; that, save as aforesaid, their application was finally, definitively and dispositively dismissed by the Constitutional Court on its merits; and that the Constitutional Court intended, by its judgment and order, that the then applicants should depart and be content with the declaratory and costs orders which had ultimately been awarded to them; moreover, that they should be precluded in perpetuity from seeking from any Court the rest of the relief now claimed by them. He invited us to examine the judgment as well as the order. This I shall now proceed to do, and to consider whether what was said in the judgment disturbs my prima facie view of the construction to be placed on the order, which I have attempted to set out above.

Mr. Newdigate referred to several passages in the judgment of the Constitutional Court in this regard. The first of these which I shall deal with appears at 393 C-E (para. [55]). It reads:

> "There can be no doubt also that the SCA was correct in concluding that there were genuine disputes of fact raised on the papers on the following issues which must accordingly, in the light of the rule in Plascon-Evans, be dealt with on the basis of the respondents' versions:
>
> (a) Whether the first respondent was performing its contractual obligations owed to the second respondent under the Service Agreement;
>
> (b) whether improved access and egress control would reduce crime on trains; and
>
> (c) whether the first and second respondents were contravening the general operating instructions by allowing trains to travel with open or no doors."

Mr. Newdigate contended that this passage indicates that, on these issues at least, the Constitutional Court accepted the versions of the facts put forward by the

respondents and, in effect, decided those issues finally and definitively in their favour.

However, as regards issue (a) referred to in this passage, it has not been raised by the plaintiffs again in their particulars of claim in the present action: there is consequently no issue in this regard in the present action to which the plea of res judicata can be raised.

As to issue (b), much the same applies; for a footnote to the passage (footnote 66) states that:

> "It should be noted that the applicants no longer seek relief in this Court on this score."

This issue consequently fell away and became irrelevant in the proceedings before the Constitutional Court: res judicata can therefore not apply to it.

As for issue (c), the passage from the judgment of the Constitutional Court which I have quoted above must be read with the following passage which appears later in the same judgment, at 409 E-G (para. [104]):

> "The SCA held that the High Court erred in granting an interdict in circumstances where it had not found that there was a general practice of operating the trains in conflict with the general operating instructions. In my view, one cannot determine on the record before us how widespread or severe the practice of travelling with doors open is. The general allegations made in this regard are contradicted by the respondents' deponents, though their own video evidence suggests that in at least some cases, trains do travel with doors open. There is no explanation from the respondents to explain the video footage. It may well be that the video footage does not represent a general practice, but we have no way of determining that." (My emphasis.)

From the latter passage it would appear that the Constitutional Court found itself unable, on the record before it, to determine "how widespread or severe the practice of travelling with doors open is", as "the general allegations made in this regard are contradicted by the respondents' deponents....." For this reason the Constitutional Court had "no way of determining" whether the respondents' video footage represented "a general practice". It was on this basis that the Constitutional Court went on to conclude at 409G (para. [105]) that:

> "In the light of the dispute of facts on the record, I am not persuaded that it is appropriate to grant the applicants the relief they seek in this regard."

Whilst it is somewhat difficult to reconcile these passages in the Constitutional Courts' judgment with one another when they are examined together, I do not consider that it can be said, as Mr. Newdigate submitted, that it was the intention of the Constitutional Court to decide once and for all that on issue (c) the version of the facts advanced by the respondents was to be accepted as true, and that that advanced by the applicants was to be rejected as false. Had that been the Court's intention, one would not have expected to find the question "how widespread or severe the practice of travelling with doors open is" left open: the Constitutional Court would simply have accepted the respondents' version; but it seems that it was not prepared to do that; for instead, it left the question unanswered.

My understanding of these passages is fortified, in my view, by the words in which the Constitutional Court couched paragraph [105] of its

judgment: instead of "refusing" or "dismissing" the applicants' application, the Court merely declined to grant them relief, finding that it was not persuaded that it was "appropriate" to do so "(i)n the light of the dispute of facts on the record". Indeed, nowhere in the judgment or the order of the Constitutional Court is it said in so many words that any part of the applicants' application is refused or dismissed; instead there are several indications that the Court was not prepared to make findings where there were disputes of fact, e.g. in the following passage at 394 G-I (para. [59]):

> "There is no real dispute that crime is a problem on the trains. The precise ambit of that problem, the methodology that should be used to measure it, such as the Metrorail Crime Index, and the question of whether there is more crime on trains than elsewhere are all in dispute. But I cannot see that much turns for the determination of this case on those disputes. The relevant fact for our purposes is that there is a problem with crime on trains. I can reach this conclusion without resolving the other disputes of fact that I have mentioned and without determining the facts of any of the particular crime incidents aired on the papers."

And, again, at 406 G-I (para. [94]):

> "There are a range of factual disputes on the papers as to what steps have been taken by them in relation to annexure 6. It is also clear that the situation is not static. Indeed, the term of the validity of the Service Agreement and annexure 6 was due to end on 31 March 2003, though it still appears to be regulating the relationship between Metrorail and the Commuter Corporation. Much water has flowed under the bridge since the time the record was completed in mid-2002. In the circumstances, it does not seem that much purpose will be served by a determination of whether the respondents' conduct in 2002 in meeting their obligations was reasonable or not."

And, again, at 410H – 411B (para. [109]):

> "The applicants also sought an order in which this Court would put Metrorail and the Commuter Corporation on terms to take steps to implement that order. While such an order is no doubt competent, I am not persuaded that it is an appropriate order in the circumstances of this case. There is nothing to suggest on the papers that Metrorail and the Commuter Corporation will not take steps to comply with the terms of the order."

In short, the language used by the Constitutional Court in its judgment and order is redolent, as regards disputed questions of fact, of absolution from the instance or of an unwillingness on its part to make an order rather than of any attempt to resolve such disputes one way or the other.

Then Mr. Newdigate referred to the following passage at 395 C-E (para. [61]) of the judgment of the Constitutional Court:

> "I turn now to consider the merits in relation to the relief sought by the applicants. The first question that arises for consideration is the following: Are any or all of the respondents under an obligation to provide for the safety and security of commuters on Metrorail trains in the Western Cape? Specifically, does such an obligation arise from either the provisions of the SATS Act or the provisions of the Constitution? I shall consider these questions first. Thereafter I shall consider whether on the facts established in this case, if any of the respondents are under such an obligation, it is an appropriate case in which declaratory or mandatory relief should be granted. The final question to be considered will be whether the applicants are entitled to the relief

> restraining Metrorail from operating the commuter rail service in breach of its general operating instructions."

The "first question that arises for consideration" as set out in this passage was decided by the Constitutional Court on the undisputed facts; that decision formed the basis for paragraph 3 of its order; I have dealt with it above. In the sentence commencing with the words, "Thereafter I shall consider ...." it is, to my mind, highly significant that what is stated to be the question is not whether or not the applicants' application should be granted, refused or dismissed, but rather "whether .... it is an appropriate case in which declaratory or mandatory relief should be granted". Again, that is the language of absolution, or of a Court which is not prepared to make an order. The same applies, it seems to me, to the last sentence in this passage, commencing with the words, "The final question to be considered ...." What is to be considered is, again, not whether or not the application should be refused or dismissed, but rather whether the applicants "are entitled to the relief....." In any event the plaintiffs do not seek this relief in their particulars of claim. It is consequently irrelevant for the purpose of the special plea.

Finally, Mr. Newdigate relied on the following passage at 405 F-G (para. [90]) of the judgment of the Constitutional Court, which deals with whether the first and second respondents complied with their obligations by concluding a certain service agreement with one another, and with the security guards and security companies employed by the first respondent, and with the activities of such security guards:

> "There are disputes of fact in relation to the detail of these matters and particularly in relation to the activities of security guards and the methods adopted for them to report crime. In relation to these disputes, the version of the respondents needs to be accepted."

However, as I understand it this passage does not form the basis for a finding that the applicants' application should be refused or dismissed on its merits. On the contrary, it seems to me to be clear from the subsequent passage at 406 G-I (para. [94]) of the judgment, which I have quoted above, and which deals with the same service agreement, that because "(m)uch water has flowed under the bridge since ... mid-2002", it " does not seem that much purpose will be served by a determination of

whether the respondents' conduct in 2002 in meeting their obligations was reasonable or not." Again, that is the language of absolution, or of a Court declining to make an order, rather than that of refusal or dismissal of an application on its merits.

Mr. Newdigate also pointed out that in their notice of application in terms of Constitutional Court Rule 19 for leave to appeal to that Court against the decision of the Supreme Court of Appeal the then applicants sought, inter alia, an order which would, in effect, reinstate the initial order which had been made in their favour in this Court; and that, in its order (at 411 H (para. [111])) the Constitutional Court said:

> "..... but the order of the High Court is not reinstated, save for ...."

This, he submitted, was tantamount to a refusal of the relief sought by the applicants in the Constitutional Court, save as regards those aspects in respect of which relief was granted.

There would, I think, have been more merit in this argument had the Constitutional Court been sitting as a Court of first instance; but of course it was not:

it was exercising purely appellate jurisdiction. Primarily, the function of the Constitutional Court was therefore to decide whether or not the decision of the Supreme Court of Appeal was correct and sustainable in law. The Constitutional Court held that it was not, and it therefore upheld the applicants' appeal and set aside the order made in the Supreme Court of Appeal. That included the order of the Supreme Court of Appeal that "the application is dismissed". The next question which, logically, arose for consideration was what order the Supreme Court of Appeal ought, then, to have made. In the absence of any other order, the effect of the Constitutional Court's order would have been automatically to revive this Court's order. Alternatively, the Constitutional Court could, had it wished, have ordered that, save to the extent stipulated in its own order, the relevant portions of the order made in this Court should be set aside, and an order substituted therefor to the effect that the application was refused or dismissed. Had it done so, the defendants' present contentions would have had greater cogency. But it chose not to make such an order. Instead, it merely declined to order the reinstatement of this Court's order, save in certain stipulated respects. That, again, is the language of absolution, or of a Court declining to make an order, rather than the

language of refusal or dismissal.

In the result, the judgment of the Constitutional Court:

(a) Contains no definition of the precise content, in practical terms, of the first and second respondents' "obligation to ensure that reasonable measures are taken to provide for the security of rail commuters ...";

(b) Contains no finding that the respondents have or have not breached their obligations in any way in the past;

(c) Contains no finding as to whether or not facts exist such as to justify the granting or refusal of the mandatory or interdictory relief sought by the applicants, or of a structural mandamus;

(d) Contains no finding as to whether or not facts exist such as to justify the granting or refusal of the prohibitory relief sought by the applicants (i.e. the order sought by them prohibiting the first respondent from operating rail commuter services in the Western Cape otherwise than in accordance with the terms of its general operating instructions).

It can be assumed that the Constitutional Court is perfectly familiar with the Rules and practice of this Court. Of high significance, to my mind, is the absence from the Constitutional Court's judgment and order of any overt suggestion that, as provided for in Uniform Rule 6(5)(g) of this Court, the correct order for this Court to have made at first instance was to have dismissed the applicants' application on the ground that it could not properly be decided on affidavit: see Tamarillo (Pty.) Ltd. v. B.N. Aitken (Pty.) Ltd., 1982(1) SA 398 (AD) at 430 G-H. Yet this is the effect which Mr. Newdigate invites us to attach to the judgment and order of the Constitutional Court. However, when Courts non-suit litigants on this basis they can be expected, I think, to have the courage of their convictions and to say so in clear and unambiguous language, so that the parties will know where they stand, and why, rather than leaving it to them to winkle out the true meaning of the order from obscurity. All the more is this so in the case of the Constitutional Court, now the most elevated tribunal in the country. I am satisfied that, had the Constitutional Court intended to make an order in such terms it would have done so with much greater clarity than emerges from the words in which its judgment and order are expressed.

I am further fortified in my above conclusion by the costs order made by the Constitutional Court in paragraph 4 of its order. Save for certain of the costs in that Court, the applicants were awarded all their costs in this Court, in the Supreme Court of Appeal and in the Constitutional Court. I find such an order very difficult, if not impossible, to reconcile with the interpretation now sought to be placed on the Constitutional Court's judgment and order by the first and second defendants. According to that interpretation, the applicants were substantially unsuccessful in obtaining most of the relief which they had sought, certainly for practical purposes: in particular, the mandatory and interdictory relief had all been refused on its merits, according to the defendants, and the declaratory order made in paragraph 3 of the order would have been but cold and academic comfort to them. Moreover, according to the defendants' interpretation, the applicants were precluded by the order from ever approaching any Court again for such mandatory or interdictory relief, or for a declaratory order defining the precise content of the first and second respondents' obligation. In the face of such massive defeat the costs order would be, to say the least, surprising.

My prima facie view of the meaning and effect of the Constitutional Court's order is confirmed rather than disturbed by the content of its judgment.

There is, in my opinion, a further flaw in the special plea. One of the requisites of a plea of res judicata is that the matter adjudicated upon must have been between the same parties (Horowitz v. Brock and Others, supra, loc. cit): idem actor, idem reus. As I have said, of the 51 present plaintiffs only nine were applicants in the earlier proceedings: the remaining 42 were strangers to that application; indeed, in the case of plaintiffs 45 to 51 inclusive, their causes of action (in the sense of the incidents which allegedly caused them to sustain damages) allegedly arose after the Constitutional Court had delivered its judgment; and in the case of plaintiffs 32 to 44 inclusive, their causes of action (in the same sense) arose only after all the facts which were placed before this Court, the Supreme Court of Appeal and the Constitutional Court had already occurred. It was contended on behalf of the first and second defendants that this did not matter, as both the application and the present action were brought as class actions under section 38 of the Constitution, Act No. 108 of 1996. I am unable to agree. For the plea of res judicata to succeed, the parties concerned in both sets

of proceedings must either be the same individuals or "persons who are in law identified with those who were parties to the proceedings": Joubert, LAWSA, Vol. 9 para. 637. Such persons must be privy to one another; and they must derive their interest in the later proceedings from the parties to the earlier proceedings, such as, e.g. a deceased and his heir, a principal and his agent, a person under curatorship and his curator, etc.: Swadif (Pty.) Ltd. v. Dyke, N.O., 1978(1) SA 928 (AD) at 945 A – D; Cassim v. The Master and Others, 1960(2) SA 347 (D) at 355 C-D and Joubert, LAWSA, loc cit. I fail to see how a party to one set of proceedings can be said to derive his interest in the subject-matter of those proceedings from another person who was a party to other, earlier proceedings merely by virtue of the fact that the first person happens to belong to the same class of persons as the second. Even if both sets of proceedings, as here, are class actions, there seems to me to be insufficient privity between the 42 plaintiffs and applicants whose participation is not common to both sets of proceedings to found a successful plea of res judicata, at least as far as they are concerned.

For these reasons I conclude that the special plea must be dismissed.

The application to strike out

The first and second defendants' application to strike out is aimed at certain passages in section D (historical background prior to litigation), the whole of section E (the first and second defendants' legal obligations and duties), and portions of section G (first and second defendants' unlawful conduct) of the plaintiffs' particulars of claim. Although in the defendants' notice of application in terms of Rule 23(2) the grounds on which the application is brought are stated to be that the allegedly offending portions of the particulars of claim are vexatious and/or irrelevant, in argument the attack was confined to irrelevance.

It is to be noted that Rule 23(2) stipulates that:

> ".... the court shall not grant the same (i.e. an application to strike out) unless it is satisfied that the applicant (for a striking-out order) will be prejudiced in the conduct of his claim or defence if it be not granted."

It is also to be noted that a decision whether or not to strike out is discretionary in nature: see Stephens v. de Wet, 1920 AD 279 at 282.

"Irrelevant", for the purposes of the Rule, means irrelevant to an issue or issues in the action: see Stephens v. de Wet, supra, loc. cit. and Meintjes v. Wallachs Ltd., 1913 TPD 278 at 285. In the former of the two last-mentioned decisions Innes, C.J. said at 282:

> "...(T)he correct test to apply is whether the matter objected to is relevant to an issue in the action. And no particular section can be irrelevant within the meaning of the Rule if it is relevant to the issue raised by the plea of which it forms a part. That plea may eventually be held to be bad, but until it is excepted to and set aside it embodies an issue by reference to which the relevancy of the matter which it contains must be judged."

The Court will not concern itself with the validity or otherwise of the claim, or whether it raises a cause of action: that may be a matter for exception. All that concerns the Court is whether or not the passage or passages sought to be struck out is or are relevant in order to raise an issue on the pleadings: see Erasmus, "Superior Court Practice", B1 – 16I. In Golding v. Torch

Printing and Publishing Co. (Pty.) Ltd. and Others, 1948(3) SA 1067(C) Ogilvie Thompson, A.J., as he then was, said at 1090:

> "A decisive test is whether evidence could at the trial be led on the allegations now challenged in the plea. If evidence on certain facts would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded."

In Richter v. Town Council of Bloemfontein, 1920 OPD 161 de Villiers, J.P. said at 173 – 174:

> "It is further asked in the application that paragraphs 4 and 5 of the declaration be struck out on the ground that they are irrelevant and superfluous. Now I must admit that it is not clear to me that these paragraphs are relevant, but at the same time I feel that it is not impossible that they may become relevant in some way not yet apparent. If there is that possibility it would be proper to follow the practice of the English Courts which is that an application to strike out irrelevant matter in a pleading will not be granted if a doubt exists whether the matter is relevant or not (see Blake Odgers, 'Pleading and Practice', Chap. VIII.) Even apart from that, it is possible to regard both

> paragraphs 4 and 5 as mere recitals of the history of the case, and it therefore seems to me that the paragraphs should be allowed to stand."

And in Ahlers, N.O. v. Snoeck, 1946 TPD 590 de Villiers, J. said at 594:

> "For the sake of clarity the history of a case is often permissible as an introduction to allegations founding the cause of action."

These principles must be applied to the present application.

Mr. Newdigate pointed out that in section D of the plaintiffs' particulars of claim (historical background prior to litigation) extensive reference is made to facts and circumstances which existed in previous decades, going back as far as the 1950's and 1960's; to the findings of two commissions or committees of enquiry, one of which reported in 1992 and 1993 and the other of which dealt with certain events which took place in 1996, and to certain medical research which was conducted in 1992. These averments, he submitted, were irrelevant, as a matter of pleading, to the relief claimed by the plaintiffs: they added nothing as a

matter of pleading to the issues between the parties, and served only to add what he called "clutter" to the particulars of claim. He argued that they went beyond what is permissible in the pleading of irrelevant matter as history. As regards section E of the particulars of claim (first and second defendants' legal obligations and duties) he contended that these aspects had been "fully dealt with in the declaratory order of the Constitutional Court" (he was referring, I think, to paragraph 3 of that order). It was consequently not open to the plaintiffs to seek to "revisit" this issue, as he put it. Parts of section G of the particulars of claim (first and second defendants' unlawful conduct) were attacked by Mr. Newdigate for much the same reasons as the other parts were objected to.

In the first place, much of what is pleaded in the allegedly offending passages, especially those in section D of the particulars of claim, is clearly history. Even if some of this may be regarded, strictly speaking, as irrelevant, the pleading of history for the sake of clarification is permissible (Ahlers' case, supra, loc. cit.). Moreover, even if the relevance of some of the allegedly offending passages may not immediately be apparent, so that doubt may exist in this

regard, it may be permissible for them to be allowed to stand in anticipation of their relevance becoming apparent at a later stage (Richter's case, supra, loc. cit.).

In some of the passages under attack, and especially in section D of their particulars of claim, the plaintiffs have pleaded a long history of the conduct and state of knowledge of the first and second defendants and of their precursors in function at various times in the past. In paragraph 2 of the Part A relief claimed by them, the plaintiffs seek a mandatory interdict, in final form, directing the first and second defendants to take certain steps relating to the provision of proper and adequate safety and security for rail commuters, including the steps listed in paragraphs 1.1 to 1.13 of the Part A relief. In paragraph 1, it will be recalled, the plaintiffs seek a declaratory order that from the 27th March 1997 up to the present time the first and second defendants have breached their obligations to take reasonable steps to provide for and ensure the safety and security of rail commuters in that they have failed to take the allegedly reasonable steps set out in paragraphs 1.1 to 1.13.

In order to succeed in obtaining the interdictory relief sought by them in paragraph 2, it is trite that the plaintiffs will have to establish at the trial, as one of the requisites for such final relief, an injury actually committed or reasonably apprehended: see Setlogelo v. Setlogelo, 1914 AD 221 at 227. It seems to me to be open to the plaintiffs, and to be perfectly legitimate, to plead and attempt to prove at the trial factual matter from which they will, in due course, invite the trial Court to draw certain relevant inferences from the past conduct of the first and second defendants, and of their precursors in function. Whether such conduct was lawful or not is not, to my mind, of any great moment: if certain evidence of past conduct goes to show a likelihood of repetition of the same or similar conduct in the future, it will probably be relevant and consequently admissible as showing a course of conduct. And if the evidence is relevant and therefore admissible, such facts "cannot be regarded as irrelevant when pleaded" (Golding's case, supra, loc. cit.).

The same applies, I think, to evidence which goes to show a particular state of mind or knowledge on the part of the first and second defendants or of their

precursors in function: in my view it is open to and legitimate for the plaintiffs to plead and attempt to prove at the trial what the state of mind or knowledge of the first and second defendants (or that of their precursors in function) was at the time when they acted or failed to act in particular ways in particular circumstances in the past; and to invite the trial Court to draw appropriate inferences from such evidence, including an inference that the same or similar conduct will probably be repeated in the future, if an interdict is not granted.

Much of the matter objected to by the first and second defendants, especially that in section D of the plaintiffs' particulars of claim, seems to me to be directed at showing that the attention of the first and second defendants, or of their precursors in function, was repeatedly drawn by various more or less official persons and bodies to certain shortcomings over a long period, and that they were repeatedly warned of the necessity or desirability of taking certain measures, but that, despite such knowledge and warnings, the first and second defendants and their precursors in function persisted in their erstwhile conduct, much as before. I do not say for a moment that the plaintiffs will necessarily or even probably establish these things: I

have no idea whether or not they will succeed in doing so. But if that is the case which they wish to put up, I fail to see how what they have pleaded can be said to be irrelevant to that case, or how they can be precluded from advancing their case by making the relevant allegations. Indeed, by making the relevant allegations they are probably laying the foundation for a full and proper formulation of the precise issues which will arise for determination at the trial, something which ought to be welcomed rather than discouraged.

Similarly, as regards the declaratory order sought by the plaintiffs in paragraph 1 of the Part A relief, in my view it is legitimate and permissible for them to attempt to prove at the trial, and therefore also to plead, that the first and second defendants and their precursors in function have, over a long period, acted or failed to act in certain ways, and with a certain state or states of mind or knowledge, and to invite the trial Court to draw appropriate inferences from such conduct relating to the probability or otherwise of it having been persisted in since the 27th March, 1997. Again, I express no view as to the plaintiffs' prospects of success in establishing such a probability: but I am unable to agree with Mr. Newdigate that the allegations concerned are irrelevant to the

issues, or that the plaintiffs should be precluded by a striking-out order from putting forward a case which is based on the above propositions.

As for the attack on section E of the particulars of claim (the first and second defendants' legal obligations and duties): it is true that in paragraph 3 of its order the Constitutional Court declared that the first and second defendants have an obligation "to ensure that reasonable measures are taken to provide for the security of rail commuters whilst they are making use of rail transport services provided and ensured by respectively, the first and second respondents". In paragraph 1 of section E of the particulars of claim the words of this order are pleaded virtually verbatim. There can surely be no valid objection to that. But the order is couched in extremely wide and non-specific terms. Neither from the words of the order itself nor from the content of the judgement of the Constitutional Court is it possible to give precise content to what exactly the obligation resting on the first and second defendants comprises, in concrete, practical terms. In my view the Constitutional Court did not attempt to codify or to set out in any detail the content of the first and second defendants' obligations. It left that to the trial Court, if the

then applicants wished to pursue the matter, as they now do. This, it seems to me, is what the plaintiffs have now set out to do in the rest of section E of their particulars of claim. In paragraph 2 they plead that the first and second defendants have certain statutory obligations arising from the Legal Succession to the South African Transport Services Act, No. 9 of 1989, and also certain obligations and duties at common law. None of these allegations are in conflict with anything that the Constitutional Court has said either in its order or in its judgment, nor do they pretend to qualify or amend anything which that Court has said; they merely seek to add practical detail and concrete content to the order. In my view there is nothing objectionable in that. It is certainly not irrelevant to the question of what the first and second defendants' obligations comprise and entail.

It is correct, as Mr. Newdigate has pointed out, that much of what has been pleaded in the allegedly offending passages is evidence. However, that is insufficient reason in itself to justify its being struck out.

Nor am I able to apprehend any real prejudice to the defendants if the allegedly

objectionable matter is not struck out. Whilst there is perhaps a degree of prolixity in the manner in which it has been formulated and set out in the particulars of claim, it must be borne in mind, I think, that the matter is a complex one, it is a class action involving a wide range of activities, and the plaintiffs seem to me to wish to plead and prove a course of conduct and a particular state or states of mind and knowledge on the part of the first and second defendants and of their precursors in function at various times. The defendants do not contend that they are unable to plead to or to deal properly or adequately with the relevant allegations. At worst for them, I think, it may possibly be difficult or inconvenient: but that is not a sound basis for a striking-out order.

I am not persuaded that any of the matter under attack is irrelevant to the issues in this case; and no other proper basis has been advanced for its exclusion from the pleadings. In the exercise of my discretion, I conclude that the application to strike out must be refused.

The application for a separation of the trials

The first and second defendants apply in terms of Rule 10(5) for an order:

> "That separate trials be held in respect of each of the claims of the Third to Fifty-First Defendants (sic: plaintiffs?) set out in part B of the prayers of the Particulars of the Plaintiffs' Claim, as based upon the averments contained in section I of the Particulars of the Plaintiffs' Claim."

In an affidavit in support of the application Mr. S.G. Mokotedi says:

> "It would be wholly inconvenient for each individual damages claim to be dealt with as part of a composite action forming part of a single trial. To do so would involve an extremely lengthy trial, involving the leading of evidence, as well as argument, in relation to issues which are not of general applicability to the Plaintiffs, but which relate to individual Plaintiffs. Adopting this course would, in all probability, result in a massive waste of time, effort and legal costs. It would be far more convenient, I aver, for this Court to order that separate trials be held in respect of the damages claims of individual Plaintiffs. In the premises, and in terms of Rule 10(5) of the Uniform Rules of Court, the First and Second Defendants pray

for an order in terms of prayer 4 of the accompanying Notice of Application."

These contentions were later amplified by him in a replying affidavit.

The plaintiffs may be divided, for the purposes of the relief claimed by them in Part B of their particulars of claim, into three groups, viz:

(a) Group 1: this consists of five plaintiffs whose claims have either been settled or have become prescribed; they no longer have any valid outstanding claims for damages against the defendants, and for the purposes of this application they may be left out of account, as no purpose would be served by separating their trials from the main trial, or from any other trial.

(b) Group 2: this consists of 22 plaintiffs, each of whom had already instituted a separate action for damages of his own when the present action was instituted; their separate actions are pending; they are the plaintiffs who seek consolidation of their respective actions with the present action;

(c) Group 3: this consists of 23 plaintiffs who seek damages for the first time in the present action.

The question to be decided is accordingly whether or not the respective trials of each one of the 43 plaintiffs who comprise Groups 2 and 3 should be heard separately, as regards the Part B relief claim by them, or whether they should all be heard together as part of a single composite trial.

The Court has a discretion to permit the joinder of parties or causes of action under Rule 10, or the consolidation of actions in terms of Rule 11, on grounds of convenience, especially in order to save costs or to avoid a multiplicity of actions: see Anderson v. Gordick Organisation, 1962(2) SA 68(D) at 72H, Khumalo v. Wilkens and Another, 1972(4) SA 470(N) at 475 F-H, and Erasmus, op. cit., B1 – 100.

The overriding consideration, I think, at least for the purposes of this case, is that of convenience: of the parties, of witnesses, and, last but not least, of the Court.

Before dealing with the question of convenience, however, there is another aspect which, it seems to me, constitutes a serious practical obstacle to separation. It is this. The relief sought by all the

plaintiffs in Part A, if granted, whilst of course not dispositive of their claims for relief in Part B, may well, and probably will, be highly relevant thereto: if, for example, it were to be found by a trial Court that, during a period and at a place germane to one of the plaintiffs' individual claims for damages the first and second defendants, or either of them, had breached their obligations in one or more of the respects alleged in paragraph 1 of the Part A relief, the plaintiff concerned may well wish to rely on such a finding, or on the evidence on which it is based, for the purposes of his claim for damages under Part B. If this is so I have some difficulty in comprehending, if there were to be a separation of trials as sought by the first and second defendants, precisely how evidence given in or a finding made by a trial Court in one trial, in dealing with Part A relief, could be relied on by the parties, or by one or some of them, in a second trial, presumably presided over by a different Judge, in dealing with Part B relief. It must borne in mind that what is sought here is not a separation of <u>issues</u> in terms of Rule 33(4), but a separation of <u>trials</u>: if granted, each separate trial would proceed <u>ab initio</u> as an entirely separate, distinct and self-contained entity. If a party to such a trial were to seek to rely on evidence given in or findings made by another Court in other proceedings,

difficult problems relating, e.g., to admissibility and to issue estoppel might well arise. Perhaps such problems could be alleviated by prior agreement between the parties to the effect that the evidence led before the first Court and its findings thereon, or, perhaps, its findings on certain stated issues, would be admissible and binding on the parties in the separate trial before the second Court: however, there is no suggestion on the papers before us that any such agreement has been concluded or even considered, or that it is likely to be.

Turning now to the matter of convenience: on behalf of the first and second defendants it is contended that considerable inconvenience would result from a refusal to separate the trials, especially to them. They point out, correctly, that without a separation the single trial would, in all probability, be a long one, with many parties, especially on the side of the plaintiffs. However, if there were a separation, there would, instead, be up to 43 separate, albeit shorter, trials. I am unpersuaded that the aggregate of the time, money and effort required to dispose of this multiplicity of separate short trials would be less than that required for a single long trial. Indeed, the converse appears to me to be more likely, inasmuch as

some witnesses, especially experts, can be expected to give evidence which is common and relevant to the claims of more than one plaintiff. Without a separation, such witnesses would need to testify only once; if the trials were to be separated, however, they may well be required to repeat the same evidence several times in different trials before different Judges. The spectre of conflicting findings of fact and credibility being made in different Courts raises its head.

Then it is contended by the first and second defendants that it would be more difficult for them to prepare for a single long trial than for a multiplicity of short ones, and that the possibility of arriving at settlements of some of the plaintiffs' claims would be reduced if there were to be no separation. Why this should be so has not been satisfactorily explained to us. Otherwise than is the case with the plaintiffs, the defendants are armed with the limitless resources, both as to funds and as to manpower, of the state. Moreover, whether there is a single long trial or 43 short ones, much the same aggregate amount of preparatory work will have to be done on both sides, including, possibly, settlement negotiations. I fail to see how this work could or would be reduced by a separation of trials.

It has been pointed out that a single long trial would also entail inconvenience for the plaintiffs: they would probably have to wait longer for their claims for relief under Part B to be decided than if there were to be a separation of trials. That is no doubt so. However, the short answer to this submission is that the plaintiffs are content to wait: and it can safely be assumed that they know what is best for them. On the other hand, delay can hardly prejudice the defendants to any material extent: at worst, it seems to me, they might have to wait a little longer before being able to execute any order as to costs which they might be awarded against the plaintiffs, or against some of them. That, to my mind, is not severe prejudice or serious inconvenience, especially not for para-statal bodies such as the first and second defendants.

It was also contended by the first and second defendants that a separation of trials would result in greater convenience for the Court than a single trial. I disagree. The prospect of up to 43 different Judges each hearing a separate trial which has a background at least to some extent common to 42 other cases seems to me to be far from convenient. I have already mentioned the danger of different Courts arriving at conflicting conclusions on the facts, or on the credibility of

witnesses. Whilst it is true that a single long trial would no doubt be burdensome for one Judge to have to deal with, that inconvenience, to my mind, pales into insignificance when compared with the others which I have mentioned.

The conveniences which would follow if there were no separation of trials must also be considered. First, as I have said, each witness would have to give evidence only once, as opposed to possibly several or even many times. The undesirability of different Courts making conflicting findings of fact or credibility would be excluded. The defendants would not have to be in several different courts at the same time, opposing the claims of various plaintiffs: all of their resources and manpower could be concentrated in one place, viz. the court in which the single trial was being conducted.

Finally, it is of importance, I think, that the plaintiffs have chosen to approach this Court by way of a class action, and they desire to continue to do so. One of the advantages of this approach appears to be the assistance as regards funding which they have hitherto enjoyed from the Legal Aid Board. Mr. L.D. van Minnen has deposed to an affidavit in this regard, in which he says:

"56. The Legal Aid Board ("LAB") after having received recommendations from its impact Services Committee responsible for the assessment and funding of multi-party cases, which in its view are deserving of support and which may impact positively on the public interest, approved funding for the payment of qualifying expert costs and disbursements in this action. The approval does not include funding for experts in separate individual actions for damages.

57. Plaintiffs whose trials are separated from this action will thus forfeit both the benefit of such expert evidence and the opportunity to fund experts. Neither they, nor their attorneys of record (all of whom are acting on a contingency basis), can financially afford the services of the required experts."

Many of the plaintiffs appear to be indigent, unsophisticated people who can ill afford to litigate in this Court individually, using their own resources. In Permanent Secretary, Department of Welfare, Eastern Cape and Another v. Ngxuza and Others, 2001(4) SA 1184 (SCA) Cameron, J.A. said at 1194B-C (para. [6]):

> "It is precisely because so many in our country are in a 'poor position to seek legal

> redress' and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice that both the interim Constitution and the Constitution created the express entitlement that 'anyone' asserting a right in the Bill of Rights could litigate 'as a member of, or in the interest of, a group or class of persons."

At 1195H – 1196B (para. [12]) the learned Judge of Appeal went on to say:

> "It is the needs of such persons, who are most lacking in protective and assertive armour, that the Constitutional Court has repeatedly emphasised must animate our understanding of the Constitution's provisions. And it is against the background of their constitutional entitlements that we must interpret the class action provision in the Bill of Rights. Though expressly creating that action the Constitution does not state how it is to be developed and implemented. This it leaves to Courts, which s 39(2) enjoins to promote the spirit, purport and object of the Bill of Rights when developing the common law, and upon which s 173 confers inherent power 'to develop the common law, taking into account the interests of justice'."

It seems to me that, put at its lowest, there is at least a real risk that, should these 43 plaintiffs in effect be deprived of their status as "class" litigants and be compelled to pursue their actions for Part B relief separately as individuals, they or some of them may, for practical purposes, be precluded from having their claims properly adjudicated upon by this Court. That would be a most unfortunate result, and it ought to be avoided if reasonably possible. It can be avoided, I think, if the class action is permitted to proceed as a single trial.

I conclude that the first and second defendants have failed to make out an adequately convincing case for a separation of trials; on the other hand, the Group 2 plaintiffs have, for the reasons which I have mentioned, satisfied me that their existing actions ought to be consolidated with the present action. Their application for consolidation would have had to be made by them sooner or later, and its costs, on an unopposed basis, should accordingly be costs in the cause. However, they are entitled to the additional costs occasioned by the first and second defendants' opposition to their application.

In the result, I make the following order:

1. The first and second defendants' special plea is dismissed, with costs.

2. The first and second defendants' application to strike out is refused, with costs.

3. The first and second defendants' application for a separation of trials is refused, with costs.

4. The plaintiffs' application for a consolidation of trials is granted; save as provided for in paragraph 6 below, the costs of that application, on an unopposed basis, shall be costs in the cause.

5. The first and second defendants are ordered to bear the costs occasioned by their exception up to the time of its abandonment.

6. The first and second defendants are ordered to bear the costs occasioned by their opposition to the plaintiffs' application for a consolidation of trials.

7. All the costs referred to in this order, save those referred to in paragraph 4 thereof, shall include the costs occasioned by the employment of two counsel.

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THRING, J.

I agree.

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ALLIE, J.