IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: A97/2023

In the matter between:

ESKOM HOLDINGS SOC LTD	Appellant
and	
LOUIS JOHANNES BOTHA	1st Respondent
HENDRIK FRANCOIS NAUDE	2nd Respondent
WESDAN BOERDERY (PTY) LTD	3rd Respondent
GOUVELD BOERDERY (PTY) LTD	4th Respondent
CHRISTOFFEL PETRUS SCHEEPERS	5th Respondent

JUDGMENT BY: MHLAMBI, J

CORAM: MHLAMBI, ADPJ *et* DAFFUE, J et MGUDLWA, AJ

HEARD ON: 25 March 2024

DELIVERED ON: 3 July 2024

[1] This is an application against the decision of the court *a quo* (Loubser, J) in which the appellant's special pleas were dismissed with costs. The crisp

question for determination was whether the appellant (Eskom) enjoyed the notice protection afforded by section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act ("the Act").[1] Having considered certain legislation and authorities, the court *a quo* was not satisfied that the appellant qualified as an organ of state as defined in section 1(1)(c) of the Act, and concluded that the respondents were not required to give notice in terms of section 3 of that Act.

[2] The court *a quo* also found that the appellant was an organ of state in terms of the Constitution as it was clear that the definition in the Constitution was wider than the narrower definition in the Act. Section 1(1) of the Act defines an organ of state as:

"(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 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 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 that Act;

(g) any person for whose debt an organ of state contemplated in paragraphs (a) to (f) is liable;"

[1] 40 of 2002.

[3] Section 239 of the Constitution[2] defines an organ of state as:

"(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution—

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;"

[4] The appeal was noted against the whole of the judgment and orders granted in favour of the respondents on 15 February 2023 and was directed against the following findings of fact or law:

1. The finding that the appellant did not fall under those entities that had the benefit of a statutory notice provision before the coming into operation of the Act, leaving a strong impression that the Act was not designed to include Eskom as one of those certain organs of State to which its provisions applied.

2. Paragraph 1(1)(c) of the Act, which defines an organ of state, was the only definition that could conceivably apply to the appellant.

3. The appellant was not exercising power or performing a function in terms of the Constitution but did so in terms of other legislation.

4. The appellant did not qualify as an organ of state in terms of paragraph 1(1)(a) of the Act.

5. The judgment of this Division in *Pegma Thirteen Investments (Pty) Ltd v Free State Development Corporation*[3] was distinguishable from the present matter as there was no indication that Eskom was controlled by any National or Provincial Department and that it was an extension of such a department. It was but an independent entity created by legislation.

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[2] The Constitution of the Republic of South Africa Act 108 of 1996.
[3] FB Case number 2681/2006 delivered on 18 September 2008.

6. The further grounds of appeal were that the court *a quo* erred in not finding that:

6.1 the appellant was an organ of state in terms of paragraph 1(1)(g) of the Act as the appellant's entire share capital was held by the State and the National Department of Public Enterprises, alternatively, the National Treasury;

6.2 that the cases of *Haigh v Transnet Ltd*[4] *and Nicor IT Consulting (Pty) Ltd v North West Housing Corporation*[5] were distinguishable from the present matter.

[5] The appellant contended that:

5.1 the clear intention of the legislature in section (1) of the Act, was to give a far wider meaning to the definition of an organ of state and not limit its meaning to those entities referred to and mentioned in the Schedule of Laws amended and repealed by section 2(1) of the Act. Consequently, paragraphs (a), (c) and (g) of the Act applied to the appellant;

5.2 the Eskom Conversion Act, 13 of 2001 only deals with converting the appellant into a public company with a share capital and does not define or set out the appellant's functions, powers, or operations. It follows that the appellant is a functionary or institution exercising power or performing a function in terms of the Constitution of the Republic of South Africa, 1996. It derives directly or indirectly, its powers from the Constitution. The appellant relied on *Eskom Holdings SOC Ltd v Letsemeng Local Municipality and others*[6] as authority that Eskom was an organ of state in the National sphere of government and was bound by the Constitution, which contemplates the generation and transmission of electricity as a national competence;

[4] 2012 (1) SA 2623 (NCK)
[5] 2010 (3) SA 90 (NWM).
[6] 2022 JDR 0433 (SCA).

5.3 relying on *Eskom*[7] and *Pegma*[8], the appellant contended that it was a National Department. Its reasoning was based on the finding in *Pegma* that the Free State Development Corporation (FDC) was an extension of the Provincial Department of Finance under whose control it effectively resorted and which brought it within the ambit of paragraph (a) of the definition of an organ of state in section 1(1) of the Act. Similarly, the appellant was exclusively and effectively controlled by the Minister of Public Enterprises by the provisions of the Eskom Conversion Act,13 of 2011 and the Companies Act, 71 of 2008. The appellant should therefore be viewed as an organ of state within the ambit of section 1(1)(a) of the Act.

[6] The appellant contended in its heads of argument that it, just like the Free State Development Corporation in *Pegma,* was an organ of state within the meaning of section 1(1)(a) and (c) of the Act as it had to fulfil a task or a purpose of the Constitution, and such a task or function did not mean that it could only be performed by an institution established in terms of the Constitution.[9] The court *a quo* was bound by the doctrine of *stare decisis* to follow the decision in *Pegma* on the interpretation of an organ of state as contained in the Act.

[7] It is clear from the notice of appeal and the submissions made that the appellant seeks, in the main, a broader interpretation of the definition of an organ of state as provided in the Act. But this cannot be, as succinctly set out in the judgment of Loubser, J wherein it was stated that the appellant, Eskom, was indeed an organ of state in terms of section 239(b)(ii) of the Constitution. It was exercising a public power and performing a public function “in terms of any legislation.” But it did not exercise its power or perform its functions in terms of the Constitution as stipulated in section 1(1)(c) of the Act. The words “in terms of any legislation” do not appear in the Act’s narrower definition.[10]

[8] *Pegma* failed to distinguish between the concept of an organ of state generally, as defined in the Constitution, and an organ of state as defined in the Act. The

[7] Supra.
[8] Supra.
[9] Para 20 of the appellant’s heads of argument.
[10] Paras 14 & 15 of the judgment.

appellant, though obliged by the Constitution to provide electricity for the economic and social well-being of people, did not perform these functions in terms of the Constitution because the Constitution neither referred to it nor provided for its existence.

[9] The court *a quo* correctly pointed out that the starting point was that the Act did not apply to all organs of state, but only to certain organs of state as aptly set out in the preamble of the Act. Citing *Madinda v Minister of Safety and Security,*[11] the court *a quo* stated that the purpose and the ambit of the Act were to serve as an omnibus statute that was intended to regulate the prescription and harmonise the period of prescription of debts for which certain organs of state were liable. The Act brought together and rationalised under one statutory umbrella provisions previously scattered through many statutes.[12] None of the statutory provisions and Acts referred to in the Schedule to the Act (of the laws amended and repealed) referred to the appellant. The appellant did not have the benefit of a statutory notice provision before the coming into being of the Act.[13]

[10] The Act, as stated in its preamble, sought to harmonise and create uniformity in the provisions of existing laws which provided for different notice periods for the institution of legal proceedings against certain organs of state for the recovery of debt, by substituting those notice periods with a uniform notice period that would apply when legal proceedings were instituted against certain organs of state for the recovery of a debt. It is crystal clear that the Act was intended to apply only to those provisions of the existing laws that provided for different notice periods for litigation against certain organs of state, and not against all organs of state. A few specific entities have been incorporated for notice protection in sections 1(1)(d), (e) and (f). The appellant is not one of them. The Act was not designed to afford the appellant statutory notice protection which it never had before.

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[11] 2008 (4) SA 312 (SCA).
[12] *Ibid* para 7, referred to in para 8 of the court *a quo*'s judgment.
[13] Para 9 of the court *a quo*'s judgment.

[11] In *Natal J*oint *Municipal Pension Fund v Endumeni Municipality*,[14] it was stated that: "*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…The process is objective, not subjective… 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."*

[12] The court in *Pegma,* influenced by *Mittal Steel South Africa LTD (Formerly Iscor LTD v Hlatshwayo*[15] was of the view that the FDC's developmental activities crowned it with the profile of an entity performing a public function as it sought to achieve some collective benefit for the general public. Consequently, the court found that*:" By virtue of the obviously 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.*"[16] *Mittal Steel,*[17] however, was concerned with a body such as that described in subsection *(b)*(ii) of the definition of 'public body' in section 1 of PAIA, one 'exercising a public power or performing a public function in terms of any legislation', which had the attributes

[14] 2012 (4) SA 593 (SCA) at para 18.
[15] 2007(1) SA 66 (SCA).
[16] Para 39 of the judgment.
[17] Supra, para 10.

of a 'public body'. The words are the same as those used in section 239(b)(ii) of the Constitution. The court in *Pegma* applied the standard in section 239(b)(ii) of the Constitution to conclude that the FDC was an organ of state as defined in the Act.

[13] *Pegma* appreciated that the constitutional definition of organ of state was not the same as the statutory definition contained in the Act as the definition of the latter was more restrictive than the former. However, the court concluded, *"that does not necessarily demonstrate that the lawmaker intended to restrict the constitutional provision."* Neither the Court in *Pegma,*[18] nor the appellant referred to the principle set out in *Madinda*.[19]

[14] In *Nicor IT Consulting,*[20] it was made clear that the Act was not intended to apply to all organs of state. The court held that the words "in terms of the Constitution" in section 1(1)(c) of the Act "connote that both the identity of the functionary or institution and the power or function that he, she or it exercises are identified in the Constitution itself."[21] Such power or function should arise from the Constitution itself. The defendant in that case derived its powers and functions from its enabling Act, the North-West Housing Corporation Act, and not in terms of the Constitution. Consequently, the court held that the defendant was not an organ of State as defined in the Act.[22] This case is on all fours with the facts *in casu.*

[15] Loubser J agreed with the views held in *Haigh v Transnet*,[23] that the Legislature, in enacting the definition of organ of state in the Act, clearly chose to limit the group of functionaries and institutions to which the Act would apply, by not including those that performed their functions and exercised their powers other than in terms of the Constitution or a provincial constitution. The Act came into being long after the proclamation and commencement of the Constitution. The legislature must be deemed aware of the wider definition of the term "organ of state" in the Constitution when it enacted the Act.

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[18] *Pegma* was decided after *Madinda*.
[19] Supra.
[20] Supra.
[21] Para 14 of the judgment.
[22] Para 14 of the judgment.
[23] Supra, para 23.

[16] Both these decisions are in line with the decision in *Madinda* and are not distinguishable from the matter at hand. The appellant's reliance on *Eskom Holdings*[24] does not assist the appellant's case in any way whatsoever. It was contended that the appellant is a national department based on the finding in *Eskom Holdings*, read with the finding in *Pegma* that the FDC was an organ of state within the ambit of Section 1(1)(a) of the Act because it was an extension of the provincial Department of Finance under whose control it effectively resorted. It is stated in the court *a quo*'s judgment that it was common cause between the parties that Eskom is an organ of state.[25] *Eskom Holdings* confirms that the appellant is an organ of state bearing constitutional duties, but does not serve as authority that the appellant is performing a function in terms of the Constitution. Rampai J stated in *Pegma* that what was required by section 1(1)(c) of the Act was that the function performed must be a function specified in the Act.[26] The Constitution does not refer to the appellant by name or function.

[17] The court *a quo* found, and correctly so, that the present case was distinguishable from *Pegma* as there was no indication nor evidence at its disposal that the appellant was in the full control of a national or provincial department and was an extension of such department. The appellant performs its functions in terms of the Eskom Conversion Act[27] and the Electricity Regulation Act.[28] Section 1(1)(g) does not apply as, contrary to the appellant's submissions, there is no indication that it does.

[18] In the premises, the reasoning in *Pegma* was wrong in finding that the FDC was an organ of state within the Act's meaning and should not be followed. The appeal should therefore fail.

[19] The costs should follow the event.

[20] I therefore propose the following order:

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[24] Supra.
[25] Para 3 of the judgment.
[26] Para 28 of the judgment.
[27] 13 of 2001.
[28] 4 of 2006.

Order:

1. The appeal is dismissed with costs, including the costs of the appellant's application for leave to appeal and the costs of the respondents' employment of senior counsel.

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MHLAMBI, J

I concur,

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DAFFUE, J

I concur

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MGUDLWA, AJ

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