

SOUTH AFRICA / JUDGMENT

Johannesburg Water (Soc) Ltd v Dark Fibre Africa (Pty) Ltd (A2023/081149) [2025] ZAGPJHC 459 (14 May 2025)

[2025] ZAGPJHC 459

COURT

South Gauteng High Court, Johannesburg

BEFORE

MABESELE, WILSON

CASE / FILE NUMBER

A2023/081149

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FLYNOTES:

CIVIL

PROCEDURE – Organs of state – Johannesburg

Water –

Institution

performing constitutional functions – Sole purpose aligns
with Act's intent to regulate liabilities

incurred in

fulfilling constitutional mandates – Appellant is an organ
of state for purposes of Act – Provision

of water as a basic

municipal service – Magistrate's dismissal of special

plea was incorrect – Appeal upheld

– Institution of

Legal Proceedings against Certain Organs of State Act 40 of 2002,
s 3.

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, JOHANNESBURG)

Case

no: A2023-081149

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED.

DATE: 14 May 2025

In the matter between:

JOHANNESBURG
WATER (SOC) LTD
Appellant
and
DARK
FIBRE AFRICA (PTY) LTD
Respondent
CORAM: MABESELE J AND
WILSON J
Summary

For the purposes of the
Institution of Legal Proceedings Against Certain Organs of State Act
40 of 2002, an institution performs a function “in terms of the
Constitution” whenever its exclusive or dominant purpose is to
carry out one of more of the State’s constitutional functions.
Such an institution is an “organ of state” under
the Act.
It makes no difference that the institution does not derive its
powers directly from the Constitution. The contrary decisions
in
Nicor IT Consulting (Pty) Ltd v North West Housing Corporation
2010 (3) SA 90 (NW) and Haigh v Transnet Ltd 2012 (1) SA 623
(NCK) are incorrect.

JUDGMENT

WILSON J (with whom MABESELE J agrees):

1 The central question in this case is whether the appellant, Johannesburg Water, is to be treated as an “organ of state” within the meaning given to that term in the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (“the Legal Proceedings Act”). In this judgment, we conclude that Johannesburg Water is an organ of state so defined, because it is an institution “performing a function in terms of the Constitution” under section 1 of the Legal Proceedings Act.

The nature of that function is the provision of water as a basic municipal service under sections 27 (1) (b) and 152 (1) (b) of the Constitution, 1996. Johannesburg Water was set up in terms of the Municipal Systems Act 32 of 2000 (“the Systems Act”) to perform that function, and only that function, for the residents of Johannesburg. The mere fact that its activities are directly

regulated by the Systems Act, the Companies Act 71 of 2008 and a contract with the City of Johannesburg, rather than by the Constitution itself, makes no difference to the reality that it performs one of the State’s constitutional functions, and is accordingly an organ of state under the Legal Proceedings Act.

The dispute

2 The respondent, Dark Fibre, owns and controls a network of underground fibreoptic cables. It sells or leases the use of those cables to other entities who require means of data transfer, whether for telecommunications, access to the internet, or otherwise. Dark

Fibre says that Johannesburg Water, or contractors working for it, negligently damaged one of Dark Fibre's cables while performing

work on an underground water pipe in Greenside, Johannesburg. Dark Fibre instituted proceedings in the Johannesburg Regional Court

claiming just over R320 000 for what it said was the reasonable cost of repairing the damage caused.

3 Section 3 of the Legal Proceedings Act obliges anyone claiming a "debt" against an organ of state to deliver, within six months of the debt falling due, a notice setting out the facts giving rise to the debt and the particulars of the debt insofar

as these are known to the claimant. In defending Dark Fibre's action, Johannesburg Water contended that Dark Fibre claimed a "debt" as defined in the Legal Proceedings Act, and raised the special plea that Dark Fibre had failed to give Johannesburg Water the notice section 3 requires.

4 The failure to deliver a section 3 notice can be condoned, but Dark Fibre did not seek condonation. It instead argued that Johannesburg Water is not an organ of state within the meaning of the Legal Proceedings Act, and was for that reason not entitled to notice under section 3. The Magistrate below agreed with Dark Fibre and dismissed the special plea. Johannesburg Water now appeals.

The appeal

5 The Magistrate's reasons are not easy to discern, but it seems from his judgment *ex tempore* that the Magistrate took the view that, because Johannesburg Water is not a national or provincial department of state, it cannot be regarded as an organ of state for the purposes of the Legal Proceedings Act. When given an opportunity to supplement his reasons under Rule 51 of the Magistrates' Court Rules, however, it appears to have occurred to the Magistrate that what matters under the Legal Proceedings Act is the nature of the function an institution performs, rather than the identity or affiliation of the institution that performs it. This is consistent with section 1 of the Legal Proceedings Act, which sets out that an organ of state includes any functionary or institution which exercises "a power or perform[s] a function in terms of the Constitution" – whether it is housed in a state department or not.

6 Nonetheless, relying on the decision in *Haigh v Transnet Ltd* 2012 (1) SA 623 (NCK) ("Haigh"), the Magistrate appears to have considered that Johannesburg Water could not be an organ of state under the Legal Proceedings Act because, though it performs a constitutional function, it does not do so "in terms of the Constitution". In other words, the Magistrate appears to have reasoned that Johannesburg Water is not an organ of state because it does not derive its powers

or functions directly from the Constitution. The Magistrate does not spell this theory out in his written reasons. However, it seems to me that this is the approach that in fact underpins those reasons.

Johannesburg Water is an organ of state under the Act

7 The approach I have imputed to the Magistrate below is ultimately derived from the decision in *Nicor IT Consulting (Pty) Ltd v North West Housing Corporation* 2010 (3) SA 90 (NW) (“*Nicor*”), which the decision in *Haigh* followed. At paragraphs 7 to 14 of *Nicor*, Lever AJ reasons that an institution does not “exercise a power or perform a function in terms of the Constitution” unless it derives its powers or functions directly from the Constitution. On the reasoning in *Nicor* and *Haigh*, Johannesburg Water is not an organ of state under the Legal Proceedings Act because it is neither mentioned in, nor derives its powers or functions directly from, the Constitution. The fact that it indisputably performs a Constitutional function, by providing water to the people of Johannesburg, is of no moment.

8 It appears to have weighed with the court in *Nicor* that to hold otherwise might lead to absurd results: “[i]f, for example, a non-government organisation (NGO) had as its main

objective the raising of funds for the provision of low-cost housing and in fact provides such housing to the indigent in South Africa . . . [it] would be an 'organ of State' and it would be entitled to notice . . . within six months, as contemplated in s 3 of the Act” (*Nicor* paragraph 12).

9 These misgivings notwithstanding, it seems plain to me that *Nicor* and *Haigh* were wrongly decided, at least on the point in issue. What matters is not the proximity between the powers the institution exercises and the constitutional text, but whether the exclusive or dominant purpose of the institution is to exercise or carry out one or more of the State’s constitutional powers or functions.

10 This approach to the question, it seems to me, caters fully for the concerns expressed in *Nicor*. It properly includes institutions, such as Johannesburg Water, which are set up by the State and held at arms-length, but whose very purpose is to perform a function under the Constitution. It nonetheless excludes contractors who may happen to perform constitutional functions on the State’s behalf without that being their main purpose, or non-governmental organisations whose main purpose is to give effect to a constitutional entitlement as an act of charity, rather than because the non-governmental organisation is obliged by the Constitution to do so.

11 The need to draw this distinction is central to the purposes of the Legal Proceedings Act. The Act seeks to regulate the process for collecting debts owed by organs of state. One feature of the process the Act sets up is the prelitigation notice procedure to

which Johannesburg Water says it is entitled in this case. The idea is that the State, and the various institutions performing

constitutional functions on its behalf, will likely incur substantial liabilities while exercising constitutional powers or performing

constitutional functions. Those liabilities are ultimately underwritten by the State as a whole. A process is required to allow

the State as a whole to keep track of its liabilities. Early notice of a creditor's claim, which is what section 3 provides for, is part of that process.

12 Johannesburg Water is a case in point. Johannesburg Water derives none of its powers or functions directly from the Constitution. Nor does it describe itself as an organ of state. It is nonetheless a municipal entity established as a private company in terms of section 86B of the Municipal Systems Act. It is wholly owned and controlled by the City of Johannesburg (see 86G of the

Municipal Systems Act). It is subject to the Public Finance Management Act 1 of 1999. It must restrict its activities to those that the City of Johannesburg would otherwise legitimately undertake, and it has no competence to undertake any others (see section 86D (1)

(b) of the Municipal Systems Act). In other words, Johannesburg Water's only purpose is to provide water to the residents of the City of Johannesburg. The delict Dark Fibre alleges in the court below was committed in the course of doing just that.

13 It is, in my view, untenable to suggest that Johannesburg Water is not an organ of state simply because it does not derive its powers and functions directly from the Constitution. The City in particular, and the State as a whole, clearly have an interest in keeping track of Johannesburg Water's liabilities in the manner that the Legal Proceedings Act prescribes. This is because Johannesburg Water's assets and liabilities are the City's assets and liabilities. For that reason, Johannesburg Water's liabilities are ultimately underwritten by the State itself.

14 It follows that Johannesburg Water is an organ of state for the purposes of the Legal Proceedings Act because it is an institution performing a function in terms of the Constitution: the provision of water as a basic municipal service under sections 27 (1) (b) and 152 (1) (b) of the Constitution.

Relief

15 Accordingly, the court below should have upheld the special plea. Mr. van der Merwe, who appeared for Johannesburg Water before us, conceded that this does not spell the end of Dark Fibre's action. It means only that Dark Fibre must now ask the court below to condone its failure to give the notice section 3 of the Legal Proceedings Act requires. The court below will grant that application if good cause has been shown, if Dark Fibre's claim has not prescribed, and if Johannesburg Water was not prejudiced by the failure to give notice. On the facts of this case, these seem to me to be slight hurdles indeed.

16 Ultimately, though, that is a question for the court below. Dark Fibre's action should be stayed until the court has had an opportunity to answer it.

17 For all these reasons –

17.1 The appeal is upheld with costs, including the costs of counsel, which may be taxed on the “C” scale.

17.2 The order of the court below dismissing the appellant’s second special plea is set aside and substituted with the following order –

“ 1. *The special plea is upheld.*

2. The action is stayed pending the condonation of the plaintiff’s failure to give the defendant notice under section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.
3. The plaintiff is to pay the costs occasioned by arguing the second special plea.”

17.3 The matter is remitted to the Johannesburg Regional Court for further proceedings consistent with this judgment.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 14 May 2025.

HEARD ON:

24 April 2025

DECIDED ON:

14 May 2025

For the Appellant:

C van der Merwe

Instructed by Moodie & Robertson

For the Respondent: R Ellis

(Heads of argument drawn by AJ Schoeman)

Instructed by Kruse Attorneys Inc

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