

SOUTH AFRICA / JUDGMENT

Botha and Others v Eskom Holdings SOC Ltd; Van Zyl and Others v Eskom Holdings SOC Ltd (3878/2021) [2023] ZAFSHC 45; 2024 (2) SA 322 (FB) (15 February 2023)

[2023] ZAFSHC 45

COURT

Free State High Court, Bloemfontein

BEFORE

P. J. Loubser

CASE / FILE NUMBER

3878/2021

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FLYNOTES:

NOTICE
TO ORGANS OF STATE AND ESKOM
CIVIL
PROCEDURE – Organs of state – Notice – Whether
notice required for Eskom as an organ of State –
Not a
functionary or institution exercising a power or performing a
function in terms of the Constitution – Not an
organ to
which Act applies – Plaintiffs not required to have given
notice – Institution of Legal Proceedings Against Certain
Organs of State Act 40 of 2002, s 3(1).
IN
THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN
Case
number: 3878/2021

Reportable:

YES/NO
Of
Interest to other Judges: YES/NO
Circulate
to Magistrates: YES/NO
In

the matter between:

LOUIS
JOHANNES
BOTH A
1st Plaintiff
HENDRIK
FRANCOIS
NAUDE
2nd Plaintiff
WESDAN
BOERDERYE (PTY)
LTD
3rd Plaintiff
GOUEVELD
BOERDERY (PTY)
LTD
4th Plaintiff
CHRISTOFFEL
PETRUS SCHEEPERS
5th Plaintiff
And
ESKOM
HOLDINGS SOC
LTD
Defendant
Case
number: 1019/2022, 1020/2022, 1021/2022, 1022/2022, 1023/2022,
1024/2022, 1025/2022, 1026/2022, 1027/2022, 1028/2022, 1029/2022,
1030/2022, 1031/2022, 1032/2022, 1033/2022, 1034/2022 & 1035/2022
M.
VAN
ZYL 1st
Plaintiff
T.
JANSE VAN
RENSBURG 2nd
Plaintiff
LENA HOENDER BOERDERY
(EDMS) BPK 3rd
Plaintiff
C.
A.
BOSHOFF 4th
Plaintiff
L.
M.
SWART 5th
Plaintiff
EARLY
LIGHT TRADING 130 (EDMS) BPK 6th
Plaintiff
P.

H.
FERREIRA 7th
Plaintiff
THALWI
BOERDERY
BPK 8th
Plaintiff
P.
J.
MEYER 9th
Plaintiff
PRINSTO
INVESTMENTS
BK 10th
Plaintiff
DIE
HUMAN
TRUST 11th
Plaintiff
J.
A.
BARNARD 12th
Plaintiff
WHITFIELD
WEGE BOERDERY (EDMS) BPK 13th
Plaintiff
N.
VAN
JAARSVELDT 14th
Plaintiff
DIABLO
TRADING 221 (EDMS) BPK 15th
Plaintiff
H.
J.
HUMAN
16th Plaintiff
R.
VAN
BILJON 17th
Plaintiff
ESKOM
HOLDINGS SOC
LTD Defendant
HEARD
ON: 15 NOVEMBER 2022

JUDGEMENT

BY: LOUBSER, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 15 FEBRUARY 2023. The date and time for hand-down is deemed to be 15 FEBRUARY 2023 at 12:00

[1] The crisp question to be decided in the actions instituted under all the above case numbers is whether the defendant ("Eskom") enjoys the notice protection afforded by section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act>[1] ("the Act"). This section stipulates, inter alia, that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the claimant has given

the organ of state in question notice in writing, within six (6) months from the date on which the debt/claim became due, of his or her intention to institute the legal proceedings in question.

[2] The plaintiffs in all the cases instituted action against Eskom for damages they suffered on their farms in fires allegedly caused by the negligence of Eskom. The action under case number 3878/2021 relates to a fire in the Heilbron district during September 2018, and the actions under case number 1019/2022 to 1035/2022 relate to a fire in the district of Lindley during August 2020. In all these cases Eskom raised a special plea based on the fact that the plaintiffs had failed to give it the required notice in terms of section 3(1) of the Act. It is common cause between the parties that the required notice was not given by any of the plaintiffs. All the plaintiffs subsequently filed a replication to the effect that the provisions of the Act do not apply to Eskom, and that they were therefore not required to give the notice.

[3] It is also common cause between the parties that Eskom is an organ of State. On behalf of the plaintiffs, however, it is contended that Eskom is not one of those organs of state to which the Act applies. Since the special plea raised by Eskom relate to all the plaintiffs, and since the replication filed by all the plaintiffs is the same, the parties agreed to the consolidation of all the actions for purposes of the adjudication of the special plea raised. They agreed

that the adjudication of the special plea should be dealt with first, and that all other issues between the parties should stand over for later determination.

[4] Insofar as it may be necessary to make an order in terms of Uniform Rule 33(4) accordingly, such an order is herewith made.

[5] Now the question is simply whether the provisions of the Act do apply to Eskom or not. I was unable to find any direct authority on this point, and neither could any of the counsel appearing at the hearing of the special plea refer me to any such authority. Consequently, the Court will have to revert to the provisions of the Act and of the Constitution to determine the question.

[6] As a starting point, it is clear that the Act does not apply to all organs of state, but only to certain organs of state. This is apparent from the name of the Act and also from the preamble to the Act. The opening paragraph of the preamble, for instance, reads as follows: “To regulate the prescription and to harmonise 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 the recovery of debt; to repeal or amend certain laws, and to provide for matters connected therewith.”

[7] The preamble then continues to recognise the position relating to certain existing laws, and I quote the following relevant paragraphs: “Recognising that certain provisions of existing laws provide for different notice periods for the institution of legal proceedings against certain organs of state in respect of the recovery of debts.”

“And recognising the need to harmonise and create uniformity in respect of the provisions of existing laws which provide for different notice periods for the institution of legal proceedings against certain organs of state for the recovery of a debt, by substituting those notice periods with a uniform notice period which will apply in respect of the institution of legal proceedings against certain

organs of state for the recovery of a debt.”

“And recognising the need to provide for transitional arrangements to ensure a smooth transition between the existing statutory provisions

regulating notice periods for the institution of legal proceedings against certain organs of state in respect of the recovery of debts and the periods of prescription of such debts, and the provisions of this Act.”

[8] In *Madinda v Minister of Safety and Security*[2] the Supreme Court of Appeal had the following to say about the purpose and the ambit of the Act (per Heher JA with Navsa and Mthiyane JJA concurring): “The Act is an omnibus statute which as the preamble states is intended ‘to regulate the prescription and harmonise the periods of prescription of debts for which certain organs of state are liable... Thus, it brings together and rationalises under one statutory umbrella provisions which were previously scattered through many statutes. (These are identified in the schedule of laws amended and repealed.)”[3]

[9] Altogether fourteen statutory provisions of different Acts are listed in the schedule to the Act to which Heher JA referred. Interestingly enough, none of the statutory provisions and Acts in the schedule applied to Eskom at all. In addition, and as far as could be determined, Eskom does not fall under those entities generally that has had the benefit of a statutory notice provision before the coming of the Act. In my view, this alone leaves the strong impression that the Act was not designed to include Eskom as one of those certain organs of state to which its provisions apply.

- [10] The enquiry does not end there, however. This is so because the term “organ of state” is defined in section 1(1) of the Act. It is therefore also necessary to consider this definition in order to determine whether Eskom in terms thereof perhaps qualifies as one of those organs of state to which the Act applies. In terms of section 1(1), “organ of state” means –
- (a) any national or provincial department
 - (b) a municipality contemplated in section 151 of the Constitution
 - (c) any functionary or institution exercising a power or performing a function in terms of the Constitution, or a provincial constitution referred to in section 142 of the Constitution
 - (d) the South African Maritime Safety Authority established by section 2 of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998)
 - (e) The South African National Roads Agency Limited contemplated in section 3 of The South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998)
 - (f) National Ports Authority Limited, contemplated in section 4 of the National Ports Act, 2005, and any entity deemed to be the National Ports Authority in terms of section 3 of the Act.
 - (g) any person for whose debt an organ or state contemplated in paragraph
 - (a) to (f) is liable.
- [11] The only definition that can conceivably apply to Eskom, is the one in paragraph (c). Eskom is certainly not a national or a provincial department as referred to in paragraph (b), although it is a state-owned entity. But could it meet the definition of a “functionary or institution exercising a power or performing a function in terms of the Constitution”, as set out in paragraph (c)?
- [12] Mr Mullins, appearing for the applicants, submitted that Eskom is not a functionary or institution exercising a power or performing a function in terms of the Constitution. To qualify as such, it had to be referred to in the Constitution either by name or by function, which did not happen, he submitted. He pointed out that Eskom performs its functions in terms of the now repealed Eskom Act 40 of 1987, and in terms of that Act’s successor, the Eskom Conversion Act 13 of 2001, and to some extent, in terms of the Electricity Regulation Act 4 of 2007. Eskom is also not referred to in the Constitution by name.
- [13] While dealing with the Constitution, it is apposite to refer to the definition of an organ of state as it is defined in section 239(b)(i) and (ii). In terms of this subsection in the Constitution, “organ of state” means.
- “(b) any other functionary or institution*
- (i) exercising a power or performing a function in terms of the Constitution or provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation...”

[14] From this Constitutional definition it is clear that the definition of an organ of state in the Act is narrower than the definition in section 239 of the Constitution. The material difference between the two definitions is that the definition in the Constitution includes a functionary or institution that exercises a public power or performs a public function in terms of any legislation. The definition in the Act does not go that far.[4] For the rest, the definition in the Act as contained in clauses (a),

(b) and (c) is essentially the same as that set out in the

Constitution. As already pointed out, an organ of state is defined in the Act (section 1(1)(c) as any functionary or institution exercising a power or performing a function in terms of the Constitution.

[15] While Eskom may not be exercising a power or performing a function in terms of the Constitution, it certainly does so “in terms of any legislation”. That is why Eskom is no doubt an organ of state in terms of that Constitution. At the same time, it is obvious that Eskom is not an organ of state in terms of the Act, because the words “in terms of any legislation” do not appear in the Act’s narrower definition.

[16] In this respect the remarks of Olivier J in *Haigh v Transnet Ltd*[5] are informative. He had the following to say:

In paragraph [23]: “In my view the legislature, in enacting the definition of an “organ of state” in the Legal Proceedings Act, quite clearly chose to limit the group of functionaries and institutions to which that Act would apply, by not including those that performed their functions and exercised their powers in terms of legislation other than the Constitution or a provincial constitution... It must be kept in mind that the Legal Proceedings Act came into being long after the proclamation and commencement of the Constitution and the legislature must be deemed to have been aware of the wider definition of the term “organ of state” in the Constitution when it enacted the Legal Proceedings Act”

In paragraph [26]: “When the legislature provided for the establishment of the National Ports Authority Limited and for its inclusion in the definition of the term “organ of state” in the Legal Proceedings Act ... the legislature ... had a golden opportunity to also include Transnet into that definition, had it wished to do so... Under these circumstances it is completely inconceivable that the legislature would ... have intentionally overlooked Transnet Limited as a company which should also be included within the definition of “organ of state” in the Legal Proceedings Act.”

In paragraph [30]: “A requirement of notice like that contained in the Legal Proceedings Act limits the fundamental right of access to courts and, insofar as the provisions of the Act may be open for interpretation, it should be interpreted to avoid such effect.”

- [17] I am in full agreement with those sentiments expressed by Olivier J. They are, broadly speaking, also in line with what Lever AJ found in the Nicor case[6] referred to earlier. In the present matter, Eskom is equally not listed in the Act as one of the entities to which the Act applies.
- [18] Mr Snyman, appearing for the Defendant, submitted that Eskom is an organ of state within the meaning of paragraph (a) and (c) of the definition of an organ of state in the Act by reason of the fact that it has to fulfil a task or a purpose of the Constitution, namely the provisions of bulk electricity on the national grid. He relied heavily on the unreported judgment of this court in Pegma Thirteen Investments (Pty) Ltd v Free State Development Corporation[7] where Rampai J found that the Free State Development Corporation (FDC) was an organ of state within the meaning of the mentioned
- paragraph (a) and (c) of the Act. In that case, the plaintiff also contained, as in the present matter, that the FDC was not an organ of state within the meaning of the Act, since it did not exercise a power or perform a function in terms of the Constitution or a provincial constitution.”
- [19] Mr Snyman further contended that this Court is bound by the rules of stare decisis to follow the conclusion reached in the Pegma-case, since it cannot be said that Rampai J was clearly, plainly or palpably wrong in his reasoning.
- [20] In his judgment, Rampai J mentioned that the Free State Provincial Government is the sole shareholder of all the shares of the FDC. The MEC responsible for the provincial Department of Finance effectively controls the FDC, he further pointed out. In such circumstances, he found that the FDC is an extension of the provincial Department of Finance, which brings it within the ambit of paragraph (a) of the definition of an organ of state in section 1(1) of the Act.
- [21] In this respect, the Pegma matter is clearly distinguishable. There is no indication in the present matter that Eskom is controlled by any national or provincial department and that it is therefore an extension of such a department. It is an independent entity created by the legislation referred to earlier. Although it appears as if the finding of Rampai J on this point was the primary ratio for his conclusion that the FDC was an organ of state within the meaning of the Act, he went further to find that this was also the position as far as paragraph (c) is concerned.
- [22] On the facts and on the evidence before him, Rampai J concluded that the FDC has been performing public functions in terms of the national Constitution. “By virtue of the obvious public functions the corporation performs for the general population of the province, I am inclined to find that the defendant was indeed an institution as contemplated in the second segment, in other words, paragraph (c) of the definition,” he found.

- [23] At the same time, Rampai J acknowledged that the statutory definition of “organ of state” (in the Act) is more restrictive than the constitutional definition. On this point he then remarked that “However, that does not necessarily demonstrate that the lawmaker intended to restrict the constitutional provision by way of a statutory provision”.
- [24] In my view, Rampai J did not make a sufficient distinction between the concept of an organ of state generally, as defined in the Constitution, and an organ of state as defined in the Act. In the present matter Eskom is indeed an organ of state in terms of section 239(b)(ii) of the Constitution because it performs a public function in terms of “any legislation”. The Act, on the other hand, requires it to perform its functions in terms of the Constitution. While Eskom is under a Constitutional obligation to provide electricity for the economic and social wellbeing of people, it does not perform its functions in terms of the Constitution, because the Constitution does not refer to Eskom and it does not provide for its existence. This is done in terms of other legislation. For instance, the Judicial Service Commission is a functionary or institution in terms of the Constitution because it owes its composition to section 178(1) of the Constitution.[8]
- [25] In the premises, I am not persuaded that Eskom qualifies under paragraph (c) of the definition of an organ of state in section 1(1) of the Act. As a result, it was not necessary for the plaintiffs in the present matter to give the required notice in terms of section 3 of Act 40 of 2002.
- [26] The following order is made:
1. The special pleas are dismissed.
 2. The defendant is ordered to pay the plaintiffs’ costs in the various action in relation to the special pleas, inclusive of the costs of the plaintiffs employing senior counsel.

P. J. LOUBSER, J

For the Plaintiffs: Adv. J. F. Mullins SC Instructed by: Honey & Partners Bloemfontein
For the Defendant: Adv. C. Snyman Instructed by: Phatshoane Henney Attorneys Bloemfontein

- [1] Act 40 of 2002
- [2] 2008 (4) SA 312 (SCA)
- [3] Par 7 of the judgement
- [4] See Nicor IT Consulting (Pty) Ltd v North West Housing Corporation 2010(3) SA 90 (NWM) par 7
- [5] 2012(1) SA 623 (NCK)
- [6] Supra
- [7] Case number 2681/2006 dated 18 September 2008

[8] Cape Bar Council v Judicial Service Commission 2012 (4) BCLR 406 (WCC) par 15, 17

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