REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/12454

DATE: 03/09/2010

In the matter between:

THE WITWATERSRAND AFRICAN TAXI OWNERS ASSOCIATION Applicant

and

THE MEC FOR ROADS AND TRANSPORT Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This is a review application. The applicant seeks to have reviewed and set aside the decision by the respondent to close all taxi routes and the

portion of the ranks operated by the applicant to the operation of mini-bus taxi type services commencing at 00h01 on 12 May 2010 until 4 June 2010. More directly stated, the applicant seeks an order reviewing and setting aside the Regulations made by the respondent under s 93 of the Gauteng Public Road Transport Act 7 of 2001 ("*the Act*") as published in Notice 1334 of 2010 in the Provincial Gazette on 6 May 2010 ("*the Regulations*"). The Regulations had led to the decision referred to in the first part of this paragraph.

THE PARTIES

[2] The applicant is the Witwatersrand African Taxi Owners Association ("*WATA*"), an association of taxi owners, and also the entity named in the General Notice 1334 of 2010 published in the Provincial Gazette Extraordinary of 6 May 2010.

[3] The respondent is the MEC for Roads and Transport, cited as the Member of the Executive Committee, the duly appointed representative in the control of the Department of Roads and Transport, an organ of State as defined in s 239 of the Constitution. He is also the person empowered to promulgate Regulations under the empowering provisions of s 93(2) and (3) of the Act.

SOME BRIEF BACKGROUND

[4] The relationship between the parties, characterised by disputes in relation to the applicant's routes needs to be stated briefly in order to place a proper context on the current application. It is not in dispute that the tempestuous relationship just described was further marred by the introduction of a new bus system which has commonly become known as the Bus Rapid System ("*BRT*"). In this regard, the applicant has not only raised various issues in regard to the BRT system, but also persistently made representations to the respondent about the implementation of the bus routes, as well as what it perceived to be the consequences of the BRT system to both the applicant and its about 1 200 members. It is also not in dispute that other taxi associations, besides the applicant, have embarked on protest action opposing the implementation of the BRT bus system. Furthermore, the respondent previously attempted to close the routes and ranks operated by the applicant. As a consequence, an urgent application was instituted by the applicant on 29 March 2010 to set aside what it labelled the unlawful attempts by the respondent to close the applicant's taxi ranks and routes. The applicant was successful in the urgent application in that on 29 March 2010, Coppin J granted an interim order in favour of the applicant. The effect of the order was essentially to interdict the respondent from closing all the routes and the portion of the ranks operated by the applicant. In a clear endeavour to rectify the shortcomings attendant in the above urgent application, the respondent published General Notice 1070 of 2010 in the Provincial Gazette Extraordinary on 6 April 2010. In this Notice, the respondent withdrew the

previous notice (Notice No. 1023 of 2010) of 26 March 2010, which had the intention of closing the ranks and routes of the applicant. The reason for the withdrawal of the Notice was given as, "*as it was published in error*". Furthermore, in the General Notice 1070 of 2010, the respondent stated that in terms of s 93(1) of the Act, he was declaring the implicated routes operated by WATA to be routes characterised by violence, unrest or instability warranting special measures. In addition, the respondent gave notice of his intention to promulgate regulations in terms of s 93(2)(a) of the Act affecting routes and ranks which would be measures taken to normalise the area. Of significance and relevance in Notice 1070 of 2010, are the following separate statements by the respondent: "*The proposed regulations will be in force and effect until further notice*", and "*I am therefore inviting interested and affected persons to lodge or submit their written requests for reasons or written representations by faxing, posting or handing them in, on or before 16/4/2010 …*". (my underlining)

[5] In the second phase of the procedure, the respondent proceeded to publish General Notice No. 1334 of 2010 on 6 May 2010. This was also in terms of the Act. The gist of the notice is contained in the schedule thereto, which provides:

> "*All routes and the portion of the ranks operated by the Witwatersrand African Taxi Owners Association are closed to the operation of minibus taxi-type services commencing at 00h01 on 12 May 2010 until the 4th of June 2010.*"

This notice, once more, prompted the applicant to launch an urgent

application in this Court. In the first part of the relief, the applicant sought an urgent interdict against the respondent, preventing the respondent from closing the routes and taxi ranks operated by the applicant as envisaged in General Notice 1334 of 2010, pending the present review proceedings. The applicant also sought an order directing the respondent to provide reasons together with a substantive response to the applicant's representations made on 16 April 2010. On 11 May 2010 Nicholls J granted the interim interdict order sought by the applicant. The order is currently in place. Pursuant to the interdict, the applicant supplemented its founding papers, whilst the respondent filed a supplementary answering affidavit. This was followed by a replying affidavit from the applicant. I deal with the contents of these affidavits later on the merits of the present application. All of the above are not in dispute or no issue has seriously been taken in connection therewith.

[6] The main issue for determination in this application, and which is in dispute, is whether or not a situation is in existence where it could be said that the ranks and routes operated by WATA are characterised by violence, unrest or instability. In other words, was the respondent justified in his attempts to close the ranks and routes?

[7] Prior to dealing with the various grounds of review, the opposing contentions of the parties in connection therewith, as well as the disputed facts, it is instructive to have regard to the provisions of the Act, in particular those relevant to the application. The purpose of the Act is set out in s 1 as follows:

"***1. Purpose of this Act.***– *(1) The purpose of this Act is to promote and provide for an effective public passenger road transport system for Gauteng. This can be achieved by fulfilling the primary objects of the Act, which are to –*

a) implement provincial and national government policy relating to public passenger road transport services and facilities, monitor the implementation of such provincial policy, conduct investigations into issues arising from the implementation of such policy and make necessary policy adjustments;

b) promote and facilitate the increased utilisation and development of public passenger road transport in the Province;

c) use the planning and development of public transport as a tool for restructuring society so as to –

(i) enable and encourage workers to reside nearer to their places of work, especially where locational disadvantages were created by previous discriminatory policies;

(ii) encourage residential areas to be located nearer to work areas;

(iii) promote easier movement of persons in the Province;

(iv) promote urban renewal, densification and mixed land uses;

d) integrate and co-ordinate public passenger transport modes and transport planning with land use and development planning to improve mobility through an efficient public passenger road transport system;

e) take the necessary steps to promote co-ordination between transport authorities and other planning authorities in the province, or between such authorities and the Province, with a view to avoiding duplication of effect;

f) promote co-ordination between modes of public passenger road transport and the seamless movement of passengers in the system;

g) promote public consultation and participation before taking any decision or performing any official act and to prescribe the procedures to be followed in that regard;

h) control and regulate public passenger road transport services through issuing operating licences to operators of those services, and excluding persons without valid and specific operating licences from operating such services;

i) permit motor vehicles to be used for public passenger road transport services only in relation to the types of services offered;

j) provide for the registration of operators providing certain types of public passenger road transport services and associations of those operators;

k) promote the safety and interests of passengers using public passenger road transport services;

l) establish institutional structures to support the objectives of this Act;

m) promote effective and efficient enforcement of laws relating to public passenger road transport, including road traffic and road safety laws;

n) promote professional operating practices by the operators of public passenger road transport services;

o) promote the co-ordinated provision of adequate and accessible public passenger transport infrastructure, subject to specific legislation dealing with roads, railway lines and other transport infrastructure;

p) promote a system where users pay for the services they receive, except where subsidies are needed to enable affordable transport and effective land use, to provide for the accessibility and mobility of special categories of passengers or for other sound policy reasons, and to ensure that services are subsidised only in those circumstances;

q) provide for competitive tendering for subsidised public passenger road transport services;

r) provide for effective and integrated data bases and management information systems for public passenger road transport operations;

s) provide for a demerit system for operators of public passenger road transport services; and

t) promote small, medium and micro enterprises and operators previously disadvantaged by unfair discrimination.

(2) This Act replaces Chapter 3 of the National Act with regard to matters dealt with in this Act."

In this regard, sub-sections (1)(a), and (1)(g), (1)(k) and (1)(m) are pertinent to the present application. From the definitions s 2 of the Act, it is plain that the respondent is indeed "*an organ of State*" as defined in s 239 of the Constitution, and therefore an "*administrator*", as defined in the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*").

[8] More importantly, s 93 of the Act provides as follows:

"***93. Special emergency measures.***– *(1) The MEC may, by notice in the Gazette, declare an area in which the special measures provided for in this section will apply, where he or she is of the opinion that this is necessary to normalize the situation in the area characterised by violence, unrest or instability.*

(2) (a) The MEC may make regulations providing that one or more routes or ranks as specified, or that all of the routes and ranks, without specification, are closed to the operation of public passenger road transport services in an area declared under subsection (1) for a period stated in the notice, and that no person may undertake specified services on the affected route or routes or in the affected rank or ranks during the period.

(b) The regulations may provide that the contravention thereof will constitute an offence and prescribe penalties in respect thereof.

(3) Before making regulations under subsection (2), the MEC must cause a notice to be published in the Gazette or in a newspaper circulating in the declared area stating –

(a) a brief description of the nature and purpose of the intended action;

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

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

d) that interested or affected persons may request reasons for the proposed regulations;

e) that any interested or affected person may make representations;

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

g) the address to which representations must be submitted; and

h) the manner in which representations may be made.

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

From these provisions, it is plain that the respondent has a discretion to promulgate the notice for special measures in an area/areas where, "*he or she is of the opinion that this is necessary to normalise the situation in the area characterised by violence, unrest or instability*". Similarly, the respondent has the discretion to make regulations to the effect that routes and ranks are closed to operation of public passenger road transport services in an area inflicted by violence, unrest or instability. However, of significance in s 93(2) is that the closure of the ranks and routes should be, "*for a period stated in the notice*". More significantly, s 93(3) provides that before making the regulations, the respondent must cause a notice to be published in the Gazette or in a newspaper circulating in the declared area stating, *inter alia*,

the period for which the proposed regulations will be in force; that interested or affected persons may request reasons for the proposed regulations, and that any interested or affected persons may make representations. Notably, s 93 concludes in 93(4) that, "*The MEC (the respondent) must consider any representations received under subsection (3) before making regulations under subsection (2)*" (my insertion). I deal herein later with the applicant's request for reasons and representations made as well as the respondent's reaction thereto.

[9] I now turn to the applicant's grounds of review. These are essentially four in number. Firstly, the applicant contends that the decision of the respondent in making the regulations closing the ranks and the routes operated by the applicant was irrational and not proportional to the existing circumstances, as to the information the respondent claims to have in its possession regarding the alleged violence, unrest or instability at the ranks or routes operated by the applicant and its members. This ground of review, and indeed, the others dealt with below, ought to be reviewed both on the basis of the provisions of PAJA, and the Constitution. This is also the least parameter required by Administrative Law.

[10] Section 6(1) of PAJA provides as follows:

> "***6. Judicial review of administrative action.***– *(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*
>
> *(2) A court or tribunal has the power to judicially review an administrative action if –*

(a) the administrator took it –

(i) was not authorised to do so by the empowering provision;

ii) acted under a delegation of power which was not authorised by the empowering provision; or

iii) was biased or reasonably suspected of bias;

b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

c) the action was procedurally unfair;

d) the action was materially influenced by an error of law;

e) the action was taken –

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

f) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

g) the action concerned consists of a failure to take a decision;

h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where -

(a) (i) an administrator has a duty to take a decision;

ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

iii) the administrator has failed to take that decision,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;

ii) a law prescribes a period within which the administrator is required to take that decision; and

iii) the administrator has failed to take that decision before the expiration of that period,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period."

[11] In the respondent's answering affidavit, attested to by Mr M Thulare, Chief Director, Legal and Contract Manager, in the employ of the respondent, reasons are advanced for the decision of the respondent. He was not directly involved in this matter, but alleges that, "*we spent countless hours with him (the respondent) discussing the appropriate response that Government should take to the violence and instability that accompanied the Applicant opposing to this programme. His decision to issue the regulations was not arrived at easily*" (my insertion). As in the case of the respondent in his later supplementary affidavit, Mr Thulare relies on certain incidents of violence which occurred between 12 March 2010 and 20 April 2010. These incidents are contained in Annexures A1-A10 of the respondent's supplementary answering affidavit. Mr Thulare also alleges that he was aware of an incident on 30 April 2010 when a BRT bus was shot at on one of the routes operated by the applicant. However, he does not specify the route. During such incident, he says, eight people were injured, one critically. He says, "*These were all innocent commuters whose only crime was to travel on the BRT buses*". In support of his assertions, Mr Thulare annexed to his affidavit newspaper cuttings from The Star Newspaper on 3 April 2010. In paragraph 1(4) of his affidavit, Mr Thulare concludes, "*Accordingly I submit that the MEC's decision to promulgate the regulations was made in the interest of the general safety of commuters, the general public and members of the applicant …*". One other allegation Mr Thulare makes, and which is denied vehemently by the applicant, is that situations of unrest and instability were caused by the applicant due to the applicant's decision to expel certain of applicant's members for their involvement in negotiations with the respondent

regarding the BRT programme. These expelled members subsequently approached the respondent and voiced their unhappiness about their expulsion. There were, however, no confirmatory affidavits from these expelled members whose number Mr Thulare puts at over thirty.

[12] In his supplementary affidavit, the respondent, in large measure, aligns himself with the allegations made by Mr Thulare. He also relies on the information contained in Annexures A1-A10 referred to by Mr Thulare. The incidents of violence for the period 12 March 2010 to 20 April 2010 are contained in Annexures A1-A10, entitled "*Violent Incidents on Routes Operated by WATA*". They are ten in number. In his view, the respondent says he was perfectly justified in terms of s 93(2) of the Act to issue the relevant Notice, and to promulgate the Regulations since Annexures A1-A10 clearly indicate that the routes are characterised by instability and unrest. In justifying his decision as rationale, the respondent also relies on the written reasons furnished to the applicant previously. I shall deal later with these reasons. It will also be necessary to briefly analyse closer the incidents of violence relied on by the respondent. In paragraph 8.6 of the supplementary answering affidavit, the respondent states:

> "*8.6 In my reasons dated 30 April 2010 (Annexure 'A' to the affidavit of Thulare), I clearly indicated that I was satisfied, based on information provided by the relevant officials that the routes and ranks forming a subject matter of this application are indeed characterized by violence, unrest or instability. In addition to the information provided by the relevant officials, I further referred in my reasons to specific incidents of instability within the applicant itself. These incidents relate to members of the applicant who*

have been expelled from the applicant for reasons related to their involvement in BRT negotiations and are prevented by the applicant from operating on the affected routes and ranks."

[13] The applicant, on the other hand, on the disputed issue, contends, firstly, that there is no violence at all on its routes. Alternatively, that the alleged violence was not of such high level to justify the drastic emergency measures resorted to by the respondent. The applicant has also given undertakings to disassociate itself from any form of violence surrounding the introduction of the BRT bus system. In this regard it is appropriate to quote *in extensio* the relevant portions of the applicant's founding papers, supplementary affidavits, the replying affidavit, as well as the respondent's reaction thereto.

[14] In paras 12 and 13 of its supplementary founding affidavit, the applicant states:

"*12. There are a number of observations which underlie the respondent's resort to this drastic emergency provision:*

12.1 First, in the first urgent application proceedings before Coppin J on 29 March 2010 the applicant gave undertakings that it would not in any way associate itself with any violence directed at the BRT and/or its operations. The applicant has not breached those undertakings which were given on 29 March. The undertaking is repeated here.

12.2 Second, there were three incidents of unrest alluded to by the respondent in the schedule attached as Annexure 10 to its answering affidavit. On 9 April a tavern was robbed and a cellphone was stolen; on 17 April petrol was thrown inside a depot but no damage was reported; and on 19 April the tyres of three buses were spiked on

the BRT route. It is noteworthy from this that –

12.2.1 The robbing of a tavern and the theft of a cellphone can hardly be said to be significant enough to trigger drastic emergency provisions since this is merely the kind of crime that occurs all over Johannesburg; and

12.2.2 The incident involving petrol and the spiking of tyres, again, does not seem drastic enough to justify the use of an extraordinary emergency provision – besides: The applicant has not in any way been associated with these incidents, no accusations have been levelled at the applicant and the applicant has, upon hearing these incidents, distanced itself from the violence (as it did with the shooting that happened on 30 April 2010).

12.3 Third, I should point out that the only incidents of unrest (which are relatively minor) all took place after the MEC had already made his decision to bring the Regulations into effect (he notified the world of his intention to bring the Regulations into effect on 6 April 2010).

13. For the three reasons given above, it is patently clear that the respondent's decision to invoke the emergency provisions is completely unrelated to the purpose that section 93 was enacted to combat. In addition, the nature of the unrest is not severe enough to warrant the drastic resort to any emergency statutory provision. The reaction from the MEC is clearly disproportionate (although, as I have already pointed out, his conduct was in fact not a reaction because those 'relied upon' events had not yet happened)."

In the same affidavit, the applicant in paras 26 and 27.2 and 27.3 states:

"*26. At this juncture I point out that the applicant, in paragraph 20 of the founding affidavit in Part A, conceded that it was aware of one isolated incident of violence which occurred on 29 April 2010. That is, presumably, the same incident that the*

respondent refers to in its answering affidavit although the parties disagree on the date – the applicant thinks the shooting took place on 29 April whilst the respondent thinks it happened on 30 April. The date is not what is relevant, what is relevant is that I have now been able to ascertain that the shooting did not take place on a route operated by WATA but rather on a route operated by a rival taxi organisation 'STS' (Soweto Taxi Services). WATA has, in the press, repeatedly distanced itself from the shooting and made it patently clear that it was not responsible nor does it in any way condone this kind of violence. Due to the pressure under which this affidavit was prepared, I am still gathering that proof and reserve the right to provide it in reply as the respondent denies that it happened on an 'STS' route."

Paras 27.2 and 27.3:

"*27.2 Factually there does not appear to be any violence of the kind that meets the threshold needed to trigger the use of an emergency provision.*

27.3 The trivial incidents of petty crime attached to the MEC's reasons do not meet the threshold although, the shooting of 29/30 April may meet that threshold (although the point is not conceded) but WATA had nothing to do with the only possible event that could have called for a reaction of the kind contemplated by the MEC."

In paras 8.18 and 8.19 of his supplementary answering affidavit, the respondent states:

"*8.18 The applicant argues that the incidents of unrest in the affected area are not severe enough to justify my decision to invoke the emergency measures. Presumably, the applicant suggests that the emergency measures can only be invoked under circumstances where there is loss of lives. This argument is simply unsustainable. I am not expected to sit back wait until such time that there is loss of lives before invoking the emergency measures …*

8.19 … even in the event that this Honourable Court finds that the incidents of violence, unrest or instability referred to above are not serious enough, this Honourable Court ought not to interfere with the Regulations purely because there may be a better

balance which could have been arrived at by attributing more weight to other factors."

Finally, in the applicant's replying affidavit prepared for the purposes of Part B (p 135), it states the following:

"*15.6 The applicant notes the respondent's denial of our allegation that, factually, there is no violence, unrest or instability which justifies the invocation of the emergency measures. In reply the applicant points out that:*

15.6.1 It is not the applicant's contention that there has been no violence, unrest or instability in the affected areas, but merely that insufficient violence, unrest or instability exists to justify invoking the drastic emergency measures in these circumstances;

15.6.2 The only evidence offered by the respondent, to date, is contained in the answering affidavit filed during the course of the Part A proceedings yet, notably, the incidents of violence, unrest or instability are either unrelated to the taxi industry or else they simply do not meet the threshold required under a rationality and/or reasonableness enquiry; and

15.6.3 *The respondent, despite adequate opportunity, has failed to produce any additional evidence and so it must, therefore, be assumed that no additional evidence exists.*"

In paras 15.8 up to 15.8.3 of the same affidavit, the applicant states as follows:

"*15.8 The applicant admits that it has expelled certain members from its organisation but denies that this in any way created violence, unrest or instability. But, more importantly, I have been advised*

to point out that:

15.8.1 *The respondent's submission that this is the cause of violence, or unrest or instability has been made in a broad sweeping manner and is devoid of any violence to support it;*

15.8.2 *A bare unsubstantiated averment cannot be permitted to justify a grave denial of rights in the absence of, at the very least, substantiated facts; and*

15.8.3 *The respondent has not taken the court into its confidence by providing evidence to support and/or substantiate the broad sweeping allegation.*"

In para 15.11 the applicant states:

"*15.11* *The applicant denies that the taxi route targeted by the respondent is characterised by instability. No evidence has been produced by the respondent to substantiate this allegation and I am not aware of any actual instability.*"

Further on in para 15.15 the applicant states as follows:

"*15.15* *The applicant denies, for reasons already averred, that:*

15.15.1 *A factual situation characterised by violence, unrest or instability prevailed or currently prevails;*

15.15.2 *Regulations were needed to ensure the safety of commuters who travel on the WATA routes; and*

15.15.3 *That there is an abnormal situation that needs to be normalised.*"

In para 15.16 of the same affidavit the applicant states as follows:

"*15.16 The applicant does not suggest that emergency measures can only be invoked where there has already been a loss of lives. Instead, the applicant merely contends that:*

15.16.1 Where the legislature expressly mandates that a factual set of circumstances prevail before emergency provisions can be triggered then, at a minimum, such factual situation must prevail;

15.6.2 Emergency measures cannot be threatened and/or used to coerce members of the public into co-operating with government because, to do so, would be an improper use of power; and

15.6.3 Decision makers afforded a discretion by the legislature must always exercise that discretion in a rational and reasonable manner."

[15] Prior to dealing with the law applicable to the first ground of review raised by the applicant, it is indeed prudent to first deal with the disputed issue, that is the presence or otherwise of violence on the ranks and routes operated by the applicant. It is a critical and decisive issue for determination since it prompted the respondent to promulgate the challenged regulations under discussion. The versions of the parties as mirrored in the respective affidavits, quoted above, are clearly at variance. The technique generally used by the courts in resolving factual disputes has been set out in various decided cases, notably *SFW Group Ltd and Another v Martell Et CIE and Others* 2003 (1) SA 11 (SCA) at para [5]. The critical issue is whether the respondent's allegations of the presence of violence at the affected ranks and routes create a real dispute of fact. A genuine dispute of fact will not exist merely because the respondent has put up a different version. In *Room Hire*

Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 it was said:

> "*…it does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent's mere allegation of the existence of the dispute of fact conclusive of such existence.*"

There is also authority for the proposition that a court must sometimes take a robust, common-sense approach to a motion. See in this regard *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G. In the present matter, the evidence of Mr Thulare, as described above, is largely of a hearsay nature on the disputed issue. He relies partly on newspaper cuttings. Regrettably, the respondent's assertions that "*he has reason to believe*", or else that, "*it has come to his attention*", that violence, unrest or instability characterised the WATA routes, are not sufficient in the circumstances of the matter. Surely, in a matter of such huge public interest, affecting the rights of so many people, some form of concrete evidence is called for. More the reason if such drastic measures as closing public routes and ranks. When I questioned counsel for the respondent, Mr Khoza, in argument as to how and what is the respondent's source of the information, he argued that the respondent was not like "*a bobby on the beat*". Once more, this is insufficient to justify the decision of the respondent, especially in the light of the responsible purpose of the Act, as set out in s 1 above.

[16] Indeed, a close examination of the contents of Annexures A1-A10

(violent incidents on routes operated by WATA) on which both Thulare and the respondent for their assertions of violence rely, shows that the incidents are rather scanty. The alleged incidents are also unrelated to the applicant or its routes. For example, the very first incident on 12 March 2010 relates to:

> "*Rea Vaya bus carrying few Rea Vaya drivers was shot at by passengers in a Toyota Corolla in Kliprivier Valley area.*"

The incident on 31 March 2010 states:

> "*Two STS members' houses were petrol bombed. Mr Sabelo's house in Pimville was attacked at 01h00. The windows were broken and the curtains burnt. There was slight damage to the car. Mr Ramabanta's house was petrol bombed at 01h00 in Naledi. He fired shots at the culprits but they got away.*"

The incident on Friday 9 April 2010 reads:

> "*3 armed men robbed Tavern opposite a BRT Station. Station Guard robbed of his cellphone when trying to intervene.*"

None of the above incidents directly or conclusively implicate the applicant especially when one considers the undertakings given by the applicant to refrain from any violence. The other difficulty with Annexure A1-A10 is that it has no known author or compiler. Moreover, none of the victims or entities of the violence have testified. Where applicable, no police dockets or witness's statements were produced. Indeed, there are strong suspicions that taxi owners and drivers are opposed to the introduction of the BRT system. However, once more, there is no credible evidence linking the applicant to the violence. In the same manner, the assertions of both Thulare and the

respondent that violence was created when the applicant expelled some of its members, were not substantiated at all. None of the expelled members made any statements or affidavits to this effect.

[17] Applying the above stated legal principles of resolving factual disputes to the present matter, the respondent's version that the ranks and routes operated by the applicant are characterised by violence, unrest or instability, is not credible and conclusively proved. There simply was no factual existence of violence attributable to the applicant. The use of the words "*unrest*" or "*instability*", seems to be misplaced or exaggerated. The submission of the applicant that the incidents mentioned in Annexures A1-A10 simply do not reach a level of severity which justifies the drastic invocation of the draconian s 93 emergency provisions, has considerable merit.

[18] It is clear that in order to meet the threshold required under the rationality test, there must be a certain credible degree of evidence of violence attributable to the applicant before the respondent can resort to the special measures. In *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC), the full bench of the Labour Appeal Court, at para [37] said:

> "*[37] Many formulations have been suggested for this kind of substantive rationality required of administrative decision-makers, such as 'reasonableness', 'rationality', 'proportionality' and the like (cf, for example, Craig Administrative Law (op cit at 337 - 49); Schwarze European Administrative Law (1992) at 677). Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis*

justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA."

Subsequently, the formulation of the question in *Carephone (Pty) Ltd*, was approved by the Supreme Court of Appeal in *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) at para [21] G , where Howie P said:

"*It is clear that the standard expressed in those cases approximates, to all intents and purposes, to the one constituted by s 6(2)(h) of the Promotion of Administrative Justice Act. The word 'perversity' may be appropriate (I need express no opinion on the subject) to the standard set by s 6(2)(h) and Wednesbury Corporation but it has no bearing on the rationality test set by s 6(2)(f)(ii) and explained in Pharmaceutical Manufacturers, Bel Porto and Carephone. It is the latter test with which we are concerned in the present case. In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?*" See also *Rustenburg Platinum Mines v CCMA* 2007 (1) SA 576 (SCA) at para [25]. It is indeed so that in reviews, both under s 6 of PAJA, quoted earlier, or under the Constitution, public authorities such as the respondent in the present matter, are obliged to act rationally. The latter is therefore the minimum standard set by the Constitution, and also set by Administrative Law as is apparent from s 6(2)(f)(ii) of PAJA, which states as follows:

"*(2) A court or tribunal has the power to judicially review an administrative action if the action itself is not rationally connected to:*

(a) the purpose for which it was taken;

(b) the purpose of the empowering provision;

c) the information before the administrator; or

(d) the reasons given for it by the administrator."

[19] With the above in mind, a close look at s 93 of the Act, quoted earlier,

in order to determine exactly what the respondent may or may not do in the context of rational decision-making is critical. Section 93(2) of the Act, also quoted above, authorises the respondent to make regulations closing taxi routes or the operation of a taxi services on particular routes if it acts in accordance with s 93(1) of the Act, also quoted above. It is therefore clear that the legislature's purpose is to invoke these special emergency measures only where violence, unrest or instability prevails.

19.1 In interpreting the provisions of s 93(1) of the Act, which clearly invade the rights of citizens, such as the applicant, and commuters, a close and careful scrutiny is expected of the courts. In our democratic state, a state of emergency, which may be followed by exceptional measures necessary to restore peace and order, may only be declared by the State President in terms of s 37 of the State of Emergency Act 64 of 1997. In terms of the latter s, a state of emergency may only be declared in terms of an Act of Parliament, and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency, and the declaration is necessary to restore piece and order. Once a state of emergency has been declared, the State President may make emergency regulations in respect of "*any area in which the state of emergency has been declared and for as long as the proclamation declaring the state of emergency remains in force, by proclamation in the Gazette … as are necessary or*

expedient to restore peace and order and to make adequate provision for terminating the state of emergency, or to deal with any circumstances which have arisen or are likely to arise as a result of the state of emergency". (See s 2 of Act 64 of 1997.) The emergency measures taken, clearly will have the consequence of depriving the rights entrenched by the Bill of Rights, but such deprivation is carefully circumscribed by s 37 of the Act. One of the requirements is that a derogation must be proportional to the emergency. No derogation from s 37 itself is permissible, and all the requirements are justiciable. This means that the jurisdiction of the Courts, unlike the pre-Constitution era, cannot be excluded during emergencies. From these provisions it is abundantly clear that the resort to emergency measures, as in the case of the respondent in the present matter, is not a light and trivial matter.

19.2 The provisions of s 93(1) of the Act must also be interpreted with regard to ss 22 and 39(2) of the Constitution Act 108 of 1996. The provisions must also be given their plain ordinary meaning. Section 22 of the Constitution guarantees the right to freedom of trade, occupation and profession. Section 39(2) enjoins the courts when interpreting any legislation, and developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights. Furthermore, the words "*emergency measures*" in s 93(1) of the Act must be interpreted

in the context of the Act as set out earlier in this judgment. Lexical research can be useful and at times indispensible. (See *Fundstrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at p 726-727.) The expression "*special measures*" suggests "*extra measures*". In *Rex v Pocket* 1948 (2) SA 938 (SR) at p 941 Regulations which were made as "*necessary or expedient*" to alleviate or control the effects of existing drought, were regarded as an "*emergency measure*". The Concise Oxford Dictionary (10th ed), defines the word "*special*" as "*better, greater, or otherwise different from what is usual … something designed or organised for a particular occasion or purpose etc.*". Similarly, the word "*emergency*" is defined as, "*a serious, unexpected, and potentially dangerous situation requiring immediate action*". The word "*measure*" is defined as "*a plan or course of action taken to achieve a particular purpose*". All of these ordinary meanings suggest that, in the context of the present matter, the respondent must have more than cogent reasons to resort to special emergency measures in exercising his powers under s 93(1) of the Act.

I have already examined the incidents of violence alleged by the respondent and concluded that factually there is no violence attributable to the applicant. It follows that an attempted promulgation based on these grounds will therefore be irrational based on the Constitution and the provisions of PAJA. The minor incidents of violence, to the extent admitted by the applicant, do not justify the decision of the respondent. I should add that the only minor

incidents of unrest, all took place after the respondent had already made his decision to bring the Regulations into effect. This was on 6 April 2010. The conclusion that the respondent's decision to invoke the emergency provisions was completely unrelated to the purpose of s 93, becomes irresistible. In addition, the reaction of the respondent is clearly disproportionate to the unrest involving the BRT system. For these reasons, the applicant's first ground of review falls to succeed.

[20] I turn to the second ground of review advanced by the applicant. That is that, in the process of promulgating the Regulations, the respondent did not comply with the provisions of s 93 of the Act. In deciding this issue, it is unavoidable to bear in mind the evidence considered in evaluating the first ground of review. The finding made in respect of the first ground of review also impacts largely on the second ground. To this must be added the following common cause factors. After the contents of Notice No 1070 of 2010 of 6 April 2010 (Annexure FA4) was brought to the attention of the applicant, the applicant requested reasons from the respondent and also made representations to the respondent concerning the need to use these drastic emergency provisions. This was on 16 April 2010 by means of a letter, (Annexure FA5) addressed to the respondent by the applicant's attorneys of record. The request for reasons was rather extensive. However, paras 4, 5, 6 and 7 read as follows:

> "*4. Our client hereby requests reasons behind the intended regulations as more fully set forth in the above notice.*
>
> *5. In this regard, it is asked that you identify the violence, unrest or*

instability forming the basis for the MEC's opinion, as is required by Section 93(1) of the Gauteng Public Passenger Road Transport Act No 7 of 2001 ('the Act').

6. *We record that for the preceding 6 (six) weeks there has been no violence, unrest or instability, in any of the areas reflected in the schedule annexed to the above notice, or at all.*

7. *To the extent that you are of the view that there has been violence, unrest or instability, in relation to the routes more fully reflected in the schedule, we ask that you identify those routes and provide us with particularity of such violence, unrest and instability, together with news clippings in support thereof (to the extent that clippings exist).*"

There was no immediate response to the request for reasons until much later. In the answering affidavit, Mr Thulare contends that the respondent responded to the request on 30 April 2010. The letter in response to the request, Annexure A1 to the answering affidavit, was hand dated 30 April 2010. It was surprisingly posted to the applicant. On the other hand, the applicant contends that it only became aware of this response when it received the answering affidavit in May 2010. For present purposes, it is unnecessary to pronounce on the delay in furnishing the reasons, which complaint the applicant has abandoned. The crisp issue under this ground of review is really whether the respondent in promulgating the Regulations, acted within the parameters of s 93 of the Act. To answer this question, regard must be had, once more, to the Constitution and the applicable provisions of PAJA.

[21] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC), at paras [56], [57] and [58], the court said:

"*[56] These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada the Supreme Court of Canada held that:*

> *'Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc v The Queen [1985] 1 SCR 441 at 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.'*

In Germany, art 20(3) of the Basic Law confirms the rechtstaatprinzip which is related to the concept of the rule of law. The importance attached to this principle is underscored by the fact that art 79(3) prohibits any amendment of it. It is a principle which applies also to the Länder or provinces.

[57] The principle is also expressly recognised in the 1996 Constitution. Section 1 provides that:

> *'The Republic of South Africa is one, sovereign, democratic State founded on the following values:*
>
> *(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.*
>
> *(b) Non-racialism and non-sexism.*
>
> *(c) Supremacy of the constitution and the rule of law.*
>
> *(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.'*

> *[58] It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.*"

In addition, in this regard s 6(2)(a)(i) of PAJA is instructive.

[22] The preamble to the Act provides, *inter alia*, that, it sought:

> "*To change the law governing public passenger road transport in Gauteng, and for that purpose –*
>
> *to provide for a public passenger road transport system as part of an integrated system of land transport for Gauteng, compatible with the national land transport system and the land transport systems of the other provinces;*
>
> *to provide for the planning of public passenger road transport operations and infrastructure integrated with land use planning;*
>
> *to provide for the regulation and control of public passenger road transport by provincial and local government;*
>
> *…*
> *and to provide for matters connected therewith.*"

From this, it is plain that integrated public passenger transport, the control and regulation thereof, by provincial and local government, is prominent. The purpose of the Act has been set out earlier in this judgment. The purpose in subsections (a), (f), (g), (k) and (m) of s 1 is more relevant to the present matter.

[23] Section 93 of the Act, the main bone of contention, makes it clear that its provision is a "*special emergency measure*" and it is inserted in Part 13 of the Act, under the heading, "*LAW ENFORCEMENT*". Section 93(1) explains what is the trigger-point of the special emergency measure envisaged. The determinative phrase in s 93(1) is "*where he or she is of the opinion that this is necessary to normalize the situation in the area characterised by violence, unrest or instability*". There is, unfortunately no definition of "*characterised by violence, unrest or instability*" in the Act. However, as shown and found under the previous ground of review, the nature of the alleged presence of violence by the respondent does not warrant the invocation of the emergency provision. This, in spite of the respondent's assertion in his reasons that, "*I as the MEC responsible for Roads and Transport, indeed I am of such opinion. After careful considering of the information provided by the relevant officials, I decided that the closure of the routes specified in the schedule attached to Notice 1070 of 2010 ('the routes'), was required*" (my underlining). I have already found that there was no factual basis for this opinion. The identity of the relevant officials is not disclosed. The same applies to the manner of gathering the information.

[24] Section 93(2) and (3) show that the respondent has to deal with the process in two stages. The two stages cannot be kept separate, strictly speaking. First, the respondent must publish a notice, and secondly, he must make the Regulations. It is significant that the publishing of the Notice must meet the requirements as set out in s 93(3) of the Act, in particular sections 93(3)(c), (d) and (e). It is unnecessary to repeat the provisions. However,

what is plain is that the Notice, which is attached to Annexure FA4 to the founding papers does not contain a specific period as is required by s 93(3)(c) of the Act. In this regard the Notice merely states:

> "*The proposed regulations will be in force and effect until further notice.*"

The notice is therefore blatantly defective in that regard. I have previously dealt with the issue of the applicant's request for reasons and the respondent's reply thereto. The reasons were requested on an urgent basis on 16 April 2010. However, the respondent did not respond immediately, as stated earlier. But instead later posted its reasons by surface mail for reasons not satisfactorily explained. The result was that the applicant did not receive the reasons before the Regulations were made, nor did the applicant receive the reasons until the respondent's answering affidavit was served. The respondent's argument that emergency measures were a decision which had to be taken quickly to normalise the situation in the affected area is not convincing at all. Further that if the respondent was expected to first furnish reasons, and then wait for the applicant to supplement its representations, the process would almost certainly have been contentious and drawn out. This argument of the respondent does not ameliorate the situation. It ignores the prejudice suffered by the applicant in the process.

[25] Section 93(4) of the Act which provides that:

> "*The MEC must consider any representations received under subsection (3) before making the regulations under subsection (2)*",

is undoubtedly mandatory. In para 16 of his supplementary answering affidavit the respondent states:

> "*16. I accordingly deny that I have fallen foul of the requirements of sections 93(3) and (4) of the Act. Even in the unlikely event of this Honourable Court finding that I failed to comply strictly with the requirements of sections 93(3) and (4) of the Act (which is denied), I am advised that having regard to the objects of section 93, the nature and purpose of, and the need to make the Regulations, and the urgency of the Regulations, that it was reasonable and justifiable in the circumstances for me to depart from the requirements of section 93(3) and (4) of the Act. Further argument in this regard will be addressed to the Honourable Court at the hearing of this matter.*"

In *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A), the court was concerned with the interpretation of s 25 of the Compulsory Motor Vehicle Insurance Act 56 of 1972. After dealing with the historical interpretations placed on peremptory and directory statutory requirements, Trollip JA at p 434A-D said:

> "*These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular (see the remarks of VAN DEN HEEVER J in Lion Match Co Ltd v Wessels 1946 OPD 376 at 380). Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity. (See the authorities quoted in Shalala v Klerksdorp Town Council and Another 1969 (1) SA 582 (T) at 587A - C.) On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not be necessary at all, and non- or defective compliance therewith may not have any legal consequence (see, for example, Sutter v Scheepers 1932 AD 165). In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial*

compliance in order to be legally effective (see JEM Motors Ltd v Boutle and Another 1961 (2) SA 320 (N) at 327 in fin - 328B and Shalala's case supra at 587F - 588H, and cf Maharaj and Others v Rampersad 1964 (4) SA 638 (A) at 646C - E). It is unnecessary to say anything about the correctness or otherwise of this trend in such decisions. Then, of course, there is also the common kind of directory requirement which need only be substantially complied with to have full legal effect (see, for example, Rondalia Versekeringskorporasie Bpk v Lemmer 1966 (2) SA 245 (A) at 257H - 258H)."

See also *Special Investigation Unit v Nadasen* [2002] 2 All SA 170 (A). In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), Ngcobo J (as he then was), at paras [90] and [91] said:

"*[90] The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in Thoroughbred Breeders' Association v Price Waterhouse, the SCA has reminded us that:*

> *'The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning. As was said in University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (A) at 914D - E:*
>
> > *"I am of the opinion that the words of s 3(2) (d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature."*
>
> *The well-known passage in the dissenting judgment of Schreiner JA in Faga v Dönges NO and Another; Bhana v Dönges NO and Another 1950 (4) SA 653 (A) at 662G - 663A was also quoted with approval. It is of course clear that the context to which reference is made in the latter case must include the long title and chapter headings. (Compare Swart en 'n Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) at 202C.)'*

[91] The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that

promotes the 'spirit, purport and objects of the Bill of Rights'. In Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others this Court explained the meaning and the interpretive role of s 39(2) in our constitutional democracy as follows:

> *'This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.'*"

It is equally true and trite that it is a primary rule of statutory construction that words in a statute must be given their ordinary grammatical meaning in the light of their context.

[26] From the above principles, it is plain that the use of the word "*The MEC must*", in s 93(4) of the Act creates a mandatory provision. There is no discretion. The respondent was therefore not entitled to make the Regulations until such time as he had considered the applicant's representations made after receiving the respondent's reasons. This did not happen despite the respondent's assertions to the contrary. In fact, para 16 of the respondent's supplementary answering affidavit quoted above, shows that the respondent fails to appreciate the distinction between mandatory provisions on the one hand, and directory provisions, on the other hand. Cora Hoexter *Administrative Law in South Africa* (2007) at p 47 states that:

"*As a general rule statutory requirements must be observed: A court*

> *will not likely accept that the legislature has used words in vain. It is of course open to the legislature to stipulate what the consequences are of non-compliance with the provision. Where he does not do so, the question arises whether non-compliance or less than perfect compliance will lead to invalidity. The answer depends at least partly on whether the court regards the provision as 'mandatory' or merely 'directory' (permissive). If it is the former, strict compliance may be required on pain of invalidity; if the latter, partial compliance or even non-compliance is more likely to be acceptable.*"

Indeed, a statute that takes away the existing rights of citizens, such as the present application, should be constructed restrictively. There is ample authority for this proposition. Indeed, public officials such as the respondent, who act in public interest, should comply diligently with Regulations and other directions aimed at the attainment of transparency and accountability. See in this regard *Choice Decisions v MEC, Department of Development, Planning and Local Government, Gauteng, and Another (No. 2)* 2003 (6) SA 304 (W). For all these reasons, the review based on the ground that the respondent failed to comply with the provisions of s 93 of the Act, must also succeed.

[27] I now turn to the third ground of review advanced by the applicant, namely that in making the Regulations, and closing the ranks and the routes, the respondent acted with an ulterior purpose or ulterior motive. This is undoubtedly, a serious allegation levelled against the respondent. The respondent vehemently denies the allegation. In paras 18, 19 and 20 of his supplementary answering affidavit, the respondent states:

> "*18. I deny that I used the emergency measures under section 93 of the Act for an ulterior purpose of ulterior motive.*
>
> *19. The emergency measures under section 93 of the Act are intended for purposes of normalizing the situation in an area*

that is characterized by violence, unrest or instability.

20. *The applicant seeks to suggest that there must first be a bloodbath before I am permitted to legitimately invoke the provisions of section 93 of the Act. This can simply not be the case. On a plain reading of the section, all that it requires is that the area must be characterized by violence, unrest or instability. If anyone of the jurisdictional facts is present, and provided I am of the opinion that the measures are necessary to normalize the situation, then I am entitled to invoke the provisions of section 93 of the Act.*"

Furthermore, in para 12.3 of his reasons (page 101 of the bundle), which purports to be his actual purpose and/or motive, the respondent states as follows:

"*12.3 The closure of the Routes is an interim measure aimed at securing the safety of commuters who travel in particular areas that are characterised by unrest and instability, and whose safety, therefore, has been compromised. Your client will be free to operate on the Routes once the unrest and instability has ceased and the Routes have been re-opened.*"

Indeed, the applicant admits that there was only one serious incident that can be correctly described as or characterised as "*violence, unrest or instability*". This is the shooting incident that occurred on 30 April 2010. In this regard, the applicant, in para 26 of its supplementary founding affidavit states as follows:

"*26. At this juncture I point out that the applicant, in paragraph 20 of the founding affidavit in Part A, conceded that it was aware of one isolated incident of violence which occurred on 29 April 2010. That is, presumably, the same incident that the respondent refers to in its answering affidavit although the parties disagree on the date – the applicant thinks the shooting took place on 29 April whilst the respondent thinks it happened on 30 April. The date is not what is relevant, what is relevant is that I have now been able to ascertain that the shooting did not take place on a route operated by WATA but rather on a route operated by a rival taxi organisation 'STS' (Soweto Taxi*

> *Services). WATA has, in the press, repeatedly distanced itself from the shooting and made it patently clear that it was not responsible nor does it in any way condone this kind of violence. Due to the pressure under which this affidavit was prepared, I am still gathering that proof and reserve the right to provide it in reply as the respondent denies that it happened on an 'STS' route.*"

However, the applicant argues that since the shooting did not occur on WATA routes, but on STS (Soweto Taxi Services) routes, the subsequent closure of the WATA routes, displays an improper motive. I have already found that, on the basis that there is no genuine factual dispute on the issue of violence, the respondent's conduct and decision in closing the ranks and routes of the applicant was irrational and beyond the powers of the respondent conferred by the Act. Although there is no factual violence, implicating the applicant and its routes and ranks, I am unable to agree with the applicant's submission that the respondent had an ulterior motive. There is no conclusive proof, on a balance of probabilities, for the submission. The applicant admits the presence of limited violence, although not occurring on its routes. Furthermore, having in mind the duties and responsibilities of the respondent as envisaged in the purpose and object of the Act, it is difficult to conclude reasonably that the respondent, albeit mistakenly, did not have in mind the safety of passengers. In para 45 of his supplementary heads of argument, the respondent in fact argues that the closure of the routes is a measure aimed at securing the safety of commuters who travel in particular areas that are characterised by unrest and instability. The respondent therefore sees this as a valid reason, once more, albeit mistakenly, for invoking the special measures. It must be remembered that the applicant is not the only taxi association that services the estimated 60% of South Africans or South

Africa's commuters who use mini-bus taxis. The motives suggested by the applicant, namely that the Government is co-ercing the applicant into buying into the BRT system by closing the ranks and the routes, is plainly not the only reasonable inference to be made. There is no factual basis for this.

[28] For these reasons, there is accordingly no basis for the complaint made by the applicant in regard to this ground of review.

[29] I deal with the final ground of review pursued in closing argument. This is that, by closing the ranks and the routes the respondent is arbitrarily depriving the applicant of its property. The complaint is that the respondent's conduct in bringing the Regulations into effect under the guise of the empowering provisions of s 93 of the Act, which will limit and/or interfere with the taxi owners' property, is what falls to be scrutinised for constitutional muster. For this submission, the respondent relies on s 25(1) of the Constitution, as well as certain case law.

[30] In the light of the finding in favour of the applicant on the first two grounds of review above, it becomes unnecessary to deal extensively with the instant ground of review. The previous findings must, of necessity, impact on the applicant and its members' rights to property. Furthermore, the crisp contention of the respondent is that there is a clear rational relationship between the closure of the routes and the end sought to be achieved thereby being, to normalise the situation in the affected areas. The respondent in fact

concedes that the implementation of the Regulations will have the effect of depriving members of the applicant of the income they would have earned through their operations. This, however, the respondent argues will be of temporary duration. Alternatively, the respondent argues that the deprivation of property is not at all arbitrary, and that the provisions of s 36(1) of the Constitution were applicable. Both parties on this aspect rely on *First National Bank SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 (4) SA 768 (CC).

[31] The concessions made by the respondent, by implication, meet the contention of the applicant that if the Regulations remain in place, the following are inescapable consequences. The taxi routes are closed; taxi owners will not receive an income from the fare that they charge commuters; and income and money, because they contribute to one's estate can properly be called '*property'* for the purposes of constitutional protection; members of the applicant organisation operate their taxis and ranks along certain routes; and that the taxi owners earn an income from their taxi operations.

[32] Section 25(1) of the Constitution indeed guarantees the right to all property-holders, in the following terms:

> "*No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*"

The constitutional issue under consideration is whether or not, by closing the ranks and routes operated by the applicant, the respondent is arbitrarily

depriving the applicant of its property. In the light of the respondent's concessions referred to above, as well as his reliance on s 36(1) of the Constitution, it is unnecessary to decide the issue whether the property of the applicant is implicated. It clearly is implicated. It is equally not necessary to decide the issue whether the Regulations actually deprive the applicant of its property. The only issue to be determined is whether the deprivation of property facilitated by the invocation of the Regulations is arbitrarily.

[33] As far as back as 1942, many years before our democratic order, and in *Loxton v Kenhardt Liquor Licensing Board* 1942 (A) 275, the court considered the word "*arbitrary*" in regarding to s 29(1) of the Liquor Act 30 of 1928. This case involved the cancellation of two liquor licences of the applicant by the respondent. The court had to decide whether in cancelling the licences, the Liquor Board exercised its powers in an arbitrary or grossly unreasonable manner. In upholding the appeal, Feetham JA approved the test laid down by Tindall J in *Pietersburg Club Ltd v Pietersburg Licensing Board* [1931] TPD 217 at p 224. The test was in the following terms:

> "*… But in the present case we are not dealing with the common law; the Statute allows a review if the Board exercised its powers in an arbitrary or a mala fide or a grossly unreasonable manner. As the expression 'grossly unreasonable' is used as an alternative to mala fide it cannot be argued that the unreasonableness must be so gross as to justify an inference of mala fides. I think, therefore, that there is no need for the unreasonableness to be so gross as to give rise to an inference of one or other of the elements mentioned in the judgment cited; it is sufficient if the powers have been exercised in a grossly unreasonable manner. Restrictions in a licence seem to me grossly unreasonable where they are so unreasonable where they are so unreasonable that no reasonable man, applying his mind to the condition of affairs dealt with, would impose such restrictions.*"

Indeed, this appears to be still good law today. If not, the issue was resolved in *First National Bank of SA t/a Wesbank v Commissioner, South African Revenue Services* (*supra*). The Court had to deal with the constitutional challenge by the appellant to the provisions of s 114 of the Customs and Excise Act 91 of 1964. At paras [65]-[67] of the judgment, Ackermann J said:

> "*[65] In its context 'arbitrary', as used in s 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of s 36. This is so because the standard set in s 36 is 'reasonableness' and 'justifiability', whilst the standard set in s 25 is 'arbitrariness'. This distinction must be kept in mind when interpreting and applying the two sections.*
>
> *[66] It is important in every case in which s 25(1) is in issue to have regard to the legislative context to which the prohibition against 'arbitrary' deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary.*
>
> *[67] De Waal et al*
> *are of the view that a deprivation 'is arbitrary' for purposes of s 25(1) 'if it follows unfair procedures, if it is irrational, or is for no good reason'. The protection against unfair procedure has particular relevance to administrative action - which protection is provided for under s 33 of the Constitution - but it could also apply to legislation and be relevant to determining whether, in the light of any procedure prescribed, the deprivation is arbitrary. Although the learned authors conclude that*
>
> > *'the substantive element of s 25(1)'s non-arbitrariness requirement probably does not involve a proportionality enquiry',*
>
> *their conclusion that deprivation would be arbitrary if it took place 'for no good reason' seems to import a stricter evaluative norm than mere rationality, although less strict than the proportionality evaluation under s 36.*"

After examining extensively, approaches followed in other democratic systems, Ackermann J concluded on the meaning of ‘arbitrary’ in s 25 of the Constitution, as follows in para [100], as follows:

> “[*100] Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:*
>
> *(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.*
>
> *(b) A complexity of relationships has to be considered.*
>
> *(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.*
>
> *(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.*
>
> *(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.*
>
> *(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.*
>
> *(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a*

proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25."

Ackermann J went on to find that the deprivation in s 114 of the Customs and Excise Act 91 of 1964 was accordingly arbitrary for purpose of s 25(1) of the Constitution, and therefore a limitation (infringement) of the concerned person's rights. See also *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (2) BCLR 150 (CC) at paras [34]-[35].

[34] Based on the above legal principles, as well as the common cause facts, and the concessions made by the respondent in the present matter, the Regulations are plainly both procedurally and substantively arbitrary in the circumstances. Having regard to the purpose and scope and, in particular the public interest functions of the Act, as described earlier in this judgment, there is nothing constitutionally that prevents Government from depriving citizens of their property. However, the Government cannot do so in an arbitrary manner. In the present matter, there is no justifiable relationship between the closure of the ranks and the routes, and the end sought to be achieved thereby. The purpose is to normalise the situation allegedly characterised by unrest and instability. There is no credible evidence of unrest and instability. The argument that the Regulations are to endure for a limited period or will expire should the situation become normal, is without merit at all. Although of paramount consideration, the safety of commuters is being advanced as the

reason for the closure of the ranks and routes unjustifiably. Similarly, the argument advanced that the limitation of the appellant's property rights is reasonable and justifiable in terms of s 36(1) of the Constitution, is misplaced. There is plainly no credible evidence or submission present that might be relevant in applying s 36(1) of the Constitution. On the papers, it is clear that the harm likely to be suffered by members of the applicant hugely outweighs any benefits to society. There is no evidence of harm. On the other hand, if the Regulations remain in place, both members of the applicant and ordinary commuters who require taxi services are likely to suffer substantial prejudice. Therein lies the proportionality assessment which impacts adversely on the constitutional rights of the applicant. The Regulations are undoubtedly unconstitutional. Consequently, the ground of review based on the deprivation of property on an arbitrary manner, must succeed as well.

[35] I conclude that for all the above reasons, the decision and/or operation of the decision by the respondent to close all routes and the portion of the ranks operated by the applicant to the operation of mini-bus taxi type services calls to be reviewed and set aside. The costs ought to follow the result. It has not been argued otherwise.

ORDER

[36]

1. An order is granted in terms of prayer (1) of Part B of the Notice of Motion dated 27 May 2010.

2. The respondent is ordered to pay the costs of the application, including the costs incurred under Part A of the Notice of Motion.

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D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	2 JUNE 2010
DATE OF JUDGMENT	3 SEPTEMBER 2010