Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

REPORTABLE

Case No: 23406/15

In the matter between:

Timothy Fanfani Mabaso **Applicant**

And

National Commissioner of Police **First Respondent**

Minister of Police **Second Respondent**

JUDGMENT – 2 JUNE 2017

LE GRANGE, J:

Introduction:

[1] The Applicant in this matter seeks the review and setting aside of the First and Second Respondents ("the Respondents") failure to take a decision pursuant to having been given a notice in terms of section 3 of the Institution of Legal Proceedings against certain organs of state Act 40 of 2002 ("the Act"), including certain ancillary relief.

[2] The review application is in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and premised upon the Applicant's contention that the Respondents have a legal duty in terms of the Act to take a decision to accept or reject or endeavour to settle its claim for damages. One of the main ancillary relief sought by the Applicant is *inter alia*, a decelerator directing that the Respondents have such a legal duty and for them to take an appropriate decision.

[3] The Respondents in opposing the relief sought have taken the view that the Act, if properly interpreted, does not contemplate such an obligation.

Counsel:

[4] Advocate J-H Roux, SC assisted by P.S. Van Zyl appeared for the Applicant. Advocate K Pillay assisted by B G Smith appeared for the Respondents.

The Dispute:

[5] At the heart of this matter, is the question whether the Act contemplates that a legal duty exists upon the Respondents to respond to a notice issued pursuant to s 3 of the Act. If no such duty exists, it follows that the review and ancillary relief sought by the Applicant cannot succeed.

Factual Matrix:

[6] The Applicant's attorneys during June 2015 gave the First Respondent notice, in

terms of section 3(1) of the Act, of the Applicant's intention to institute an action for damages against the Second Respondent ("the notice"). The facts underpinning the Applicant's intended claim in the action can be summarised as follows. The Applicant in February 2015 was at a tavern in Gugulethu. According to him he consumed some alcohol over a period of 2 to 3 hours. On his way home he was stopped by traffic officers and arrested. His car was taken to Delft Police station. He was then taken to Mitchells Plain Police station for a blood sample. According to the Applicant at about 23h00 he enquired about the possibility of being released on bail. A police officer however pushed him against the wall with some force. The Applicant avers as a result of the assault he fell and broke his right arm. The Applicant states that he was not assisted or taken to the hospital but rather kept overnight in a police cell. According to the Applicant he was released the following day on bail in the amount of R 500. The Applicant also states that he visited a medical doctor and certain X-rays were taken of his arm. He was ultimately taken to Mitchells Plain hospital for an operation. The Applicant further states that as a result of the assault he underwent an operation to place an internal fixation in his right arm. The Applicant now alleged that as a result of the assault he suffered general damages in the amount of R 350 000.

[7] Counsel for the Applicant relied heavily on certain decided cases with similar clauses in other legislation, to which I will return, for the general proposition that the Act if purposively interpreted, indeed provides that a legal duty exists upon the Respondents to take a decision, once a s 3 notice has been delivered. It was also

contended, in the absence of any express time limit stipulated in the Act, a period of 30 days may be used as a guideline to the time reasonably required for the Respondents to make a decision. It was further argued that the Applicant's personal circumstances, should be a contributing factor in considering a purposive approach as it will assist the vast majority of indigent claimants like the Applicant, to a speedily resolution of their dispute with the Respondents.

[8] The main submissions by the Respondents' Counsel can be summarized as follows: in the absence of an express provision in the Act, there is no basis in law or on a proper interpretation of the Act that compel the Respondents to respond to a s 3 notice in the Act; the case-law relied upon by the Applicant are distinguishable and not applicable in the present instance; the information contained in the s 3 notice is often inadequate for the purpose of taking an informed decision by the Respondents on how to proceed on an intended claim; that such an obligation, if exists, could be subject to review under PAJA or in terms of the principal of legality and may result that the organ of state will be required to defend itself in parallel litigation; a s 3 notice may also be served in terms of the Act on the National Commissioner of Police in respect of the National Minister however, the organ of state against which the relevant claim lies in the present instance is the Minister of Police. Despite this, the Notice of Motion requires a response from both Respondents. Moreover, according to the Respondents, the Police Department simply does not have the resources to engage in such preliminary consultations and investigations as such investigations do take place after summons has

been issued. At that stage legal counsel have been employed and the underlying cause of the action and factual basis properly pleaded. According to the Respondents, it would be at this stage where there may be liability on the merits, the Department will take advice from its Counsel to make an informed decision whether to settle the claim or not. Lastly, it was contended that there could be no prejudice to the Applicant whatever his financial circumstances may be, on account of the Respondents failure to respond to a notice as a Plaintiff is at liberty to issue summons assuming the claim was rejected or no mutual agreeable settlement on the claim could be reached.

The Legal Framework:

[9] In order to determine whether the Act contemplates that a legal duty exists upon an organ of state to respond to a notice issued pursuant to a s 3 notice, of the Act, it is perhaps convenient to re-visit the relevant provisions provided as follows:

> *"3 Notice of intended legal proceedings to be given to organ of state*
>
> *(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-*
>
> *(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or*
>
> *(b) the organ of state in question has consented in writing to the institution of that legal proceedings-*
>
> *(i) without such notice; or*

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must-

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and

(b) briefly set out-

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(c) For purposes of subsection (2) (a)-

(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state willfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.

(4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that-

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(d) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

[10] The section in question has been in recent times the subject matter of interpretation in a number of cases. The requirements of s 3(4)(b) were discussed in Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) regarding good cause and the absence of prejudice to the organ of state in considering condonation. In Minister of Safety and Security v De Witt 2009 (1) SA 457 (SCA), the issue of condonation was again under consideration in instances where no notice was given by the creditor, or where the notice was defective in some respect, but where legal proceedings were instituted before the expiry of the prescription period.

[11] At issue in this case is a different question.

[12] The approach to statutory interpretation was recently summarised by the Supreme Court of Appeal in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph [18] and restated in Novartis SA v Maphil Trading 2016 (1) SA 518 at paragraphs [24]-[29]. In Endumeni *supra* at paragraph [18], the following was held :

"…The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[13] The case law relied upon by the Applicant in support of its contention for a

purposive interpretation was firstly, Mohlomi v Minster of Defence 1997 (1) SA 124 (CC). In that case the Plaintiff instituted a claim for damages against the Minister of Defence in connection with a shooting incident. A special plea was raised by the Minister of Defence for non-compliance with the requirements of s 113(1) of the Defence Act 44 of 1957, which stipulated the following:

> *"No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months. . . has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof".*

[14] The constitutional validity of said section came under scrutiny, with regard to s 22 of the Interim Constitution, which related to the fundamental right *"to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum".*

[15] The Court compared s 113(1) of the Defence Act with the provisions of the South African Police Service Act, 68 of 1995 ("the Police Act"). In considering the issues it was found that s 113(1) differed considerably to the Police Act, and the Court came to the conclusion that section 113(1), which provided a time limit within which litigation may be launched was constitutionally invalid.

[16] In the second instance reliance was placed upon the dictum of Mogopodi v Member of the Executive Council of the Free State (122/2008) [2008] ZAFSHC 38 (13 March 2008). In that case two issues were discussed namely, (1) whether the proper

notice in terms of s 3 of the Act was in fact furnished; and (2) whether the requirements of the Act were complied with. The notice in terms of s 3 of the Act was delivered late and a letter was sent to the Department of Education requesting condonation for the late delivery. It appears no answer was forthcoming. The complainant thereafter sent a further letter and still no response was forthcoming. The complainant then issued summons. In para [7] of the said judgment, it was held, that the provision of giving notice in terms of s 3 of the Act was for the convenience of the organ of state to conduct proper investigations and decide whether to make payment or defend the intended action.

[17] The Court did not consider or pronounce on the issue whether such organ of state is obliged to respond to such notice.

[18] In the third instance, the Applicant relied on case law relating to the interpretation of certain provisions in the Road Accident Fund Act 56 of 1996 ("the RAF Act"). In particular reliance was placed on Daniels and Others v Road Accident Fund and Others (8853/2010) [2011] ZAWCHC 104 (28 April 2011). In that case, the Court considered the provisions relating to the claims procedure and the functions of the Fund in respect of the processing and determination of claims in terms of the RAF Act.

[19] The court made reference to s 24 of the RAF Act which *inter alia* provides that a claim for compensation in terms of the Act must be submitted by means of a duly completed form in the prescribed format. The said section further requires the claim form to be completed so as to provide the Fund with a clear reply to each applicable

question. Precise details must further be furnished by a claimant in respect of each item in the prescribed form under the heading 'Compensation claimed'. The prescribed form includes provision for the medical report required in terms of s 24(2)(a) of the Act.

[22] In terms of s 24(5), a claim form submitted by, or on behalf of a claimant in purported compliance with the requirements of the Act will be deemed to have been validly completed in all respects if the Fund did not raise any objections within 60 days of the posting or delivery of the form to the Fund. In these instances, proceedings for the recovery of compensation from the Fund may not be instituted by a claimant before the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the Fund, and before all requirements contemplated in s 19(f) of the Act have been complied with.

[21] The Court, in view of the above held the following:

> *"[10] It is evident upon a consideration of the aforementioned provisions of the Act that the compensation scheme provided thereby contemplates that a claimant will, when submitting a claim, provide the Fund with sufficient relevant information to enable it (i) to investigate whether it is liable (in other words, whether the insured driver was causally at fault in regard to the injuries or death upon which the claim is founded) and, if so, (ii) also to determine the amount of compensation payable. The interval of 120 days that is required to pass between the filing of a claim and the accrual of a right to the claimant to institute action against the Fund to enforce payment of a claim for compensation is obviously*

intended to permit the Fund sufficient opportunity to carry out the required investigations and, if indicated, to settle the claim, or attempt to settle it before the institution of litigation. In regard to the last-mentioned aspect, the provisions of s 17(3)(b) of the Act pertinently provide that if the matter should go to trial, 'the court may take into consideration any written offer, including a written offer without prejudice in the course of settlement negotiations, in settlement of the claim concerned, made by the Fund ... before the relevant summons was served' in making a costs order.

[. . .]

[13] The requirements of the Act in respect of the submission of claim forms and the provision of full information to the Fund, as well as the imposition of a mandatory moratorium before legal proceedings for the recovery of compensation may be instituted, constitute additional limitations. A yet further and - in the context of the first and second applicants' complaints - particularly pertinent limitation is the exclusion of any liability by the Fund to pay mora interest on awards made by the court in actions by claimants to enforce their rights to compensation unless payment is delayed for more than 14 days after the relevant court order. Ordinarily, a debtor in respect of an unliquidated claim would be liable to pay interest at the prescribed rate from the earlier of the date of demand for payment, or that of service of the process commencing enforcement proceedings.

[14] There can be no doubting therefore that the limitations of common law and constitutional rights arising out of the aforementioned provisions of the Act create an obligation on the Fund to diligently investigate claims submitted to it and to determine, if practically possible within 120 days of receipt of the claim, whether it is liable to compensate the claimant, and, if so, in what amount. The Fund is obliged to conduct itself in this respect with due recognition that its very reason for existence is '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'. In this connection it was observed in the majority judgment of the Constitutional Court in Road Accident Fund and Another v Mdeyide 2011 (1) BCLR 1 (CC) (at para 78) that the Fund is 'a hugely important public body which renders an indispensible service to vulnerable members of society'. The majority judgment in Mdeyide reflected an acknowledgment of the crucial importance of a 'properly administered' Fund to the upholding of 'the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms'.

[15] In my view the constitutionality of at least some of the rights-limiting provisions in the Act mentioned earlier is predicated on the implicit undertaking by the state that the operation of the Act will entail the efficient discharge by the Fund of its functions in respect of the processing and determination of claims. Certainly, the justification for the limitations goes limping when the relevant organ of state fails properly, in faithful compliance with the Act, to render the

performance that constitutes the very basis for characterising the limitation as reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Recognition of that effect inexorably impels the conclusion that a materially inadequate performance by the Fund of the relevant statutory functions would amount to conduct that would unjustifiably infringe the affected limited rights. At the same time, any such failure by the Fund to fulfil its statutory object would evidence a breach by the state of its obligations in respect of other rights, like equality, human dignity, security of the person, health and social security, which the Act is meant to represent a means of advancing and protecting."

Discussion:

[22] On a plain reading of s 3 of the Act, it is evident that a claimant who is referred to as a "creditor" is obliged to give notice of its proposed intention to institute legal proceedings against an organ of state. In reading the particular provision as a whole and having regard to its context, there can be no doubt that the Legislature intended to ensure that the organ of state is given an opportunity to investigate the claims in terms of its own internal rules and to consider them responsibly.

[23] The question now is whether in the context in which the provision appears it is apparent that the purpose to which it is directed, a legal duty is deemed to exist on the Respondents that compels them, after such investigation and before getting embroiled in litigation at public expense, to take a decision whether to accept or reject or

endeavour to settle such claim for damages. In answering this question consideration must be given to the objective meaning of the words, its context, the intention of the Legislature and the underlying purpose of the Act. In this regard see: Novartis *supra* at paragraph [27].

[24] The case law relied upon by the Applicant in support for its proposition is in my view distinguishable to the enquiry in the present instance. In the Mohlomi matter, the enquiry was solely premised on whether the requirement limiting the time during which litigation may be launched was constitutional. It was in that context that the Court made the remark that it will be in the public's interest that procrastination needs to be curbed. It further commented on the demand for prior notification and the logistical difficulties which the State had to deal with. Moreover, mention was made that the organ of state ought to be afforded the opportunity to investigate the claim, or consider it upon receipt of the notice before getting embroiled in litigation at public expense. The existence of a legal duty to do so was however not discussed or decided upon. (See: Mohlomi *supra* at paragraph [9]). It also needs to be mentioned that Mohlomi was decided approximately five years prior to the enactment of the current Act under consideration. If the Legislature wanted to place such a legal duty on the Respondents it could have expressly stated so in the Act.

[25] In the Mogopodi matter, the reliance by the Applicant on paragraph [7] of the judgment for support that there is a legal duty on the organ of state to respond to the said notice, is unconvincing. It is correct that it was noted by the Court that the

provision of giving notice in terms of section 3 is for the convenience of the organ of state to conduct proper investigations and decide whether to make payment or defend the intended action. It does not follow that if such a duty to investigate exists there is an equal obligation on the organ of state to respond to the said section 3 notice before summons had been issued.

[26] The underlying objective purpose of the notice is clearly for the convenience of the organ of state. On a proper reading of the judgment, the Court could not have contemplated that the Act read as a whole places such a duty on the organ of state as it was in the first place never asked to do so and secondly no time frame within which such response must be complied with was ever considered.

[27] The Daniels case relied upon by the Applicant is in my view equally of no assistance for the Applicant's case. The Daniels matter dealt with the RAF Act, and the provisions and objectives of the RAF Act, clearly differ in substance and form, from the Act under consideration.

[28] The object of the Fund is the payment of compensation in accordance with the RAF Act for loss or damage wrongfully caused by the driving of motor vehicles. On a proper reading of the RAF Act, one of the Fund's powers is to investigate and settle claims subject to the Act, arising from loss or damage caused by the driving of a motor vehicle whether or not the identity of the owner or the driver thereof, or the identity of both the owner and the driver thereof, had been established. Moreover, in terms of

s 24 of the RAF Act, a claimant is obliged to furnish precise details when submitting a claim in the prescribed claim form.

[29] In terms of the RAF Act, such claim form will be deemed to have been validly completed in all respects if the Fund does not raise any objections within 60 days of the posting or delivery of the form to the Fund. Proceedings for the recovery of compensation from the Fund may not be instituted by a claimant before the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the Fund, and before all requirements contemplated in the RAF Act have been complied with. It was in the context of these specific provisions that the Court found in Daniels that:

> '[14]...*There can be no doubting therefore that the limitations of common law and constitutional rights arising out of the aforementioned provisions of the Act create an obligation on the Fund to diligently investigate claims submitted to it and to determine, if practically possible within 120 days of receipt of the claim, whether it is liable to compensate the claimant, and, if so, in what amount…'*

[30] It is evident that there is a marked distinction between the RAF regulations and the provisions of the Act under consideration. The RAF Act, in no uncertain terms places a duty on the Fund to consider a claimants claim and to either reject and furnish reasons for such rejection or to give directions on which further or additional information may be required. There is no equivalent or corresponding provision in the Act.

[31] In considering whether more than one meaning may be possible, the arguments advanced by Counsel for the Respondents that on a proper consideration and construction of the Act there is no obligation on the Respondents to answer to a notice issued in terms of s 3, is not without merit. In terms of section 3(2)(b) of the Act the only substantive information that a notice must include is a "brief" setting out of: (i) the facts giving rise to the debt; and (ii) such particulars of such debt as are within the knowledge of the creditor. It cannot be disputed that the notice contemplated under section 3 provides an organ of state with significantly less information than what ordinarily would be required in a plea. In fact Rule 18(4) of the Uniform Rules of this Court provide that:

> "18(4*) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto*."

[32] As regards to claims for damages, in terms of Rule 18(10) of the Uniform Rules, the following is provided:

> *"A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and*

duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for-

> *(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;*
>
> *(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;*
>
> *(c) disability in respect of-*
>
> > *(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);*
> >
> > *(ii) the enjoyment of amenities of life (giving particulars);*
>
> *and stating whether the disability concerned is temporary or permanent; and*
>
> *(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent."*

[33] The contention by the Respondents that the notice requirements of section 3 are inadequate for the purposes of taking an informed decision, cannot be rejected as mere conjecture or speculation. Moreover, if the provision presupposes that there is an obligation to make a decision on such limited facts it will surely deprive an organ of state who may seek to defend the matter, after summons had been issued, to object in

terms of the Court Rules against inadequate or inappropriately drafted pleadings. To this extent a reading in that the Respondents are obliged to make an informed decision on such limited facts will clearly undermine the apparent purpose of the section. Moreover, the fact that the Act does not prescribe any time limits for a response must be a further indicator that the Legislature did not intend that a response is required in these circumstances.

[34] A further and very important consideration which in my view detracts from the proposed interpretation sought by the Applicant is that any resultant decision or failure to take a decision after such notice had been served, could be subjected to review proceedings under PAJA or in terms of the principle of legality. Such proceedings may result in unintended consequences. The Respondents may be subjected to parallel litigation which would inevitably compromise the interest of justice and be detrimental to the speedy resolution of these cases.

[35] Furthermore, the Respondents complaint that the taking of a decision in response to every notice received would place an extreme administrative burden on the Respondents' Departments, cannot be ignored. According to the Respondents such steps would require withdrawing police officers from other duties to engage in preliminary consultations and investigations. This in turn could compromise the general policing functions. Furthermore, resources would be spent on an investigation in circumstances where a claim is ultimately not pursued. The Respondents stated that such investigations do take place after summons had been issued, at which stage

Counsel would have been appointed and the underlying cause of action and factual basis for it would have been properly pleaded. In most instances, where there is merit in the complaint, the Respondents will take advice from Counsel which advice will inform their decision as to whether to settle a claim or not. These considerations cannot merely be rejected as fanciful or unreasonable.

[36] In weighing up all the relevant factors pertaining to the process of attributing meaning to the words in the Act, and having regard to the context and purpose of the provisions, I am satisfied that the Legislature did not intend that a legal duty exists on the Respondents to take a decision to accept or reject or endeavour to settle its claim for damages pursuant to a s 3 notice.

[37] It follows that the declaratory relief sought by the Applicant cannot succeed. The review application also falls to be dismissed.

[38] In the result the following order is made.

The Application is dismissed with costs.

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LE GRANGE, J

For the Applicant	**:**	**Adv JH Roux S.C assisted by PS van Zyl**
For the Respondents	**:**	**Adv K Pillay assisted by BG Smith**
Date (s) of Hearing	**:**	**16 February 2017**
Judgment delivered on	**:**	**02 June 2017**