CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 56/03

RAIL COMMUTERS ACTION GROUP	First Applicant
LESLIE DAVID VAN MINNEN	Second Applicant
SEVEN OTHERS	Third to Ninth Applicants
versus	
TRANSNET LTD t/a METRORAIL	First Respondent
S A RAIL COMMUTERS CORPORATION	Second Respondent
MINISTER OF TRANSPORT	Third Respondent
MINISTER OF SAFETY AND SECURITY	Fourth Respondent

Heard on : 17-18 August 2004

Decided on : 26 November 2004

JUDGMENT

O'REGAN J:

[1] This application for leave to appeal raises the question of who bears responsibility for ensuring the safety of passengers travelling on commuter trains.

The applicants assert that all the respondents bear obligations to ensure the safety of passengers, and also that all the respondents have failed to meet those obligations. The first three respondents argue that the South African Police Service ("SAPS") bears the primary responsibility to ensure the safety of passengers, not the institutions that operate the trains nor the Minister of Transport.

[2] The first applicant, the Rail Commuters Action Group ("the commuter association"), is a voluntary association representing the interests of rail commuters in the Western Cape. The second applicant is Leslie van Minnen (Mr van Minnen), a retired personnel manager. The remaining applicants are Jane Styer (the third applicant), Judin Coulsen (the fourth applicant), Raymond Love (the fifth applicant), Hester Fouché (the sixth applicant), Miriam Adolf (the seventh applicant), Berendina Fuller (the eighth applicant) and Zolani Matyeni (the ninth applicant). According to the applicants, the third to sixth applicants and ninth applicant all suffered assaults or injuries while travelling on Metrorail trains, while the seventh and eighth applicants are widows of men who were murdered while travelling on Metrorail trains, and the second applicant is the father of a twenty-year old boy who died as a result of being attacked and stabbed while travelling on a Metrorail train. The second to ninth applicants are all individuals who have a direct interest in the relief sought. The first applicant is a loose association of people formed at a meeting. The respondents do not dispute the capacity of the first applicant to institute legal proceedings. Given the fact that the other applicants clearly have standing and capacity to sue and that no

relief is sought in the interest of the first applicant alone, there is no need to consider whether the first applicant has the capacity to sue.

[3] The first respondent is Transnet Ltd, a public company with share capital, but in which the state is the only shareholder. It was formed in terms of section 32 of the Legal Succession to the South African Transport Services Act, 9 of 1989 as amended ("the SATS Act"). Metrorail is one of the five business units of Transnet Ltd, but it does not have separate legal personality. I shall ordinarily refer to the first respondent as Metrorail, but at times where I am speaking specifically of Transnet as a legal entity, I shall refer to "Transnet". The second respondent is the South African Rail Commuter Corporation Ltd ("the Commuter Corporation"), a legal person established in terms of section 22 of the SATS Act and registered in terms of the Companies Act, 61 of 1973. The third respondent is the Minister of Transport, and the fourth respondent is the Minister of Safety and Security. In the Cape High Court ("the High Court") and the Supreme Court of Appeal ("the SCA"), the Member of the Executive Council (MEC) for Safety and Security in the Western Cape was cited as fifth respondent. No relief was granted against the fifth respondent by the High Court. Upon appeal to this Court, the applicants do not seek relief against the fifth respondent, who is therefore not before us.

Facts

[4] Juan van Minnen, the son of the second applicant and a final-year engineering

student, was travelling home on the Metrorail train service at about 19h00 on a Friday evening in June 2001 when he was stabbed by unknown assailants. He died the next day in hospital. A few weeks later, on 28 June 2001, a public meeting was held in Fish Hoek in the Western Cape to protest the level of violence on commuter trains in the Western Cape. At that meeting, the commuter association was formed and a committee of nine volunteer members was appointed by those present. A report-back meeting was held on 31 July 2001 which was attended by Mr André Harrison, the regional manager of Metrorail in the Western Cape. At the end of this second meeting the committee was mandated by a show of hands to institute legal proceedings.

[5] On 6 August 2001 the applicants' legal representatives wrote to all the respondents requesting access to information and documents. After an exchange of letters, a wide range of documents was provided by the respondents. On 27 December 2001 proceedings were instituted by the first three applicants in the High Court. These applicants also sought early discovery of further documents in terms of Uniform Rule of Court 35(1) read with Rule 35(13). On 12 February 2002, an agreement between the parties in relation to early discovery was made an order of court by the High Court and the respondents discovered some 55 000 pages of information. The parties referred to this process as "informal discovery" and it is referred to as such in the High Court order. After receiving the discovered documents, the applicants filed a supplementary founding affidavit at the end of March 2002, in which the remaining applicants were joined.

[6] The relief sought by the applicants in the High Court changed several times. The amended notice of motion which formed part of the record before this Court sought relief in the following terms:

> "1. It is declared that the manner in which the rail commuter services in the Western Cape are:
>
> 1.1. operated by the First Respondent;
>
> 1.2. controlled and funded by the Second Respondent;
>
> insofar as the provision of proper and adequate safety and security services and the control of access to and egress from rail facilities used by rail commuters in the Western Cape are concerned, is not in the public interest as contemplated in section 15(1) (insofar as First Respondent is concerned), and section 23(1) (insofar as Second Respondent is concerned), of the Legal Succession to the South African Transport Services Act, No. 9 of 1989, as amended ('the SATS Act').
>
> 2. It is declared that the manner in which the rail commuter services in the Western Cape are;
>
> 2.1 operated by the First Respondent;
>
> 2.2. controlled and funded by the Second Respondent;
>
> 2.3. policed by the South African Police Service;
>
> 2.4. monitored by the Fifth Respondent;
>
> insofar as the provision of proper and adequate safety and security services and the control of access to and egress from rail facilities used by rail commuters in the Western Cape are concerned, is wrongful, unlawful and in violation of the constitutional rights of rail commuters to life, to freedom from all forms of violence from private sources, to human dignity, freedom of movement and to property.
>
> 3. It is declared that the First Respondent has a contractual obligation to convey fare-paying passengers safely and securely on commuter rail services in the Western Cape.
>
> 4. It is declared that:
>
> 4.1 the First and Second Respondents have a legal duty to protect the lives and property of members of the public who commute by rail, whilst they are making use of the rail transport services provided by the First and Second Respondent;
>
> 4.2. the First and Second Respondents are in breach of the said duty, in

that they have negligently failed to provide and/or fund proper and adequate safety and security services and/or by their failure to control access to and egress from rail commuter facilities used by rail commuters in the Western Cape;

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

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

7. In the alternative to paragraphs 1, 2, 4, 5 and 6 above and only in the event that the relief claimed in such paragraph is not granted: The First and Second Respondents are directed, within such time as the Honourable Court may order, to comply strictly with and give effect to all such terms and conditions contained in the current and future operational, business and/or other agreements between first and second Respondents dealing with the provision, monitoring and funding of safety and security services for its staff, the public and commuters making use of rail facilities within the Western Cape, provided always that the terms and conditions contained are and remain in the interest of the public as contemplated in the SATS Succession Act.

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

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

10. It is confirmed that the Applicants were entitled to early discovery in terms of Rule 35(1).

11. Granting leave to Applicants to approach the Honourable Court on the same papers, amplified insofar as necessary, within such period as the Honourable Court may think fit, for such further orders as may be necessary if respondents fail to have due regard to and implement the terms of prayer 5, alternatively the terms of prayer 7,

> and in any event if respondents fail to have due regard to and implement the terms of Prayers 8 and 9.
>
> 12. Directing the Respondents, jointly and severally, the one paying the others to be absolved, to pay the Applicants' costs of suit, such costs to include the costs attendant upon the engagement of the services of three counsel."

[7] It will be noted that this relief relates to different causes of action. Some relief relates to breach of statutory duty, and in particular an alleged breach of sections 15(1) and 23(1) of the SATS Act. Section 15(1) provides as follows:

> "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."

In this subsection "the Company" refers to Transnet Ltd, the first respondent, and the "Corporation" refers to the second respondent. Section 23(1) provides that:

> "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."

Other relief is formulated in terms of delict and, in particular, the question of whether the conduct of the respondents was wrongful. Paragraph 3 of the relief sought goes to contract, and some of the relief is founded on the Constitution.

History of commuter rail services

[8] The relief sought by the applicants needs to be understood within the historical context of the manner in which rail commuter services have been provided in South

Africa. It is important to start by recording the effect apartheid spatial planning has had on the customer base of commuter rail services. Apartheid spatial planning ensured that the townships in which black people were required to live were established far from urban centres where most jobs are found. Accordingly the need for public commuter transport services to ensure that workers can commute from their homes to their places of work is essential. As a result of this racist town planning, the journeys undertaken by black working class South Africans are often extremely long. The demographic pattern of commuter rail use in South Africa reflects this apartheid history. So, according to the 1999/2000 Metrorail Corporate Report, approximately 83% of commuters were African people, 16% were Coloured people, and only 1% and less than 1% were White and Indian people respectively. In all areas, more men than women used commuter rail services. The average monthly income of rail commuters per province is also very low. In the year 2000 it varied from the lowest of R1 868 for the Free State province to the highest of R3 265 for the Western Cape. The Western Cape has the highest per capita income probably because of the fact that it has one of the few commuter rail routes that services a suburban area. Commuter rail services thus, by and large, provide poor communities with essential public transport.

[9] Until the enactment of the SATS Act, rail commuter services were provided by the South African Transport Services ("SATS") established by the South African Transport Services Act, 65 of 1981. Until 1986 law and order on rail commuter services (and at airports) were provided by special railway police, the South African

Railways Police Force, which fell under the control of SATS. In 1986 this police force was disestablished and its members transferred to the South African Police Force. The effect was that the control of law and order on the railways was transferred from SATS to the South African Police.

[10] From 1985 to 1991 SATS continued to operate commuter rail services, amongst other things. During 1989, following upon the recommendation of the De Villiers Commission Report on SATS, published in July 1986, government decided to deregulate public transport services and it was decided that SATS would become a public company capable of trading for profit. The government also accepted the suggestion in the Report that the uneconomic but socially necessary commuter services should be separated from other more profitable transport services. These political decisions led to the enactment of the SATS Act which established the first respondent as a public company and transferred to it as a going concern the enterprise formerly operated by SATS, with the exception of the assets owned by SATS. The assets used to render commuter services, including all rolling stock, and significant portions of stations and track were transferred to the Commuter Corporation, the second respondent. The business of the first respondent was divided into a series of divisions or business units, including the South African Airways, port services and freight rail services. The commuter rail service, under the name “Metrorail”, was one of these divisions.

[11] The main object of the Commuter Corporation is, according to section 23 of the SATS Act, to ensure that rail commuter services are provided "in the public interest". The Act requires the Commuter Corporation and Transnet to enter into a contract setting out the terms upon which the commuter services will be provided by Transnet at the request of the Commuter Corporation. The first contract between them was signed on 13 September 1990 and a second agreement was signed during 1992. The current Service Agreement was signed during August 2000, although it regulates the period from 1 April 1999 to 31 March 2003. During this period Metrorail was afforded the exclusive right to operate commuter rail services. The Commuter Corporation pays the stipulated contract payments to Metrorail on an annual basis. Those contract payments are, in turn, received monthly by the Commuter Corporation from the national Department of Transport. The present monthly payment is approximately R93 million. Metrorail is entitled to supplement these payments with fares received from commuters.

[12] The arrangements for the provision of security in relation to the commuter rail services are governed by clause 10.10 of the Service Agreement and annexure 6 to it. Clause 10.10 provides that Metrorail shall be responsible for providing security services "subject to the provisions of any applicable law and negotiations with Government, the SARCC and the SAPS in defining security responsibilities between business entities and authorities, as more fully described in annexure 6". Annexure 6 divides security responsibilities into a public and non-public component. Paragraph

5.2 of annexure 6 regulates the non-public component of security responsibilities as follows:

> "5.2.1 Metrorail will be responsible for securing the non-public component of the service with specific emphasis on:
>
> - The performance of access control in accordance with applicable legislation and based on the needs/requirements of each region.
> - Cash in transit.
> - Protection of the SARCC Service Property including, inter alia, cable theft and vandalism. Metrorail will strive to keep incidents as low as reasonably possible. When the crime index trends exceed the present acceptable levels Metrorail will provide the SARCC with reasons as well as the intended action plans to improve the situation.
> - Protection of staff working in high risk areas or conditions.
> - The provision of security in the Staging yards.
> - Containing crime within the crime index parameters agreed on. The SARCC will be advised of reasons and action plans when the crime index trend exceeds the agreed level.
> - Primary fire fighting functions. Include specifically inspections and/or preventative measures to detect basic causes or conditions that may result in fire on rolling stock e.g. inspection of trains after each run to ascertain that no cause for eruption of fire exist."

Paragraph 5.3 regulates what is termed the "public component" as follows:

> "5.3.1 The responsibility for securing the public component of the SARCC's business rests with the SA Police Service in terms of Section 5 of the SA Police Act, 1985 or revisions. Metrorail will be required to play a supportive and/or complementary role in support of the SAPS to maintain law and order on stations and on trains as defined in clause 3.1 and Legal Succession Act, No 9 of 1989.
> 5.3.2 Metrorail is mandated and will be funded to deploy its own resources as well as contracted Security guards to protect the public component of the business (crime prevention and crime control) . . . Should proposals for a specialised rail police

> structure succeed, this section of the agreement will be renegotiated and adjusted to reflect the cost savings."

[13] The Commuter Corporation is required to perform a supervisory function in respect of security services. It employs what is called the "Metrorail National Crime Index" which is produced by dividing the total number of incidents by the total number of actual journeys and multiplying it by 100 000. The crime index adopted in the agreement of 0,682 was based on the 1997/8 statistics. The target identified was to reduce this index by 5% per annum.

The High Court

[14] Before considering the merits of the case, the High Court had to determine an application to strike out launched by the respondents and opposed by the applicants. It granted that application in part and refused it in part. The High Court then considered each of the prayers sought by the applicants. In respect of prayer 1, which related to the nature of the statutory duties established in sections 15(1) and 23(1) of the SATS Act, Davis and Van Heerden JJ held that:

> "While the term 'public interest' may not be capable of precise definition, the use of the phrase is to our mind designed to ensure that first and second respondents adopt a policy which promotes the general welfare of the public which uses the public facility in question, in this case the railway service."

After considering the evidence concerning access and egress control on the trains, safety, security and policing, the judges concluded as follows:

> "Given the definition of public interest which we have adopted, the evidence appears to favour applicants' argument. Such evidence includes the absence of effective access and egress control; the fact that trains run with open doors; and a very high level of crime which is only regarded as acceptable because respondents employ a questionable statistical index. In short, the service which is presently operated by first respondent in the Western Cape and supervised by second respondent does not in our view meet the standards of a service run in the public interest."

[15] In relation to the contractual relief sought in prayer 3, the court concluded that the applicants had not succeeded in showing that a tacit term should be imported into the contract of carriage and that relief was accordingly refused. In prayers 2 and 4 the applicants sought an order that the respondents bore a "legal duty" to provide adequate safety and security services on the commuter rail network in the Western Cape. Relying on section 39(2) of the Constitution, and decisions of this Court and the SCA, the court held that the first and second respondents were under a legal duty to "act to minimise the extent of violent crime and lack of safety on the commuter rail service." This duty should be adjudicated on the basis of reasonableness:

> "[I]n the light of all the circumstances of the particular case, have these respondents infringed the interest of the applicants in an unreasonable manner?"

[16] In relation to prayer 4.2 which had required the court to declare that the respondents had acted negligently in failing to carry out this duty, the court held that it was not appropriate to determine delictual liability on a piecemeal basis and that a finding of negligence should only be made after a careful examination during a trial of

the evidence led by the parties. The court thus refused to grant an order finding that the first and second respondents had negligently failed to perform this duty.

[17] The High Court did not find that the third respondent bore a legal duty in terms of the SATS Act or the Constitution to take steps to protect the safety and security of rail commuters. That finding was made only in respect of Metrorail and the Commuter Corporation. Accordingly, it did not grant declaratory relief against the third respondent. However, it granted mandatory relief against the third respondent. Its reasoning for doing so flowed from its consideration of the relationship between Transnet and the Commuter Corporation and the third respondent. It noted that the state is the only member of and shareholder in both Transnet and the Commuter Corporation, and that the third respondent exercises the rights in respect of the shareholding in the Commuter Corporation. The equivalent rights in relation to Transnet are exercised by the Minister of Public Enterprises, who is not a party to these proceedings. The members of the Board of Control of the Commuter Corporation are all appointed and dismissed by the third respondent. In the light of these considerations, the High Court considered it appropriate to order mandatory relief against the third respondent reasoning that:

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

> the first and second respondents, such relief must also encompass the third respondent."

[18] The High Court concluded that the applicants had not established that relief should be granted against the fourth and fifth respondents. In relation to the fourth respondent, the court reasoned as follows:

> "There is an enormous need for policing services in many localities apart from commuter trains and stations and the national and provincial policing policy has been determined accordingly. In so determining the national policy, the fourth respondent has had to have reference to all the inhabitants of the Republic, as well as the policing needs and priorities of the provinces. The applicants have not made out a case that the policy decisions taken in this regard, nor the implementation thereof, are not rational, taken lawfully and directed to proper purposes. In our view, it is clear from the papers before us that these are the kind of 'quintessential policy decisions involving calculations of social and economic preference,' which are much more suited to decision by elected representatives than by the Judiciary".

It concluded similarly that there was no basis in law or on the facts of the case for any relief to be granted against the fifth respondent.

[19] The court also held that the applicants were entitled to an order interdicting the first respondent from operating the commuter rail service in a manner otherwise than in accordance with its own operating instructions. The High Court made costs orders against the first and second respondents in respect of their applications to oppose the amendment of the notice of motion and special costs orders, on an attorney and client scale, against the same respondents in relation to the unsuccessful parts of their striking out applications. The court ordered that the applicants' costs (including the

costs of informal discovery) be paid by the first, second and third respondents, but ordered the applicants to pay the costs of the fourth and fifth respondents, against whom the applicants had been unsuccessful, including the costs of informal discovery.

[20] The court accordingly granted relief in the following terms:

> "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.

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 paras 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 paras 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."

Supreme Court of Appeal

[21] The respondents sought and were granted leave to appeal by the High Court to the SCA. The applicants lodged a cross-appeal in respect of the refusal of relief against the fourth and fifth respondents, and in relation to the successful applications to strike out and costs. This application too was granted by the High Court.

[22] There were three judgments delivered by the SCA. The main judgment was written by Howie P and Cloete JA. Two minority concurring judgments, one by Streicher JA and the other by Farlam and Navsa JJA, were written. As to the meaning of "in the public interest" in subsections 15(1) and 23(1) of the SATS Act, Howie P and Cloete JA reasoned as follows:

> "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 privatisation of the first respondent in future, that it was the public which had to be served in the utilisation 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 . . . . 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." (my emphasis and footnotes omitted)

The applicants' attack on the Service Agreement between the first and second respondents on the basis that it is not "in the public interest" was also rejected by the two judges.

[23] Howie P and Cloete JA held further that there were extensive disputes of fact, which could not be resolved on the papers, specifically in respect of:

(i) whether the first respondent was properly performing its contractual obligations owed to the second respondent under the Service Agreement;

(ii) whether improved access and egress control at stations would reduce crime on trains;

(iii) the safety and security on commuter trains;

(iv) the incidence of crime on such trains when compared to the crime rate generally;

(v) the reasonableness of steps taken by the first respondent to deal with these problems; and

(vi) whether the first and second respondents were contravening the general operating instructions by allowing trains to travel with open or no doors.

Howie P and Cloete JA held that the High Court had misapplied the principles laid down in *Plascon-Evans*. They held that the disputes of fact listed above could not be resolved on the papers and that accordingly the facts placed before them by the first, second and third respondents had to be accepted. Those facts, they held, constituted an insuperable obstacle to the conclusions reached by the High Court. In this respect, their judgment was concurred in by all the other judges. On the respondents' evidence, the SCA held, there was nothing better which first to third respondents could do. Accordingly, relief should not have been granted against the first, second and third respondents.

[24] With regard to paragraph 4 of the order of the High Court, which related to compliance with the first respondent's general operating instructions, Howie P and Cloete JA held that it was not an issue that had been raised in the founding papers by the applicants and moreover, the High Court had not made the factual finding necessary to justify such an order.

[25] As indicated above, the applicants cross-appealed to the SCA against the High Court findings in respect of the Minister of Safety and Security, the fourth respondent, and the MEC for Safety and Security in the Western Cape, the fifth respondent. The High Court had granted no relief against either respondent. In considering this appeal, the main judgment of the SCA found that the allegations in the fourth respondents' answering affidavits went largely unchallenged in the applicants' reply. On the fourth

respondent's version, the main judgment held that it could not be found that the measures taken by the fourth respondent were unreasonable. The applicants' cross-appeal in relation to the fourth respondent was therefore refused. In relation to the fifth respondent, the main judgment of the SCA held that there was no basis for seeking relief against the fifth respondent and that this was conceded in argument by counsel for the applicants before the SCA. This cross-appeal was therefore also dismissed.

[26] The SCA did not determine the applicants' appeal against those parts of its affidavits which had been struck out by the High Court. As to costs, the SCA overturned the High Court's adverse interlocutory costs orders against the respondents on the basis that the "incorrect view of the merits led to an incorrect view of the interlocutory costs". The remaining costs orders made by the High Court were set aside.

[27] Writing separately, Streicher JA concurred in the order of the majority, and interpreted "a service that is in the public interest" to mean only "that the public would be better off by having the service than by being without it." In so finding, he did take into account the values and fundamental rights enshrined in the Constitution. He held further that it is the fourth respondent, and not the first to third respondents, who is responsible for the safety and security of commuters.

[28] In their judgment concurring in the order, Farlam and Navsa JJA disagreed with the interpretations of "in the public interest" adopted by Howie P and Cloete JA, and Streicher JA. Instead, they held that the provision of rail commuter services constitutes the exercise of public power which must conform not only to its empowering statute but also to the Constitution. They reasoned as follows:

> "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."

[29] They held accordingly that the provision of such services could, in appropriate cases, be challenged as directly infringing constitutional rights or as being not "in the public interest", properly construed in the light of the Constitution. However, they held that the applicants in the present case had failed to provide any basis for judicial intervention because:

(a) they attempted to cast upon the providers of rail commuter services the overall responsibility for maintaining law and order on trains;

(b) they failed to show factually that the respondents were not discharging their alleged responsibilities; and

(c) they sought an order that would infringe the separation of powers by engaging policy and budgetary allocation.

[30] The SCA therefore upheld the appeal of the first to third respondents and dismissed the cross-appeal. As no costs were sought on appeal, no costs order was made.

Application for leave to appeal to this Court

[31] The applicants lodged an application for special leave to appeal to this Court against the judgment and order of the SCA. In this Court, they seek the following relief:

> "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 on 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 the first respondent is concerned) and s. 23(1) (insofar as the second respondent is concerned) of the Legal Succession to the South African Transport Services Act No. 9 of 1989, as amended.
>
> 2. It is declared that the first to third respondents and the South African Police Service have a legal duty to protect the lives and property of rail commuters in the Western Cape, whilst they are making use of rail transport services provided and ensured by, respectively, the first and second respondents and which are policed by the South African Police Service.
>
> 3. It is ordered as follows:
>
> 3.1 The respondents are directed forthwith to take all such steps (including interim steps) as are reasonably necessary to put in place proper and adequate safety and security services on 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 and to human dignity.

3.2 The several respondents are directed to present under oath a report to the Cape Provincial Division of the High 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 appellants 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 appellants' commentary.

4. The first respondent is interdicted and restrained from operating rail commuter services otherwise than in accordance with the terms of its general operating instructions as regards the prescribed procedures that must be followed by its employees when defective doors are observed, as stipulated in terms of the following clauses of its operating instructions:

a. Clause 12001.2.3

While performing their duties, metro guards must observe whether or not sliding doors are closing property. If any sliding doors are not operating correctly the instructions in sub-clause 12001.4 must be complied with. They must also warn commuters against the undesirable practice of keeping sliding doors open when the train is about to depart or en route.

b. Clause 12001.4.1

In the event of a sliding door not responding to the door-operating mechanism, or should any difficulty be experienced in operating it manually, the metro guard must lock the defective sliding door and for the information of the public, gummed stickers, inscribed 'LOCKED – GESLUIT' must be affixed on the inside and outside of all sliding doors that are locked. Should a hissing sound of compressed air escaping at the door mechanism be heard, the sliding door concerned must also be isolated. A supply of these stickers must be kept by the metro guard.

c. Clause 12001.4.2

When a sliding door is isolated the metro guard must, before the 'right away' signal is given, ensure that all commuters requiring to do so have alighted from, or boarded the train.

d. Clause 12001.4.3

The metro guard must report all defects detected by himself or reported to him, to the train driver. The train driver must, before signing off duty, report the defects in accordance with appropriate instructions, according to the procedure applicable at the signing-off depot. This does not exempt the

metro guard from his duty to record these details in the book regarding damaged/defective rolling stock at his home depot, in accordance with existing instructions.

5. The respondents shall, jointly and severally, pay the costs incurred by the appellants 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, as well as the qualifying expenses of the experts, Messrs Greyling and Roodt and Professor Dunne, whose affidavits were filed of record by the appellants, the costs of the appeals to the Supreme Court of Appeal and the appeal to this Court."

All the respondents oppose the application for leave to appeal.

[32] It will be noted that this relief is not identical to the relief claimed in the amended notice of motion, or to the relief granted by the High Court, although it is in similar terms. In particular, the relief relating to the control of access to and egress from trains contained in the amended notice of motion and granted by the High Court is no longer sought in these prayers. Moreover, the relief sought in the prayers relating to the general operating instructions which was granted in paragraph 4 of the High Court order has been spelt out in greater detail. The legal basis for prayer 1 flows from the interpretation of the SATS Act, prayer 2 may flow either from delict or directly from the Constitution, prayer 3 is a structural interdict flowing from the declarators in prayers 1 and 2, and prayer 4 is a mandamus relating to the general operating instructions.

[33] The SCA remarked that "the applicants' case has been characterised throughout by a singular lack of direction." It is true that the precise terms of the relief they seek

have been varied on several occasions during the proceedings. In their initial application, the applicants sought to hold the respondents liable in contract, delict, under a statutory duty and the Constitution. The vacillation in the precise terms of the relief sought, however, should not blind us to the fact that the thrust of the applicants' case throughout has remained unchanged. They seek to establish that the respondents bear a legal obligation (based on statute, delict and/or the Constitution) to take steps to ensure the safety and security of rail commuters who travel on Metrorail trains.

Additional affidavits lodged with the Court on appeal

[34] Some time after they lodged their application for special leave to appeal, the applicants lodged a further set of affidavits. They argued that these affidavits constituted further information as contemplated within rule 19(3)(c) read with rule 31. Thereafter a flurry of further affidavits were lodged:

(a) an answering affidavit on behalf of Metrorail by Mr Harrison;

(b) certain further confirmatory affidavits by members of the press on behalf of the applicants;

(c) a further affidavit on behalf of the applicants by Mr Theron lodging a joint expert report by Prof Dunne and Mr Page – this the applicants sought to lodge in terms of rule 19 read with rule 31 or alternatively section 22 of the Supreme Court Act, 59 of 1959;

(d) a further affidavit on behalf of the applicants by Mr Theron containing certain press reports lodged on 2 August 2004;

(e) further answering affidavits on behalf of first and second respondents by Mr Du Preez lodged on 10 August 2004;

(f) a further affidavit on behalf of the applicants deposed to by Mr Theron lodged on 13 August 2004; and

(g) a further affidavit on behalf of the fourth respondent in response to the new matter lodged on 13 August 2004.

The first, second and fourth respondents oppose the admission of these further affidavits but the third respondent does not oppose their admission.

[35] The fact that three of the respondents oppose the admission of the further affidavits need not preclude their admission. Whether the affidavits will be admitted depends on whether the applicants can establish that they should be admitted. The applicants seek the admission of the initial supplementary affidavits, containing further press reports concerning the establishment of a rail guard, and affidavits on the changing practice in relation to security and access control on the southern sector of railways in the Western Cape on the basis of rule 19(3)(c) read with rule 31. Whereas in relation to the subsequent affidavits, and in particular, in relation to the further report by Prof Dunne and Mr Page, and the affidavit by Mr Theron containing press reports on the rail guard issue, they rely not only on rule 19(3)(c) read with rule 31, but also on section 22 of the Supreme Court Act, which is incorporated by rule 30.

[36] The first, second and fourth respondents argued, and the applicants correctly

conceded, that Rule 19 was not a permissible vehicle for the admission of new evidence on appeal. This position is reflected in *S v Lawrence; S v Negal; S v Solberg*, where Chaskalson P explained:

> "I shall assume in favour of the appellants that their version of the agreement should be accepted. But even if this is so, the evidence would not be admissible in terms of Rule 19. Rule 19 deals with the preparation of the appeal record, which according to the practice of our Courts has always been understood to mean a record of the proceedings in the court against whose decision the appeal has been noted. Rule 19(1)(b) is directed to the exclusion from the record of evidence that may not be relevant to an appeal on constitutional issues only. It prescribes a procedure for circumscribing the record and not a means for introducing new evidence on appeal. That is apparent not only from the context, but also from the reference in Rule 19(1)(b)(ii) to 'evidence and exhibits', which can only be understood as referring to evidence and exhibits already on record."

[37] Despite the changes effected in the 2003 Rules, nothing affects this conclusion. The applicants also rely on rule 31(1) which provides that:

> "Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record. Provided that such facts-
>
> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification."

The precursor of this rule in the 1995 Rules was rule 34 (and in the 1998 Rules was rule 30). In *Lawrence*, this Court, per Chaskalson P, held as follows:

> "Rule 34(1)(a) requires the facts relied upon to be 'common cause' or 'incontrovertible'. The Rule has no application to disputed facts. Rule 34(1)(b) requires the facts to be of the character contemplated by the Rule and to be capable of 'easy verification'. Factual material in the affidavits which falls within these parameters is admissible under Rule 34; but disputed facts which are not capable of easy verification are not."

[38] This approach was confirmed in *Prince v President, Cape Law Society, and Others*, where in discussing rule 30, Ngcobo J held:

> "The Rule has no application where the facts sought to be canvassed are disputed. A dispute as to facts may, and if genuine usually will, demonstrate that the facts are not 'incontrovertible' or 'capable of easy verification'. If that be the case, the dispute will in effect render the material inadmissible. Ultimately, the admissibility depends on the nature and substance of the dispute." (footnotes omitted)

None of the evidence tendered late, in my view, falls within rule 31. It is all put in issue by the respondents. The affidavits lodged at the time of the application for leave to appeal therefore fall to be excluded on that basis alone.

[39] The applicants also rely, in the alternative, on section 22 of the Supreme Court Act in relation to the new affidavits they sought to tender after the application for leave to appeal. New evidence is admissible in this Court on appeal, including in motion proceedings, in terms of that section, which reads:

> "22 Powers of court on hearing of appeals.—
> The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power—
> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to

> remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
>
> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

[40] In *Lawrence*, Chaskalson P referred to this provision and held that it is only in exceptional circumstances that evidence may be admitted on appeal:

> "Section 173 of the 1996 Constitution confers on this Court, the Supreme Court of Appeal and the High Courts an 'inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'. Counsel for the appellants contended that if the expert evidence on which they rely is not admissible under Rule 19 or Rule 34, this Court should exercise its powers under s 173 of the Constitution to admit it. The appellants do not, however, have to rely on s 173, which in any event seems not to be applicable to this case. This Court has power under its Rules to admit new evidence on appeal. The question is whether that power should be exercised in the circumstances of the present case. For the reasons already given this Court should not, save in exceptional circumstances, permit disputes of fact or expert opinion to be raised for the first time on appeal. Such circumstances have not been established in the present case." (footnotes omitted)

[41] The SCA has similarly held that new evidence should be admitted on appeal under this section only in exceptional circumstances. This is because on appeal, a court is ordinarily determining the correctness or otherwise of an order made by another court, and the record from the lower court should determine the answer to that question. It is accepted however that exceptional circumstances may warrant the variation of the rule. Important criteria relevant to determining whether evidence on

appeal should be admitted were identified in *Colman v Dunbar*. Relevant criteria include the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence to produce it late in the day, and the need to avoid prejudice. One of the most important criteria was the following:

> "The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced it would be practically conclusive, for if not, it would still leave the issue in doubt and the matter would still lack finality."

In *S v Louw*, the Appellate Division held also that for new evidence to be admitted on appeal, some reasonably sufficient explanation must be offered to account for the failure to tender the evidence earlier in the proceedings.

[42] In *Van Eeden v Van Eeden*, the Cape High Court held that it was well established that the court's powers as derived from section 22(a) of the Supreme Court Act should be exercised sparingly. The court held, further, that in that case the additional evidence related to facts and circumstances which had arisen after the judgment of the court a quo. This raised the question whether it was competent for the court, in the exercise of its power under section 22(a), to receive such evidence or to authorise its reception. Comrie J held that the section did not include any express limitation which would exclude the reception of the evidence then sought to be tendered and that the court exercising appellate jurisdiction had a discretion whether or not to allow the evidence to be admitted, which discretion should be exercised sparingly and only in special circumstances. From time to time, he held, cases did

arise which cried out for the reception of post-judgment facts.

[43] In my view, this approach is correct. The Court should exercise the powers conferred by section 22 "sparingly" and further evidence on appeal (which does not fall within the terms of rule 31) should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late filing is an important factor. The existence of a substantial dispute of fact in relation to it will militate against its being admitted.

[44] The two further affidavits that the applicants wish to have admitted under section 22 are first, an affidavit of Mr Theron attaching the joint report of two expert witnesses, Professor Dunne and Mr Page and secondly, an affidavit of Mr Theron attaching press cuttings relating to recent political decisions to establish a rail guard. Professor Dunne, the head of the Department of Statistical Sciences at the University of Cape Town, filed a written report which was attached to the applicant's replying affidavit, dealing in particular with the evaluation of the Metrorail Crime Index and comparing it to the national crime data. Mr Page, who was an expert witness on behalf of Metrorail is currently a Graduate Research Assistant at the Centre for Urban Transportation Research at the University of South Florida in the United States of America. The joint report takes the view that the Metrorail Crime Index is flawed and expresses views on the evaluation and compilation of crime statistics and asserts that

safety and security on the trains are inextricably entwined. There can be no doubt that it is often of great assistance to a court where experts representing different parties compile a joint report. However, that should ordinarily be done in good time. The question is whether in this case it is appropriate to admit the joint report.

[45] Assuming for the moment that the explanation tendered by Mr Theron for the late filing of the report is adequate, the question that arises is whether the evidence sought to be lodged is sufficiently material and weighty to meet the standard required for the admission of evidence at this late stage. As will be seen below, it is my view that the intensive debate on the evaluation of crime statistics on the record, which is furthered in the tendered report, is of little value to the determination of this case. The reliability or otherwise of the Metrorail Crime Index is also disputed, and in my view cannot be determined on the papers as they stand, even were they to be supplemented by the tendered report. In any event, the reliability or otherwise of that index is not determinative of the issues before us. Accordingly, and after a careful consideration of the tendered report in the light of the record, I have concluded that it is not sufficiently material and weighty to render it appropriate for admission at this late stage of the proceedings.

[46] To his second further affidavit, Mr Theron attached press cuttings and correspondence relating to developments in railway policing. Again, this evidence, the admission of which is opposed by the respondents, is not sufficiently weighty and

material to warrant admission under section 22(a). Accordingly, the further affidavits filed by the respondents opposing the admission of the affidavits tendered by the applicants and the responses thereto by the applicants will all not be admitted.

[47] It is appropriate to note that it has become a regrettable practice in this Court that affidavits are tendered on appeal often only days before an appeal hearing, if not on the day of the appeal itself. This is an unacceptable practice which must be discouraged. The late filing of affidavits in circumstances which do not meet the stringent test for admission set out in this judgment will not be permitted by this Court. Attorneys should take care to consider the test for the admission of late affidavits and satisfy themselves before filing the affidavits that they do qualify for admission in terms of the rules of this Court and the principles elucidated in this judgment.

Issues to be decided

[48] The relief that the applicants seek in this matter is of three kinds: declaratory, mandatory and prohibitory. As to declaratory relief, the applicants seek an order declaring first that the manner in which commuter rail services are operated in the Western Cape is not "in the public interest" as contemplated in sections 15(1) and 23(1) of the SATS Act; and secondly that the first to third respondents and the SAPS "have a legal duty to protect the lives and property of rail commuters in the Western Cape, whilst they are making use of rail transport services". The mandatory relief

sought would require the respondents forthwith "to take all such steps (including interim steps) as are reasonably necessary to put in place proper and adequate safety and security services on 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 and to human dignity." It would place respondents on terms to report on oath within four months of the date of the order to the High Court as to what steps have been taken to comply with the mandatory order. The prohibitory relief would restrain Metrorail from operating rail commuter services otherwise than in accordance with the terms of its general operating instructions.

[49] The applicants also persisted in their heads of argument with an application for leave to appeal against, in effect, the order of the High Court striking out certain material from their affidavits. In light of the conclusions I have reached in this matter, I do not consider it necessary or appropriate to consider the arguments concerning the application for leave to appeal in respect of that order. Were the High Court order to have been incorrect, it would not affect the order to be made by this Court and it need not be considered further.

This Court's jurisdiction to determine facts connected to decisions on constitutional matters

[50] The respondents argue that none of the relief sought by the applicants should be

granted because the applicants have not on the papers established sufficient facts to entitle them to relief. The respondents argue that the SCA was correct in holding that the applicants had not established the necessary facts to lead to relief and further, that this Court has no jurisdiction to determine the facts differently from the manner in which they were determined by the SCA.

[51] The respondents seek to rely on this Court's judgment in *S v Boesak* to sustain their argument that this Court does not have jurisdiction to determine factual disputes as they do not constitute either "constitutional matters, [or] issues connected with decisions on constitutional matters". There can be no doubt that this Court has jurisdiction only in matters which raise "constitutional matters and issues connected with decisions on constitutional matters". In the *Boesak* case, the Court was concerned with an appeal in a criminal matter. The appellant in this Court sought to challenge certain factual findings made by the SCA on the ground that incorrect factual findings by the SCA led to his conviction and therefore resulted in a breach of his constitutional rights. The question that arose was whether incorrect factual findings on appeal which lead to the conviction of an accused of themselves constitute a breach of the appellant's constitutional rights. This Court held that they did not. In identifying the broad principles governing this Court's jurisdiction in criminal matters, the Court reasoned as follows:

> "(a) A challenge to a decision of the SCA on the basis only that it is wrong on the facts is not a constitutional matter
>
> In the context of s 167(3) of the Constitution, the question whether evidence

> is sufficient to justify a finding of guilt beyond reasonable doubt cannot in itself be a constitutional matter. Otherwise, all criminal cases would be constitutional matters, and the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA would be illusory. There is a need for finality in criminal matters. The structure of the Constitution suggests clearly that finality should be achieved by the SCA unless a constitutional matter arises. Disagreement with the SCA's assessment of the facts is not sufficient to constitute a breach of the right to a fair trial. An applicant for leave to appeal against the decision of the SCA must necessarily have had an appeal or review as contemplated by s 35(3)(o) of the Constitution. Unless there is some separate constitutional issue raised, therefore, no constitutional right is engaged when an appellant merely disputes the findings of fact made by the Supreme Court of Appeal." (footnotes omitted)

[52] This reasoning does not imply that disputes of fact may not be resolved by this Court. It states merely that where the only issue in a criminal appeal is dissatisfaction with the factual findings made by the SCA, and no other constitutional issue is raised, no constitutional right is engaged by such a challenge. Where, however, a separate constitutional issue is raised in respect of which there are disputes of fact, those disputes of fact will constitute "issues connected with decisions on constitutional matters" as contemplated by section 167(3)(b) of the Constitution. On many occasions, therefore, this Court has had to determine on appeal the facts of a matter in order to determine the constitutional claim before it. Were it to be otherwise, this Court's ability to fulfil its constitutional task of determining constitutional matters would be frustrated.

[53] In assessing a dispute of fact on motion proceedings, the rules developed by our

courts to address such disputes will be applied by this Court in constitutional matters. Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where however a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the Court may adjudicate the matter on the basis of the facts asserted by the applicant. Given that it is the applicant who institutes proceedings, and who can therefore choose whether to proceed on motion or by way of summons, this rule restated and refined as it was in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* is a fair and equitable one. Where an applicant seeks constitutional relief, and there is a dispute of fact on the papers before the Court, the identification of the facts upon which the constitutional matter should be adjudicated constitutes an issue connected with a decision on a constitutional matter which falls within this Court's jurisdiction. In such circumstances, this Court is not bound by the facts as determined by the SCA in its application of the rule as stated in *Plascon-Evans*. The respondent's argument to this effect must therefore be rejected.

Consideration of facts established on the record

[54] There is a welter of factual disputes on the papers. The record runs to nearly 7000 pages (if I include the additional affidavits sought to be admitted on appeal) and there is a wide range of factual issues traversed, including the incidents in which the

individual applicants or their kin were injured on Metrorail. I cannot decide the delictual liability of the respondents in relation to these incidents on this record. Indeed, as the High Court noted, it is generally undesirable for courts to make final determinations of the legal elements of delictual liability in motion proceedings. This Court held similarly in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*:

> "It is not desirable that a case as complex as this should be dealt with on the basis of what the facts might be rather than what they are."

[55] 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.

[56] However, at least one fact is not in dispute upon the papers and indeed counsel for all the respondents conceded this when it was put to them in argument. It seems

not to be disputed that there is a problem with crime on Metrorail trains in the Western Cape. The dispute, as characterised in the heads, was whether crime was "rife" or not, or in excess of other crime rates. It is not clear to me that this dispute needs to be resolved. There are several places on the record where the respondents admit the problem of crime on the trains. It is perhaps most tellingly conceded in the National Metrorail/SAPS Working Committee report entitled "Submission with regard to a safe and secure rail commuter environment in South Africa" dated 25 March 1999 in which the compilers of the report note that:

> "It is evident from this submission that, although there are different role-players involved in the rail commuter environment and with specific reference to the safety and security of the rail commuters, the current situation can no longer be tolerated, politically or socio-economically. The devastating impact of crime on the rail commuter business has been taken into account."

This report was annexed to the founding affidavit of Mr Frylinck, the deponent on behalf of the applicants, but was admitted by the first respondent and not placed in dispute by others.

[57] Another telling admission on the record is that made by Mr Nortje, a director in the legal department of the SA Police Services, who deposed to an affidavit on behalf of the fourth respondent, averring that:

> "Captain van Breda informs me that the doorways between carriages are permanently sealed off. The aforementioned conditions make it extremely dangerous for an armed policeman to be in the carriage without police back-up."

It is difficult to conclude other than that there is a serious problem with crime on Metrorail trains. Indeed, it is clear from the respondents' own expert, Mr Page, in his report which was annexed to the answering affidavit of Mr van Niekerk on behalf of Metrorail, that crime has increased, rather than dropped, in the two years following the adoption of the Service Agreement. It increased by 19% in the first year and 28% in the second. The target set in the Service Agreement was to reduce the 1997/1998 crime levels by 5% per annum. This clearly has not been achieved.

[58] A further question that arises is how to deal with the competing interpretations of the crime statistics, and indeed whether it is necessary to do so. The respondents have furnished the details of the number of crimes occurring on Metrorail trains in different regions for different periods. There are disputes about the reliability of the methods for the recording of incidents, but for the purposes of this judgment, the statistics furnished by the respondents must be accepted. Similarly, the fourth respondent has furnished crime statistics for the broader community. The question that was debated on the record and in argument is how to evaluate the number of crimes on trains in the context of the overall crime rate.

[59] It is also clear on the papers that crime on the trains in the Western Cape is not as severe as crime on trains operated in other parts of South Africa. There seems to be no reason, however, why the determination of the legal and constitutional responsibilities of the respondents should ever turn on the question of where crime is

most severe or indeed on the question of whether crime is more prevalent on trains than elsewhere. 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.

[60] At least one dispute was characterised as a dispute of fact both by the SCA and the respondents' counsel, which in fact concerns questions of law, not fact. This is the question of the reasonableness of the first, second and third respondents' conduct. Quite clearly the conduct itself constitutes a question of fact, and where there are genuine disputes as to what that conduct was, the respondents' version must be accepted. The question of whether that conduct once established was reasonable in the circumstances, is not a question of fact, but one of the application of legal principles to a set of established facts which this Court must determine. Unlike the question of whether a particular issue has been established beyond a reasonable doubt, which turns only on an evaluation of evidence and its cogency, the question of whether conduct is reasonable in the context of a legal duty, requires the application of legal principles to a set of established facts.

The merits of the application

[61] 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 obligations of Metrorail and the Commuter Corporation

[62] The applicants argue that, as far as Metrorail and the Commuter Corporation are concerned, subsections 15(1) and 23(1) of the SATS Act should be interpreted in the light of the Constitution as imposing positive obligations upon them to protect the rights of rail commuters to dignity, life and security of the person when they travel on trains. They argue, therefore, that the interpretations of these subsections adopted by Howie P and Cloete JA, on the one hand, and Streicher JA on the other, should be rejected. It will be recalled that Howie P and Cloete JA interpreted the sections

without reference to the Constitution to mean that an obligation was imposed upon Metrorail and the Commuter Corporation in providing a rail commuter service to serve the needs of the public. Streicher JA, on the other hand, considered that the values and rights in the Constitution needed to be considered in interpreting the subsections, but concluded that the phrase "in the public interest" should be interpreted to mean only "that the public would be better off by having the service than by being without it".

[63] The applicants prefer the approach adopted by Farlam and Navsa JJA, who held that in order to interpret a provision of a statute so as to incorporate constitutional norms, it is necessary to consider "its context, the overall purpose of the statute, the legislative history and to hold the provision concerned up to constitutional scrutiny." The judges held that, understood in context, the rail commuter service serves mainly the needs of the indigent and is "unlikely ever to be profitable". In offering the service, the reasoning went, the respondents are "obliged to render such services in a manner contemplated in the empowering statute and not in conflict with constitutional norms."

[64] Metrorail and the Commuter Corporation dispute that they are under any obligation to protect rail commuters from crime when they are travelling on Metrorail. They and the fourth respondent argue that the SAPS is the only bearer of that obligation in terms of section 205(3) of the Constitution. Section 205(3) provides

that:

> "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."

The first and second respondents argue that the Service Agreement, which asserts that the primary responsibility for preventing crime and maintaining law and order on Metrorail services lies with the SAPS, is consistent with the constitutional obligation imposed by section 205. They argue that Howie P and Cloete JA's interpretation of subsections 15(1) and 23(1) is therefore the correct one, which this Court should endorse.

[65] In interpreting the provisions in the SATS Act, it is necessary first to understand the context of the legislation as a whole. As indicated above, the legislation was enacted to facilitate the privatisation of the provision of a range of transport services that had previously been provided by the state. However, it was accepted at the time, and the legislation makes it plain, that rail commuter services were different to many of the other services which were in the process of being privatised. In particular, it was acknowledged that, although there was a great public need for such services, they were unlikely ever to be profitable. Accordingly, the second respondent was established to requisition and monitor the provision of rail commuter services "in the public interest". Relevant, too, is the particular importance of rail commuter services to disadvantaged communities in South Africa, particularly in the light of apartheid

spatial planning which relegated such communities to the fringes of our cities and imposed inevitably direct and indirect costs on those communities occasioned by their distance from the urban centres.

[66] It is also necessary to consider the relevant provisions of the Constitution. The applicants rely on sections 10, 11 and 12 of the Bill of Rights. Section 10 provides that:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

Section 11 provides that:

> "Everyone has the right to life."

Section 12 provides that:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
>
> . . .
>
> (c) to be free from all forms of violence from either public or private sources;".

The applicants argue that these provisions need to be read in the light of section 7(2) and 8(1) of the Constitution. Section 7(2) provides that:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

Section 8(1) provides that:

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

An "organ of state" is defined in section 239 of the Constitution as meaning:

> "(a) any department of state or administration in the national, provincial or local sphere of government; or
> (b) any other functionary or institution—
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation,
> but does not include a court or a judicial officer".

[67] The applicants argue that all the respondents are organs of state. There can be no doubt that the third and fourth respondents as Ministers in the national Executive fall within the scope of "organ of state". The first and second respondents exercise powers and perform functions in terms of the SATS Act and it was accordingly argued that they constitute "organs of state" within the meaning of section 239(b)(ii). This must be correct. All the respondents are bearers of obligations in respect of the rights conferred by the Bill of Rights.

[68] It is not claimed by the applicants that the conduct of the respondents invades those rights. Rather, it is their argument that the first and second respondents bear a positive obligation in terms of the provisions of the SATS Act read in the light of the

Constitution to take steps to protect the safety and security of rail commuters. They also argue that, as the first and second respondents both deny the existence of this obligation and fail to observe it, they are entitled to both declaratory relief and a mandamus against those two respondents.

[69] The rights contained in the Bill of Rights ordinarily impose, in the first instance, an obligation that requires those bound not to act in a manner which would infringe or restrict the right. So, for example, the right to freedom of expression requires those bound by it not to act in a manner which would impair freedom of expression. The obligation is in a sense a negative one, as it requires that nothing be done to infringe the rights. However, in some circumstances, the correlative obligations imposed by the rights in the Bill of Rights will require positive steps to be taken to fulfil the rights. In the case of most of the socio-economic rights in the Bill of Rights, the ambit of the positive obligation that flows from the right is explicitly determined in the Bill of Rights. The precise ambit of the positive obligation thus imposed has been discussed by the Court in several cases concerned with socio-economic rights.

[70] It is clear that rights other than the social and economic rights in the Constitution do at times impose positive obligations. In *S v Baloyi (Minister of Justice and Another Intervening),* the Court was considering a declaration of invalidity made by the High Court in respect of certain provisions of the Prevention of

Family Violence Act, 133 of 1993. In considering the constitutionality of those provisions, the Court held that section 12(1)(c) read with section 7(2) –

> "has to be understood as obliging the State directly to protect the right of everyone to be free from private or domestic violence."

The Court emphasised the importance of this obligation in the light of our Constitution's commitment to gender equality and the rights of children and the need to take steps to ensure that women and children were provided with effective forms of relief against family violence. Thus the Court reasoned that the Prevention of Family Violence Act had to be understood in the context of the state fulfilling the positive obligations imposed upon it by the provisions of the Bill of Rights.

[71] In *Carmichele v Minister of Safety and Security*, in considering the obligations imposed by the rights to life, dignity and freedom and security of the person, this Court held that:

> "It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."

The Court went on to distinguish our constitutional framework from that of the United States of America in this regard and approved instead the approach adopted by the European Court on Human Rights where that Court held:

> "It is thus accepted by those appearing before the Court that Article 2 of the Convention [which entrenches the right to life] may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."

[72] It is not necessary to decide in this case whether sections 10, 11 and 12 of the Constitution impose positive obligations upon Metrorail and the Commuter Corporation as the case made out by the applicants relates primarily to the obligations Metrorail and the Commuter Corporation bear in terms of the SATS Act. In determining the scope of the obligations created by sections 15(1) and 23(1) of the SATS Act, regard must be had to the provisions of the Constitution and, in particular, the provisions must be interpreted to "promote the spirit, purport and objects of the Bill of Rights".

[73] Since this Court's judgment in *Carmichele,* the SCA has developed the legal principles governing the state's delictual liability in respect of its constitutional obligations, and particularly, those relating to the rights to dignity, life and freedom and security of the person in a series of cases. In developing that approach, the SCA has explicitly acknowledged that one of the considerations relevant to the question of whether a legal duty for the purposes of the law of delict is the constitutional value of accountability, in terms of which government and those exercising public power should be held accountable to the broader community for the exercise of their powers.

[74] Accountability of those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution. Section 1 of the Constitution provides as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> . . .
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Accountability is also to be found in chapter 3 of the Constitution, in which section 41(1) provides:

> "All spheres of government and all organs of state within each sphere must—
> . . .
> (c) provide effective, transparent, accountable and coherent government for the Republic as a whole."

It is again recognised as one of the key values of public administration in section 195 of the Constitution which provides that:

> "(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
> . . .
> (f) Public administration must be accountable.
> . . .
> (2) The above principles apply to—
> (a) administration in every sphere of government;
> (b) organs of state; and
> (c) public enterprises."

[75] The value of accountability is thus expressly mentioned in a range of provisions in the Constitution. As importantly, however, the value is asserted within the scheme of the Bill of Rights. The Bill of Rights requires that where an entrenched right is limited, that limitation may be constitutionally permissible if it is "reasonable and justifiable in an open and democratic society based upon human dignity, equality and freedom". Section 36(1), therefore, requires the state, or any person asserting that a limitation of a right falls within the provisions of section 36(1), to show that the limitation is reasonable and justifiable. It is one of the objects of the Bill of Rights to require those limiting rights to account for the limitations. The process of justifying limitations, therefore, serves the value of accountability in a direct way by requiring those who defend limitations to explain why they are defensible. The value of accountability, therefore, is one which is relevant to a consideration of the "spirit, purport and objects of the Bill of Rights".

[76] The value of accountability is asserted not only for the state, but also for all organs of state and public enterprises which would include all four respondents. The principle that government, and organs of state, are accountable for their conduct is an important principle that bears on the construction of constitutional and statutory obligations, as well as on the question of the development of delictual liability.

[77] In *Van Duivenboden*, the SCA emphasised that the principle of accountability would not always result in the existence of delictual remedies enforceable against the

state. In particular, the SCA emphasised that there may be other legal or political remedies more suitable for ensuring that the principle of accountability is observed. The SCA also recognised that in some circumstances, even where no other remedy exists, there may be reasons of public interest, which would suggest that a legal duty cognizable in delict would not arise. Accordingly, in *Olitzki Property Holdings v State Tender Board and Another*, the SCA concluded that no action for damages for lost profit lay in circumstances where the procurement provisions of the Constitution had not been followed in the award of a tender.

[78] The principle of accountability, therefore, may not always give rise to a legal duty whether in private or public law. In determining whether a legal duty exists whether in private or public law, careful analysis of the relevant constitutional provisions, any relevant statutory duties and the relevant context will be required. It will be necessary too to take account of other constitutional norms, important and relevant ones being the principle of effectiveness and the need to be responsive to people's needs.

[79] The applicants sought declaratory relief on the basis of the provisions of the SATS Act read in the light of the Constitution. The SCA has expressly recognised in *Van Duivenboden* and *Olitzki* that there may be legal remedies, arising from public law, rather than from private law, which will serve to protect the constitutional rights in issue here. The question posed by this argument is not whether Metrorail and the

Commuter Corporation bear a private law duty to the individual applicants or other rail commuters to protect them from criminal activity while travelling on Metrorail trains. It is rather whether the first and second respondents are under a public law duty, arising from the provisions of the SATS Act read in the light of the provisions of the Constitution, that is enforceable by the public law remedies of declaratory, mandatory and prohibitory relief.

[80] In determining whether the applicants are entitled to public law relief under the SATS Act as requested, the Court should bear in mind that private law damages claims are not always the most appropriate method to enforce constitutional rights. Private law remedies tend to be retrospective in effect, seeking to remedy loss caused rather than to prevent loss in the future. Moreover, the use of private law remedies to claim damages to vindicate public law rights may place heavy financial burdens on the state. Ackermann J's observations in *Fose v Minister of Justice* in the context of an application for punitive damages bear repeating:

> "In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are 'multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform', it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated". (footnotes omitted)

[81] These remarks should not, of course, be understood to suggest that delictual

relief should not lie for the infringement of constitutional rights in appropriate circumstances. There will be circumstances where delictual relief is appropriate. It is important, however, that we do not overlook the value of public law remedies as effective and appropriate forms of constitutional relief. It should also be emphasised that a public law obligation such as that under discussion does not automatically give rise to a legal duty for the purposes of the law of delict. It is not necessary to consider the circumstances in which it would do so and I expressly refrain from considering that question.

[82] Metrorail and the Commuter Corporation bear obligations in terms of sections 15(1) and 23(1) of the SATS Act. Those obligations must be interpreted in the light of the provisions of the Bill of Rights, and in particular sections 10, 11 and 12 of the Constitution. They should be interpreted too in the context in which those obligations are to be performed. It must be borne in mind that the first and second respondents enjoy, in effect, a monopoly over the provision of rail commuter services for the period of the agreement they have entered into. Moreover, as organs of state they exercise that monopoly in circumstances where the spatial planning of our cities means that those most in need of subsidised public transport services are those who often have the greatest distances to travel. Those people are also often the poorest members of our communities who have little choice in deciding whether to use rail services or not. The rail commuter services operated by the first and second respondent are used by hundreds of thousands of commuters on a daily basis. Another

relevant consideration is the fact that once a commuter enters a train, he or she cannot easily leave it while it is in motion. Boarding a train renders commuters intensely vulnerable to violent criminals who target them. The applicants emphasised in argument the double bind in which commuters find themselves: they generally have little choice about using the train, and once on the train they are unable to protect themselves against attack by criminals.

[83] These factors make it clear that in construing the nature of the obligations imposed upon Metrorail and the Commuter Corporation, the need to hold these respondents accountable for the exercise of their powers is important. Institutions which are organs of state, performing public functions and providing a public service of this kind, should be held accountable for the provision of that service. It is for this reason that the Constitution affirms accountability as a value governing public administration. Metrorail has the obligation to provide rail commuter services in a way that is consistent with the constitutional rights of commuters. In the absence of a public law obligation of the kind contended for by the applicants, there is no way of ensuring that Metrorail complies with this duty. Nor could it be argued by Metrorail and the Commuter Corporation that a public law obligation of this sort would impose undue burdens on them that would impair their ability to provide the service effectively or efficiently.

[84] In these circumstances, I conclude that Metrorail and the Commuter

Corporation bear a positive obligation arising from the provisions of the SATS Act read with the provisions of the Constitution to ensure that reasonable measures are in place to provide for the security of rail commuters when they provide rail commuter services under the SATS Act. It should be clear from the duty thus formulated that it is a duty to ensure that reasonable measures are in place. It does not matter who provides the measures as long as they are in place. The responsibility for ensuring that measures are in place, regardless of who may be implementing them, rests with Metrorail and the Commuter Corporation.

[85] It should be noted that the formulation of this duty does not flow from a narrow interpretation of the phrase "in the public interest" as contained in sections 15(1) and 23(1) of the SATS Act. To that extent, it differs from the approach taken in all three judgments in the SCA. As this Court has said previously, our Constitution constructs and restrains the exercise of public power in our democracy. Determining the scope of public power, therefore, and any duties attached to it requires an analysis not only of the statutory provisions conferring the power, but also of the social, political and economic context within which the power is to be exercised and a consideration of the relevant provisions of the Constitution. If this approach is followed, the ambit of public duties of organs of state will be drawn in an incremental and context-driven manner.

[86] The duty thus identified requires Metrorail and the Commuter Corporation to

ensure that reasonable measures are in place to provide for the safety of rail commuters. The standard of reasonableness requires the conduct of Metrorail and the Commuter Corporation to fall within the range of possible conduct that a reasonable decision-maker in the circumstances would have adopted. In assessing the reasonableness of conduct, therefore, the context within which decisions are made is of fundamental importance. Furthermore, a court must be careful not to usurp the proper role of the decision maker. In particular,

> "[a] decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker."

This Court considered the manner in which the standard of reasonableness should be applied to positive constitutional obligations in *Government of the Republic of South Africa and Others v Grootboom and Others*. The Court held that the standard would need to be assessed in the light of the "social, historical and economic context" of housing and in the light of institutional capacity.

[87] In adopting this standard the Court requires the bearer of constitutional obligations to perform them in a manner which is reasonable. This standard strikes an appropriate balance between the need to ensure that constitutional obligations are met, on the one hand, and recognition for the fact that the bearers of those obligations

should be given appropriate leeway to determine the best way to meet the obligations in all the circumstances. As this Court reasoned in *Minister of Health and Others v Treatment Action Campaign and Others (2)*:

> "Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation."

[88] What constitutes reasonable measures will depend on the circumstances of each case. Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer – the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource

constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities.

[89] Metrorail and the Commuter Corporation deny that they bear obligations to rail commuters to protect their safety and security. They argue that it is the SAPS who bears such obligations, in terms of section 205 of the Constitution, and not them. They accordingly clearly misconstrue the nature of the obligations imposed upon them by the SATS Act. In the alternative, Metrorail and the Commuter Corporation asserted that their obligations were met by the conclusion of the Service Agreement, and, in particular annexure 6 to the Service Agreement, the provisions of which have been described above.

[90] It will be recalled that annexure 6 allocates the responsibility for the public component of safety and security on the trains to the SAPS, and reserves for Metrorail only "a supportive and/or complementary role" in this regard. On the other hand, Metrorail bears full responsibility for the "non-public" component of security relating primarily to the protection of assets and personnel. To show what they have done to

meet both these responsibilities, Metrorail and the Commuter Corporation have put a wide range of information before us to indicate how many security guards they employ in different regions, the nature of their contracts with private security companies, and the processes for crime-recording. There are disputes of facts 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.

[91] However, it is clear that Metrorail and the Commuter Corporation have known for some time that the SAPS have only the scantiest resources for providing security to rail commuters. Indeed, in March 1999, Metrorail and the SAPS jointly produced a report which recorded that the effective disestablishment of the SA Railways and Harbours Police in 1986 had left a "void" which led to an increase in "theft, vandalism, intimidation, robberies, attacks on commuters and unsafe conditions on trains and stations in general". Although the Service Agreement arrangements between the Commuter Corporation and Metrorail had suggested that the SAPS was primarily responsible for ensuring the safety and security of rail commuters, the report noted that:

> "The changed environment in South Africa, after the 1994 elections and the rising crime, forced the SAPS to prioritise and concentrate its efforts in maintaining law and order in the broad perspective. The unfortunate shortage of resources resulted in the re-allocation of the Mobile Units into normal policing functions at station level, once again creating a void in the train commuter environment. The existence of such a void forced Metrorail, with its limited resources, to manage the public and non-public

components without the assistance of a dedicated police force."

The report continued that the working group had concluded that the way forward was the establishment of a rail commuter transit police which would report to the Commuter Corporation.

[92] From their affidavits and their argument to this Court, it was clear that neither Metrorail nor the Commuter Corporation considered that they bore any obligation in relation to the security of rail commuters, and that they did not interpret the void as something they had to fill. In this regard, they erred both in relation to their obligations, and in relation to annexure 6. Annexure 6 makes it clear Metrorail's role in relation to the security of rail passengers is a "supportive" and "complementary" one. The ordinary meaning of a complementary role implies that where a void is created, it will be filled by the person who has the complementary duty. Once it was clear that the SAPS was unable for resource reasons to carry out the task imposed upon them by annexure 6 given their resource constraints, Metrorail had to take reasonable steps to ensure that a void was not created.

[93] In the circumstances, it is clear that the terms of annexure 6 are not themselves in conflict with the legal obligations borne by Metrorail and the Commuter Corporation. There is no reason why Metrorail cannot fulfil its legal obligations in terms of annexure 6 by taking reasonable measures to provide for the security of rail commuter passengers, once it is clear that the SAPS is unable to do so. I conclude

therefore that annexure 6 is not in conflict with Metrorail and the Commuter Corporation's legal obligations.

[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. Before turning to the question of relief, I turn to consider the question of the argument of the applicants that the respondents bore a duty arising from the law of delict, as well as the question of the legal duties of the third and fourth respondents.

The legal duty actionable in delict

[95] The applicants sought an order that Metrorail and the Commuter Corporation bear a legal duty towards commuters for the purposes of the law of delict. However, for the reasons outlined in *Carmichele*, it is not ordinarily desirable for this Court on motion proceedings to decide the elements of delictual liability. There can be no doubt that that reasoning applies here as well. Whether or not Metrorail and the Commuter Corporation bear a legal duty in respect of the injuries caused to any of the

individual applicants or their family members is not something that this Court could or should determine on the papers in this case. Extensive disputes of fact exist. It is not desirable to determine elements of a legal duty in delict in the abstract on the basis of facts that may or may not be proved. To the extent, therefore, that the second prayer for relief sought in this case is seeking this Court to determine the existence of a legal duty for the purposes of the law of delict, it cannot succeed.

The obligations of the third respondent

[96] It will be recalled that the High Court did not conclude that the third respondent bore an obligation in terms of the SATS Act or a legal duty to take steps to protect the rights of rail commuters to safety and security. It ordered relief against the third respondent, only in relation to the mandatory relief, "[i]n the light of the inter-relationship between the first and second respondents, and the second and third respondents".

[97] On appeal to this Court, the applicants argue that the third respondent does bear an obligation to rail commuters in the Western Cape, on the basis that the third respondent is the national Minister responsible for transport. The third respondent argues in turn that the responsibility for the prevention of crime in terms of our Constitution rests solely on the fourth respondent in terms of section 205 of the Constitution. The question that arises is whether the provisions of the SATS Act impose any obligations upon the third respondent in respect of the safety and security

of rail commuters, on the facts of this case.

[98] Although it is clear that the national Minister is responsible for transport generally, it is also clear on the record that the primary responsibility for ensuring the provision of rail commuter services has been imposed on the Commuter Corporation, a separate legal entity, by the SATS Act. It is true, as the High Court noted, that the Minister appoints and dismisses the members of the Board of Control of the Commuter Corporation, but that does not mean that the Minister bears the obligations of the Commuter Corporation. It is also true that the Commuter Corporation may be requested by the Minister to ensure that rail commuter services are provided in any area in South Africa. This interrelationship however cannot destroy the fact that the Commuter Corporation and Metrorail together bear the responsibility for providing rail commuter services and not the third respondent. For this reason, the High Court erred in granting relief against the third respondent solely on the basis of the interrelationship between the third respondent and Metrorail and the Commuter Corporation. Relief could only have been granted against the third respondent on the ground that it independently was the bearer of an obligation, not on the ground that it was related to other respondents, who are separate legal entities, who did bear an obligation to the applicants.

[99] In the light of the fact that it is Metrorail and the Commuter Corporation who bear the legal responsibility to provide commuter services under the SATS Act, it

cannot be concluded that the third respondent, whatever policy making obligations he may have in terms of the Constitution, bears an obligation in terms of the SATS Act directly to take steps to protect the safety and security of rail commuters.

The obligations of the fourth respondent

[100] The fourth respondent accepts that he bears an obligation in terms of section 205 of the Constitution to maintain law and order in the Republic but points out that it is a duty which runs throughout the Republic and which requires the fourth respondent to make a range of policy decisions to determine how best it should be met. The applicants note that in 2001, despite the problem of crime on the trains in the Western Cape, the fourth respondent decided to reduce its Commuter Patrol Unit based in the Western Cape from approximately 200 members to 38. They argue that this was an unreasonable decision in the circumstances. The fourth respondent rebuts this, however, by pointing to the fact that the SAPS does not perform guard duties, and that in the light of the shortage of available police officers, it must prioritise as effectively as possible. The fourth respondent has placed evidence on the record, which identifies the process of prioritisation that has been undertaken in which key police stations have been identified.

[101] In considering the evidence put forward by the fourth respondent, the High Court concluded that it had not been shown by the applicants that the policy of the fourth respondent was not rational, lawful or directed to proper purposes. In the

circumstances, the High Court dismissed the relief against the fourth respondent. I agree that the applicants have not made out a case against the fourth respondent, for the reasons given by the High Court.

The General Operating Instructions

[102] The final aspect of the case to be addressed, before I turn to relief, is the question of whether the applicants are entitled to relief in relation to the General Operating Instructions. The clauses of the Operating Instructions relied upon by the applicants relate to the rules prohibiting trains travelling with open doors. The applicants did not seek this relief in their original notice of motion, nor was it fully addressed in their founding affidavit, but the supplementary founding affidavit raises the issue and they successfully sought the amendment of their notice of motion before the High Court in this regard. The High Court held that there was no dispute between the parties as to the fact that the Operating Instructions were binding on Metrorail, but could not make a finding of fact on the record as to how often and in what circumstances trains do travel with doors open.

[103] It is disputed by the respondents on the record that trains travel with open doors, though it is conceded that the design of the doors is such as to permit commuters to prevent the doors from closing. On the other hand, the respondents also furnished a video recording which shows commuter trains travelling in the Western Cape from which it is apparent that trains do travel with doors open, when no person

appears to be holding them open.

[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.

[105] 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.

Relief

[106] I have concluded that Metrorail and the Commuter Corporation bear an obligation in terms of the SATS Act interpreted in the light of the Constitution to ensure that reasonable measures are taken to provide for the safety and security of rail commuters on the rail commuter service they operate. In this Court, they both denied that they bore such an obligation. The first form of relief that is sought by the applicants is declaratory. Section 172(1)(a) of the Constitution states that this Court

must declare "any law or conduct that is inconsistent with the Constitution" to be invalid to the extent of its inconsistency. It is a special constitutional provision, different to the common law rules governing the grant of declaratory orders. It does not mean, however, that this Court may not make a declaratory order in circumstances where it has not found conduct to be in conflict with the Constitution. Indeed section 38 of the Constitution makes it clear that the Court may grant a declaration of rights where it would constitute appropriate relief:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

Unlike under section 172(1)(a), the courts are not obliged to grant a declaration of rights but may do so where they consider it to constitute appropriate relief. The principles developed at common law, and under the provisions of the Supreme Court Act, will provide helpful guidance to consider whether such a declaratory order should be made, though of course the constitutional setting may at times require consideration of different or additional matters.

[107] It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or

prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.

[108] It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed.

[109] In this case, Metrorail and the Commuter Corporation denied, in error, that they bore obligations to protect the security of rail commuters. Given the importance of that obligation in the context of public rail commuter services, it is important that this court issue a declaratory order to that effect. 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.

Costs

[110] The applicants have been successful in this Court against the first and second respondents, though only in part, and are accordingly entitled to be awarded costs in

that regard, save in relation to the applications to tender further evidence to this Court. Each of the parties shall bear their own costs in respect of the applications to tender further evidence. The third and fourth respondents must pay their own costs in the High Court, the SCA and this Court. Although the applicants were finally not successful against them, the applicants' litigation against them was neither frivolous nor vexatious, but raised important and difficult constitutional issues. It would not accordingly be appropriate to require the applicants to pay the costs of the third and fourth respondents. The applicants are entitled to recover the costs incurred in opposing the first and second respondents' appeal to the SCA. However, in relation to costs in the High Court proceedings, it is appropriate to reinstate paragraphs 6.3, 6.4 and 6.5 of the High Court costs order, which directed the respondents to pay the applicants' costs in respect of the respondents' applications to strike out on the attorney and client scale. I cannot conclude that the court in making this order exercised its discretion improperly. As to paragraphs 6.2 and 6.7 of the High Court order, in which costs orders were made against the applicants, it appears from the SCA judgment that the respondents waived these costs orders when before that court. They did not seek to alter that waiver in this Court. It would not be appropriate therefore to reinstate these orders. The remaining costs orders made in the High Court need not be reinstated. Their substance is dealt with in the costs order made by this Court.

Order

[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 paragraphs 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.

Langa ACJ, Mokgoro J, Moseneke J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of O'Regan J.

For the applicants: M Seligson SC, RP Hoffmann SC, DJ Dippenaar instructed by Heyns and Partners.

For the first and second respondents: JJ Gauntlett SC, JNS Du Plessis SC, K Pillay instructed by Napoleon and Vogel and Jan S de Villiers.

For the third respondent: M Donen SC, M Salie, instructed by the State Attorney (Cape Town).

For the fourth respondent: PB Hodes SC, RT Williams SC, instructed by the State Attorney (Cape Town).