THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 148/2003
Reportable

In the matter between :

TRANSNET LTD t/a METRORAIL	First Appellant
THE SOUTH AFRICAN RAIL COMMUTER CORPORATION LIMITED	Second Appellant
THE MINISTER OF TRANSPORT	Third Appellant

(First to Third Respondents in the court *a quo*)

and

THE RAIL COMMUTERS ACTION GROUP	First Respondent
LESLIE DAVID VAN MINNEN	Second Respondent
JANE LINDSAY STYER	Third Respondent
JUDIN RUDLUFF BEUDINE COULSEN	Fourth Respondent
RAYMOND JOHN LOVE	Fifth Respondent
HESTER FOUCHÉ	Sixth Respondent
MIRIAM MURIEL ADOLF	Seventh Respondent
BERENDINA SUSANNA FULLER	Eighth Respondent
ZOLANI CHRISTIAN MATYENI	Ninth Respondent

(First to Ninth Applicants in the court *a quo* and cross-appellants)

And in the matter between:

THE RAIL COMMUTERS ACTION GROUP	First Appellant
LESLIE DAVID VAN MINNEN	Second Appellant
JANE LINDSAY STYER	Third Appellant
JUDIN RUDLUFF BEUDINE COULSEN	Fourth Appellant
RAYMOND JOHN LOVE	Fifth Appellant
HESTER FOUCHÉ	Sixth Appellant
MIRIAM MURIEL ADOLF	Seventh Appellant
BERENDINA SUSANNA FULLER	Eighth Appellant
ZOLANI CHRISTIAN MATYENI	Ninth Appellant
	(First to Ninth Applicants in the court *a quo*)

and

THE MINISTER OF SAFETY AND SECURITY	First Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR COMMUNITY SAFETY IN THE WESTERN PROVINCE	Second Respondent
	(Fourth and Fifth Respondents in the court *a quo*)

CORAM : HOWIE P, STREICHER, FARLAM, NAVSA, CLOETE JJA

HEARD : 9 & 10 SEPTEMBER 2003

DELIVERED : 29 SEPTEMBER 2003

Summary: The meaning of the phrase 'in the public interest' in ss 15(1) and 23(1) of the Legal Succession to the South African Transport Services Act 9 of 1989 discussed.

JUDGMENT

HOWIE P *et* CLOETE JA :

INTRODUCTION

[1] These proceedings represent the culmination of a desperate attempt by a group of concerned members of the public to do something about what they perceive to be the unacceptably high, and escalating, level of violence and lawlessness on commuter trains in the Western Cape. They took their case to the Cape High Court which granted them wide-ranging relief. The first to third respondents against whom such relief was granted, have appealed; and the applicants cross-appealed to the extent that further relief against the first to third respondents was denied them. The applicants also appealed against the refusal of relief against the fourth and fifth respondents. Both appeals and the cross-appeal are to this court with the leave of the court *a quo*.

PARTIES

[2] The judgment of the court *a quo* (Davis and Van Heerden JJ) has been reported as *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2003 (3) BCLR 288 (C). To avoid confusion, it is convenient to refer to the parties as they were in the court *a quo* not only in the reasons which follow but also in the order we make.

[3] The first applicant is a voluntary association of persons who have styled themselves the Rail Commuter Action Group. The association was formed to advance the cause of safe urban commuting by train in the

Western Cape. It has no legal personality. The second applicant is the father of the late Juan van Minnen, whose tragic death on 8 June 2001, whilst he was travelling on a suburban commuter train from Rondebosch to Fish Hoek, was the catalyst for the formation of the first applicant. The third to sixth and ninth applicants were alleged victims of criminal attacks, and the seventh and eight applicants are the widows of persons killed in consequence of alleged criminal attacks, all of which the applicants say were perpetrated on commuter trains in the Western Cape. The *locus standi* of the applicants to bring these proceedings was not in issue on appeal (although the detail of each alleged attack was).

[4] The first respondent is Transnet Ltd, a public company established by the Minister of Economic Co-ordination and Public Enterprises pursuant to the provisions of s 2 of the Legal Succession to the South African Transport Services Act 9 of 1989 ('the Act'). The State is the only member and shareholder of the first respondent. The whole of the commercial enterprise of the State as contemplated in s 3(1) of the South African Transport Services Act 65 of 1981 ('the 1981 Act') including all assets, liabilities, rights and obligations, with the exception of those relating to rail commuter assets, have been transferred to the first respondent and the first respondent has acquired that enterprise as a going concern – all as contemplated in s 3(2) of the Act.

[5] The second respondent, the South African Rail Commuter

Corporation Ltd, was established in terms of s 22(1) of the Act. The affairs of the second respondent are, in terms of section 24 of the Act, managed by a board of control appointed by the third respondent, the Minister of Transport. The right of ownership in the rail commuter assets of the South African Transport Services ('SATS') was transferred to the second respondent as contemplated in s 25(1) of the Act.

[6] The first respondent has a number of operational divisions, one of which is Metrorail. Metrorail operates a railway commuter service in five urban regions, one of which is the Western Cape. It does so pursuant to a 'request' made by the second respondent as contemplated in s 15(1) of the Act and in terms of a service agreement concluded with the second respondent, also as contemplated in s 15 of the Act.

[7] It is necessary to quote the relevant provisions of s 15 and the terms of 23(1) of the Act in full:

'15(1) Subject to the provisions of this section, the Company shall provide, at the request of the Corporation or a transport authority, a service that is in the public interest.

…

15(11) For the purposes of the application of this section, a service shall include—

(a) making available a harbour works, railway line , pipeline, building, structure or moveable property for the use of the Corporation or the transport authority;

(b) the construction, maintenance or operation of a harbour works, railway

line, pipeline, building or structure;

(c) the acquisition of moveable or immoveable assets; and

(d) the provisions of any other service that forms part of the principal business of the Company or is related thereto.

…

23(1) The main object and the main business of the Corporation 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.'

The proper construction of the phrase 'in the public interest' is critical to the determination of the appeal of the first, second and third respondents.

[8] 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 s 206(1) of the Constitution. The fifth respondent is the Member of the Executive Council for community safety, Western Cape Province.

THE RELIEF SOUGHT

[9] The notice of motion was amended several times. The last amendments were sought at the outset of the hearing before the court *a quo*. Some were opposed but all were granted. The terms of the notice of motion before and after the last amendments appear from the judgment of the court *a quo* at 298J-301D. There is no appeal against the order granting the amendments but there is an appeal by the first and second

respondents against the costs order made against them. In addition all of the respondents brought applications to strike out matter in the applicants' affidavits. Those applications were partially successful [1] but the respondents were ordered to pay the costs of the applications on the attorney and client scale. The respondents seek the reversal of those costs orders.

[10] The applicants' case has been characterised throughout by a singular lack of direction. That directly contributed to the volume of the record which comprises 5797 pages, the majority of which were not necessary for the application or the appeal. There are allegations made in the founding affidavit, and the supplementary founding affidavit delivered after informal discovery was ordered by consent, which indicate that the relief sought against the first and second respondents was *inter alia* founded in delict and in contract. Those bases were expressly abandoned in the heads of argument delivered on behalf of the applicants before the appeal. Yet paragraph 2 of the order made by the court *a quo*, which the applicants sought to defend on appeal, is clearly based in delict. It was the first of a series of prayers comprising paragraph 4 of the notice of motion[2] in which the applicants sought declaratory orders that the first and second respondents owed a legal duty to members of the public, that those

[1] See judgment of the court *a quo* at 309I.
[2] See judgment of the court *a quo* at 299H-300B.

respondents had breached such duty and that a causal connection existed between the breach and any damages suffered by the second to ninth applicants. No attempt was made to resurrect the contractual claim in argument — and rightly so, as the applicants' case in this regard required them to establish a tacit term which would have been in conflict with an express term of the contract of carriage between the first respondent and fare-paying commuters.[3] In argument, leading counsel for the applicants nailed their colours to the mast and indicated — repeatedly — that all the relief sought against the first to third respondents was predicated on the interpretation placed upon s 15(1) and 23(1) of the Act by the court *a quo*. But by the time that other senior counsel representing the applicants had concluded his argument, the applicants' case had again lost focus and was said to depend on the interpretation of those sections or the Constitution or both and, in the case of the fourth paragraph of the order granted by the court *a quo*, delict as well.

[11] The issues were nevertheless limited to some extent as the applicants only sought to defend the orders granted by the court *a quo*, with the inclusion of the fourth respondent in paragraphs 2 and 3. They asked for no further relief against the first to third respondents. The relief

[3] *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) at 567A-F and cases there quoted, to which may be added *P J Hawkes & Co Ltd v Nagel* 1957 (3) SA 126 (W) at 132B-C and *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* 2002 (5) SA 494 (SCA) at 511C.

claimed against the fifth respondent was abandoned altogether (and we shall have something to say about that later on in this judgment).

[12] It is now convenient to set out the terms of the order granted by the court *a quo*:

'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 provisions 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 aggress from rail commuters 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 applicant's 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.'

[13] We shall first deal with the appeal by the first to third respondents; thereafter, with the appeal by the applicants to include the fourth respondent in paragraphs 2 and 3; and finally, with the orders in respect of costs.

FIRST TO THIRD RESPONDENTS

[14] The reasoning of the court *a quo* may be summed up as follows: It is

in the public interest that railway commuter services be safe; ss 15(1) and 23(1) of the Act require the first and second respondents respectively to provide services 'in the public interest' and to ensure that this is done; therefore the first and second respondents have an obligation to ensure that the services are safe not only operationally but also in regard to crime.

[15] The approach of the court *a quo* loses sight of the purpose behind the Act. The ordinary meaning of 'public interest' considered by the court *a quo*[4] offers no real assistance. According to the Oxford English Dictionary it means 'public welfare'. But in what sense? The phrase by itself is not capable of clear and comprehensive definition. The answer must lie in an analysis of the context provided by the Act and its predecessor, the 1981 Act. (It was, in our view correctly, not suggested during argument that the phrase bears different meanings in each of the subsections in question.)

[16] Before the Act came into operation, s 3(1) of the 1981 Act had provided that SATS was a commercial enterprise of the State. Section 2(3), read with s 1 of that same Act, provided that SATS was to be administered under the control and authority of the State President, which control and authority would be exercised through the Minister of Transport Affairs. The purpose of the Act, which repealed the 1981 Act[5], was to deregulate *inter alia* the railways. To that end all the assets of the SATS' commercial

[4] At 319G-J.
[5] Section 36 read with Part 7 of Schedule 2.

enterprise were transferred to the first and second respondents, as we have said. In addition s 32(1) of the Act provides that the first respondent shall be entitled for the purposes of *inter alia* privatization:

'(a) to form companies in terms of the Companies Act, 1973;

(b) to divide its activities at its discretion into business units and to transfer to such companies all or some of such units, or parts thereof, including assets, liabilities, rights and obligations; and

(c) to acquire fully paid-up shares in those companies as consideration therefor.'

[17] The 'public' contemplated was, in our view, the public at large. The 'interest' contemplated was the benefit which would be conferred on the public by the provision of public transport services and the services referred to in s 15(11). Section 7(1) of the 1981 Act provided *inter alia* that SATS should be administered 'with due regard to … the total transport needs of the Republic'. The phrase 'in the public interest' in ss 15(1) and 23(1) imposes no greater obligation than to serve those needs. Firstly, therefore, it means for the purpose of public transport. Secondly, the phrase has the purpose of making it clear, particularly because of the possibility of privatization of the first respondent in future, that it was the public which had to be served in the utilization of the assets transferred to the first and second respondents . The maintenance of law and order and the prevention of crime were functions which had previously been entrusted to the South African Railway Police Force established in terms

of s 43 of the 1981 Act.[6] The Railway Police Force was dissolved and its functions and members were transferred to the South African Police in terms of s 1 of the Transfer of the South African Railway Police Force to the South African Police Act 83 of 1986 — some three years before the Act was passed. The Act and in particular s 15(11) makes no provision for safety and security services to be provided by the first respondent to commuters, or for that matter to anyone else who might use the services to be provided by the first respondent in terms of the Act. Parliament was obviously content to leave those persons to their ordinary contractual and delictual remedies at common law and their personal safety from crime to the competence of the police.

[18] The applicants nevertheless submitted that in terms of s 7(2) of the Constitution the State must respect, protect, promote and fulfil the rights in the Bill of Rights and that any construction of the phrase 'in the public interest' in ss 15(1) and 23(1) of the Act which ignores or negates this provision 'cannot stand up to proper scrutiny'. The rights relied upon were human dignity; the right to life; freedom and security of the person; freedom of movement; and property. The answer to these submissions is

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[6] Section 44(1) of the 1981 Act provided that the functions of the SA Railway Police force 'shall be, *inter alia* —
(a) …
(b) the maintenance of law and order;
(c) …
(d) the prevention of crime',
inter alia within the area of the SATS' jurisdiction.

that, for reasons already advanced, ss 15(1) and 23(1) of the Act do not have to be interpreted, and cannot properly be interpreted, as conferring an obligation on either the first or second respondent to protect the rights mentioned by providing safety and security services. That is the function of the South African Police Services ('SAPS') which arises from the express provisions of s 205(3) of the Constitution, which reads:

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

There is therefore no basis for a finding that the subsections ignore or negate constitutional rights, Protection of the respective rights to life, person and property are catered for by the provisions just quoted. Whether the applicants have shown that the police are not performing that function, and whether a court of law is competent to give directions in that regard to the fourth respondent, are questions dealt with later in this judgment.

[19] We would add that were the first respondent's conduct in operating commuter rail services to infringe commuters' constitutional rights, their cause of action would arise from that conduct and not from the first respondent's obligation to provide public transport. It must be remembered that s 15(1) refers to all the types of service formerly provided by SATS. Urban rail commuters have no greater rights under the section than travellers on mainline trains, the airways or railway buses or than users of the harbours or visitors to SATS-owned buildings. Moreover,

as a public carrier the first respondent has contractual and delictual obligations, as we have said, and if these require development in satisfying constitutional rights it is in that context that s 39(2) of the Constitution will play a role, not in stretching the language of the section beyond limits its wording can accommodate. Finally, it is hard to conclude, say in the case of a s 23(1) rail service to a neighbouring country (which must also be 'in the public interest'), that the legislature intended that travellers would have the benefit of the sort of safety and security services which the applicants demand from the first respondent, even in South Africa much less in the foreign country.

[20] The service agreement between the first and second respondents did make provision for operational safety as well as for the security of commuters. A spirited attack was mounted in the court *a quo* aimed at showing that these provisions fell short of what was required of the respondents in terms of ss 15(1) and 23(1) of the Act. But as the attack was founded on the first and second respondents' obligation said to flow from the phrase 'in the public interest' in those two sections, it was misplaced for the reasons just given. Furthermore, even assuming that the applicants had *locus standi* to challenge the validity of the service agreement, such challenge could only have been directed at declaring the agreement *ultra vires*. It is not competent for the applicants to seek to prescribe, amend or supplement the terms of the agreement, which have

in terms of s15 of the Act to be settled between the first and second respondents, or by arbitration within the parameters referred to in the section — and this is particularly so where more onerous obligations in regard to operational safety and security of commuters would clearly have cost consequences for the contracting parties. And even if it be accepted that a member of the public could seek proper performance by the first respondent of its contractual duties to the second respondent — the case initially advanced in the applicants' papers — the applicants cannot succeed because there were fundamental disputes of fact on the papers which altogether precluded the court *a quo* from granting the relief which it did in paragraphs 1 to 3 of its order.

[21] One of the cardinal allegations made by the applicants was that improved access and egress control at stations would have a meaningful impact on crime on commuter trains. The principal deponent to the affidavits delivered on behalf of the applicants was Mr M Frylink, who claimed no particular expertise which would qualify him as an expert on this question. In the first and second respondents' answering affidavits it was denied that access and egress control would make any meaningful difference to crime levels, and the reasons for this denial were set out in detail in a number of affidavits deposed to by experts. Some of the rival allegations are summarised in the judgment of the court *a quo* at 320F-321E. There were, in addition, disputes relating to safety and

security on commuter trains, the incidence of crime on such trains when compared to the crime rate generally and the adequacy and reasonableness of steps taken by the first respondent to deal with these problems. The evidence on these disputes is summarised in the judgment of the court *a quo* at 322F-326F.

[22] Faced with these extensive disputes of fact, the court *a quo* concluded[7] that 'the evidence appears to favour applicants' argument'. That approach conflicted with the trite principles delineated by this court in *Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. The disputes between the applicant and the first and second respondents were simply not capable of resolution on the papers. The fact that a senior officer in the SAPS deposed to an affidavit on behalf of the fourth respondent in which he supported the applicants on the question of the efficacy of access and egress control as a means to reduce crime — a fact much emphasized in the judgment of the court *a quo*[8] — may lend some credence to the applicants' case but it in no way enables the issue to be determined on affidavit. The dispute of fact between the applicants and two of the respondents did not cease to exist because another respondent made common cause on this issue with the applicants. We may add that the applicants did not contend that the case should have

[7] At 328E.
[8] At 321E-322B.

been referred to oral evidence or sent to trial so as to resolve the evidential disputes. In the result the applicants did not make out a case that the first and second respondents in fact acted in a manner actionable in law.

[23] The third paragraph of the order, which contained a so-called 'structural' *mandamus*, was particularly inappropriate in view of the disputes of fact. The court reasoned[9]:

'[T]he 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 should 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 doors 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.'

The facts deposed on behalf of the first and second respondents were an insuperable obstacle to the conclusions, provisional or otherwise, reached by the court *a quo*. On the evidence which had to be accepted for the purposes of the application, there was nothing better which the first to third respondents could effectively do. The order accordingly required the first to third respondents to embark on an exercise in futility on pain of being held in contempt of court.

[24] The relief granted in paragraphs 1 to 3 of the order against the first

[9] At 351H-I

and second respondents should accordingly not have been granted. There are additional and substantial reasons why those orders should not have included the third respondent but it is not necessary to canvass them as it is clear that if the applicants cannot succeed against the first and second respondents they cannot succeed against the third respondent either.

[25] Paragraph 4 of the order should also not have been granted. The applicants mounted an attack in the supplementary founding affidavit to the effect that 'the [first respondent's] practice of travelling with no or open doors … is in clear contravention of the Occupational Health and Safety Act 85 of 1993 in that the First Respondent are [sic] fully aware of the hazards and risks that follows [sic] from train operations whilst doors are open'. The main deponent to the first respondent's answering affidavit, Mr A B Harrison, specifically denied that it is the first respondent's practice to travel with no or open doors and he referred to an affidavit by Mr B A Carver. Carver explained that doors on commuter coaches are kept closed with compressed air whilst the train is travelling; and that the air pressure has to be regulated to avoid causing injury to persons caught in the doorway whilst the doors are closing as well as to allow doors to be forced open to free a trapped person. The system, said Carver, was designed with the safety of the commuter in mind but, as he went on to explain, it is often abused by unruly elements in the coach who hold the

door open. Carver said that doors of the type described are also susceptible to theft and at times such doors are removed and thrown off en route necessitating the cancellation of the train at its terminal station. Carver then went on to quote, or paraphrase, the first respondent's General Operating Instructions 12001.2.3, 12001.4.1, 12001.4.2 and 12001.4.3 which deal with the steps which must be taken by Metrorail employees if doors are not operating properly.

[26] Harrison also attached a video recording to the answering affidavit for the purpose of showing the problems faced by the first respondent in regard to access and egress control at peak times. That video, which this court viewed, shows trains travelling with some open doors and no person apparently in the immediate vicinity of those doors — which could lead to the inference that the doors were not being held open and were accordingly defective. The court *a quo* apparently had no regard to the video but leading counsel representing the applicants set much store by it in arguing the appeal.

[27] Shortly before the hearing in the court *a quo* the applicants gave notice of intention to amend the notice of motion to include a prayer in the terms granted as paragraph 4 of the order. The application was opposed — unsuccessfully, as we have said. Counsel representing the first to third respondents then asked for a postponement to supplement the answering affidavits, but the application was refused by the court *a quo*. In these

circumstances the applicants cannot complain if they are held to the allegations made in their founding papers.

[28] It will be apparent from the aforegoing analysis that compliance with the first respondent's general operating instructions, insofar as they relate to open and defective doors, was not raised in the founding papers and formed no part of the relief originally sought by the applicants. The fact that other general operating instructions were alleged not to have been complied with — a fact relied upon by the court *a quo*[10] to allow the amendment — is, on the case presented, irrelevant. Despite that, the court *a quo* gave an order in terms wide enough to cover all the general operating instructions of the first respondent even though they were not before it.

[29] The reasoning of the court *a quo* was that it was common cause that the first respondent's general operating instructions were applicable and should be complied with, and because[11] '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' the relief embodied in paragraph 4 should be granted. But the court *a quo* did not find that the first respondent was not complying with its general operating

[10] At 307A-F.
[11] At 346C.

instructions. In the absence of such a finding, which the court was not able to make on the disputed evidence, the relief granted was not competent. It is not open to a court to reason that a final interdict should be granted because it will do no harm, when the conduct sought to be prohibited is not established.

[30] For these reasons the orders against the first, second and third respondents should not have been granted and their appeal against such orders must succeed. In electing only to defend those orders and in not asking for further relief against the first, second and third respondents, the applicants abandoned their cross-appeal which must accordingly be dismissed.

FOURTH RESPONDENT

[31] It was (in our view correctly) conceded in argument by the applicants' counsel that unless paragraph 3 of the order was amended to include the fourth respondent, no point would be served in including the fourth respondent in paragraph 2 of the order.

[32] Comprehensive affidavits were filed on behalf of the fourth respondent. In the applicants' reply, those allegations went largely unchallenged. To the extent that they were challenged, it was not (nor could it have been) suggested that the fourth respondent had not raised a genuine dispute of fact, or that the averments made on behalf of the fourth respondent were so far-fetched or clearly untenable that this court was

justified in rejecting them on the papers. The applicants' appeal must accordingly be decided on the version of the fourth respondent. That version was in essence the following:

(a) it was rational, reasonable and justifiable to restructure the commuter unit of the SAPS and according to SAPS' statistics, policing of trains and railway stations has been more effective since the restructuring of the commuter unit;

(b) the SAPS has many priorities country wide which cannot be addressed simultaneously;

(c) the allocation of more police to trains and railway stations will, of necessity, result in loss of manpower elsewhere, and the Western Cape is one of the regions with the lowest crime rate;

(d) a policy decision has been made to reprioritise police services and address under-resourced areas and priority crimes; and

(e) a calculation of staff requirements to place police on trains shows that very considerable cost would have to be incurred with budgetary implications for the Government's priorities and spending plans.

On this version the relief sought by the applicants could not be granted. In *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC) para [38] the court held:

'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 focussed 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.'

In *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC) para [41] the Constitutional Court held:

'The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive… A court considering reasonableness will not inquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.'

[33] On the fourth respondent's version it cannot be argued that the measures taken were unreasonable; and the applicants are accordingly not entitled to the relief sought against the fourth respondent in terms of paragraph 3 of the order made by the court *a quo*. In view of the concession made by the applicants' counsel to which we have already referred, the relief sought against the fourth respondent in terms of para 2 of that order falls away.

FIFTH RESPONDENT

[34] There was simply no case made out against the fifth respondent as was pointed out expressly and in terms in the answering affidavit delivered

on his behalf (which was met with a bald denial in the applicants' replying affidavit) and in the heads of argument delivered by his counsel well before the appeal was heard in this court. It was only in response to a question put by this court on the second day of the appeal that counsel for the applicants conceded that there was no justification for seeking any relief against the fifth respondent. The reason for his joinder in these proceedings was, we were told from the bar, political. In these circumstances the propriety of his joinder in the court *a quo* and especially in the appeal is seriously open to question. It could well be said that such joinder was vexatious. Only because of the attitude of all the respondents to the matter of costs, is it unnecessary to decide whether it was.

CONCLUSION

[35] Rail commuters are justified in being concerned about crime on trains. It would be irresponsibly dismissive for courts not to share that concern. The vast majority are compelled to use trains because they cannot afford other transport. However, courts are not at large to go further and grant relief when no proper case for it has been made out. Unfortunately for the applicants and their cause, their case was seriously flawed in the fundamental respects discussed above.

COSTS

[36] Counsel representing first to third respondents and counsel representing fourth and fifth respondents waived the costs orders made by

the court *a quo* in favour of the third, fourth and fifth respondents in paragraphs 6.2 and 6.7 of the order and indicated that none of their clients sought the costs of appeal. The applicants submitted (but the respondents did not concede the point) that this was their entitlement as they were engaged in public interest litigation. It is unnecessary to decide the point. All respondents nevertheless sought the reversal of the costs orders made against them by the court *a quo*. Those latter costs fall under two headings: the application to amend and the application to strike out.

[37] The two interlocutory applications were dealt with in the same hearing as the main case, beginning with argument on the amendment. The amendment was allowed before argument proceeded on the main case. The respective decisions on costs of the amendment application, as well as the result and costs of the striking-out application, were all deferred for disposal in the overall final judgment.

[38] If, in a hypothetical case, an amendment (or striking-out) application were disposed of in separate proceedings in advance of the main case, the court could, of course, order costs to follow the result of such application. It would more advisedly, however, consider the possibility that the result of the main case might demonstrate that the application will have been irrelevant to that latter result. With that prospect in view the interlocutory court might reserve such costs or order them to be costs in the cause.

[39] The essential difference in the present matter is that the relevance of the interlocutory proceedings was clearly determinable, not merely as a matter of foresight or contingency, but beyond doubt by the time the judgment on the merits was given. In the event the court *a quo* decided the merits in favour of the applicants. Had it decided the merits in favour of the respondents, as we consider ought to have been the case, it would undoubtedly have perceived the irrelevance of the interlocutory proceedings to the eventual outcome and have realised the inescapable illogicality in not making the costs of those proceedings follow the result of the main case. The incorrect view of the merits led to an incorrect view of the interlocutory costs. It follows that all the costs orders in favour of the applicants in respect of the amendment and striking-out applications can and must be set aside.

[40] It is apparent from paras 6.6 and 6.7 of the orders made by the court *a quo* that the court considered that the costs of the 'informal discovery' procedure and the costs of earlier postponements of the hearing of the application should be costs in the cause. A different approach was not suggested on appeal. As the orders in favour of the applicants on the merits will be set aside by this court it follows that the costs orders against the first to third respondents on these aspects must also be set aside. It only remains to add that there was no appeal against paragraph 5 of the order, but its continued existence is of no relevance or importance.

ORDER

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'.

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C T HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

_____
T D CLOETE
JUDGE
SUPREME COURT OF APPEAL

STREICHER JA:

[1] I agree with the order proposed by Howie P and Cloete JA. I shall, as was done in their judgment, refer to the first respondent, the second respondent, the third respondent and the applicants in the court *a quo* as they were in that court.

[2] In my view, for the reasons set out hereunder, the phrase 'a service that is in the public interest' in ss 15 and 23 of the Legal Succession to the South African Transport Services Act 9 of 1989 ('the Act') means no more than that the service should be a service benefiting the public in the sense that the public would be better off by having the service than by being without it.[12] Whether the public would be better off would of course depend on all the relevant circumstances including the values and fundamental rights enshrined in the Constitution.

[3] There is no statutory obligation on the Department of Transport to provide a rail commuter service. It may, however, request the second respondent to ensure that such a service is provided in the public interest (s 23(1)). The second respondent is thereupon obliged to ensure that such a service is provided. It may do so by requesting the first respondent to provide the service in the public interest, whereupon the first respondent is obliged to do so (s 15(1)).

[4] The terms upon which the service is to be rendered are to be agreed

[12] *Argus Printing and Publishing Co Ltd v Darby's Artware (Pty) Ltd and Others* 1952 (2) SA 1 (C) at 8-10; and *Leicester Properties (Pty) Ltd v Farran* 1976 (1) SA 492 (D &CLD) at 494 in fine to 495A.

between the first and the second respondent or if they fail to agree they are to be determined by way of arbitration by an arbitration tribunal consisting of three arbitrators, one of whom shall be appointed by the second respondent, one by the first respondent and one by the third respondent (s 15(3)). In terms of s 15(6) the terms stipulated by the arbitration tribunal –

(a) shall include such terms as would normally be included in a contract for the provision of the relevant service including terms which oblige the first respondent to provide the service required;

(b) present the first respondent with an opportunity to earn a reasonable profit;

(c) provide for the granting by the first respondent or the transport authority of adequate security for payment for the service;

(d) provide for a reasonable cash flow to the first respondent in respect of the provision of the service; and

(e) stipulate the period during which the service shall be provided.

[5] The terms stipulated by the arbitration tribunal are for all purposes deemed to constitute a contract concluded by the parties and may be enforced, amended or cancelled in the same manner as the terms of any other contract (s 15(5)).

[6] The Act does not confer any jurisdiction on a court to make a contract for the parties i.e. the contract between the parties or the terms stipulated by the arbitration tribunal cannot be amended or supplemented by a court.

[7] The standard of the service would of necessity depend on financial considerations. Rail commuter services in the various regions in South Africa,

including the Western Cape, are being subsidised by the Department of Transport. In 2002 the subsidy amounted to approximately R93 million per month. Not being obliged to render a rail commuter service a court has no jurisdiction to order the Department of Transport to increase that subsidy. It follows that the terms of the contract or the terms stipulated by an arbitration tribunal and, therefore, the standard of the service rendered or to be rendered would depend on the subsidy the Department of Transport is prepared to pay.

[8] In the light of the aforegoing the phrase 'a service that is in the public interest' could not have been intended to mean more than a service from which the public would benefit in the sense that the public would be better off with the service than without it. To interpret the phrase so as to require a service of a higher standard may result in the public being deprived of a service from which they would benefit in the aforementioned sense and which the Department of Transport may be prepared to subsidise and make available to the public through the second and the third respondents. Such an interpretation would in fact be against the public interest. It is in the public interest that the public should have a service which would put them in a better position than the position in which they would be in if they have to go without the service.

[9] It follows that by providing that the service should be in the public interest the intention was not to prescribe the quality of the service to any greater extent than that the service should be a service benefiting the public in the sense aforementioned.

[10] The applicants did not make out a case that the public are no better off with the service provided in terms of the agreement between the first and the second respondents than they would have been without the service. Initially one of the applicants' prayers was that the first respondent be interdicted from (a) operating any train on the Western Cape rail commuter service which was not staffed with at least three guards and one conductor; and (b) 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'. However, when the first respondent indicated that it would then not be able to operate the service at all the respondents abandoned that prayer, thereby, by implication, conceding that the public is better off with the service than they would be without the service.

[11] The court *a quo* found that the manner in which the rail commuter services in the Western Cape are provided by the first respondent and ensured by the second respondent is not in the public interest insofar as (a) the provision of proper and adequate safety and security services; and (b) the control of access to and egress from rail facilities used by rail commuters in the Western Cape, are concerned. In para 1 of its order it made an order to that effect.[13] It arrived at this conclusion on the basis that it is in the public interest that public transport be provided which adheres to reasonable standards of safety, security and

[13] *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2003 (3) BCLR 288 (C) at

reliability.[14] It then proceeded (a) to deal with the factual dispute as to whether improved access and egress control would reduce crime;[15] (b) to refer to evidence to the effect that trains at times travelled with open doors;[16] (c) to deal with the dispute of fact as to whether crime on commuter rail facilities in the Western Cape was disproportionately high[17]; and (d) to find that there are certain deficiencies in the present system of security and that there was a need for improvement[18]. It held that the evidence appeared to favour the applicants' argument[19] and concluded that the service does not meet the standards of a service run in the public interest.

[12] Apart from the fact that the court *a quo* ignored the well known *Plascon-Evans* rule[20] in regard to disputes of fact and evidence contained in replying affidavits, it erred in finding that because of some deficiencies in certain aspects of the service provided by the first respondent, the service was not in the public interest. The Act does not prescribe that access and egress control or safety or security should be of a specified standard. It left it to the first and second respondents to negotiate or to the arbitrators to determine to what extent the available funds should be allocated to specific aspects of the service and what the standard of the various aspects of the service should be. The Act requires the service as a whole to be in the public interest. To determine whether that is the case all the features of the service, positive and negative, have to be taken into

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328E-F and 352A-C.
[14] At 320C.
[15] At 320F-322F.
[16] At 322G-F.
[17] At 323F-326G.
[18] At 326G-328D.
[19] At 328E-F.

consideration and given such weight as is considered proper in the circumstances.[21]

[13] For these reasons the appeal against para 1 of the order by the court *a quo* ('the court order') should be allowed.

[14] In terms of para 2 of the court order the court *a quo* declared that the first and second respondents had a legal duty to protect the lives and property of members of the public who commuted by rail, whilst they were making use of rail transport services provided and ensured by, respectively, the first and second respondents.

[15] The court *a quo* held:

(a) That the underlying obligations of first and second respondents were to be located in the Act.[22]

(b) That those obligations were similar to those imposed upon the respondent in *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)*[23] in terms of the South African Police Service Act 68 of 1995.[24]

(c) That commuters enjoyed a constitutional right to life as well as a constitutional right to freedom and security of the person, which included

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[20] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.
[21] See *Clinical Centre (Pty) Ltd v Holdgates Motor Co (Pty) Ltd* 1948 (4) SA 480 (W) at 489.
[22] At 334G.
[23] 2003 (1) SA 389 (SCA).
[24] At 334G-H.

the right to be free from all forms of violence from either public or private sources.[25]

(d) That commuters who were subjected to violent crime which jeopardised their right to life and their right to freedom and security of their person were effectively remediless unless it could be said that a legal duty existed whereby first and second respondents had to act to minimise the extent of violent crime and lack of safety on the commuter rail service.[26]

[16] It does not follow from the fact that commuters enjoy the constitutional rights referred to that the first and second respondents have a legal duty to protect their lives and property whilst they are making use of rail transport services provided and ensured by respectively the first and second appellants. The court *a quo* apparently found that such a duty should be recognised in the light of the fact that, according to it, the underlying obligations of the first and the second respondents in terms of the Act were similar to those imposed on the South African Police in terms of the South African Police Service Act. However, the obligations of the first and second respondents in terms of the Act, cannot be equated with those of the South African Police.

[17] Section 205(3) of the Constitution reads:

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

[25] At 334I.

law.'

Referring to that section and to the fact that under the South African Police Service Act the functions of the police included the maintenance of law and order and the prevention of crime Vivier ADP stated in *Van Eeden*:[27]

'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.'

[18] The first and second respondents are not agencies of the State responsible for the discharge of its constitutional duty to protect the public against invasion of their aforesaid fundamental rights. In terms of the Act the second respondent's duty is to ensure a service in the public interest by way of a contract or arbitration. The first respondent's obligations in terms of the Act are to be found in the contract it concluded with the second respondent. Whether those obligations give rise to a duty to protect the life and property of a member of the public depends on the terms of the contract and the circumstances of the particular case.

[19] For these reasons the appeal against para 2 of the court order should be allowed.

[20] In terms of paragraph 3 of the court order the first, second and third respondents were ordered to forthwith take all such steps as were reasonably necessary to put in place proper and adequate safety and security services which

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[26] At 334J-335A.

had to include steps to properly control access to and egress from rail commuter facilities used by rail commuters in the Western Cape.

[21] The order was based on the court *a quo*'s, in my view, erroneous, interpretation of the phrase 'a service in the public interest'.[28] It has financial implications. The court *a quo* was alive to that fact but, once again disregarding the Plascon-Evans rule in regard to disputes of fact and evidence contained in replying affidavits, it concluded that the evidence placed before it provided no support for the argument that affordability alone was an obstacle to the granting of the order. It stated, furthermore:[29]

'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.'

[22] As stated above it was for the first and the second respondents to determine how to allocate the available resources and if they could not do so for the matter to be determined by way of arbitration. By granting the order the court *a quo* was imposing a term on the contract between the first and the second respondents. It had no jurisdiction to do so.

[23] For these reasons I agree that the appeal against para 3 of the court order should be dismissed.

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[27] At 398D.
[28] A339F-G.
[29] At 345D.

[24] I agree with the judgment of Howie P and Cloete JA in all other respects and, therefore, agree with the order.

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STREICHER JA

FARLAM and NAVSA JJA:

[1] We have had the benefit of reading the judgment of Howie P and Cloete JA. We agree with the order proposed by them but find ourselves unable to agree with their approach to the interpretation of the phrase 'in the public interest' in ss 15 and 23 of the Legal Succession to the South African Transport Services Act 9 of 1989 ('the Act').

[2] In our view the error made by our learned colleagues in paragraph [17] of their judgment is that they hold the phrase 'in the public interest' in ss 15 and 23 of the Act imposes no greater obligation than what was described in s 7(1) of the South African Transport Services Act 65 of 1981 as 'the total transport needs of the Republic'. In our view this is too narrow an approach and one that ignores a significant change of wording and the deliberate choice by the legislature of the wider expression 'in the public interest'.

[3] Writing in (2003) 120 *The South African Law Journal* (pp 322-329) on the approach of the Supreme Court of Canada to the interpretation of words in statutes when dealing with administrative law problems the distinguished administrative law scholar and judge

of the Federal Court of Canada, Appeal Division, John M Evans, *inter alia* states the following at 326:

'(a) While dictionaries provide the range of meanings that words can bear in "ordinary speech", the particular shade of meaning to be attributed to a given word or phrase is derived from the context in which it is used. In the case of statutory language, the interpretative context includes: the overall purposes of the statute; the legislative history of the scheme and the Act; the function in the statutory scheme of the particular provision in dispute; and the impact of the legislation on fundamental individual rights and constitutional values, including, in particular, those protected by constitutional and quasi-constitutional instruments, and by international legal norms.'

This approach is consonant with the approach of our courts.

[4] In *Carmichele v Minister of Safety and Security* 2001(4) SA 938 (CC) at para [54] the following was said:

'Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court:

"This jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental

constitutional value for all areas of the law, acts as a guiding principle and stimulus for the Legislature, Executive and Judiciary."

The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by s 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.'

[5] In *Pharmaceutical Manufacturers Association of South Africa and Another*: *In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para [33] at 692E-G Chaskalson P said the following:

'The control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. . . The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.'

In para [50] of the same judgment at 698D-F the following appears:

'What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of s 24 of the interim Constitution. What is "lawful administrative action", "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it" cannot mean one thing under the Constitution and another thing under the common law.'

[6] The proper approach to a case in which a court is asked to interpret a provision of a statute so as to incorporate constitutional norms is to consider *inter alia* its context, the overall purpose of the statute, the legislative history and to hold the provision concerned up to constitutional scrutiny.

[7] The privatisation of transport services is clearly one of the objects of the Act. However, it is clear that privatisation of the rail commuter service is still in a transitional phase. It is clear as set out in paras [4] and [5] of the judgment of our learned colleagues that the State, through the scheme of the Act, is still in effect the controller

and provider of this service. Put differently, even though the provision of the rail commuter service in the present case is regulated by a written agreement it is nevertheless pursuant to the statutory scheme and is ultimately the exercise of public power. It is common cause that the rail commuter service is unlikely ever to be profitable and presently serves mainly the needs of the indigent. It is surely unarguable that the provider of such a (state subsidised) service through a statutory scheme in a constitutional state such as ours is obliged to render such services in a manner contemplated in the empowering statute and not in conflict with constitutional norms. For example a discriminatory commuter service based on racial lines would clearly be unlawful and challengeable at the instance of a member of the public. A rail commuter service using coaches built with materials hazardous to public health could, in appropriate circumstances, conceivably be challenged by an interested member of the public. In the first example not only would there be a breach of s 9 of the Constitution (the equality clause) but it would also be a service not in the public interest. In the last mentioned example it is arguable that the service would offend against a commuter's right to

an environment that is not harmful to his or her health or well-being as protected by s 24 of the Constitution. The service rendered would also not be in the public interest.

[8] The problem for the applicants in the present case is that they failed to provide any basis for judicial intervention. First they attempted to cast upon the providers of the commuter rail service the overall responsibility for maintaining law and order on trains. Second they failed to show factually in circumstances in which arguably the providers of the service have some security responsibilities that such responsibilities were not being discharged. Third they sought an order the effect of which would be to involve the court in venturing into areas outside its jurisdiction, namely, of policy and budgetary allocation. These are matters, which in a constitutional state based on the doctrine of the separation of powers are not appropriate for judicial intervention. On these aspects we are in full agreement with our colleagues.

[9] A distinction should be made between non-sustainable cases and cases in which members of the public could conceivably mount a challenge to the manner in which rail commuter services are

rendered. To limit commuters to their contractual and delictual remedies is to take too narrow a view.

[10] We have also had the advantage of reading the judgment of Streicher JA. We note that in his approach to the interpretation of the phrase in question he considers it appropriate to take constitutional values into account. We disagree with him that the phrase means no more than that the rail commuter service should be a service benefiting the public in the sense that the public would be better off by having the service than being without it. We adopt the approach set out above.

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IG FARLAM
Judge of Appeal

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MS NAVSA
Judge of Appeal