IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 3003/2018

In the matter between:

GOLDFIELDS LOGISTICS (PTY) LTD **PLAINTIFF**

and

MEC: FREE STATE DEPARTMENT OF POLICE, ROADS AND TRANSPORT **DEFENDANT**

BEFORE: CHESIWE J

HEARD ON: 23 NOVEMBER 2021

DELIVERED ON: 28 FEBRUARY 2022

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[1] The Plaintiff instituted a claim for damages amounting to R234 594-65 as amended in the particulars of claim. The damages claim is based on the fixed and repairs effected on the provincial road R59

between Bothaville and Parys in the Free State. The matter is defended.

[2] The Plaintiff claims for reimbursement for fixing and repairing the R59 which expenses are calculated as follow:

- "R22 750,10 expended by Plaintiff on payment of casual labourers hired between 14 June 2015 until 24 April 2017 to effect repairs to the road and/or potholes in the role;
- R29 340,86 expended by Plaintiff purchased Bitumen emulsion for use to effect repair to the road and/or potholes;
- R28 710,00 expended by Plaintiff on travelling costs for transport of a supervisor and labourers regarding repairs to the road, with a 3 litre Ford Ranger light commercial vehicle at R11, 22 p/km AA tariff over 2558 km in the time between 14 June 2015 and April 2017;
- R45 936,00 expended by Plaintiff on the salary of two supervisors (to supervise labourers and the process of repairs of the road) at R400-00 per day for fifty-eight (58) days between 14 June 2015 until 24 April 2017;
- R107 857, 72 expended by Plaintiff on travelling costs for transport with a Volvo FH40 light commercial vehicle at R11,74 p/km AA – traffic over 9 193km in the time between 14 June 2015 and April 2017 for transport of labours."

[3] The Defendant filed a special plea of prescription under the Prescription Act 68 of 1969 and non-compliance in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of

State Act 40 of 2002 and whether the necessary expenses under the *negotiorum gestio* amounts to damages.

[4] Before the parties commenced with oral arguments, Counsel on behalf of the Defendant, Adv. Mitchley, submitted that the special plea of prescription is abandoned, based on the amended plea of the Plaintiff that the claim is for expenses running from June 2015 to 2017.

[5] Counsel on behalf of the Plaintiff, Adv. Benade, submitted that the abandonment of the first special plea had cost implication and that the court is to award costs to the Plaintiff.

[6] Both Counsel submitted written heads of argument with regard to the outstanding special plea of non-compliance in terms of Section 3 of the Act.

[7] The court has to determine whether the Plaintiff has complied with the Section 3 Notice, including the term "*debt*" as defined in the Act and whether the Plaintiff's claim can be recovered under *negotiorum gestio* with the right to be reimbursed for the necessary and useful expenses incurred.

[8] Adv. Mitchley submitted that Defendant's contention is that the Plaintiff should have given notice as required by section 3 as the matter involved a debt owed to the Plaintiff. Counsel submitted that the Defendant had no contractual obligation with the Plaintiff. The Plaintiff cannot claim for enrichment as the Plaintiff was not impoverished. Counsel further submitted that, if the State is not given proper notice, the State will have to deal with countless meritless claims against it and such claims would be difficult to verify with no

proper notice given, as the State has a large work force and the annual budget must be informed timeously of any claims against it.

[9] Adv. Benade submitted in oral argument that the Plaintiff seeks a claim for reimbursement for the expenses of having repaired the potholes and do not claim for damages as defined in the Act. He further submitted that the Plaintiff's claim is sought under *negotiorum gestio* and this does not include damages, but a claim for the necessary and useful expenses incurred by the Plaintiff.

Non-compliance with Section 3

[10] Section 3 of the Act provides as follows:

"(1) No legal proceedings for the recovery of a debt may be instated 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 within the knowledge of the creditor."

[11] The Act further defines "debt" as:

"debt" means 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, whether such debt became due before or after the fixed date."

[12] The Plaintiff issued the Defendant with the combined summons on 13 June 2018. The summons was served on the employee of the MEC for the Department of Police Roads & Transport in the Free State. The Plaintiff did not make an application for default judgment. On 13 June 2019, the Plaintiff proceeded to serve combined summons upon Me. Oertel, an employee in the office of the State Attorney. Whereupon, the Defendant filed a notice to defend on 11 July 2019. There is no evidence in the papers that the Plaintiff gave a Section 3 Notice. Instead, the Plaintiff proceeded with instituting the combined summons.

[13] The Act is clear and non-ambiguous that, a litigant who wishes to institute action against an organ of state is required to give notice in writing of such intention. The notice must briefly set out the facts giving rise to the debt and its particulars thereof. Having perused the file, there is no such notice in the court file, neither a notice attached the to the papers.

[14] The Plaintiff's contention that, there was no need to file a Section 3 Notice, may be misplaced as the Act is specific with regard to any litigation against an organ of State. Whether it is for reimbursement for expenses incurred, an organ of state must be notified as required by the Act. It does not apply in this instant as the Plaintiff is not

claiming for damages, but for reimbursement. Bearing in mind that the Act defined debt as any debt arising from any cause of action which arises from a delictual, contractual or any other liability including a cause of action which relates to or arises from the act performed or omission to do anything. The definition in the Act is wide enough to include claims, be it delictual or contractual. However, in this instance the Plaintiff had no contractual agreement with the Defendant. For the fact that the Plaintiff had the intention to institute litigation, it was therefore obliged to give notice.

[15] Submission by Counsel for the Plaintiff's that, the claim does not fall within the ambit of the Act as the claim is for reimbursement and not for delictual damages, may be slightly correct, however, cognisance should be taken that an organ of state must be made aware of any legal action in order to conduct its own investigations to any claim.

[16] Adv. Mitchley in her heads of argument quoted the South Law Commission [1] as follows:

> "The circumstances under which the State can incur liability are legion. Because of the State's large and fluctuating work force and the extent of its activities, it is impossible to investigate an incident properly long after it has taken place... The State is obliged by law to follow cautious and sometimes cumbersome procedures. Government bodies operate on an annual budget and must be notified of possible claims as soon as possible... The State needs time to deliberate and consider questions of policy and possibility of settlements... The State acts in the public interests and not for gain...

[1] Report Project 42: Investigation into the limits for the institution of action against the State, referred to in Moise v Greater Germiston Transnational Local Council 2001 (4) SA 491 (CC) at par 10. And see Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd 2010 (4) SA 109 (SCA) at par 13.

> Because public funds are involved the State must guard against unfounded claims… [T]he State is an attractive target for unfounded claims."

[17] The legislature in enacting that an organ of state must be notified of the potential litigation in writing, intended that it has to be any act or omission that involved money of which, notice must be given to investigate the claim, be it reimbursement for expenses incurred by a party who intends to litigate against the State.

[18] I am inclined to agree with Counsel for the Defendant that, if such claims are not investigated, the State will be flooded with claims with no proper notice. Litigants may take it as a free for all if the proper mechanisms are not in place when dealing with the State in litigation matters. It is just and fair that any legal action against the State, should have notice. The State has a right to defend itself against claims that are not properly established.

[19] I perused the file and could not find any written notice in terms of section 3(1)(a) of the Act. In my view, the Plaintiff by proceeding to issue summons against the Defendant did not comply with the Section 3 Notice. According to the court stamp, the summons and particulars of claim were issued on 13 June 2018 and there is no evidence of the notice. Further, the Rule 37A (10) minutes that was held on 2 June 2021, the Defendant at that stage already raised a special plea of non-compliance with section 3. The Plaintiff could have remedied the situation with an application for condonation.

[20] The Plaintiff in replication, admits that the summons were served for purposes of an application for default judgment, even though the Defendant raised a special plea of non-compliance.

[21] At para 3.1 of the replication (at par 7 & 8 thereof), the Plaintiff admits that the Defendant is an organ of state as defined by the Act, but replicates that the Act only covers the claim of any debt for which an organ of state is liable for payment for damages and that the Act is not applicable to the Plaintiff's cause of action.

[22] The Plaintiff by admitting that the Defendant is an organ of state, therefore means it has to be notified of any potential litigation. The court must be satisfied that the requirements are met in respect of non-compliance with section 3 for it to condone the non-compliance. However, in this case there is neither an application for condonation.

[23] In **Minister of Safety and Security v De Witt,**[2] the court said the following:

> "...s 3(1) is couched in peremptory terms, a court has no power to condone failure to serve a notice prior to the creditor's institution of the action."

[24] The Plaintiff was aware already during the Rule 37 minutes that, the Defendant had raised a special plea of non-compliance with the provisions of section 3 of the Act. In my view, the Plaintiff should have remedied the issue and one would have expected the Plaintiff to bring an application for condonation. Instead, the Plaintiff contends that its claim was not a debt, but relied on *negotiorum gestio.* Even if the Plaintiff relied on *negotiorum gestio*, it would have been proper to serve a notice to the Defendant, which I doubt the Defendant would have raised non-compliance as a special plea. In my view, the Plaintiff did not comply with necessary notice in terms of section 3 neither with its provisions.

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[2] 2009 (1) SA 457 SCA.

NEGOTIORUM GESTIO

[25] The principle of *negotiorum gestio* is simply that an intervening party manages the affairs of others and thus seek restitution or reimbursement, as in this instance, where the Plaintiff fixed the road and is claiming for the expenses incurred or reimbursement.

[26] The Plaintiff in the particulars of claim at paragraph 5.2 states as follow:

> "The Defendant has been ignorant of the fact that its affairs were managed as aforesaid [paragraph 5.1 above refers], alternatively, the Defendant was aware of the management of its affairs and/or the repairs to this particular road effected by the Plaintiff and did nothing about it and/or accept it, and is thus legally regarded as having authorised it tacitly."

[27] At paragraph 5.3, the Plaintiff further states that:

> "In effecting the repairs as aforesaid the Plaintiff had the intention to manage the affairs of the Defendant and/or to effect the repairs to this particular road which was the statutory responsibility of the Defendant, and had the intention to claim reimbursements from the Defendant for expenses necessarily and/or usefully incurred in so managing the affairs and/or effecting the repairs."

[28] Plaintiff proceeded to list the necessary and useful expenses incurred in paragraph 6.1 to 6.5 of the amended particulars of claim. These have already been stated above.

[29] The Defendant in its plea (Ad Paragraph 5.2) contends that:

> "20. The Defendant admits that it had no knowledge of the Plaintiff's alleged maintenance of the R59 road between 2014 and 2017, and therefore denies same.

21. The Defendant denies that it was aware of the alleged management of its affairs and/or the repairs to this particular road was effected by the Plaintiff, denies that it did nothing about it, and denies that it accepted it.

22. The Defendant denies that it is legally regarded as having authorised the Plaintiff's alleged conduct tacitly or otherwise.

23. The Defendant specifically pleads that the Plaintiff had a duty to notify the Defendant of its intended actions, and take certain further steps, as pleaded hereinbelow [sic], which duty it did not comply with."

[30] The Defendant further pleads as follows:

"28. In the event the repairs had to be effected as a matter of urgency, the Plaintiff was required *inter alia* to:

30.1 Obtain two independent invoices from Civil Contractors evidencing the reasonable costs of repairs.

30.2 Submit a motivation to the Defendant as to why the repair was required.

30.3 Submit to the Defendant evidence as to the condition of the road. Which may be produced *inter alia* by way of photographs and or by way of affidavits from third parties.

30.4 The Plaintiff ought to have given the Defendant an opportunity of one month to inspect the work and indicate whether it is satisfactory or not.

30.5 Thereafter render an invoice to the Defendant after the inspection had been completed to the satisfaction of the Defendant, alternatively after the month for inspection had lapsed." [sic]

[31] In **ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers,**[3] the court held that:

[3] 1998 (1) SA 939 (C)

"...there was no question of *negotiorum gestio* in its ordinary sense: at no stage did the respondent have the slightest intention to managing the affairs of the appellant, he was acting on the strength of an instruction by B to carry out repair work to the damaged vehicle."

[32] The court in **ABSA Bank Ltd t/a Bankfin** *supra* further held that:

"The fact that there was no privity of contract between the respondent and the appellant was irrelevant..., provided the prerequisites for such an action had been complied with..."

As in this matter the parties had no contractual obligation, be it direct or indirect.

[33] In **Williams's Estate v Molenschoot and Schep (Pty) Ltd,**[4] The plaintiff effected repairs to a house belonging to defendant in terms of an oral agreement between A and B, who purported to act as A's duly authorised agent. The court in this matter held that:

"Where a person executes repairs to the property of another upon the instructions of a third person who had no authority to give such instructions, the person executing such repairs is a *negotiorum gestor* in relation to the *dominus*, and as such has an action against the *dominus* based on the *negotiorum gestor*... .A *negotiorum gestor* is entitled to claim a reimbursement or indemnity for his actual expenditure and is not entitled to any remuneration or profit in addition."

[34] In **Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en 'n Ander,**[5] the parties of a property entered into an agreement with a company in terms of which the company would develop the property.

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[4] 1939 CPD 360.

[5] 1996 (4) SA 19 A, also 1996 (3) B ALL SA 1

[35] A perusal on the above judgments, it stands out that there were instructions from a third party, the parties had agreements between them, be it oral or written agreements. And the parties are private individuals. The difficulty of this matter is that the Defendant is an Organ of State and the court has to deal with a state organ that holds public funds. It therefore becomes difficult for the court to order the relief sought if indeed the necessary procurement in terms of all the relevant legislation and policies was not followed.

[36] It may have been a good initiative from the Plaintiff's side, but the applicable procurement prescripts which are designed to ensure transparency cost effectiveness, must be followed. The various statutes such as the Public Finance Management Act 1 of 1991 (PFMA), Municipal Finance Management Act 56 of 2003, (MFMA), Treasury Regulations, Supply Chain Management policies are there for a purpose and to prevent a free for all management of the State's affairs. Indeed, the State will be flooded with claims and litigation from parties who will claim that they managed the State's affairs. Litigants would repair and fix state property without following the proper procurement process.

[37] Indeed, it is no secret that the roads in and around the Free State Province are riddled with potholes, including the rest of the roads around the country. It is tempting for businesses to try and fix these roads, as it affects their them. However, as stated by Counsel for the Defendant, the Plaintiff did not render an account to the Defendant; The Plaintiff did not give the Defendant an opportunity to inspect the road nor to obtain quotation from their Civil Contractors or engineers, or informed the Defendant that if the road is not inspected/fixed within

a period of month, the Plaintiff would be entitled to proceed with the repairs.

[38] Equally frustrating as it may be for companies such as the Plaintiff and having had to fix these potholes, the court cannot condone such action which may result in countless claims against the State, which claims will not be verified as the proper processes where not followed nor the procurement process. The Defendant is obliged to follow the prescripts of PFMA, MFMA, and National Treasury, including Supply Chain Management Policies to pay for services rendered. There are budget constraints for any project that the Defendant has to deal with.

[39] Section 217 of the Constitution provides as follows:

> "when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

[40] As the Defendant is an organ of state, it is obliged to deal with public funds in an accountable manner. Litigants cannot be allowed to randomly fix State's infrastructure and expect to claim for reimbursement, without following the proper procurement process.

[41] Therefore, the relief sought by the Plaintiff ought not to be granted.

[42] The Plaintiff prays that the Defendant be ordered to pay the cost for the abandonment of the first special plea. Adv. Mitchley submitted that the Defendant only received a copy of the return of service on 16 November 2021 and that the Plaintiff delivered the replication late. Counsel submitted that she still had to prepare for the first special plea, and the Defendant should not be burdened with costs due to

the Plaintiff's failure to deliver the annexures as well as the replication.

[43] It is a trite principle of our law that a court considering an order of costs exercises a discretion.[6] The courts discretion must be exercised judicially.[7] It is also a well-established law that the general rule is that the costs follow the result.

[44] I accordingly make the following order.

1. The Plaintiff 's claim is dismissed with costs.
2. The Defendant's second special plea is upheld.

CHESIWE, J

[6] Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others 1996 (2) SA 621 (CC), 1996 (4) BCLR 441 [1996] ZACC 27).

[7] Motaung v Mukubela & Another, NNO; Motaung v Mothiba, NO 1975 (1) SA 618 (O) at 631.

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Instructed by:	Symington & De Kok Attorneys
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On behalf of Respondents:	Adv. JF Mitchley
Instructed by:	State Attorney
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