

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MTHATHA

CASE NO. 3642/2015

Date heard: 19 October 2017

Date delivered: 6 February 2018

In the matter between:

REFORMED PRESBYTERIAN CHURCH

Applicant

IN SOUTHERN AFRICA

and

MINISTER OF POLICE

1st Respondent

STATION COMMISSIONER, LIBODE

2nd Respondent

JUDGMENT

LAING AJ:

[1.] The Applicant has brought an application in respect of the alleged unlawful conduct of the Respondents with regard to criminal charges made in terms of CAS No. 159/01/2015 at

the Libode Police Station. Only the First Respondent has opposed the matter. The Applicant seeks the following relief, *inter alia*:

- (a.) that the Respondents' disposal of the police docket, opened at the Libode Police Station under CAS No. 159/01/2015, and the subsequent filing thereof in the police archives be declared unlawful and be set aside;
- (b.) that the Respondents' discontinuation of the investigation into criminal charges made under CAS No. 159/01/2015 be declared unlawful and be set aside;
- (c.) in the alternative to (b.), that the Respondents' delay in the investigation of the above charges be declared unlawful and be set aside;
- (d.) that the Respondents be directed to conduct thorough investigations, forthwith, into the above charges; and
- (e.) that the Respondents be directed to advise the Applicant of progress in the investigations on a regular basis and of the outcome of such investigations within 30 days.

Factual background

[2.] Previously, several senior members of the Applicant left for the Uniting Presbyterian Church. The decision resulted in tension between the two congregations which culminated in the disruption of the Applicant's church services at the Zandukwana outstation. On 19 November 2014, the Applicant obtained interim relief against the above erstwhile members in the Libode Magistrates' Court, which was made final on 22 January 2015.

[3.] From the start, the respondents in the Magistrates' Court matter displayed a dismissive attitude towards the orders. When the sheriff attempted to serve the final order, the respondents refused to cooperate, compelling him to attach the order to the doors of their

residences. Shortly afterwards, the respondents allegedly informed some of the Applicant's members that they would ignore the order and intended to take possession of the Applicant's church hall. This led to the Applicant's attorneys' delivering written requests to the Second Respondent in the present matter to assist.

[4.] On 25 January 2015, the Applicant's members telephoned the Second Respondent and other senior officials in the South African Police Services ('SAPS'), calling for immediate protection in light of the tensions between the two church groups. In response, a SAPS team proceeded to the Zandukwana outstation, where the officers encountered what can only be described as a stand-off between members of the Applicant and members of the Uniting Presbyterian Church. The SAPS officers allegedly advised the members of the Uniting Presbyterian Church to obtain legal advice in relation to the orders from the Magistrates' Court.

[5.] Consequently, but on the same date, members of the Applicant, including a Mr William Matiwane, went to the Libode Police Station to lay charges of contempt of court and malicious injury to property. This met with no success, constraining the Applicant to instruct its attorneys to intervene, whereupon they lodged a complaint with both the National and Provincial Commissioners. This appeared to have had the desired effect and the First Respondent's legal services division informed the Applicant that its members could indeed lay charges. This was done.

[6.] The Applicant alleges that its members frequently checked on progress by telephoning the investigating officer, Constable Lwandile Bebula, who would respond that the matter was still under investigation. Written requests for updates on progress were made to the Second Respondent on 19 February and again on 3 March 2015. Subsequently, on 9 March 2015, Const. Bebula contacted the Applicant's attorneys and informed them about some of the difficulties attached to the investigation, including the unavailability of suspects. He confirmed that the police docket had not yet been referred to the senior public prosecutor. On 29 September 2015, the Applicant's attorneys sent a letter to the senior public prosecutor

at the Libode Magistrates' Court, enquiring about the status of the matter. No response was received.

[7.] In general, the Applicant asserts that the Second Respondent and police officials have been unwilling to assist with regard to any incident involving members of the Uniting Presbyterian Church. On 21 May 2015, the Applicant obtained an order against the First and Second Respondents in the High Court for the return of the keys to the Zandukwana outstation, which had been confiscated pending the resolution of the dispute between the two church groups.

[8.] The Applicant secured a copy of the police docket on 4 December 2015. How this was achieved is not explained but is not material to the present matter. The investigation diary reveals a set of instructions previously given to Const. Bebula at the commencement of the case. In terms thereof, he was required to: (a.) contact the complainant and interview him about the case; (b.) collect and file the returns of service in respect of the order, as proof that it was served on the suspects; (c.) obtain statements from witnesses; (d.) take the matter to the public prosecutor for a decision; and (e.) present the case to an officer for inspection. The Applicant alleges that most of the instructions were never carried out.

[9.] Furthermore, the Applicant draws attention to the last entry in the investigation diary, made on 10 March 2015. This indicates that the case was treated as a civil matter and that the civil proceedings were to be completed before the case could be taken further. To this the Applicant avers that no civil proceedings were pending. It argues that the Second Respondent or officials under his control closed the investigation and disposed of the docket on 11 March 2015 without any basis upon which to do so. Their conduct was unlawful and in breach of the Applicant's constitutional right of access to court and in breach of the constitutional duties imposed on the SAPS.

[10.] In the answering papers, the First Respondent attacks the application on a number of grounds, arguing, *inter alia*, that the relief sought by the Applicant is incompetent and

inappropriate and infringes the doctrine of the separation of powers. Moreover, the First Respondent points out that the Applicant has failed to join the National Prosecuting Authority ('NPA') and has failed to make out a case in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[11.] Dealing with the facts, the First Respondent avers that Const. Bebula obtained copies of the court orders from the Applicant's members, together with the sheriff's returns of service. Const. Bebula noticed that there had been no personal service of the orders on the respondents. Nevertheless, he took warning statements from the suspects and presented the docket to the public prosecutor, Mr Phumelele Myataza.

[12.] On 10 March 2015, Mr Myataza refused to make a decision on the merits of the case and directed that the civil proceedings should be completed before taking the criminal proceedings any further. He states in his affidavit that he had made enquiries and established that an application for leave to appeal against the final order had been set down for hearing on the above date. Moreover, he had understood at the time that the parties had been attempting to reach settlement in the matter.

[13.] Consequently, Const. Bebula contacted Mr Matiwane and informed him about the above. According to the First Respondent, Mr Matiwane confirmed that civil proceedings were still underway and had been enrolled for hearing on 10 March 2015. He undertook to notify Const. Bebula as soon as these had been finalized so that the case could again be presented to the public prosecutor for a decision on the merits. This was never done. The First Respondent avers that the Applicant has been well aware that the case was placed into archives on a temporary basis, pending finalization of the civil proceedings. To that effect, Const. Bebula confirms in his affidavit that no decision was taken to halt the investigations. In any event, the instruction to await the outcome of the civil proceedings was given by Mr Myataza, not by the Respondents or anyone under their control. The Applicant ought to have joined the NPA.

[14.] Moreover, states the First Respondent, the subject of the application is a complaint about police inefficiency. The matter should have been referred to the relevant provincial authority, alternatively the Independent Police Investigating Directorate ('IPID') for consideration.

[15.] It is noted that the Applicant, in reply, avers that an application for rescission of judgment was pending on 10 March 2015, rather than an application for leave to appeal. Be that as it may, it appears to be common cause that civil proceedings in one form or another were underway on the date in question.

Issues for determination

[16.] The Applicant seeks substantive relief against both the First and the Second Respondents. There is a point of contention between the parties that arises from the sheriff's service of the application at the offices of the State Attorney, rather than at the offices of the Second Respondent in Libode. The First Respondent has argued that this does not constitute service and accordingly the Applicant cannot obtain any relief against the Second Respondent.

[17.] In matters of this nature, where an organ of state or a functionary thereof has been cited in the proceedings, it is customary for the applicant to serve process on the State Attorney. However, the First Respondent has referred to the rescission application in this matter, in terms of which the court held that service on the State Attorney was insufficient. An applicant was required to ensure that service was carried out directly upon the Second Respondent.¹ As such, this court is bound by the above finding. To the extent that may be necessary, this is an aspect that will be discussed further in the paragraphs below.

¹ See the judgment of Mgxaji AJ in *Minister of Police and Another v Reformed Presbyterian Church in South Africa, In re Reformed Presbyterian Church in South Africa v Minister of Police and Another* (Case No. 3642/2015) Eastern Cape Local Division, Mthatha, handed down on 24 May 2016.

[18.] For the moment, the issues to be determined are as follows:

- (a.) factually, whether the Second Respondent's officials discontinued investigations and disposed of the police docket;
- (b.) if so, then whether such conduct was unlawful and must be set aside;
- (c.) if not, then whether the filing of the police docket in archives was unlawful and must be set aside;
- (d.) whether the alleged delay in the investigation of the criminal charges is unlawful and the consequences of such a finding;
- (e.) whether the court has authority to direct the Respondents to: (i.) carry out thorough investigations; and (ii.) inform the Applicant of progress on a regular basis and of the outcome of the investigations within 30 days; and
- (f.) liability for the costs of the application.

[19.] Some of the issues raise novel arguments that may have a bearing on the development of our administrative law. In particular, the application is pertinent to questions about the nature of administrative action and an understanding of the separation of powers. The court may, however, make determinations with regard to the above issues that render a finding on the finer points of administrative law unnecessary. The duty of a court is to decide the dispute placed before it by the litigants. It is not required to decide matters of solely academic interest. See *Legal Aid South Africa v Magidiwana and Others* [2014] 4 All SA 570 (SCA), at [2]; *ABSA Bank Limited v Keet* [2015] 4 All SA 1 (SCA), at [8].

Discontinuation of investigations and disposal of the docket

[20.] With the above in mind, the first determination to be made is purely factual: whether the Second Respondent's officials discontinued investigations and disposed of the docket. The Applicant alleges this to be so, the First Respondent contends otherwise, stating unequivocally that the public prosecutor, Mr Matyaza, merely directed Const. Bebula to file the docket while civil proceedings were in still progress. Only upon the completion thereof could further steps be contemplated.

[21.] The firmly established principle in proceedings on notice of motion is that where disputes of fact have arisen in the affidavits, a final order may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. See *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A), at 368. There are, of course, exceptions to the above, which include the situation where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in merely rejecting them on the papers.²

[22.] There is no evidence that the Second Respondent's officials disposed of the docket, as contended by the Applicant. On the contrary, it is common cause that the remarks entered on the cover of the docket were to the effect that it was to be filed.³ The ordinary meaning of this is that the docket was to be placed into a file or it was to be stored for possible future reference or action. This is consistent with the averments of both Mr Matyaza and Const. Bebula to the effect that civil proceedings were to be finalized before further steps could be taken in relation to criminal investigations and prosecution. Such averments are entirely plausible. There is nothing at all to indicate that the investigations were discontinued and that the docket was disposed of. Consequently, the question about the lawfulness of the any such conduct does not arise. The issues under (a.) and (b.), above, fall away.

² *Plascon-Evans* [1984], at 368.

³ A copy of the docket cover was attached to the founding papers as an annexure. At the foot of the page appears the following, in typed text: 'Remarks-Opmerkings'. Next to this, in capitalized manuscript, appears the word 'FILE'.

Filing of police docket in archives

[23.] The next issue is whether the filing of the docket was unlawful and must be set aside. To that effect, the Applicant has framed its application within the context of the right to just administrative action, as envisaged under sub-section 33(1) of the Constitution and the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The underlying premise is that the filing of the docket qualifies as administrative action.

[24.] The definition of administrative action in PAJA is particularly convoluted and has attracted a considerable amount of criticism.⁴ The Constitutional Court distilled its meaning to seven elements in *Minister of Defence and Military Veterans v Motau and Others* 2014 (8) BCLR 930 (CC), where, at [33], the court stated:

there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.

[25.] As a point of departure, the court accepts that the filing of the docket would not constitute any of the listed exclusions. Possibly the most relevant of the listed exclusions to the matter at hand is the decision to institute or continue a prosecution, which is clearly not the case here. The decision taken by the public prosecutor, Mr Matyaza, to direct Const. Bebula to allow the civil proceedings to be completed before taking further steps does not form the subject of this application. In any event, neither Mr Matyaza nor the National Prosecuting Authority has been cited as a party in the papers.

⁴ For example, see Hoexter, *C Administrative Law in South Africa* (Juta, 2012), at 195. See, too, Quinot, *G Administrative Justice in South Africa- An Introduction* (Oxford University Press, 2015), at 76. In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA), Nugent JA observed, at 21, that the definition 'serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications.'

[26.] In *Grey's Marine Hout Bay (Pty) Ltd v Others v Minister of Public Works and Others* [2005] JOL 14415 (SCA), Nugent JA held, at [24], that:

[w]hether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of “an administrative nature”) that have emerged from the construction that has been placed on section 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the Executive, not to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.

[27.] Accordingly, the nature of the power, rather than who exercises it, becomes the focus of an enquiry as to whether conduct is administrative in nature. The conduct must represent the state at work, attending to the myriad of activities that characterise public administration and which have an impact on a community and its members.

[28.] In relation to the police, a core function of the SAPS is to investigate crime.⁵ This entails decisions to commence and to terminate investigations. It may also entail decisions to suspend investigations, pending the occurrence of a particular event, for purposes of ensuring that resources are used more effectively. A decision to file a docket, in anticipation of the finalization of civil proceedings, amounts to the suspension of an investigation. On the basis of the approach of the court in *Grey's Marine* [2005], such conduct is administrative in nature.

⁵ The provisions of sub-section 205(3) of the Constitution state that the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

[29.] Furthermore, there can be no difficulty in finding that such conduct is also composed of the second, third and fourth elements listed in *Motau* 2014. A decision to file a police docket, pending the finalization of civil proceedings, is part and parcel of the public function of investigating crime that SAPS, as an organ of state, is required to perform in terms of the Constitution.⁶

[30.] However, it is far from certain whether the conduct includes the fifth and sixth elements. To meet the definition of administrative action under PAJA and thereby create a platform upon which to launch review proceedings, an applicant must demonstrate that the conduct in question adversely affects rights, and has a direct, external legal effect. For the former, the learned author, Geo Quinot, has expressed the view that any impact on rights, whether negative or positive, will satisfy the fifth element.⁷ Consequently, the decision to file a docket may well have an impact on the rights of the complainant and others, although this will of course depend on a number of variables, for example: the basis of and the intention behind the decision, for how long the investigations will be suspended, the outcome of the pending civil proceedings, and so on. In relation to the sixth element, closer attention is required.

[31.] To that effect, Quinot observes:

[t]his element furthermore confirms the characteristic of finality in the definition of administrative action... A decision can be viewed as final, and thus potentially an administrative action, if it manifests in a direct and external legal effect. Consequently, administrative conduct that is wholly internal to the administration, often as part of a larger multistage decision-making process, will not constitute

⁶ See sub-section 205(3) of the Constitution (n 5 above). The powers and functions of the police are established in detail by the South African Police Service Act 68 of 1995.

⁷ Quinot (2015), at 88. The learned author's conclusion is drawn from an analysis of the treatment of the meaning of administrative action in, *inter alia*, *Grey's Marine* [2005], *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA), *Wessels v Minister for Justice and Constitutional Development and Others* 2010 (1) SA 128 (GNP), and *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC).

administrative action on its own, but only as part of the administrative action that will emerge once a final decision is taken that has the requisite external effect.⁸

[32.] The court agrees with the learned author, whose argument is supported by a number of cases that have mentioned the requirement of directness or finality.⁹

[33.] In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* [2010] JOL 26469 (CC), the Constitutional Court dealt with an independent investigation commissioned by the City of Cape Town into allegations of fronting. The court held, at [38], that:

[d]etecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of state decides to do and actually does with the investigation it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.

[34.] From the above, it is clear that the court required a decision that was final in nature. Administrative conduct that depended on the occurrence of a particular event or the impact of any other variable cannot be described as final or direct. It is accepted that in some circumstances a decision by the police to suspend investigations may indeed be regarded as final where such a decision produces an immediate change to the nature of the rights or duties attached to an individual. For example, this may happen where the individual's exercise or performance of a right or duty is time-barred.

⁸ Quinot (2015), at 89.

⁹ For example, see *Registrar of Banks v Regal Treasury Private Bank Ltd* 2004 (3) SA 560 (W), at 567G-I; *Sasol Oil (Pty) Ltd v Metcalfe NO* 2004 (5) SA 161 (W), at 13. See, too, the discussion in Hoexter (2012), at 232-4, where the above cases are mentioned.

[35.] However, in the present circumstances, this is not the case. The nature of the Applicant's rights in relation to the order granted against its erstwhile members is not changed by the decision taken by the Second Respondent's officials to file the docket, pending the finalization of civil proceedings. Depending on the outcome of the civil proceedings, the Applicant may still enforce its rights under the order where the police are satisfied that there is a basis upon which to resume investigations. Conversely, if the civil proceedings go against the Applicant and the order is successfully appealed or rescinded, as the case may be, then the Applicant will no longer have enforceable rights in terms thereof. In either event, the decision to file the docket does not produce a final effect on the Applicant's exercise of its rights. It cannot be said that the suspension of the investigation has a direct and external legal effect.

[36.] Accordingly, the sixth element is not present and the decision to file the docket, pending the finalization of civil proceedings, does not constitute administrative action in terms of PAJA.

[37.] In argument, counsel for the Applicant raised the principle of legality. This is of course available to a litigant who wishes to enforce the constitutional right to just administrative action where this cannot be achieved under PAJA. At the risk of oversimplification, the principle rests on the requirement that the exercise of power by the state must be done rationally and lawfully.¹⁰

[38.] Applicant's counsel referred to the judgment in *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (5) BCLR 391 (CC) as authority upon which to challenge the alleged decision by the Second Respondent to discontinue the investigation. Although a finding has already been made by this court to the effect that there is no evidence that the investigation was discontinued and that the docket was disposed of, the judgment is useful insofar as it deals with the concept of rationality within the context of the state's

¹⁰ Hoexter, C 'The Rule of Law and the Principle of Legality in South African Administrative Law Today', in Carnelly, M and Hoor, S (Eds) (2011) *Law, Order and Liberty, Essays in Honour of Tony Mathews* University of KwaZulu Natal Press: Scottsville 55, quoted in Quinot (2015), at 168.

exercise of power. To that effect, the Constitutional Court held that such exercise of power must be rationally related to the objective sought to be achieved.¹¹ In other words, to pass the test for rationality in the present case, there must be a rational connection between the decision to file the docket and the purpose of such decision. Here, the purpose was clearly the effective use of police resources, pending the finalization of civil proceedings, and ultimately the successful prosecution of the perpetrators where the outcome of the civil proceedings warranted the continuation of the investigation.

[39.] There is an obvious connection between the Second Respondent's decision to suspend the investigation and the objective of such decision. This court is satisfied that the connection is rational.

[40.] With regard to lawfulness, the above decision must be authorised by an empowering provision. This is a fundamental concept of administrative law which has found expression in key judgments such *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC), where the Constitutional Court stated unequivocally that the exercise of public power is only legitimate where lawful.¹²

[41.] In the present matter, sub-section 205(3) of the Constitution authorizes the SAPS to prevent, combat and investigate crime.¹³ Furthermore, the South African Police Services Act 68 of 1995 establishes the powers and functions of the police. Although not expressly stated as much in the statute, the authority to commence and terminate the investigation of crime falls comfortably within the empowering provisions of sub-section 205(3) of the Constitution. Similarly, the authority to suspend investigations when there is a proper basis for doing so must also come within the ambit of the above provisions. The prevention and combating of crime would not be served in the event that the police were prevented from suspending an

¹¹ *Albutt* 2010, at [49] to [51].

¹² *Fedsure* 1999, at 56.

¹³ See n 5, above.

investigation where the underlying basis therefor was subject to the influence of an independent variable or dependant on the outcome of a separate event. Clearly, where charges of contempt of court have been laid, as in the present matter, and the order that gives rise to such charges forms the subject of an appeal or rescission application, the SAPS would enjoy authority under the wide empowering provisions of sub-section 205(3) to suspend the investigation and not allocate any further resources thereto until such time as the result of the civil proceedings was known.

[42.] The court is satisfied that the decision taken by the Second Respondent's officials to file the docket in the archives was both rational and lawful. There is no basis upon which the Applicant can succeed in having the decision set aside for want of legality. That deals with the issue listed as (c.), earlier.

Delay in the investigations

[43.] The next issue, (d.), pertains to the alleged delay in the investigation of the criminal charges. The Applicant has relied on section 237 of the Constitution to argue that the First and Second Respondents are required to perform their constitutional obligations diligently and without delay. This is indeed so. In the affidavit of Const. Bebula, he points out that Mr Matiwane undertook to inform him once the civil proceedings had been finalized so that the docket could again be presented to Mr Matyaza for a decision on the merits. This arrangement partly explains the resulting delay but does not, *per se*, exonerate the police from any failure to have ensured that the suspension of the investigations did not last for an unreasonable length of time. The duty to investigate the alleged crime did not fall away when the docket was filed. The police remained under an obligation to have monitored progress in the civil proceedings and to have continued with their investigations in the event this was justified. Once criminal charges had been laid, the onus lay with the police rather the Applicant to take further steps.

[44.] Notwithstanding, counsel for the Respondents argued that the subject of the present matter is a complaint about police inefficiency. If the Applicant had been dissatisfied with the exercise and performance of the powers and functions of the Respondents and their officials, then the correct approach would have been to have reported the matter to the provincial executive, as envisaged under sub-sections 206(5) and (6) of the Constitution.

[45.] The court agrees with this. In terms of sub-section 206(3), each province is entitled, *inter alia*, to monitor police conduct and to oversee the effectiveness and efficiency of the police service. For purposes of performing the above functions, sub-section 206(5) provides that a province may investigate any complaints of police inefficiency and make recommendations to the Cabinet member responsible for policing. On receipt of a complaint lodged by a provincial executive, sub-section 206(6) states that an independent police complaints body, established by national legislation, must investigate any misconduct. The Independent Police Investigative Directorate Act 1 of 2011 was promulgated to give effect to sub-section 206(6) by means of the establishment of the IPID and the assigning of functions to it at both national and provincial levels.

[46.] There is no evidence that the Applicant made any attempt to avail itself of the remedies created in terms of sub-section 206(5) and (6) of the Constitution after its members had laid criminal charges. The Respondents' counsel has intimated that the Applicant was required to have exhausted these before approaching the court. The argument is based on the common law principle to that effect, subsequently reinforced by sub-section 7(2)(a) of PAJA, which prevents a court from reviewing an administrative action under the statute in question until an internal remedy has first been exhausted.¹⁴ The immediate flaw in such argument, for purposes of the present matter, is that this court has already found that the conduct that forms the subject of the dispute does not qualify as administrative action in terms of PAJA. Accordingly, any direct reliance on sub-section 7(2)(a) would be misplaced.

¹⁴ In exceptional circumstances, a court may exempt a person from the obligation to exhaust an internal remedy where the court deems it to be in the interests of justice. See sub-section 7(2)(c).

[47.] In *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as amicus curiae)* [2009] JOL 24131 (CC), the Constitutional Court held, at [35], that:

[i]Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

[48.] Without the Applicant's having brought a complaint about any delay in the investigations to the attention of the provincial executive, any judicial pronouncement on the matter would be premature. Moreover, it would be tantamount to usurping executive powers and functions. In relation to the issue listed as (d.), above, the court cannot make a finding in respect of the lawfulness of any alleged delay.

Directions to carry out thorough investigations and to inform Applicant

[49.] The penultimate issue, (e.), concerns the authority of the court to direct the Respondents to carry out thorough investigations and to inform the Applicant on progress and the outcome of such investigations within 30 days. This is closely related to the previous issue and raises questions pertaining to the doctrine of the separation of powers. Underlying this is the concept of deference, in respect of which the learned author, Cora Hoexter, commented as follows:

... the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.¹⁵

¹⁵ Hoexter C 'The Future of Judicial Review in South African Administrative Law' *SALJ* (2000) 117(3), 501-502.

[50.] The Constitutional Court has preferred to refer to this as the notion of respect, where it remarked in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), at para 48, that:

[a] Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field... A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.

[51.] In other words, a court must be slow to intervene in the exercise and performance of powers and functions by the police in relation to the investigation of crime, especially where the officials involved possess the experience and expertise to make a better decision than a court on how to conduct such an investigation.

[52.] To the extent that the Applicant is not satisfied that the First and Second Respondents and their officials have carried out a sufficiently thorough investigation, the remedies under sub-section 206(5) and (6) of the Constitution, read with the Independent Police Investigative Directorate Act 1 of 2011, must first be exhausted. Moreover, given the particular facts of this matter, it is not for the court to impose a deadline by which the investigation is to be completed. The court is required to respect the approach adopted by the Second Respondent and its officials to await the finalization of the civil proceedings before taking any further steps with regard to criminal investigations.

[53.] Nevertheless, the Applicant remains entitled to communication about progress made in the investigation of the alleged crime to which the charges pertain. The police cannot simply ignore the Applicant and refuse to deal with any reasonable queries made. To that effect, the Applicant may insist on the provision of proper information and insofar as this is not forthcoming the Applicant may utilize the remedies already discussed. It is incumbent

upon the Applicant to demonstrate that it has pursued such remedies before seeking relief of the nature that informs the issue listed as (e.), above.

Legal costs

[54.] The only remaining issue, (f.), concerns liability for costs. The court cannot provide the relief sought by the Applicant. The First Respondent has been substantially successful in its opposition to the application. Accordingly, there is no reason to depart from the firmly established principle that costs must follow the result.

Order

[55.] In the circumstances, the following order is made:

(a.) the application is dismissed; and

(b.) the Applicant is ordered to pay the First Respondent's costs.

JGA Laing

Acting Judge of the High Court

Appearances

For the Applicant: Mr Aron Zono, AS Zono & Associates, Suite 153, 1st Floor, ECDC Building, Mthatha

For the First Respondent: Mr Thokozile Madyibi, Mvuzo Notyesi Inc, 2nd Floor, TH Madala Chambers, 14 Durham Street, Mthatha