



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: BHISHO)**

NOT REPORTABLE

CASE NO: 126/2022

In the matter between:

BERGSIG SPECIAL SCHOOL

APPLICANT/PLAINTIFF

AND

THE MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE

FIRST RESPONDENT/ FIRST DEFENDANT

THE HEAD OF THE DEPARTMENT,

DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE

SECOND RESPONDENT/SECOND DEFENDANT

JUDGEMENT

FLYNOTES

- a) A court may raise a legal issue *mero motu* where it considers an error of law to be made.
- b) A claim for unjust enrichment is not a “debt” as defined in section (1) of Act 40 of 2002 and/or at least because it is not a claim for damages. The absence of a notice in terms of Act 40 of 2002 therefore does not bar the enrichment claim.

PIENAAR AJ

INTRODUCTION

1. I shall refer to the parties as they are referred to in the pleadings, namely as the plaintiff, the first defendant and the second defendant. Collectively I shall refer to the first and second defendants as the defendants.
2. The plaintiff has brought an application requesting the following relief:
 - 2.1 Directing that the plaintiff’s failure to comply with section 3 of the Institution of Legal Proceedings against Certain Organs of State 40 of 2002, for its failure to comply with section 3 of the said Act (to the extent that the plaintiff’s demand was not made within 6 months from the date on which the debt became due as envisaged in section 3(2) of the said Act), be condoned.
 - 2.2 Directing that the defendants pay the costs of the application in the event of them opposing same.
3. The plaintiff’s claim against the defendants is for the payment of monies expended by it on behalf of the Department of Education, Eastern Cape Province (the Department) for having paid for support staff, also known as non-educator staff which the Department allocated to the plaintiff. It is

essentially an unjust enrichment claim, for the sum of R 4 951 042.00. At paragraph 18 of its particulars of claim, the plaintiff pleads that the defendants were unjustly enriched at the expense of the plaintiff in the aggregate sum of R 4 951 042.00.

4. In answer to the plaintiff's particulars of claim the defendants filed two special pleas, namely 1) that the plaintiff had not complied with the provisions of the Institution of Legal Proceedings against Certain Organs of State 40 of 2002 (Act 40 of 2002) (the first special plea) and 2) that the plaintiff's claim had prescribed (the second special plea).
5. More specifically in relation to the defendants' first special plea, they pleaded that the plaintiff had failed to comply with the provisions of section 3 (2) (a), read with section 3 (3) (a) of Act 40 of 2002) in that, the plaintiff's statutory notice was not served on the defendants within the 6 months as prescribed in Act 40 of 2002. In the circumstances, the plaintiff should be barred from proceeding with the action and its claim should be dismissed, with costs.
6. By virtue of the second plea, the defendants pleaded that the plaintiff served summons upon the defendants on 4 September 2020, which was a date more than 3 years from the date upon which the alleged cause of action arose. Accordingly, the plaintiff's claim against the defendants had prescribed in terms of section 11 (d) of the Prescription Act, 68 of 1969. In view of the foregoing, the defendant prayed that the plaintiff's claim be dismissed, with costs.
7. Before me, Adv Wood appeared on behalf of the plaintiff and Adv Mayekiso appeared on behalf of the defendants.

FURTHER SUBMISSIONS

8. During argument, on 26 June 2025, it occurred to me (I only received the papers the day before) that Act 40 of 2002 possibly did not apply as a claim

for unjust enrichment was not a claim for damages as envisaged by Act 40 of 2002.

9. (Section 3 (1) of Act 40 of 2002 provides therefore that no legal proceedings for the recovery of a **debt**¹ may be instituted against an organ of state unless the necessary statutory notice has been served on the relevant organ of state within six months from the date on which the debt arose.

In the definition section of Act 40 of 2002 a debt is described as meaning 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**,² whether such debt became due before or after the fixed date;)

10. During argument I questioned counsel on this aspect, but I did not hold them to their submissions as this point was not an issue between the parties until I raised it.

11. After the matter was adjourned, I performed legal research on this aspect and on 29 June 2025 I emailed the following letter to counsel:

“You will recall that during argument on Thursday I questioned whether a claim for unjust enrichment was a claim for damages in terms of the Institution

¹ Own emphasis

² Own emphasis

of Legal Proceedings against Certain Organs of State Act 40 of 2002 (Act 40 of 2002). You made certain submissions, but I do not hold you thereto as this point was not an issue between the parties until I raised it.

Would you kindly have regard to the judgements by the Supreme Court of Appeal (the SCA) and the Constitutional Court in the matter of *Greater Tzaneen Municipality v Bravospan*, attached above.³

In such matter, *Bravospan* claimed monies from the municipality for security services rendered (paragraph 5 of the SCA judgement). The High Court held that *Bravospan* had made out a case against the municipality based on unjust enrichment and declared the municipality liable to pay an amount to be determined (paragraph 7).

One of the arguments raised by the municipality was that there was a failure to comply with the provisions of Act 40 of 2002 (paragraph 9). At the hearing of the matter before the SCA, counsel for the municipality conceded that the claim for unjust enrichment was not a "debt" as defined in section (1) of Act 40 of 2002 and/or at least because **it was not a claim for damages**. Thus, according to the SCA, it was rightly conceded by the municipality that Act 40 of 2002 was not applicable to the enrichment claim, and the absence of a notice in terms of the Act did not therefore bar the enrichment claim. This defence therefore had to fail (paragraph 11).

The SCA further held that South Africa has yet to recognise a general claim for unjustified enrichment. The High Court order granting *Bravospan's* claim for unjust enrichment was therefore not sustainable in law (paragraph 15). In the particular circumstances of the case the SCA set the order of the High Court aside and declared that *Bravospan* was entitled to compensation for the services rendered as a just and equitable remedy under section 172 (1) (b) of

³ The SCA judgement's reference is *Greater Tzaneen Municipality v Bravospan* 252 CC (428/2021) [2022] ZASCA 155 (7 November 2022) and the Constitutional Court judgement's reference is *Greater Tzaneen Municipality v Bravospan* 252 CC 2025 (1) SA 557 (2 October 2024)

the Constitution. The SCA further referred the matter back to the High Court to determine the quantum of the compensation (paragraphs 23 and 24).

Leave to appeal to the Constitutional Court was refused.

Could you kindly submit argument in the following regard:

1. The impact of the *Bravospan* judgements on the present matter.
2. Submissions on the order to be granted by me.
3. Whether I am entitled to raise this point *mero motu* (see also the Constitutional Court judgement at paragraph 36)

Could you kindly, if possible, make your submissions within one week hereof, or such further period granted by me on request.

Could you and the attorneys involved kindly acknowledge receipt.”

12. Both counsel filed further written submissions, in the time requested. I am indebted to counsel.

13. In his further written submissions, Mr Wood essentially submitted that:

13.1 Although South African law has not yet recognised a general enrichment action, in the circumstances of this particular matter it would be manifestly unjust for the plaintiff to be afforded no compensation for the services it rendered in the place and stead of the defendants.

13.2 They are exceptional circumstances warranting an order for compensation namely section 172 (1) (b) of the Constitution.

- 13.3 The plaintiff as per the plaintiff's particulars of claim has set out sufficient particularity for section 172 (1) (b) to be applicable.
- 13.4 The impact of the *Bravospan* judgement is applicable.
- 13.5 The plaintiff's claim is not a debt as defined in section 1 of Act 40 of 2002 and/or at least because it is not a claim for damages.
- 13.6 The court should order that it was not necessary for notice to have been given and that prescription cannot be adjudicated upon at present and will require full ventilation when the matter proceeds to trial.
- 13.7 As a result of the defendants' lack of action, the plaintiff was entitled to institute the proceedings and the application and is accordingly entitled to the relief prayed for plus costs, as per scale B.
- 13.8 However, if the court finds in favour of the defendants, it is submitted that no order be made in favour of the defendants.

14. Mr Mayekiso, on the other hand, essentially submitted as follows:

- 14.1 Our law has not yet recognised a general enrichment action.
- 14.2 The claim by the plaintiff is a "debt" as defined in section 1 of Act 40 of 2002 and the defendant are therefore entitled to raise the objection for non-compliance with the required timeframes for service of a statutory notice.
- 14.3 The basis of the plaintiff's action is couched in an alleged negligent omission to provide the required educational support.
- 14.4 Such a scenario fits the definition of a "debt" of Act 40 of 2002 as it is described as contractual or other act or omission under a law or legal system in the educational sector.

14.5 The unjust enrichment phrase at paragraph 18 (of the particulars of claim) has merely been inserted as a catch all phrase and does not change the cause of action as this being an alleged negligent omission which is properly covered by the definition of a “debt” in the Act. The provisions of Act 20 of 2002 are therefore applicable.

14.6 The court is called upon to dismiss the application and to uphold the special plea of the defendants. The relief sought by the plaintiff has also prescribed.

14.7 The court is empowered to raise a point of law *mero motu* if same is apparent from the pleadings.

14.8 In the *Bravospan* judgement the plaintiff was granted constitutional damages and not an enrichment claim.

14.9 The alleged debt has prescribed and there is no good cause proffered for the late issuing of the statutory notice as well as the late issuing and service of summons in order to interrupt the running of prescription.

14.10 The court is therefore requested to grant an order dismissing the condonation application.

DISCUSSION

Mero Motu

15. None of the parties objected to me raising the point under discussion *mero motu*. In the Constitutional Court judgement in *Bravospan* it is stated⁴ that prior precedent supports the right of a court to raise a legal issue *mero motu* where it considers an error of law to be made.

⁴ Paragraph 36

16. I accordingly find that I am entitled to raise the point under discussion *mero motu* and deal with it. No fingers are pointed at the legal representatives. The law is a minefield.

Application in terms of Act 40 of 2002 and ancillary issues

17. In accordance with the SCA judgement in *Bravospan* I hold that a claim for unjust enrichment is not a “debt” as defined in section (1) of Act 40 of 2002 and/or at least because it was not a claim for damages. The absence of a notice in terms of Act 40 of 2002 did not therefore bar the enrichment claim.

18. The defendants’ first special plea, namely that the plaintiff had not complied with the provisions of Act 40 of 2002, is accordingly not sustainable in law in that it was not necessary for the plaintiff to comply with these provisions as its claim was for unjust enrichment.

19. It follows that the plaintiff’s application in terms of Act 40 of 2002 was also not sustainable in law and unnecessary. The application stands to be dismissed.

20. Mr Wood has submitted that the plaintiff as per the plaintiff’s particulars of claim has set out sufficient particularity for section 172 (1) of the Constitution to be applicable. Mr Wood submits that there are exceptional circumstances warranting an order for compensation in terms of section 172 (1).

21. However, this is not something before me and will need to be entertained by the trial court.

22. Mr Mayekiso has submitted that the basis of the plaintiff’s action is couched in an alleged negligent omission to provide the required educational support. Such a scenario fits the definition of a “debt” as defined in Act 40 of 2002. The unjust enrichment phrase at paragraph 18 of the particulars of claim has merely been inserted as a catch all phrase according to Mr Mayekiso.

23. Paragraph 18 reads that “As a result of the aforesaid, the defendants were unjustly enriched at the expense of the plaintiff in the aggregate sum of R 4 951 042 .00”. Unjust enrichment, in my view, is the basis of the plaintiff’s claim and not a “negligent omission”. To hold that a negligent omission is the basis of the plaintiff’s claim would be stretching the particulars of claim, something that I am not entitled to do.

24. Mr Wood has submitted that this prescription cannot be adjudicated upon at present and will require full ventilation with the matter proceeds to trial. This, in my view, is a sound proposition.

CONCLUSION

25. I accordingly conclude that the application stands to be dismissed for the reasons set out above.

26. In respect of costs and as the issue on which the application stands to be decided was not raised by the parties, but by me, I believe it only fair that there should be no order as to costs.

ORDER

27. I accordingly issue the following order:

27.1 The plaintiff’s application for condonation in terms of the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, is dismissed.

27.2 There shall be no order as to costs.

B J PIENAAR

ACTING JUDGE OF THE HIGH COURT

Date heard: 26 June 2025

Further submissions received by: 4 July 2025

Date of judgement: 4 August 2025

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