

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

**Case Nr: 2115/2010
Case Heard: 25/11/2011
Date delivered: 02/12/2011**

In the matter between:

C R Haigh

PLAINTIFF

and

Transnet Limited

RESPONDENT

Coram: Olivier J

JUDGMENT

Olivier J:

INTRODUCTION:

[1]. The plaintiff, mr C R Haigh, has instituted an action in which he claims damages from the defendant, Transnet Limited, a company formed in terms of the provisions of section 2 of the Legal Succession to the South African Transport Services Act¹ (“the SATS Act”).

[2]. The defendant filed a special plea in which it is alleged:

¹ 9 of 1989

[2.1] that the defendant is an organ of state as defined in section 1 of the Institution of Legal Proceedings Against Certain Organs of State Act² (“the *Legal Proceedings Act*”); and

[2.2] that the plaintiff failed to give prior notice to the defendant as required by the provisions of section 3 of the Legal Proceedings Act.

[3]. The plaintiff has excepted to the special plea on the basis that it lacks the necessary averments to sustain such a defence. The essence of the exception is that, according to the plaintiff, the defendant is not an organ of state for the purposes of the Legal Proceedings Act.

PROCEDURE:

[4]. I raised the question with mr Pohl, counsel for the plaintiff, whether the exception procedure should have been followed. Factually speaking the defendant has quite clearly made the averments required for the purposes of a special plea like this and it is trite that the correctness of factual averments is normally accepted for the purposes of considering whether a pleading is excipiable³.

² 40 of 2002

³ **Herbstein & Van Winsen – The Civil Practice of the High Courts in South Africa**, 5th edition, Vol 1, Cilliers *et al*, p 639

- [5]. The allegation that the defendant is an organ of state as envisaged in the Legal Proceedings Act is, however, not a factual averment in the normal sense of the word. It is in effect an averment that the definition of an “*organ of state*” in the Legal Proceedings Act includes the defendant. A court takes judicial notice of the provisions of such an Act⁴ and if an averment pertaining to its provisions is clearly wrong and irreconcilable with the provisions of the Act, it will have to be disregarded⁵. No amount of evidence will make any difference then.
- [6]. Mr Pohl also pointed out that a similar special plea was dealt with on exception in **Nicor IT Consulting (Pty) Ltd v North West Housing Corporation**⁶.
- [7]. From a practical point of view it would make sense to dispose of the question whether the defendant is an organ of state for the purposes of the Legal Proceedings Act as early as possible. Should it appear that the defendant is an organ of state for the purposes of that Act, it could put an early end to this matter and avoid all the delay and expense of preparing for trial. It is also important to keep in mind that the plaintiff is suing, *inter alia*, in his capacity as the father and guardian of a minor who allegedly suffered injuries.

⁴ **Durr v S A Railways and Harbours** 1917 CPD 284 at 286

⁵ Compare **Trustees, Bus Industry Restructuring Fund v Break Through Investments CC and Others** 2008 (1) SA 67 (SCA)

⁶ 2010 (3) SA 90 (NWM)

THE LEGAL PROCEEDINGS ACT

- [8]. In terms of the provisions of section 3 of the Legal Proceedings Act
“No legal proceedings for the recovery of a debt may be instituted against an organ of state unless ... the creditor has given the organ of state ... notice in writing of his ... intention to institute the legal proceedings ...”.
- [9]. The term *“organ of state”* is defined in section 1 of the Legal Proceedings Act as meaning:
- “(a) any national or provincial department;*
 - (b) a municipality ...;*
 - (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 ...;*
 - (e) The South African National Road Agency Limited contemplated in section 3 of The South African National Roads Agency Limited and National Roads Act, 1998 ...;*
 - (f) National Ports Authority Limited, contemplated in section 4 of the National Ports Act, 2005, ...;*
 - (g) any person for whose debt an organ of state contemplated in paragraphs (a) to (f) is liable.”*

[10]. The crisp question to be decided is therefore whether the defendant is indeed an organ of state for the purposes of the Legal Proceedings Act.

THE CONSTITUTION:

[11]. The term “*organ of state*” is also used in the Constitution⁷ and in legislation enacted to give effect to the Constitution. In section 239 of the Constitution it is defined as follows:

“‘organ of state’ means –

(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”.

⁷ The Constitution of South Africa Act, 108 of 1996

- [12]. It is common cause that the defendant is not a department, a municipality, an authority, a company or a person as envisaged in paragraphs (a), (b), (d), (e), (f) or (g) of the definition of “*organ of state*” in the Legal Proceedings Act. What needs to be considered, therefore, is whether it is a “*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*”, as envisaged in paragraph (c) of that definition. The Northern Cape Province does not have a constitution of its own. What has to be considered is therefore whether the defendant exercises its powers and performs its functions “*in terms of the Constitution*”.
- [13]. The part of the definition contained in paragraph (c) in section 1 of the Legal Proceedings Act also forms part of the definition in paragraph (b) of the definition of “*organ of state*” in section 239 of the Constitution, but the latter definition goes further and, in paragraph (ii), includes a functionary or institution “*exercising a **public** power or performing a **public** function in terms of any **legislation***” (my emphasis).
- [14]. This means that a functionary or institution that does not exercise its powers or perform its functions in terms of the Constitution, but that does so in terms of any other legislation, could still be an organ of state for the purposes of section 239 of the Constitution if the power exercised or the function performed is of a public nature.

TRANSNET:

[15]. On a literal interpretation of paragraph (c) of the definition of “*organ of state*” in section 1 of the Legal Proceedings Act it would, however, be irrelevant whether the power exercised or the function performed is of a public nature. The power has to be exercised or the function performed “*in terms of the Constitution*” (not any other legislation) for such a functionary or institution to qualify as an organ of state as intended in paragraph (c) of the definition in the Legal Proceedings Act.

[16]. The defendant, as already mentioned, is the company envisaged in section 2 of the SATS Act. It does indeed perform a public service and the very close link between it and the state appears from the following passage in **Transnet Ltd v Goodman Brothers (Pty) Ltd**⁸ at 866 para [37];

“From the history of the creation of Transnet, as it appears from the provisions of the ... Act, one can only deduce that all the powers and functions of the former SA Transport Services were transferred to Transnet, who is now obliged to exercise the said powers and perform the said functions. In doing so, Transnet merely step into the shoes of the SA Transport Services. Like the latter, it is performing a public service and function and exercising all the

⁸ 2001 (1) SA 853 (SCA)

powers of a government department. Furthermore, the State is the only member and shareholder of Transnet (s 2 (2)); the entire commercial enterprise of the State ('previously existing as the South African Transport Services'), including all assets, liabilities, rights and obligations, was transferred to Transnet (s 3 (2)); the State is the only member and shareholder of Transnet and it controls Transnet; an employee of Transnet is deemed to be an employee of the State (s 9 (2)); Transnet is obliged to provide a service that is in the public interest (s 15); the Minister of Transport is entitled to make regulations on a large range of matters relating to the control and functioning of Transnet (s 30)".

- [17]. Transnet has, because of its unique nature and the fact that it exercises and performs public power and functions, been recognised to be an organ of state for the purposes of the definition in section 239 of the Constitution;

"A survey of the material in the light of which that meaning has to be determined must start with s 32 (1) of the Constitution. This sections confers upon every person the right of access to any information held by the State. It is an entrenched right in the Bill of Rights. That a juristic person (such as the respondent) is entitled to the right was not in dispute. The Act is the legislation demanded by section 32 (2) of the Constitution. The appellant was formed in terms of s 32 of the Legal Succession to the South African Transport Services Act 9 of 1989 (the SATS Act). Pursuant to the SATS Act the

appellant is an institution ‘exercising a public power’ and ‘performing a public function’. That function includes providing a transport service ‘that is in the public interest’. This brings it within the definition of ‘organ of State’ in s 239 (b) of the Constitution Section 8 (1) of the Constitution provides that the Bill of Rights binds an organ of state.”⁹

- [18]. In **Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal** it was decided that Transnet had concluded a contract in its capacity as an organ of state¹⁰. It has also been recognised as an organ of state for the purposes of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998¹¹, but in that Act the term “*organ of state*” is defined with specific reference to section 239 of the Constitution.

SUBMISSIONS ON BEHALF OF DEFENDANT:

- [19]. Mr Beharie, counsel for the defendant, conceded that, on a literal reading of the provisions of the SATS Act in accordance with their ordinary grammatical meaning, Transnet would not be included in any part of the definition of an “*organ of state*” in that Act. As regards paragraph (c) of that definition he did not attempt to argue that the defendant performs its functions or exercises its power in

⁹ **Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd** 2006 (6) SA 285 (SCA) para [8]; see also **Transnet Ltd and others v Chirwa** [2007] 1 ALL SA 184 (SCA) para [15]; **Chirwa v Transnet Ltd and Others** 2008 (4) SA 367 (CC) para’s [28] and [142]; compare **Transnet Ltd v Goodman Brothers (Pty) Ltd, supra**, where the question was left open at 871I

¹⁰ 2008 (4) SA 111 (SCA) para [19]

¹¹ **Pedro and Others v Greater George Transitional Council** 2001 (2) SA 131 (C) para [13]

terms of the Constitution. It clearly does so in terms of the SATS Act. He also conceded, if I understood him correctly, that there is no ambiguity in the wording of those provisions.

[20]. Mr Beharie argued, however, that there is a different kind of ambiguity, and an absurdity, that needs to be addressed by adopting a purposive approach in reading and interpreting the definition of the term “*organ of state*” in the Legal Proceedings Act. He advanced this argument as follows:

[20.1] According to the preamble of the Act the object and intention was to align and harmonise “*different notice periods for the institution of legal proceedings*”.

[20.2] The South African National Roads Agency Limited and National Roads Act¹², which is the enabling Act of the South African Roads Agency Limited (“SANRAL”), contains no notice requirement or period that needed to be aligned or harmonised with anything, yet SANRAL was included in the definition of “*organ of state*” in the Legal Proceedings Act during 2005.

[20.3] It is therefore clear that, despite the reference in the preamble of the Legal Proceedings Act to the need to harmonise different notice periods, the legislature in 2005

¹² 7 of 1998

decided to go further than that and to provide the advantage of a notice requirement and period to a body like SANRAL, where it previously did not have that protection.

- [20.4] The defendant is performing a public service and there is no reason why it should not also enjoy the protection and advantage of a notice requirement. An interpretation to the effect that the legislature did not include the defendant into the definition, at least when it went further than harmonising different notice periods and included SANRAL into the definition, would result in an anomaly.
- [20.5] On a purposive approach and interpretation the defendant, being in no less a deserving position than SANRAL, should in some way be read into the definition (although mr Beharie did not suggest how or where in the existing definition this could be done).
- [20.6] He did suggest, however, that the definition of an organ of state in the Constitution should be taken as a starting point and that the definition of the same term in the Legal Proceedings Act should be interpreted in a way that

would “*promote the spirit, purport and objects of the Bill of Rights*”¹³.

DISCUSSION:

[21]. It is not the stated object of the provisions of the Legal Proceedings Act to provide notice requirements and periods where none existed before. The fact that the legislature did so in the case of SANRAL would not in itself justify an interpretation that would in some way also include Transnet. We do not know why the legislature decided to incorporate SANRAL into its definition of an “*organ of state*” in that Act and it is not up to this court to speculate about what the legislature’s intention had been in doing so¹⁴. What is important, however, is that the legislature seemed to accept that SANRAL could not be regarded as a functionary or institution as envisaged in paragraph (c) of that definition.

[22]. There is in any event no room for a so-called purposive interpretation or for a reading of anything into the provisions of the Legal Proceedings Act if there is no ambiguity and if its provisions have not been declared invalid¹⁵.

¹³ section 39 (2) of the Constitution

¹⁴ **Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of M V Jade Transporter** 1987 (2) SA 853 (A) at 596G-597B

¹⁵ **Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others** 2000 (2) SA 797 (SCA) at 810; **Minister of Safety and Security v Sekhoto and another** [2011] 2 All SA 157 (SCA) para [15]

[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 (and that are not specifically provided for in paragraphs (a), (b), (d), (e), (f) or (g)). 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 Act¹⁶.

[24]. What should also be kept in mind is that the legislature quite clearly intended to exclude some organs of state from the operation of the Legal Proceedings Act. The use of the word “*certain*” in the title of the Act, and in its preamble, makes this abundantly clear. There are several examples of bodies and institutions that have been recognised to be organs of state for the purposes of the Constitution, but that are not included in the definition of that term in the Legal Proceedings Act:

[24.1] In **Mlatsheni v Road Accident Fund** it was held that the Road Accident Fund, established by section 2 of the Road

¹⁶ **Stellenbosch Wine Trust v Oude Meester Group Ltd** 1977 (2) SA 221 (CPD) at 240 D

Accident Fund Act¹⁷, is an organ of state as intended in section 239 of the Constitution¹⁸. The Legal Proceedings Act was assented to on 24 November 2002, and came into operation on 28 November 2002, and therefore many years after the Road Accident Fund had come into operation. The legislature, when enacting the Legal Proceedings Act, is deemed to have been aware of the fact that the Road Accident Fund Act contained its own provisions regarding notice prior to the institution of legal proceedings¹⁹. Yet it chose not to include the Road Accident Fund as one of the functionaries or institutions to which the Legal Proceedings Act would be applicable. Again, it is not required of this court to speculate about what the reason for that decision may have been. One can imagine, however, that the circumstances, duties and obligations of bodies, functionaries and institutions may differ to such an extent that it may not be advisable to subject all of them to the same, or any, notice requirements.

[24.2] In **National Gambling Board v Premier, Kwazulu-Natal, and Others** it was held that both the National Gambling Board, a juristic person established by section 2 of the National Gambling Act²⁰, and the Kwazulu-Natal Gambling

¹⁷ 56 of 1996

¹⁸ 2009 (2) SA 401 (E) para's [13], [14]

¹⁹ section 24 of the Road Accident Fund Act

²⁰ Act 33 of 1996

Board, a juristic person established by the Kwazulu-Natal Gambling Act²¹, were organs of state as intended in section 239 of the Constitution²². Once again neither of these bodies is included in the definition of an “*organ of state*”. The Legal Proceedings Act was enacted long after the two boards had already come into existence and had been recognised to be organs of state for the purposes of the Constitution.

[24.3] The same applies to Telkom. It was incorporated as a company long before the Legal Proceedings Act was promulgated. It was held to be an organ of state for the purposes of the Constitution as long back as in 1996²³, yet the legislature once again saw fit not to include Telkom in its definition of an “*organ of state*” in section 1 of the Legal Proceedings Act.

[25]. Just as the legislature chose not to align and harmonise the notice and prescription periods in the Road Accident Fund Act with those applicable to the organs of state included in the definition in section 1 of the Legal Proceedings Act, it also chose to extend the protection and advantage of a notice period to SANRAL, in circumstances where no such notice period had existed before and where there had therefore not been any need to align or

²¹ Act 10 of 1996

²² 2002 (2) SA 715 (CC) para’s [18], [19]

²³ **Directory Advertising Costs Cutters v Ministers for Posts, Telecommunications and Broadcasting and Others** 1996 (3) SA 800 (T) at 811B

harmonise. Even if it could be argued that this is inconsistent, and even an anomaly, it would in my view not open the door for a reading into the definition in the Legal Proceedings Act of provisions affording other functionaries and institutions the advantage of a notice requirement just because the court may be of the opinion that they should also have such an advantage.

“A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure”²⁴.

“Ultimately, when the meaning of the language in the context is ascertained, it must be applied regardless of the consequences and even despite the interpreter’s firm belief not supportable by factors within the limits of interpretation, that the legislator had some other intention ...”²⁵.

- [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 during 2005²⁶, the legislature again had a golden opportunity to also include

²⁴ **Dadoo, Ltd and Others v Krugersdorp Municipal Council** 1920 AD 530 at 543

²⁵ **Jaga v Dönges, NO and Another; Bhana v Dönges, NO and Another** 1950 (4) SA 653 (A) at 664G-H

²⁶ see, *inter alia*, sections 1, 4 and 88 of the National Ports Act, 12 of 2005, which was assented to on 31 July 2005 and came into operation on 26 November 2006

Transnet into that definition, had it wished to do so. In fact, the public company National Ports Authority Limited is apparently a subsidiary company of Transnet Limited, through which it trades as the National Ports Authority²⁷. Under these circumstances it is completely inconceivable that the legislature would again have unintentionally overlooked Transnet Limited as a company which should also be included within the definition of “*organ of state*” in the Legal Proceedings Act. In my view the fact that the legislature, under these circumstances and while being deemed to have been aware of the existence of Transnet Limited and of the fact that there existed no notice period or requirement in respect of it, again did not include Transnet Limited into its definition, is a clear indication of the fact that the legislature did not wish to do so and that this was a deliberate choice.

[27]. The Legal Aid Board, another body or institution that is not specifically named in the definition of an “*organ of state*” in the Legal Proceedings Act, has not only also been held to be an organ of state for the purposes of the Constitution²⁸ by the Supreme Court of Appeal²⁹, but it also appears to have been assumed to be an organ of state for the purposes of the provisions of section 3 (1) of the Legal Proceedings Act. The judgment in the case **Legal Aid Board & Others v Singh**³⁰ is, with respect, not very clear in this

²⁷ **Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal**, *supra*

²⁸ and the promotion of Administrative Justice Act, 3 of 2000, which was promulgated to give effect to the provisions of the Constitution

²⁹ **Kriel v Legal Aid Board and Others** 2010 (2) SA 282 (SCA) para [12]

³⁰ unreported judgment by a Full Bench in the Natal Provincial Division on 25 August 2008, case nr 14939/05, appeal nr AR 99/07

regard. In paragraph [3] thereof reference is made to the fact that the second appellant, which had actually been a prosecutor and not the Legal Aid Board (which was the first appellant), had filed a special plea in which it was alleged that the respondent (plaintiff) had failed to comply with the provisions of section 3 (1) of the Legal Proceedings Act. Immediately thereafter, however, it is stated to have been common cause that the “*first appellant*” (which was the Legal Aid Board) was an organ of state for purposes of the Legal Proceedings Act. Even if it is assumed that it had actually been the first appellant, the Legal Aid Board, that had filed a special plea, it is clear that the question whether the Legal Aid Board actually was a functionary or institution as envisaged in paragraph (c) of the definition of an “*organ of state*” in the Legal Proceedings Act was not pertinently considered³¹. It appears not to have been debated whether the Board, in providing legal assistance to indigent persons, was not in fact “*performing a function in terms of the Constitution*”³², which could be argued to mean that it was indeed a functionary or institution as envisaged in paragraph (c) of the definition of an “*organ of state*” in the Legal Proceedings Act³³. This case can therefore never be authority for the proposition that Transnet Limited should also be regarded as an organ of state for the purposes of the Legal Proceedings Act.

³¹ The Legal Aid Board clearly is not an organ of state as envisaged in any of the other paragraphs of that definition

³² see section 35 (3) (g) of the Constitution

³³ Although it would, on the other hand, possibly not have derived its power directly from the Constitution

[28]. It is of interest to note that the predecessor of Transnet Limited, the South African Transport Services, did indeed enjoy the protection of a notice requirement³⁴. That protection was lost when the South African Transport Services Act was repealed by the SATS Act on 6 October 1989, which Act contains no notice requirement. Unlike the South African Transport Services, which had been a government institution, Transnet Limited has never enjoyed the benefit of a notice requirement. This was the position since October 1989 and, at the time when the Legal Proceedings Act came into operation on 28 November 2002 it was still the position. For a period of more or less 13 years the legislature was apparently satisfied that there was no need to provide Transnet Limited with the advantage of a notice requirement³⁵. When it amended the definition in the Legal Proceedings Act in 2005 to include SANRAL and National Parts Authority Limited, it was apparently still satisfied that Transnet Limited should not be afforded the advantage of a notice requirement. Against this background it could never be said that the provisions of the Legal Proceedings Act should be interpreted to in some way impliedly include Transnet Limited as an organ of state for the purposes of that Act.

[29]. The fact is therefore that, prior to the enactment of the Legal Proceedings Act, citizens had the right to institute legal proceedings against Transnet Limited without any prior notice and there is no clear indication in that Act (even as amended) that the legislature

³⁴ see section 64 (3) of the South African Transport Services Act, 65 of 1981

³⁵ see **Transnet Ltd v Ngcezula** 1995 (3) SA 528 (AD) at 544E

intended to take away that right and to change the existing position. Even if it could be said that the provisions of the Act are ambiguous in this regard (which I do not think is the position) it should not be interpreted to take away existing rights and to interfere with the fundamental right of access to courts.

*“If, then, the expression under consideration is susceptible of two meanings and is thus ambiguous, it is the second which it should bear This would accord with a number of well-established canons of construction, viz that where a statute is reasonably capable of more than one meaning, ..., that a strict construction is placed on statutory provisions which interfere with elementary rights ..., that a statute is not presumed to take away prior existing rights ...”*³⁶

[30]. A requirement of notice like that contained in the Legal Proceedings Act limits the fundamental right of access to courts³⁷ and, insofar as the provisions of the Act may be open for interpretation, it should be interpreted to avoid such effect.

[31]. A case in point is the **Nicor** case referred to above³⁸. An action was instituted against the North West Housing Cooperation, a corporation established by the North West Housing Cooperation Act³⁹. It raised the special defence that it was an organ of state for

³⁶ **Tshwete v Minister of Home Affairs (RSA)** 1988 (4) SA 586 (A) at 612G

³⁷ see **Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women’s Legal Centre as Amicus Curiae)** 2001 (4) SA 491 (CC) para’s [12], [13]

³⁸ para [6] above

³⁹ 24 of 1982

the purposes of the Legal Proceedings Act and that the plaintiff had failed to give prior notice to it in terms of section 3 of that Act. It was held that, in order to determine whether the cooperation was an organ of state as envisaged in the Legal Proceedings Act, it had to be determined whether the defendant derived any power or function “*directly*” from the Constitution. Only then could it be said that the defendant performed its functions “*in terms of the Constitution*”, as required by paragraph (c) of the definition in the Legal Proceedings Act. The words “*in terms of the Constitution*” had to be narrowly construed and connoted “*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*”. The power or function had to arise directly from the Constitution in order to qualify such a functionary or institution as an organ of state for the purposes of the Legal Proceedings Act. It was also held, importantly, “*that the legislature did not intend (the Legal Proceedings Act) to apply to all organs of State*”. It was found that the defendant derived its powers from the North West Housing Cooperation Act, and not from the Constitution, and that it was therefore not an organ of state for the purposes of the Legal Proceedings Act.

- [32]. The enabling legislation of Transnet Limited is the SATS Act, and not the Constitution. The SATS Act is also not an Act that was proclaimed

to give effect to the provisions of the Constitution⁴⁰. Transnet Limited therefore does not even indirectly derive its powers from the Constitution.

CONCLUSION:

[33]. The defendant is therefore not a functionary or institution as intended in paragraph (c) of the definition of “*organ of state*” in section 1 of the Legal Proceedings Act. Even though it performs public functions it does not do so in terms of the Constitution, or in terms of a provincial constitution. No other part or paragraph of that definition lends itself to an interpretation which would include the defendant as an organ of state for the purposes of that Act. There is no ambiguity in the provisions of that definition in this regard and there is also no scope to read in any provisions which would include the defendant as an organ of state for the purposes of that Act.

[34]. Therefore the allegation that the defendant is an organ of state for the purposes of section 3 (1) of the Legal Proceedings Act is bad in law. It has to be disregarded, with the result that the special plea raised by the defendant discloses no defence. The averments in the special plea would “*on every possible interpretation*” thereof, read

⁴⁰ compare **S G v C G** 2010 (3) SA 352 (ECP) para [4]; **Chirwa v Transnet Ltd and Others**, *supra*, para [148]

with the Legal Proceedings Act, not sustain the special defence raised⁴¹.

COSTS:

[35]. There is no reason why costs should not follow the result in this case. The contrary was also not argued.

ORDER:

[36]. The following order is therefore made:

The exception is upheld with costs.

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

For the Plaintiff:	Adv L Le R Pohl
Instructed by:	Haarhoffs, KIMBERLEY
For the Respondent:	Adv N Beharie
Instructed by:	Du Toit Prokureurs, KIMBERLEY

⁴¹ **Klokow v Sullivan** 2006 (1) SA 259 (SCA) para[15]