THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1222/2017

In the matter between:

TIMOTHY FANFANI MABASO **APPELLANT**

And

NATIONAL COMMISSIONER OF POLICE **FIRST RESPONDENT**

MINISTER OF POLICE **SECOND RESPONDENT**

Neutral citation: *Mabaso v National Commissioner of Police & another* (1222/2017) [2019] ZASCA 43 (29 March 2019)

Coram: Navsa AP, Van der Merwe, Makgoka JJA and Mokgohloa and Eksteen AJJA

Heard: 21 February 2019

Delivered: 29 March 2019

Summary: State – actions against – s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – interpretation thereof – whether by necessary implication there is a duty on an organ of state receiving notice in terms of s 3 to make a decision to accept, reject or settle claim prior to commencement of litigation.

ORDER

On appeal from: Western Cape Division, Cape Town (Le Grange J) sitting as court of first instance:

1 The appeal is dismissed with no order as to costs.

2 The order of the court a quo is amended to read as follows:

'The application is dismissed with no order as to costs.'

JUDGMENT

Makgoka JA (Navsa AP, Van der MerweJA and Mokgohloa and Eksteen AJJA concurring)

[1] Section 3(1)(*a*) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act) provides that no legal proceedings for the recovery of a claim may be instituted against an organ of state unless the claimant has given written notice to such an organ of state of his or her or its intention to institute such legal proceedings. In terms of s 3(2)(*a*) of the Act, such notice must be given within six months after the claim (styled 'debt') became due. The specific organ of state in this instance is the department of police, nominally represented by the second respondent, the Minister of Police (the Minister), and the first respondent, the National Commissioner of Police (the Commissioner).

[2] The issue in this appeal is whether an organ of state receiving such notice is obliged to make a decision on whether to accept, reject or endeavor to settle the claim prior to litigation, and to provide reasons to a claimant for such decision. The court a quo, the Western Cape Division of the High Court, answered that question in the negative, and dismissed with costs, the appellant's application seeking a declaratory order to that effect. The appeal is with the leave of the court a quo.

Factual background

[3] The facts are straightforward. On 10 June 2015 the appellant, Mr Timothy Mabaso, through his attorneys, gave notice in terms of s 3(1)(*a*) of the Act to the Commissioner, of his intention to institute a damages claim against the Minister.[1] It is common cause that the notice was served within the six months period prescribed in s 3(2)(*a*) of the Act. In that notice, it was alleged that following his arrest and detention on 20 February 2015, the appellant had been assaulted by the police whilst in custody. A sum of R400 000 was claimed for general damages and for loss of earnings, payable within 14 days.

[4] There was no response to the notice, nor to a subsequent letter dated 13 July 2015. In the latter correspondence, instead of payment, it was demanded of the Commissioner to take a decision within 14 days as to whether he admitted liability. The Commissioner was given until 7 August 2015 to make that decision, failing which an application would be brought to 'enforce our right to a decision from you.' There was similarly no response to that letter, and further correspondence yielded no substantive answer.

[5] As a result, on 2 December 2015, the appellant launched an application in the court a quo for the following relief: a declarator that the respondents have an obligation to take a decision to accept, reject or settle the claim; a concomitant order in terms of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA), for the review and setting aside, of the respondent's failure to take the decision; and an ancillary order directing the respondents to take a decision and inform the applicant thereof, within 14 days of service of the order, with 'full and suitable written reasons therefor'. As stated already, the application was dismissed. The court a quo reasoned that, given the context and purpose of the provisions of the Act, it could not have been intended by the legislature to create a duty on the respondents to take a

[1] The notice is addressed to the National Commissioner of Police in terms of s 4(1) of the Act, which provides that in the case of the Department of Police, the notice must be sent to the National Commissioner and the Provincial Commissioner of the province in which the cause of action arose, as defined in s 1 of the South African Police Service Act 68 of 1995.

decision to accept, reject or endeavour to settle claims pursuant to a s 3 notice, prior to commencement of litigation.

Mootness

[6] At the commencement of the proceedings before us, we enquired of the parties whether the action contemplated in the notice in terms of s 3 had already been instituted. We were informed that summons had been issued and served on the department in November 2017, and that the action was being defended. Subsequent to the hearing, on 6 March 2019, the appellant's attorney formally filed a notice in which the following was confirmed: given that the claim would have prescribed on 20 February 2018, summons was issued on 24 November 2017 and served on 29 November 2017; a notice of intention to defend was served on 6 December 2017; the department had delivered its plea on 18 October 2018, and a trial date has not yet been allocated.

[7] In light of this, the question of mootness arises. Simply put, it now appears that the department has decided to repudiate the claim. In conventional terms, thus, strictly speaking, there is no need to compel the department to make a decision. Section 16(2)(*a*) of the Superior Courts Act 10 of 2013 provides that:

'(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

[8] Generally, courts do not decide issues of academic interest only. In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA (SCA) para 41 it was pointed out that courts 'decide real disputes and do not speculate or theorise' and that 'statutory enactments are to be

applied to or interpreted against particular facts and disputes and not in isolation.' This court has repeated this on a number of occasions.[2]

[9] However, there is a caveat to the general principle. A court has a discretion to enter into the merits of an appeal, notwithstanding the mootness of the issue as between the parties, where, as was put in *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5, when 'a discrete issue of public importance arose that affect matters in the future' and on which adjudication of this Court is required.[3] The Constitutional Court summed up the approach thus in *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira)* para 164:

'[I]n an adversarial system decisions are best made when there is a genuine dispute in which each party has an interest to protect. There is moreover the need to conserve scarce judicial resources and to apply them to real and not hypothetical disputes. …These objections do not apply to the present case. The applicants have a real and not hypothetical interest in the decision. The decision will not be academic; on the contrary it is a decision which will have an effect on all s 417 enquiries and there is a pressing public interest that the decision be given as soon as possible.'

See also *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and another* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) para 28, where the Constitutional Court, in deciding to hear a matter which had become moot by the time it reached that court, considered the matter to have 'important and abiding implications for the workings of our economy' and of concern to the broader public.

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[2] See *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA) 1141D-E; *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 26; *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 9; *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) para 7; *Legal Aid South Africa v Magidiwana & others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA); [2014] 4 All SA 570 (SCA) para 2.

[3] See further *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 444I-J and 445A-B; *Land and Landbouontwikkelingsbank van Suid Afrika v Conradie* 2005 (4) SA 506 (SCA) para 14; *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA) para 4; *Van Staden & others NNO v Pro-Wiz (Pty) Ltd* [2019] ZASCA 7 paras 4-5.

[10] In this case, despite the matter being moot between the parties, the interpretive issue raised in the appeal is of importance, involving as it does, the statutory responsibilities of an organ of state and the rights of prospective litigants who give notice of a contemplated litigation. Should the appellant succeed, the decision will have serious implications for how organs of state deal with the notices of the kind in question. There will of course also be attendant logistical and management issues that will arise. Furthermore, the appeal concerns a discrete legal issue – the interpretation of s 3 of the Act. It is therefore my view that the appeal should be entertained.

Background and purpose of the Act

[11] It is useful to have regard to the background and purpose of the Act. As noted in *Minister of Safety and Security v De Witt* [2008] ZASCA 103; 2009 (1) SA 457 (SCA) para 1, the Act followed on the judgments of the Constitutional Court in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) and *Moise v Greater Germiston Transitional Local Council*: *Minister of Justice and Constitutional Development Intervening* 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) in which onerous limitation provisions relating to notices to be given in respect of contemplated litigation against the state were found to be inconsistent with the right of access to courts and declared invalid. The advent of the Act was foreshadowed in *Moise* paras 20-22.

[12] As to its purpose, the long title to the Act states it as being '[T]o regulate prescription and harmonize the periods of prescription of debts for which certain organs of state are liable; to make provision for notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of recovery of debt.' The Act repealed several statutes that had previously regulated proceedings against various state organs, including the police, defence force and local authorities. In the preamble, there is, amongst others, reference to the right of access to courts as enshrined in s 34 of the Constitution, and justifiable limitations thereon in terms of s 36 of the Constitution.

Rationale for limitation provisions

[13] It must be emphasised that provisions such as s 3, as correctly observed in *Mogopodi*, are designed primarily for the benefit of organs of state, rather than prospective litigants. This view is fortified by the decisions of this court in relation to s 32 of the repealed Police Act. The provisions of that section, which were analogous to s 3, were held to have been designed for the benefit of the police rather than the prospective plaintiff. [4] The Constitutional Court adopted this view in *Mohlomi* para 7. And, in *Moise* para 10 it was stated that the object of similar statutory provisions is 'to protect the interests of the defendants.' In *Madinda v Minister of Safety and Security* [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) at para 7 this court adopted the view in relation to s 3.

[14] In *Mohlomi*, para 9, Didcott J explained the general purpose of clauses such as s 3(1):

'The conventional explanation for demanding prior notification of any intention to sue an organ of government is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.'

[15] Similarly, in *Mogopodi v Member of the Executive Council for the Free State* [2008] ZAFSHC 38, the Free State High Court reiterated this purpose when it said at para 7 that the underlying purpose for the giving of notice in terms of s 3 of the Act was one of convenience in order to assist the particular organ of state to conduct proper investigations into the claim and then to decide whether to make payment or defend the intended action.

[16] It is against this backdrop that I consider the appellant's assertions as to the purpose of s 3. Counsel for the appellant submitted, with reference to the passages in *Mohlomi* and *Mogopodi*, referred to above, that the purpose of s 3 is to create an obligation on an organ of state to make a decision on whether to accept or repudiate a claim prior to litigation. It must be pointed out that whether an organ of state has

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[4] See *Minister van Polisie en 'n ander v Gamble en 'n ander* 1979 (4) SA 759 (A) at 770 C; *Hartman v Minister van Polisie* 1983 (2) SA 489 (A) at 497H-498C; *Minister van Wet en Orde en 'n ander v Hendricks* 1987 (3) SA 657 (A) at 662E-663G.

an obligation to make a decision pursuant to a notice in terms of s 3, did not arise in either of the two cases.

[17] *Mohlomi* concerned the validity of s 113(1) of the Defence Act 44 of 1957. The subsection limited to six months, the period within which actions against the Minister of Defence relating to the conduct of members of the defence force had to be instituted after the cause of action arose. And, a notice had to be given to the Minister one month before the commencement of the action. The subsection was found to constitute an unjustifiable infringement of the right of access to courts, and was accordingly declared invalid. In *Mogopodi* the issue was whether the notice given complied with s 3. The remarks in the passages referred to were thus made in passing. It is in that context the passages should be understood. They have no bearing on the interpretation of the provisions of s 3.

The relevant provisions of the Act

[18] It is convenient now to consider the relevant provisions of the Act. As stated above, s 3(1)(*a*) provides that no legal proceedings for the recovery of a claim may be instituted against an organ of state unless the claimant has given written notice to such an organ of state of his or her or its intention to institute such legal proceedings. As previously stated, in terms of s (3)(2)(*a*) such notice must be served on the organ of state within six months from the date on which the claim became due. That notice must, in terms of s 3(2)(*b*)(i) and (ii), briefly set out the facts giving rise to the claim, and such particulars as are within the knowledge of the claimant.

[19] Section 3(4) empowers a court, on application, to condone a failure by a claimant to serve a notice, either timeously, or at all. It is clear that s 5(2), set within the architecture of the Act, contemplates that an indication of repudiation of liability might be given before the expiry of the 30 day period, ie before litigation. It is equally clear that there is no obligation in the subsection on the state during that period to make such a decision. However, should an organ of state repudiate liability before the expiry period, the claimant may commence litigation upon such repudiation.

Interpretive framework

[20] A resolution of the present dispute requires a consideration of a proper construction of s 3 of the Act, read contextually. The principles which should inform that exercise are trite. The starting point is the Constitution. It commands courts in s 39(2), when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Courts must also adopt a generous and purposive approach as explained in *Ferreira* para 46.

[21] There is no express provision in s 3 that places an obligation on an organ of state to make a decision concerning the contemplated legal proceedings prior to it being instituted, as contended for by the appellant. Such an obligation can only be found by reading the provision by implication into the section. As observed by Corbett JA in *Rennie NO v Gordon & another NNO* 1988 (1) SA 1 (A) at 22D-F, words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands. See also *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) at 749C. This important injunction received the imprimatur of the Constitutional Court in *Bernstein & others v Bester NO & others* 1996 (2) SA 751 (CC) para 105.[5]

The appellant's case

[22] Counsel for the appellant submitted that s 3 should be read so as to oblige an organ of state to make a decision subsequent to receipt of a notice in terms of s 3, and prior to litigation. He submitted that this interpretation of s 3 was one which followed by necessary implication. For this, counsel relied on the following: the right of access to courts guaranteed in s 34 of the Constitution; the provisions of the PAJA; alleged comparable legislation; and implications for the Independent Police Investigative Directorate Act 1 of 2011 (the IPID Act), which, it was said, go together with constitutional norms of accountability and responsiveness. I consider them in turn.

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[5] See *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) para 20; *NDPP v Mohamed* 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) para 48; *Masetlha v President of the Republic of South Africa* [2007] ZACC 20*;* 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) para 192.

Section 34 of the Constitution

[23] Section 34 of the Constitution reads as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[24] It was submitted on behalf of the appellant that the limited period within which the s 3 notice must be given, implicates the claimant's right to access to courts contained in s 34 of the Constitution. Therefore, it was argued, s 3 should be construed so as to impose a duty on an organ of state to make a decision whether to settle the claim pursuant to the notice. In this way, counsel submitted, access to courts is facilitated, rather than hindered. It was furthermore contended that the right enshrined in s 34 includes the right to have a matter where possible, resolved without resort to litigation.

[25] In this regard, counsel pointed to the appellant's personal circumstances. He is indigent and therefore was unable to proceed with litigation, unless assisted pro bono. He would benefit from an early decision by the department to settle his claim without him engaging in costly litigation. In these circumstances, so the submission went, absent a duty to make a decision, the effect of s 3 would be diluted, and the limitation of the appellant's right to have a dispute decided in an open court would be unjustified. This, it was contended, severely limited the appellant's right of access to courts.

[26] There is no constitutional challenge to the validity of s 3. It must also be borne in mind that s 3 envisages that in the event of a claim being repudiated, the dispute would be fully ventilated before a court of competent jurisdiction. Against that background, it is difficult to understand how s 34 of the Constitution supports the appellant's case. If anything, s 3 preserves the appellant's right to have his case adjudicated by court. It is thus difficult to see, as contended for by the appellant, how a litigant's right is frustrated thereby. As pointed out above, s 5(2) of the Act affords the state an opportunity to repudiate liability to a claimant, but it certainly does not oblige it to respond during the 30 day period.

[27] It is plain that the dispute envisaged in s 34 is one in respect of which legal proceedings have been instituted, and is therefore capable of resolution by the application of law in a '. . . public hearing before a court.' At the stage when a s 3 notice is given, and until legal proceedings are instituted, there is no adjudicable 'dispute'. It follows that s 3 does not implicate the right of access to courts.

The PAJA

[28] I turn now to deal with the appellant's reliance on the provisions of the PAJA. The essence of the appellant's case in this regard is that s 3 compels an organ of state to make payment or timeously repudiate liability. The appellant recognises that the Act does not prescribe a period within which the department must make this decision, hence reliance on the PAJA. It was contended that s 6(3)(*a*) of the PAJA comes into play. That section provides that if any person relies on the ground of review referred to in section 6(2)(*g*) and the relevant law (as in this case) does not prescribe a period within which the administrator is required to take that decision, and the administrator has failed to take the decision it is duty bound to take, that person may institute proceedings for review on the ground that there has been unreasonable delay in taking the decision.

[29] It was submitted that since a reasonable period of time had elapsed from the giving of the notice the appellant was entitled to a declaratory order. Furthermore, s 8 of the PAJA, so it was asserted, was of assistance to the appellant. Section 8(2) provides that a person who relies on any ground of review may seek an order, among others, directing the taking of the decision. The appellant's case fails at the first hurdle. As demonstrated above, neither s 3 nor s 5, or any other provision of the Act, compels a decision prior to the 30 day period.

[30] In any event, the department's failure to make a decision pursuant to a s 3 notice, does not affect any right of the appellant, let alone adversely. The appellant's right to institute legal proceedings is fully reserved, subject only to the limitation period in s 5(2). As explained by Froneman J in *Hunter v Financial Sector Conduct Authority & others* [2018] ZACC 31; 2018 (6) SA 348 (CC); 2018 (12) BCLR 1481 (CC) para 105, a failure to investigate does not meet the PAJA criterion. Applied to

the present case, it follows that the PAJA is not applicable to the department's failure to investigate the appellant's claim and make a decision on whether to accept or repudiate liability. Reliance on the provisions of the PAJA is thus misplaced.

Alleged comparable legislation

[31] Principally, the appellant relied on some provisions of the Road Accident Fund Act 56 of 1996 (RAF Act) and its regulations. He asserted that, because those provisions have been found to place an obligation on the Road Accident Fund (the Fund) to investigate claims submitted to it and decide whether to accept or repudiate liability, a similar finding ought to be made in respect of s 3. For this submission, counsel for the appellant sought reliance on *Road Accident Fund v Duma and Three Similar Cases* [2012] ZASCA 169; [2013] 1 All SA 543 (SCA); 2013 (6) SA 9 (SCA) (*Duma*) and *Daniels v Road Accident Fund* [2011] ZAWCHC 104 (*Daniels*).

[32] *Duma* concerned s 17(1) of the Road Accident Fund Act 56 of 1996 (the RAF Act) which limits the Road Accident Fund's liability to compensate a third party for general damages for 'serious injuries'. Road Accident Fund (RAF) regulation 3(3)(*c*) provides that a third party who wishes to claim for general damages must submit a 'serious injury assessment report to the Fund, which is 'obliged to compensate' such third party if it is satisfied that the injury has been correctly assessed as serious. Regulation 3(4) provides that if the Fund is not satisfied that the injury has been correctly assessed, it is obliged to reject the report and furnish the third party with reasons for the decision. It may alternatively, direct the third party to submit to a further assessment.

[33] There is a marked distinction between the RAF Act, its regulations and the Act. There is a clear and express obligation on the Fund to consider the third party's claim. That obligation is two-fold. First, to decide whether the claimant meets the 'serious injury' threshold, and second, to furnish the claimant with the reasons for its decision to reject the claim. There is no such equivalent provision in the Act. *Duma* does not assist the appellant.

[34] In *Daniels*, the Western Cape High Court considered the systemic failure by the RAF to diligently investigate claims submitted to it. This had resulted in unnecessary litigation in respect of claims which should have been settled. Even after summons had been issued, the Fund, instead of promptly settling the matters, defended them on spurious grounds. The court noted that the prescribed claim form required detailed information, which if furnished, would enable the Fund to investigate the claim and decide whether to settle or contest it.

[35] The court also had regard to the purpose of the RAF Act. It referred to *Engelbrecht v Road Accident Fund & another* 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC). In that case, it was observed at para 23, with reference to *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 285E-F that the stated primary concern of the legislature in enacting the RAF Act (and its predecessors) has always been 'to give the greatest possible protection . . . to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle.'

[36] The court also pointed out that in terms of s 4(1)(*b*) of the RAF Act, the Fund's powers and functions include 'the investigation and settling' of claims submitted to it. It is in that context that the court in *Daniels* concluded that the provisions of the RAF Act, which limit common law and constitutional rights, and create an obligation on the Fund to diligently investigate claims submitted to it and to determine whether it is liable to compensate the claimant.

[37] There are clear and discernable philosophical orientations between the legislative scheme of the Fund and the Act under consideration. Significantly, there is also a limit placed on the degree of compensation in relation to the Fund. Moreover, their respective stated purposes are vastly different. The RAF Act was enacted for the benefit of claimants. On the contrary, as stated already, the Act under consideration was in the main, enacted for the benefit of the organs of state, rather than the claimants.

[38] Another important difference is that the duty of the Fund to make a decision on a claim received by it, is expressly provided for in s 4(1)(*b*) of the RAF Act. There is no such provision in the Act. Third, the RAF prescribed form is elaborate, and requires detailed and specified information about the claim. This points to the duty on the Fund to consider the claim and endeavour to settle it. On the other hand, s 3(2)(*b*) only requires the facts and particulars of the claim to be 'briefly set out'. It does not prescribe the form in which this should be done. It follows that *Daniels* is also distinguishable.

[39] In a different context, in *Road Accident Fund Appeal Tribunal and others v Gouws and another* [2017] ZASCA 188; [2018] 1 All SA 701 (SCA); 2018 (3) SA 413 (SCA) this court considered the powers of the Road Accident Appeal Tribunal to determine finally whether the injuries submitted to it for assessment were caused by or arose out of the driving of a motor vehicle. There were no express provisions in the RAF Act or the Regulations that conferred on the Tribunal such power. Counsel for the Tribunal submitted that having regard to the object of the RAF Act, such power could be implied. Rejecting that suggestion, the following was said at para 27:

'As stated above, the general rule is that express powers are needed for the actions and decisions of administrators. As pointed out by Professor Hoexter, implied powers may, however, be ancillary to the express powers or exist either as a necessary or reasonable consequence of the express powers. Furthermore, the author goes on to state that 'a court will be more inclined to find an implied power where the express power is of a broad, discretionary nature – and less inclined where it is a narrow, closely circumscribed power'. Where the administrative action or decision is likely to have far reaching effects, it is less likely that a court will in the absence of express provisions find implied authorisation for it.' (footnotes omitted).

[40] From above, it is clear that the appellant's reliance on the RAF Act is of no assistance to him.

IPID implications and constitutional norms

[41] I come now to what the appellant describes as the implications for IPID, which includes the constitutional norms of accountability and responsiveness. It was

contended that a failure by the department to make a decision prior to litigation is indicative of laxity and thus contrary to the provisions of the IPID Act and the constitutional norms of accountability and responsiveness. In their heads of argument, counsel for the appellant point to s 28(1)(*f*) of the IPID Act, which requires that complaints of assault by police officers to be investigated by IPID. Reliance was also placed on ss 29 and 30 of the IPID Act.

[42] The aim of the IPID Act is to ensure the independent oversight over the South African Police Service (SAPS) and the various Municipal Police Services (MPS). It is enjoined to conduct independent and impartial investigations of identified criminal offences allegedly committed by members of SAPS and MPS, and make appropriate recommendations. The IPID Act has no connection with the Act under consideration, as they serve disparate purposes. I therefore fail to see how the IPID Act is relevant to the interpretation of s 3. The laudable constitutional norms of accountability and responsiveness cannot found an obligation where the Act does not expressly provide for it, and where such an obligation cannot be reasonably implied. Viewed in this light, it is clear that the IPID argument is of no assistance to the appellant, either.

Difficulties with the implied provision

[43] There are two further factors militating against implying the suggested provision into s 3. They concern first, the difficulty of formulating the provision and determining its scope. Second, there is the prospect of parallel litigation. With regard to the formulation of the suggested implied term, I understood counsel for the appellant to suggest, more or less, the following implied provision to be read into s 3:

'An organ of state served with a notice referred to in s 3(1)(*a*) must within a reasonable time of such service, either admit, reject or endeavor to settle the claim set out in such notice.'

[44] The immediate difficulty is what is meant by 'a reasonable time'? The period of 30 days in s 5(2) should be assumed to have been considered by the legislature as a reasonable period for an organ of state to consider a claim. Given that, how will

this suggested ‘reasonable period’ interface with the period in s 5(2)? Would it not render s 5(2) nugatory?

[45] It is also not clear what is expected of an organ of state in the asserted ‘endeavour to settle’. Is it supposed to make an offer? If it does, what if the offer is not acceptable to the claimant? Who determines whether the endeavour by an organ of state to settle the claim is genuine and in good faith? What happens if the claimant perceives the organ of state’s endeavour to be a sham, mechanical and in bad faith?

[46] The suggested implied provision seems to establish a parallel litigation process. Questions concerning compensation to which a claimant is entitled are for the court to decide in the contemplated litigation provided for in s 3, and are not reviewable in terms of the PAJA. It certainly could not have been intended by the legislature that the giving of the notice in terms of s 3 should result in parallel litigation. It is not in the interests of justice.

[47] These difficulties, which are by no means far-fetched, suggest that the proposed implied provision creates more problems than it solves. Apart from unduly straining the language of the Act, we would impermissibly be usurping legislative powers, thus infringing the principle of separation of powers. Furthermore, one must bear in mind the injunction in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 90 that an interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights and, the statute must be reasonably capable of such interpretation.

[48] The appellant has not identified any constitutional value advanced by his preferred interpretation. I have demonstrated that the only right said to be violated – the right of access to courts – is not implicated at all. It is instructive that s 3, and many other similarly worded provisions, have been implemented for many years without any difficulties. Had the legislature intended for the organs of state to have an obligation to make a decision pursuant to receipt of s 3, it would have said so in express terms.

Summary

[49] Over and above all the considerations set out above, one should be mindful that national state departments have a difficult task in monitoring and evaluating complaints and claims made against them. The Act and its predecessors were designed to meet that problem and to afford organs of state an opportunity to gather and preserve information and evidence. Their jurisdiction extends over large geographical areas and encompass many individual employees and officials. Even when the decision is made to oppose litigation already instituted or to repudiate liability, there is the concomitant responsibility to gather evidence and/or prepare for trial.

[50] What is contended for, without express statutory underpinning, would make the task of state departments especially onerous. All the more so, when the consequences of the declarator sought would, as already stated, be to deduce a time within which, in general terms, a decision has to be made. In the present case, the department was given 14 days within which to make the decision. To accede to what was sought by the appellant, would be to place an intolerable time burden on the state. It would also ignore reality. That having been said, it would be salutary for organs of state, within means and resources, to attempt to communicate as early as circumstances permit their attitude to claims by affected persons. For all these reasons the appeal stands to fail.

Costs

[51] There remains the issue of costs. The court a quo dismissed the application with costs. Counsel for both parties informed us that before the court a quo, there was agreement that whatever the outcome, no order of costs should be made. It would seem then that the costs order was inadvertently made. That should be rectified. With regard to costs in this court, the principle sought to be advanced by the appellant is of public importance, and involves the responsibilities of an organ of

state. The interpretive issue is of public importance, despite the dismissal of the appeal. *Biowatch*[6] accordingly applies.

[52] In the result, the following order is made:

1 The appeal is dismissed with no order as to costs.

2 The order of the court a quo is amended to read as follows:

'The application is dismissed with no order as to costs.'

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T M Makgoka

Judge of Appeal

[6] *Biowatch Trust v Registrar Generic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) paras 23-24.

APPEARANCES:

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