IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2681/2006

In the matter between:-

PEGMA THIRTEEN INVESTMENTS (PTY) LTD	Applicant
and	
FREE STATE DEVELOPMENT CORPORATION	Defendant

HEARD ON:	30 JULY 2008
JUDGMENT BY:	RAMPAI, J
DELIVERED ON:	18 SEPTEMBER 2008

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[1] These proceedings are concerned with the special plea raised by the defendant to the claim filed by the plaintiff. The question in this case is whether the defendant, a provincial development corporation, is an organ of state as contemplated in law.

[2] The plaintiff's claim is delictual in nature. It was instituted on 27 June 2006. In its particulars of claim the plaintiff alleged that the defendant had unlawfully seized certain industrial assets at Factory 30, Site 29, Industriqwa at Harrismith on 12

May 2003 and that the plaintiff was deprived of the use and economic benefit of such assets or the right to deal or to dispose of them, as a consequence of the defendant's wrongful actions. According to the plaintiff, the goods that were wrongfully seized were released on or about 10 July 2003. This then is the plaintiff's cause of action in respect of the first claim of R1 497 304,78.

[3] In its particulars of claim the plaintiff also alleged that, the defendant, among others, had unlawfully seized a certain CNC industrial machine at the place and time as specified in the first claim and that, as a result of such wrongful seizure the plaintiff was unable to contribute the said machine to the common coffers of the partnership in terms of the partnership agreement the plaintiff had concluded at Hillcrest in Pietermaritzburg in June 2003 with Tekwani Sawmills (Pty) Limited. On or about 30 June 2003, so alleged the plaintiff further, Tekwani Sawmills (Pty) Limited cancelled the partnership agreement, since the plaintiff could not contribute the machine. As a consequence of the defendant's wrongful conduct, which caused the cancellation of the partnership agreement, the plaintiff suffered a loss of R448 995,00 which

was equivalent to half the proceed which Tekwani Sawmills (Pty) limited subsequently made in connection with the export sale of wood products to Canada. This then is the plaintiff's cause of action in respect of the second claim. It is the plaintiff's assertion that the defendant is liable to compensate the plaintiff for such damages.

[4] Before pleading on the merits, the defendant, in its amended plea, incorporated a special plea. It is, for obvious reasons, unnecessary to deal with the defendant's ordinary plea. These proceedings are about the defendant's special plea only. The essence of the special plea is that, the defendant is an organ of state, as contemplated in section 1 Act No. 40/2002; that the defendant's wrongful conduct complained of, in other words, the cause of action, which was alleged to have cost the plaintiff to suffer damages, arose on 12 May 2003; that the plaintiff failed to give in advance written notice to the defendant of its intention to institute the current legal proceedings in terms of section 3 Act No. 40/2002; that the defendant, as an organ of state, has not consented in writing, to the institution of the current legal proceedings without the requisite notice and that, the plaintiff was accordingly not

entitled to institute the current legal proceedings against the defendant. The defendant's special plea was filed on 19 December 2007.

[5] The plaintiff's amended replication was then filed pursuant to the filing of an amended plea by the defendant. Firstly, in its replication the plaintiff denies the averments set out in a special plea that the defendant is an organ of state, which was entitled to a written notice in terms of section 3 Act No. 40/2002 prior to the institution of these legal proceedings. The plaintiff amplified its denial by averring that the defendant was not one of the bodies specified in the sub-paragraphs of the definition of "organ of state", as contained in section 1 Act No. 40/2002. Secondly, the plaintiff averred that the defendant was not a person for whose debt an organ of state was liable and, therefore, did not fall within the ambit of sub-paragraph (g) of the said definition. In the third place, the plaintiff averred that the defendant did not exercise a power or perform a function in terms of the Constitution or a provincial constitution referred to in section 142 of the Constitution and, therefore, did not fall within the ambit of paragraph (c) of the said definition.

[6] It has to be mentioned that before the plaintiff initiated these action proceedings under case number 2681/06 on 27 June 2006, the plaintiff launched urgent motion proceedings under case number 2399/06 on 5 June 2006. The motion proceedings, it will be noted, were filed twenty two days prior to the action proceedings. The relief, which the plaintiff as the applicant sought, was set out in the notice of motion. The thrust thereof was "that the applicant's failure to give timeous notice in terms of section 3(2)(a) Act No. 40/2002 be condoned" and "that the applicant be granted leave to institute legal proceedings against the respondent before 30 June 2006".

[7] The condonation application was unsuccessful. Fifteen days later the action was instituted. The defendant filed its original ordinary plea on 4 August 2006. It contained no special plea. However, on 19 December 2007 it was amended. The amended plea contained the special plea, as I have earlier outlined. It is this special plea I have to grapple with. If the defendant was not an organ of state, then no notice in terms of section 3 would have been necessary. In such an event the special plea will have to fail. The hearing of the main

action will then start. However, if the defendant was an organ of state, then the requisite written notice would have been necessary. In such an event the special plea must be upheld. In his opening address counsel for the plaintiff indicated that, should the special plea be upheld, the plaintiff would once again make an application to have its failure to give the defendant the requisite notice, condoned. We shall cross that bridge when we come to it.

[8] The first two sub-sections of section 3 Act No. 40/2002 provide as follows:

> "**3 Notice of intended legal proceedings to be given to organ of state**
>
> (1) 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 notice 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).

(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."

[9] The defendant contends that it is an organ of state and that there had not been a proper compliance with the aforegoing section. The plaintiff contends that the defendant is not an organ of state as defined and accordingly that, no such notice was required to be given to the defendant. Therefore, it is clear that, in order to determine whether or not the defendant was entitled to be notified of the intended legal proceedings, it must, first and foremost, be determined whether the defendant was an organ of state or not. The phrase, "an organ of state", is defined in the 1996 National Constitution and in the 2002 National Legislation.

[10] As regards the constitutional meaning of the words "organ of state", section 239 of the 1996 RSA Constitution provides as follows:

"**239 Definitions**

In the Constitution, unless the context indicates otherwise-

'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;"

[11] As regards the statutory meaning of the words "organ of state" section 1 Act No. 40/2002 provides:

"**1 Definitions**

(1) In this Act, unless the context indicates otherwise-

'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;

[Para. (f) substituted by s. 88 of Act 12 of 2005.]

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

[Para. (g) added by s. 88 of Act 12 of 2005.]

[12] The plaintiff places no reliance on the provisions of the following five paragraphs of section 1, *supra*, viz (b), (d), (e), (f) and (g). Therefore, the plaintiff's case revolves around paragraph (a) and paragraph (c). Can the defendant be regarded as a provincial department in terms of paragraph

(a) or a developmental institution in terms of paragraph (c). I propose to deal with these two statutory segments separately. However, it seems to me that a certain degree of overlapping is inevitable. This is so because the defendant performs functions that emanate from both domains.

[13] As regards the first segment I am called upon to determine whether or not the defendant, a development corporation, qualifies as a provincial department as contemplated in paragraph (a). Mr. Pammenter, counsel for the plaintiff, argued that the defendant sought to suggest that it was an organ of state by virtue of it being a provincial department and therefore, that it fell into the ambit of paragraph (a) of the definition of the words "organ of state". In developing that argument further, he pointed out that the Department of Tourism Environmental and Economic Affairs was indeed listed in column 1, schedule 2 of the Public Service Act of 1994, However, he pointed out that such listed provincial department did not include any reference to the defendant in the said schedule. Accordingly, counsel contended that the defendant was not defined as a provincial department anywhere in the schedule to the Public Service Act.

[14] Mr. Van der Walt, counsel for the defendant, argued that, although the defendant was not listed in column 1, schedule 2 to the Public Service Act of 1994, the Free State Provincial Administration was listed as was its Department of Tourism Environmental and Economic Affairs. As such he readily conceded that the defendant was not expressly named and listed anywhere in the 1994 schedule 2 as a provincial department under the auspices of the Free State Provincial Administration or Free State Provincial Government, as you like it. But that was not all where the enquiry ended. He contended that the defendant was under the control of the provincial department within the Free State Provincial Administration and that careful examination of the relationship between the defendant and the aforesaid provincial department showed that the defendant was a mere instrument under the real control of a public authority.

[15] In the case of **GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL v ESKOM** 2000 (1) SA 866 (SCA) at par. 11 the court observed that various tests were applied by the courts in evaluating the relationship between the State and a statutory corporation.

For the purposes of determining whether or not the corporation is an operational instrument, servant or organ of the government. The tests are discretionary test, proprietary test, financial test and functional test as more fully explained in that judgment.

> "[12] It is not difficult to see why the test of control is appropriate for the purpose of deciding whether a public corporation is the alter ego of the government that establishes it. The cardinal factor that has to be considered in that type of case is the relationship between the corporation and the State and, more especially, whether the corporation is properly to be regarded as a separate institution to which specific powers have been delegated by the State or whether it is a department of the government in the guise of a public corporation (cf *Trendtex Trading Corporation v Central Bank of Nigeria* [1976] 3 All ER 437 (QB) at 442d - 443h). It may then become necessary to 'pierce the corporate veil' in order to determine whether the corporation is a mere puppet with the de facto control vesting in the government."

Per Melunsky AJA at par. [12] in **GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL v ESKOM**, *supra*.

[16] Before I proceed to recite enactments, which underlie the measure of governmental control over the defendant, it appears necessary to make a few comments about the origin of the defendant. It was established pursuant to the passing of the provincial legislation with the title: Free State Development Corporation Act No. 9/1995, which was signed by the Premier of the Free State Provincial Government on 12 September 1995. It was subsequently amended by Act No. 4/2006. The corporation is a juristic person and the provisions of the Companies Act No. 6 of 1973 apply to it (section 2). It has a share capital. The Free State Provincial Government is the sole holder of all the shares of the Corporation. The rights attached to the shares are exercised by the MEC responsible for the provincial department of Tourism Environmental and Economic Affairs (section 3). It has a board of directors that manages and controls its affairs. This, in brief, is the unique character of the corporation, in other words, the defendant.

[17] The main objectives of the Free State Development Corporations are to perform or promote urban and rural development in the Free State Province with regard to any matter falling within the functional areas specified in schedule 4 and schedule 5 of the RSA Constitution. Such objectives have to be promoted in accordance with a policy determined or direction given by the responsible MEC. In realising such objectives a special emphasis is placed on the promotion and development of small business enterprises (section 3).

[18] The following provisions are useful to the enquiry: The MEC appoints the board of directors of the Free State Development Corporation (section 5(2)); the MEC may remove any director from office (section 7(2)); the MEC appoints persons to fill vacancies as and when they arise on the board of directors (section 7(3)); the MEC designates one of the directors as a chairperson or acting chairperson or substitute chairperson of the board of directors (section 8); the MEC appoints a managing director from among directors and such managing director becomes the chief executive officer of the Corporation (section 9); the MEC, after

consultation with the MEC responsible for the Department of Finance, confirms or rejects business agreements concluded by the Corporation with third parties (section 15); the Free State Development Corporation has to submit its audited annual financial statements to the MEC (section 17); the books of account, the statements of account and annual financial statements of the Corporation have to be audited by the Auditor-General, whose office is an institution of government (section 19); the Free State Development Corporation has to submit a report on its activities annually to the MEC (section 20); the Free State Development Corporation may only be liquidated or placed under judicial management provided the Provincial Executive Council of the Free State Government has by special resolution, taken a decision to that effect (section 23A).

[19] It is crystally clear from the aforegoing provisions of the particular provincial legislation that, the government through the MEC responsible for the aforesaid provincial department in the Free State Government, effectively controls the defendant. On the strength of the *de facto* control of the defendant by the government, the contention of the plaintiff

to the effect that the defendant is an entity with a distinct and separate legal personality ought to be negated.

[20] The mere fact that the Free State Development Corporation was not expressly the mentioned in the aforegoing schedule, unlike the provincial department concerned, does not justify the conclusion that such Corporation and Department are completely separate entities. The Free State Provincial Government and its Department of Tourism were established in terms of the RSA Constitution. In turn, the Department of Tourism created an operational instrument designed to facilitate the governmental process and programmes and policies geared at the realisation of specific constitutional imperatives or objectives. The instrument so created, was the Corporation. Therefore, the Corporation was established by the provincial department as a form of its own extension. In my view it is not a separate institution to which specific powers have been delegated by the Free State Provincial Government.

[21] It is clear from the aforegoing that, although the Development Corporation is subject to the corporative laws

of the country and although companies, by their very nature, are separate juristic persons independent of their shareholders and controlled by their directors, the defendant has so many peculiar and distinctive attributes that portray it as a juristic entity with a unique corporative character. The Corporation is subject to so much executive direction or governmental control that it is, in my view, the other face of the governmental structure that established it. Such an extensive measure of official control is something unknown in the conventional corporative world. The mere fact that it is not exempted from the fiscal obligation to pay value-added tax does not change its character.

[22] It seems to me that the Corporation cannot be correctly regarded as a separate and autonomous enterprise to which the provincial department has delegated certain specific powers. There is such a strong connective tissue between the Corporation and the Department that the former does not have an independent existence. I am persuaded that the Corporation is an extension of the aforesaid provincial department as defined in section 1 Act No. 40/2002. Section

1 Act No. 40/2002 states that a provincial department means:

(a) a provincial administration mentioned in the first column of schedule 1 to the Public Service Act, 1994 (Proclamation 103 of 1994); or

(b) a department within a provincial administration and mentioned in the first column of schedule 2 to that.

Although the corporation is not expressly mentioned in the schedules it is a creature of what is expressly mentioned. Therefore, the defendant as an internally invented instrument of a scheduled provincial department, is implicitly an organ of state. I am, therefore, inclined to uphold the defendant's contention. So much about paragraph (a) of the definition.

[23] In the second place, the defendant also relies on paragraph (c) of the statutory definition of the words "organ of state". Here the question is whether the Free State Development Corporation can be said to be an institution performing a function in terms of the national or provincial constitution.

[24] As regards the second segment of the definition, I am called upon to determine whether or not the defendant, a development corporation, qualifies as an institution as contemplated in paragraph (c) section 1 Act No. 40/2002.

[25] Mr. Pammenter argued that, since the Free State Development Corporation Act No. 6/1995 was a regional statute, it could never be contended that the development corporation thereby established, was a functionary or an institution in terms of the national constitution as it was not incorporated in terms of such constitution nor was it incorporated in terms of a provincial constitution since the Free State Province did not and still does not have such a constitution. On the strength of this argument counsel submitted that the defendant could not rely on the definition of the words "organ of state" in accordance with paragraph (c) of the national statute in question.

[26] Mr. Van der Walt argued that the words "any institution performing a function in terms of the Constitution" did not mean "any institution incorporated or established in terms of the Constitution" before paragraph (c) of the definition can be

invoked, as Mr. Pammenter had argued. Quite to the contrary, he submitted that the defendant qualified as an institution as contemplated in the paragraph in question.

[27] Indeed the Free State Development Corporation was not established in terms of any constitution, national or provincial. It is also a fact that currently the Free State Province has no written constitution. As earlier pointed out the Free State Development Corporation was established in terms of a regional statute. However, nowhere does segment (c) of the definition or the definition as a whole for that matter, require that any institution claiming to be an organ of state must have been established or incorporated, as Mr. Pammenter prefers to say, in terms of the constitution.

[28] What paragraph (c) basically requires is that a function performed and not an agent performing such a function, must be a function specified in the constitution, either the national or provincial constitution. It is a question of synthex. In the instant case the national constitution applies seeing that the province has no provincial constitution of its own. There has to be a defined connection between what an

organisation does on the ground and what the constitution requires to be done before an organisation can claim to be an institution as contemplated in paragraph (c).

[29] The Concise Oxford Dictionary p. 598 defines the word “institution”, among others, as “an organ founded for social purpose”. Urban and rural developments are undoubtedly public functions with strong connotations of social purpose. The New Shorter Oxford English Dictionary p. 1032 defines the word “function” *inter alia* as “the activity proper or natural to a person or a thing, the purpose or intended role of a person or a thing”. The verb to function is defined, among others, as “to fulfil the purpose or task of a specified thing”. See Concise Oxford Dictionary p. 466. The phrase “in terms of” is defined as “with regard to the aspect or subject specified”. See Concise Oxford Dictionary p. 1210. See also **OOSTHUIZEN AND ANOTHER v STANDARD CREDIT CORPORATION LTD** 1993 (3) SA 891 (AD) at 908D read with 909I – 910B.

[30] Putting all these dictionary definitions together, suggests that the proper construction of paragraph (c) as regards the

words “an organ of state” is that an organisation has to fulfil a task or a purpose of the constitution. This particular paragraph can never be correctly construed to mean that constitutional tasks, purposes or functions may only be performed by “any institution established in terms of the Constitution”.

[31] The next obvious thing to do is to ascertain precisely the functions which the defendant performs coupled with the primary objectives it strives to attain. The defendant was established as a development corporation. It is, therefore, a vehicle created with the purpose of urban and rural development in the Free State Province. Such development relates to matters that fall within the functional spheres as specified in schedule 4 and schedule 5 of the Constitution. The urban and rural development, the objectives for which the corporation was established, are thus specified in the Constitution.

[32] Counsel for the plaintiff argued that the aforesaid schedules of the Constitution relate to the functional areas over which a provincial government can legislate and that seeing that the

Free State Development Corporation cannot pass any legislation, it cannot be an organ of state because schedule 4 and schedule 5 contemplate the passing of legislation on those specified areas. This argument fails to impress. Nowhere in the Constitution or the relevant schedules could I find anything or provision in support of the construction the plaintiff seeks to rely on. I find it difficult to accept that because the Free State Development Corporation has no legislative competence, it cannot realise its objectives. Moreover, the argument loses sight of the fact that, the Constitution differentiates between the legislative authority of a province (section 104) and the executive authority of a province (section 125). Both of these two sections expressly refer to the functional areas as specified in schedule 4 and schedule 5.

[33] Needless to say, like the Free State Development Corporation, the provincial executive authority has no legislative competence. I pause to remark that corollary argument was not advanced by the plaintiff to the effect that public functions such as those that the Free State Development Corporation performs, can only be competently

performed by the provincial legislature since it alone is a structure with legislative powers.

[34] In **<u>MITTALSTEEL SOUTH AFRICA LTD (FORMERLY ISCOR LTD) v HLATSHWAYO</u>** 2007 (1) SA 66 (SCA) at par. [19] the court, endorsing its previous decision, confirmed that any institution exercising a public power or performing a public function in terms of any legislation, was an organ of state. The functional test is the vital test to be applied, where, as in this case, the functions performed are of public nature. Conradie JA, writing for the unanimous court, observed that, where an organisation was obviously performing a public function, the control test was not even needed to prove that it was an organ of state. The functions were decisive.

[35] Still at paragraph [19] Conradie JA further said the following about the control test and the functions:

> "The control test is useful in a situation when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead. This

converts a body like a trading entity, normally a private body, into a public body for the time and to the extent that it carries out public functions."

[36] Section 125(2) of the Constitution provides:

"(2) The Premier exercises the executive authority, together with the other members of the Executive Council, by-

(a) implementing provincial legislation in the province;

(b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;

(c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;

(d) developing and implementing provincial policy;

(e) co-ordinating the functions of the provincial administration and its departments;

(f) preparing and initiating provincial legislation; and

(g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament."

[37] It follows from the aforegoing constitutional provisions that the premier and the provincial executive of a province are enjoined and authorised by the national constitution to fulfil such executive functions. The Corporation was created with such executive purpose in mind. There can be no doubt that the regional statute, in other words, Act No. 6/1995, in terms of which the Free State Development Corporation was established, was passed in accordance with section 125(2)(f), which empowers the Premier and the provincial executive to draft and to initiate provincial legislation in order to fulfil certain public functions. But the actual passing of provincial statutes remains the prerogative of the provincial legislature concerned.

[38] The provisions of the regional statute read with the relevant provisions of the Constitution as well as the largely uncontested evidence of the defendant's witness, Mr. Van der Walt, collectively show that the defendant was instrumental in implementing the policies of the Free State Provincial Government relative to the economic development, poverty alleviation and reduction of unemployment in the province. These objectives are the

hallmarks of governmental endeavours to attain social justice. I am convinced, therefore, that, at all times since its establishment, the Corporation has been performing these public functions in terms of the national constitution. It has been doing so in pursuit of the scheduled matters and in keeping with its founding objectives.

[39] An entity performs a public function when it practically seeks to achieve some collective benefit for the general public or a section thereof and such entity is accepted by the public or a section of the public as having authority to render such a service or rather to perform such a public function. **MITTALSTEEL**, *supra*, at paragraph 20. In my view, the developmental activities of the defendant crowned the defendant with such a profile. By virtue of the obviously public functions the corporation performs for the general population of the province I am incline to find that the defendant was indeed an institution as contemplated in the second segment, in other words, paragraph (c) of the definition.

[40] As regards the constitutional meaning of the words "organ of state", I now turn to section 239 of the Constitution, which provides as follows:

> "**239 Definitions**
>
> In the Constitution, unless the context indicates otherwise-
>
> **'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;"

[41] It will be readily appreciated that the constitutional definition of the words "organ of state" is not the same as the statutory definition of those words. Counsel for the plaintiff suggested, without conceding, that in terms of the constitutional definition, there may well be an argument that the defendant was an organ of state. It is so that the statutory definition of the words is more restrictive than the constitutional definition.

However, that does not necessarily demonstrate that the lawmaker intended to restrict the constitutional provision by way of a statutory provision.

[42] It was contended on behalf of the plaintiff that in view of the constitutional definition of the words “organ of state” as earlier set out in this judgment, it could not be argued that the defendant was a state department in any of the three spheres of government, namely, national administration, provincial administration or local government. The essence of the argument was that the Corporation did not exercise functions conferred on it in terms of the Constitution. On behalf of the defendant it was contended that the Free State Development Corporation did not exercise the functions that it was performing on the basis that such functions were delegated to it, but that it was performing public functions in terms of the Constitution and the regional statute.

[43] In the case of **NATIONAL GAMBLING BOARD v PREMIER, KWAZULU-NATAL, AND OTHERS** 2002 (2) SA 715 (CC) the court considered the aforesaid constitutional provision.

See paragraph [18] on p. 724. At paragraph [19] Du Plessis AJ said the following:

> “[19] The parties are agreed that the national board, the Minister, the Premier and the KZN board are 'organs of State', and rightly so. The national board and the KZN board are institutions 'exercising a public power or performing a public function in terms of any legislation' as provided for in para (b)(ii) of the definition. The Premier and the Minister are functionaries 'exercising a power or performing a function in terms of the Constitution or a provincial constitution' as envisaged in para (b)(i) of the definition.”

[44] The learned Judge carried on and stated the following at paragraph [24]:

> “[24] The purpose of the word 'constitutional' in s 167(4)(a) must now be determined. The word is there used in the context of the status, powers or functions of organs of State. In para (b) of the definition of organ of State a distinction is made between an institution or functionary 'exercising a power or performing a function in terms of the Constitution' and those doing so 'in terms of any legislation'. The word 'constitutional' in s 167(4)(a)

> encapsulates the same distinction: It refers to status, powers or functions explicitly or by implication provided for in terms of the Constitution, as opposed to those provided for in terms of any legislation."

The court found that an emphasis should be placed on the functions that are performed in terms of the Constitution or any other legislation. See also **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v EISENBERG & ASSOCIATES (MINISTER OF HOME AFFAIRS INTERVENING)** 2005 (1) SA 247 (CPD) at 259E – 260B.

[45] I am persuaded that the defendant performed functions in terms of the Constitution about matters set out in schedule 4 and 5 of the Constitution. This becomes even much clearer when the scheduled matters are read in conjunction with the preamble to the Constitution as well as sections 9 to 10, 25(5), 25(8), 26(1), 26(2), 41(1)(b), 195(1)(c) and 195(2).

[46] In the circumstances I have come to the conclusion that the defendant is indeed an organ of the state in terms of section 1, Act No. 40 of 2002. It follows, therefore, that the plaintiff was obliged to have given the defendant notice in terms of

section 3, Act No. 40 of 2002 of its intention to sue the defendant and well within six months from the date on which the cause of action arose. It was never done.

[47] Accordingly I make the following order:

47.1 The special plea succeeds.

47.2 The plaintiff is directed to pay the costs hereof, occasioned by the adjudication of the original dispute.

47.3 The costs referred to in the aforegoing sub-paragraph shall include the costs occasioned by the employment of two counsels.

M. H. RAMPAI, J

On behalf of the plaintiff: Adv. C.J. Pammenter, SC
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of the defendant: Adv. D.J. van der Walt
With him:
Adv. A.J. Benade
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