FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

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

Case No: A72/2022

In the matter between: -

GOLDFIELDS LOGISTICS (PTY) LTD **APPELLANT**

and

MEC: FREE STATE DEPARTMENT OF POLICE,

ROADS AND TRANSPORT **RESPONDENT**

CORAM: MBHELE DJP, VAN ZYL J *et* BOONZAAIER AJ

JUDGMENT BY: BOONZAAIER, AJ

HEARD ON: 2 DECEMBER 2022

DELIVERED ON: 10 FEBRUARY 2023

INTRODUCTION:

[1] This is an appeal to the full bench of this division against a judgment of a single judge of this division, ("the *court a quo* ") on **3 March 2022** where the Appellant`s claim for enrichment was dismissed with costs and the

Respondent’s second Special Plea was upheld. The appeal is with the leave of the *court a quo.*

<u>THE FACTUAL BACKGROUND</u>

[2] The Appellant, instituted action against the Respondent based on its alleged right to be reimbursed for necessary and useful expenses incurred in managing the affairs of the Respondent. The affairs so managed included repairs to a specific provincial road R59 between Bothaville and Parys in the Free State. This road being a public road.

[3] It is common cause that the parties did not enter into any agreement and that the Appellant gave no notice in terms of the **Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002** (“the ILPACOS Act’). The Respondent filed a special plea of prescription under the **Prescription Act 68 of 1969** and non – compliance with the ILPACOS Act. The Respondent however abandoned the special plea of prescription after an amended plea was filed for expenses running from 14 June 2015 to 24 April 2017.

[4] It is the Appellant`s contention that it seeks reimbursement for expenses incurred in having repaired the potholes on the R 59 between Bothaville and Parys being a public road. The claim is sought under the *negotiorum gestio* for the necessary and useful expenses incurred by the Appellant and thus not for “*damages”* as defined in the ILPACOS Act.

[5] The Respondent on the other hand is of the view that the claim is a “*debt”* as defined in the ILPACOS Act hence the Appellant needed to give timeous notice in terms of section 3 of the ILPACOS Act. It was for the court *a quo* to determine whether the necessary expenses under *negotiorum gestio* amount to damages and whether the Appellant has complied with the Section 3 Notice, including the term “*debt”* as defined in the ILPACOS Act.

[6] The Respondent conceded that the merits of the claim were not before the court *a quo* for adjudication and the court *a quo* erred in considering such and dismissing the main claim on the merits.

[7] Adv. Wright on behalf of the Respondent pointed out that the court could have dismissed the Appellant`s claim due to the finding of non- compliance with the prescript of the Act.Such success would render the claim "permanently unenforceable".[1]

[8] The Appellant raised the following issues on appeal, namely:

(a) There was no need for the Appellant to apply for condonation of the failure to give a notice.

(b) The claim for unjust enrichment was not a '*debt'* as defined in s (1) of the ILPACOS Act and/or at least because it was not a claim for damages. The Act is not applicable to the enrichment claim, and the absence of a notice in terms of the ILPACOS Act did not therefore bar the enrichment claim. Its action for unjust enrichment is not a debt as defined in the ILPACOS Act because it does not arise from the damages suffered. This defence therefore has to fail because a claim for enrichment does not fall within the ambit of "*damages"* as defined in the ILPACOS Act. It`s claim for unjust enrichment is not a "*debt* "as defined by the ILPACOS Act because it does not arise from damages suffered.

[9] The Respondent argued that the question is whether compensation for unjust enrichment is damages within the definition of "*debt*" in s 1 of the ILPACOS Act. In this section "debt" is defined as <u>any debt</u> arising from delictual, contractual or other act or omission under any law, for which an organ of the state is liable to pay damages, whether the debt became due before or after the fixed date. (Own emphasis).

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1 Holeni v land and Agricultural Development Bank 2009 (4)SA 437(SCA) at [44]

THE APPLICABLE LEGAL FRAMEWORK:

[10] It is trite that in appeals, the appeal lies against the order and not the reasons therefor.

[11] I find it necessary to refer to the background of Section 3 of the Act:

i) In an attempt to alleviate the harshness of the previous legislative regime, Parliament later opted to enact uniform legislation dealing with legal proceedings against organs of State in general that sought to balance the fundamental rights of the people and the legitimate interests of organs of State. The result was the Legal Proceedings Act.

ii) The long title of the ILPACOS Act provides that its purpose is to regulate the prescription and to harmonize 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.

iii) Section 3 is the heart of the ILPACOS Act. It provides, in s 3(1) for the giving of notice in respect of the institution of legal proceedings against organs of state, unless an organ of state waives its rights. It states:

"'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 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).”

[12] Sections 3(2) and (3) deal with the giving of notice. They state:

‘(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.

(3) 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 wilfully 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.’

[13] A “*debt”* is defined in the Act as any debt arising from any cause of action:

“(a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any-

i) act performed under or in terms of any law; or

ii) omission to do anything which should have been done under or in terms of any law: and

(b) for which an organ of state is liable for payment of damages."

[14] Subsections 3(1) and (2) require that a notice of intended legal proceedings be given to the concerned organ of state by the creditor within six months from the date on which the debt became due. This is a peremptory step before legal proceedings can be instituted.

[15] Before compliance with the requirement of s 3(1) is needed, it must be ascertained whether the claim at hand constitutes a debt in terms of s 1(1). This presupposes that there are claims against organs of state which are not debts as envisaged in s 1(1) of the Act.

[16] In **Thabani Zulu & Co (Pty) Ltd v Minister of Water Affairs and Another** [2], the court held that:

> "Paragraph (*a*) of the definition [of the Act] is widely worded and makes it clear that a debt is any liability whatsoever. It is, however, followed by para (*b*) and the question which arises is how the two paragraphs relate to each other. They can be read either disjunctively or conjunctively. The paragraphs are linked by "and" and not "or". Ordinarily, paragraphs or phrases linked by "and" are read conjunctively and those by "or" disjunctively. Accordingly, although the courts have read "and" to mean "or" and *vice versa* in appropriate circumstances, there must be compelling reasons to change the words used by legislature".

[17] The court in para 12 held that:

> "Using the ordinary meaning of the words in the definition, therefore, the two paragraphs must be read conjunctively. When that is done, para (*b*) qualifies or limits the generality of para (*a*) in two ways. First, it restricts debts to those which constitute a liability to pay damages and, secondly, it restricts debts to those where an organ of state is the debtor. On an ordinary reading of the definition, it boils down to this. A debt is the liability of an organ of state to pay damages, arising from any cause of action".

[18] In the **Zulu** matter supra, what was claimed against the organ of state was

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[2] 2012 (4) SA 91 (KZD) at para 11

arrear rental in terms of a lease agreement. The court held that s 3(1) of the Act was not applicable as arrear rental was non-damages debt, but the claim for arrear rental was one for specific performance.

[19] The Supreme Court of Appeal quoted paras 11 and 12 in the **Zulu** matter with approval in **Vhembe District Municipality v Stewarts & Lloyds Trading (Booysens)(Pty) Ltd (SCA)** (Van Zyl AJA).[3]

> "This means that all the claims arising out of a contract with an organ of state, as long as they are for specific performance and not damages, are not covered by the word 'debt' under s 1(1) of the Act. Consequently, this means that the Act would not be applicable and creditors need not comply with its provisions. I submit that, as soon as a claim for specific performance or non-damages is due, the creditor may immediately proceed with an application to enforce payment or issue summons, without wasting time and costs by complying with the Act, as such compliance would be legally unnecessary."[4]

[20] The Supreme Court of Appeal was recently asked in the matter between **Greater Tzaneen Municipality v Bravospan 252** [5] to consider whether an enrichment claim is considered a 'debt' in terms of the ILPACOS Act.

[21] The Municipality had concluded a Service Level Agreement (SLA) with Bravospan. The latter relied on four alternative causes of action, namely, delict, fraud, constitutional damages and unjust enrichment. On 2 February 2021, the High Court ruled that Bravospan had made out a case against the municipality based on unjust enrichment. The Municipality appealed the decision and raised only two issues on appeal, namely:

a) Bravospan failed to comply with the provisions of s 3(2) of the ILPACOS Act; and

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3 (Unreported case no 397/2013, [26-6-2014])

4 De Rebus Oct 2014:25[2014] DEREBUS190

5 (Unreported case no. 428/2021[2022] ZASCA155(7 November 22), See also Nicor IT Consulting (Pty) Ltd v North West Housing Corporation 2010 (3) SA 90 (NWM) and Director-General, Department of Public Works v Kovacs Investment 289 (Pty) Ltd 2010 (6) SA 646 (GNP) for more.

b) Alternatively, a portion of Bravospan's enrichment claim had been prescribed.

[22] The Supreme Court of Appeal therefore had to consider the aspect of failure to comply with section (3)2 of the ILPACOS Act.

[23] However, during the presentation of the case in the SCA the Municipality conceded that the claim for unjust enrichment was not a "*debt"* as defined in s1(1) of the Act. Therefore, the municipality conceded that the Act was not applicable to the enrichment claim.

[24] Adv. Wright correctly pointed out that the SCA at the end had no need to further consider the issue. She further pointed out that the cases relied on by Appellants in Kovacs supra and Zulu *supra* all considered the definition of "*debt"* within the context of the facts of those specific cases and with reference to the pleaded causes of action.[6] Those courts did not investigate the definition of the word "*damages*".

[25] She further argued that the claim *in casu* does not stem from a contract and is not based on unjustified enrichment. It was argued in the court *a quo* that the claim cannot be for enrichment because the Plaintiff was not impoverished.

[26] She also further submitted that Subparagraph (b) of the definition of *"debt''* seemingly provides for a narrower ambit than other generally accepted definitions of the word.[7]

[27] ***Negotiorum gestio*** is the Latin for "management of business") and is a form of spontaneous voluntary agency in which an intervenor or intermeddler, the *gestor*, acts on behalf and for the benefit of a principal (*dominus negotii*), but without the latter's prior consent. The gestor is only

6 This is evident from the usage of phrases such as "plaintiff`s claim" (**Kovacs)** and " this case" (**Zulu).**

7 Electricity Supply Commission v Stewards and Lloyds of SA 1981(3) SA 340 (AD) at 344 F

entitled to reimbursement for expenses and not for remuneration, the underlying principle being that *negotiorum gestio* is intended as an act of generosity and friendship and not to allow the gestor to profit from his intermeddling. This form of intervention is classified as a quasi-contract and found in civil-law in South Africa.

[28] It originated as a Roman legal principle in which an individual acted on behalf of another, without his asking and without remuneration. It was considered a part of *officium* (duty), for instance, to defend a friend's or neighbour's interests while the friend or neighbour was away.

[29] The principal, or *dominus negotii* (or rarely *dominus negotiorum dominus rei gestae*), is bound to indemnify the gestor for the expenses and liabilities incurred. If the principal fails to do so, there is unjust enrichment, and the gestor then has a claim to bring an action for restitution. In South Africa, multiple restitutionary actions lie for *negotiorum gestio.*[8]

[30] Adv. Benade on behalf of the Appellant referred to **Amler`s Precedents of Pleadings,** [9] where it is stated that the relief claimable by a gestor include the right to be reimbursed for necessary and useful expenses.

[31] The concept of *negotiorum gestio* is known in English legal theory as ‘necessitous intervention’, which is exactly in my mind what the Appellant alleges what happened *in casu.*

CONCLUSION:

[32] It is accepted that prior notification and the need to alert on an intention to sue organs of State is required when the claim is for any debt. This is to prevent an avalanche of claims being instituted without giving the government departments the timeous opportunity to investigate claims. Still

8 Wille`s Principles of SA LAW 9th edition. Juta Cape Town at 1055
9 8th Edition, 2015 at 267

the SCA regards the definition of a "*debt"* as in the ILPACOS Act to exclude claims similar to the one in the current matter. ILPACOS Act is therefore, not applicable herein.

[33] I come to the conclusion that the court a quo erred procedurally when it decided an issue that was not yet before it.

[34] The court *a quo`s* order rejecting the Appellant`s submission with regards to its claim not being a" debt *"*is therefore not sustainable in law. The court *a quo* further erred in finding that the Appellant`s claim constitutes a "*debt "* within the ambit of the ILPACOS Act.

[35] The appeal ought to succeed.

[36] When the court considers costs, the court has a discretion which must be exercised judicially. There is no reason to deviate from the general rule hat costs follow the event.

ORDER:

[36] The following order is made:

1. The appeal is upheld with costs.

2. The order of the *court a quo* is set aside and replaced with the following:

   "The defendant`s second special plea is dismissed, with costs"

A.S. BOONZAAIER, A J

I agree and it so ordered.

N.M MBHELE, DJP

I agree

C.VAN ZYL, J

For the Appellant:	Adv H.J. Benade Chambers Bloemfontein
Instructed by:	Symington & de Kock Attorneys 169 Nelson Mandela Drive BLOEMFONTEIN
For the Respondent:	Adv. G.J.M. Wright Counsel for the Respondent
Instructed by:	Office of the State Attorney Fedsure building 9th 10th floors Charlotte Maxeke Street BLOEMFONTEIN