REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, DURBAN

CASE NO.: 4714/2011

In the matter between:

THABANI ZULU & COMPANY (PTY) LTD **APPLICANT**

and

THE MINISTER OF WATER AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA **FIRST RESPONDENT**

THE MINISTER OF AGRICULTURE, FORESTRY & FISHERIES OF THE REPUBLIC OF SOUTH AFRICA **SECOND RESPONDENT**

JUDGMENT

RALL AJ

[1] The applicant intends instituting action against the respondents for payment of the agreed fees due to it by the respondents in terms of contracts concluded by it with the erstwhile Department of Water Affairs and Forestry of South Africa. The reason why that department has not been cited as the respondent is that it has been split up and its two components now form part of the respondents' departments.

[2] The present application is brought in terms of s3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 (the Act). In it the applicant seeks condonation of its failure to give notice in terms of s3(1) of the Act of its intention to institute the action.

[3] The respondents, through the State Attorney, have neither opposed the application nor consented to the relief sought by the applicant. Instead they have elected to abide the decision of the court.

[4] When the matter came before me on 17 May 2011, I asked counsel for the applicant whether it was necessary to bring the application. This I did in the light of the judgments in *Nicor IT Consulting v NW Housing Corporation* [1] and *Director General, Public Works v Kovacs Investments* [2] In both of those cases it was held that the Act only applied to claims for damages and therefore that in other cases, notice in terms of s3(1) was not necessary.

[5] I reserved judgment and afforded the applicant's counsel the opportunity of filing heads of argument. Counsel duly provided me with the heads of argument and I am grateful for his assistance.

[6] The following parts of the Act are most relevant for present purposes:

a) The long title and preamble, the most relevant parts ofwhich read as follows:

> 'To regulate the prescription and to harmonise the periods of prescription of debts for which certain organs of state are liable; to make provision for notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of the recovery of debt; to repeal or amend certain laws; and to provide for matters connected therewith.

Preamble

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AND RECOGNISING THAT-

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1 2010 (3) SA 90 (NWM)

2 2010 (6) SA 645 (GNP)

*the Prescription Act, 1969 (Act 68 of 1969), being the cornerstone of the laws regulating the extinction of debts by prescription, consolidated and amended the laws relating to prescription;
*some of the provisions of existing laws which provide for different periods of prescription in respect of certain debts are inconsistent with the periods of prescription prescribed by the Prescription Act, 1969;

AND BEARING IN MIND THAT-
…..
*the Bill of Rights is the cornerstone of democracy in South Africa and that the State must respect, protect, promote and fulfil the rights in the Bill of Rights;
*section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum;
*the right of access to courts may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution;

AND RECOGNISING the need to harmonise and create uniformity in respect of the provisions of existing laws which provide for-
*different notice periods for the institution of legal proceedings against certain organs of state for the recovery of a debt, by substituting those notice periods with a uniform notice period which will apply in respect of the institution of legal proceedings against certain organs of state for the recovery of a debt;
* different periods of prescription, by making Chapter III of The Prescription Act, 1969, applicable to all debts:

AND RECOGNISING the need to provide for transitional arrangements to ensure a smooth transition between the various existing statutory provisions ….and the provisions of this Act;

AND BEARING IN MIND the limited need, for legal or practical purposes, to retain certain provisions of existing laws which provide for-
*notice periods that differ from the envisaged uniform notice period;
*periods of prescription that differ from the periods of prescription prescribed by Chapter III of the Prescription Act, 1969;’

(b) Section 1(1) in which 'debt' is defined to mean

'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'

(c) Section1(2) and (3) which read as follows:

'(2) This Act does not apply to any debt-

(a) which has been extinguished by prescription before the fixed date; or

(b) which has not been extinguished by prescription before the fixed date and in respect of which any legal proceedings were instituted before the fixed date.

(3) Any legal proceedings referred to in subsection (2) (b) must be continued and concluded as if this Act had not been passed.

(d) Section 2 , which reads as follows:

'(1) The laws referred to in the Schedule are, as from the fixed date, amended or repealed to the extent set out in the third column of the Schedule.

(2) Subject to section 3 and subsections (3) and (4), a debt which became due-

(a) before the fixed date, which has not been extinguished by prescription and in respect of which legal proceedings were not instituted before that date; or

(b) after the fixed date,

will be extinguished by prescription as contemplated in Chapter III of the Prescription Act, 1969 (Act 68 of 1969), read with the provisions of that Act relating thereto.

(3) Subject to subsection (4), any period of prescription which was applicable to any debt referred to in subsection (2) (a), before the fixed date, will no longer be applicable to such debt after the fixed date.

(4) (a) The expired portion of any period of prescription applicable to a debt referred to in subsection (2) (a), must be deducted from the said period of prescription contemplated in Chapter III of the Prescription Act, 1969, read with the provisions of that Act relating thereto, and the balance of the period of prescription so arrived at will constitute the new unexpired portion of prescription for such debt, applicable as from the fixed date.

(b) If the unexpired portion of the period of prescription of a debt referred to in paragraph (a) will be completed within 12 months after the fixed date, that period of prescription must only be regarded as having been completed 12 months after the fixed date'.

(e) Section 3 which reads as follows:

(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.

(3) For purposes of subsection (2) (a)-

a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.

(4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that-

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.'

[7] The Act deals with legal proceedings against organs of state for the recovery of debts. In doing so it attempts to create uniformity on two aspects. The first is the requirement to give notice of a proposed action for the recovery of a debt[3] and the second is the prescription of debts.[4] Speaking generally, this is achieved by repealing the laws dealing with notice requirements, making a single requirement applicable to all debts and making the Prescription Act[5] apply to the prescription of all debts.

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3 S3

4 S2

5 Act 68 of 1969

[8] The Act uses the word 'prescription' throughout to denote that debts have been extinguished. It is clear that the Act uses 'prescription' in a wide sense which includes prescription properly so called and expiry periods. Prescription is governed by the Prescription Act and expiry periods were and in some cases still are governed by various statutes. The main difference between the two is that the Prescription Act provides for grounds which delay the commencement and completion of prescription whereas expiry periods generally do not allow a plaintiff to rely on these grounds.[6] The wider sense is particularly apparent from s2 which refers to periods of prescription other than those prescribed by the Prescription Act. In this judgment I will follow the Act's use of the word 'prescription'.

[9] 'Debt' and 'organ of state' are defined in s1 of the Act. Nothing turns on the latter definition in this case because the respondents are sued as heads of national departments, which are clearly organs of state. The definition of 'debt' is confusing. It speaks of a cause of action which arises from a liability. This is putting the cart before the horse. As was stated by Trollip JA in *Evins v Shield Insurance*[7]:

> '"Cause of action" is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the dependant's "debt", the word used in the Prescription Act. The term, "cause of action", is commonly used in relation to pleadings or in statutes relating to jurisdiction or requiring prior written notification of a claim before action thereon is commenced.'

[10] In citing the above quotation with approval in *Duet and Magnum Financial Services v Koster* [8] Nugent JA held that a debt is the complement of a right and is better described as a liability. Although both these two cases dealt with debt in the context of the Prescription Act, what is stated in them is of general application. Accordingly, the definition of debt in the Act would have read better if it had simply stated that a debt was a liability arising out of any cause of action. Nevertheless, in my view, that is what the legislature intended the first part of the definition to mean.

6 Minister of Safety and Security v Molutsi 1996 (4) SA 72 (A) at 95F-H

7 1980 (2) 814 (A) at 825F

8 2010 (4) SA 499 (SCA) at 507A-B

[11] Para (a) of the definition is widely worded and makes it clear that a debt is any liability whatsoever. It is however followed by para (b) and the question which arises is how the two paragraphs relate to each other. They can be read either disjunctively or conjunctively. The paragraphs are linked by 'and' and not 'or'. Ordinarily, paragraphs or phrases linked by 'and' are read conjunctively and those by 'or' disjunctively. Accordingly, although the courts have read "and' to mean 'or' and *vice versa* in appropriate circumstances, there must be compelling reasons to change the words used by the legislature.[9]

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

[13]In the *Kovacs Investments* case the court came to the conclusion that the Act did not apply to a claim for arrear rental and other charges due in terms of a lease agreement, by reading the two paragraphs of the definition of 'debt' in S 1 of the Act conjunctively. On the other hand, in the *Nicor* case, whilst the court found that the Act did not apply to a claim for an amount due in terms of a contract, it did so by applying the ordinary and natural meaning of the definition, and also tested that meaning against the context and purpose of the Act. The ordinary and natural meaning was found to be that para (b) of the definition qualified the whole of para (a).

[14] It follows from what I have said that I agree with the conclusion in the *Nicor* case on the ordinary meaning of the definition of 'debt' in the Act. I also agree with the finding that para (b) of the definition cannot be read to qualify only sub-paras (i) and (ii) of para (a). In my view such a reading would not make sense.

9 Ngcobo and Ors v Salimba CC 1999 (2) SA 1057 (SCA) at 1067J-1068E

[15] The Prescription Act does not define 'debt' but that term has been interpreted by our courts. The following has been stated about the term:

> 'Volgens die aanvaarde betekenis van die begrip slaan "'n skuld" op 'n verpligting om iets te doen (hetsy by wyse van betaling of lewering van 'n saak of dienste), of nie te doen nie. Dit is die een pool van 'n verbintenis wat in die reël 'n vermoënsbestanddeel en-verpligting omvat (*Joint Liquidators of Glen Anil Development Corporation Ltd (in liquidation) v Hill Samuel (SA) Ltd* 1982 (1) SA 103 (A) te 110; *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) te 344; *De Wet en Yeats Kontraktereg en Handelsreg 4de uitg* te 2).'[10].

This is obviously far wider than the Act's definition of 'debt', and therefore incorporates liabilities for damages, liabilities for liquidated sums of money and non-monetary liabilities. I shall refer to the latter two categories of debts owed by organs of state as non-damages debts or liabilities.

[16] I am also in agreement with what was stated in the *Nicor* case on the broad purposes of the Act, namely:

> 'From the extracts of the preamble set out above there are three important issues to note. Firstly, the State intends to respect, protect, promote and fulfil the rights in the Bill of Rights. Secondly, its point of departure was that the provisions of Ch III of the Prescription Act 68 of 1969 were applicable to all debts. Finally, insofar as it was necessary to limit the right of access to the courts, such rights would be limited only to the extent that it was reasonable and justifiable to do so in an open, democratic society, as required by s 36 of the Constitution.'[11]

I would lay particular emphasis on the need to protect the right to access to the courts enshrined in s34 of the Constitution.

[17] I also agree in general terms with what was stated in that case about why the notice requirements of the Act should only apply to damages cases, namely, that the evidence in these cases is more likely to depend on the memory of people than

10 Oertel v Direkteur van Plaaslike Bestuur 1983 (1) SA 354 (A) at 370B-C

11 Para 24

documents and so the defendant should be given timeous notice of contemplated proceedings in order to be able to investigate the case. However, some damages cases may depend largely on documents. This would happen where the claim is for damages arising from breach of a written contract. Conversely, a non-damages claim may depend almost entirely on the memory of people where it is based on an oral contract. Nevertheless, generally speaking the traditional justification for notice provisions is more necessary in damages cases, particularly delictual ones. This justification was expressed as follows by Didcott J in *Mohlomi v Minister of Defence*[12] :

> 'The conventional explanation for demanding prior notification of any intention to sue such an organ of government is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.'

[18] Finally, subject to one qualification mentioned below, I agree that the Act as a whole, supports the ordinary meaning of the definition. I would add that there are indications which point to debts being restricted to monetary claims as opposed to including non-monetary ones. Firstly, in the long title, the preamble, the definition of creditor in s1 and in s3(1) the expressions 'recovery of a debt' and 'recovery of debts' are used. Secondly, ss(4) of s1 which I must say seems rather out of place in a definition section, speaks of legal proceedings being instituted by service of any process in which is claimed 'payment of a debt'.

[19] However, in my view that is not the end of the matter. I say this because the ordinary meaning of debt leads to a possible anomaly in relation to the effect of the Act on some of the debts which are not included in the Act's definition of debt, that is, non-damages debts.

[20] There is no uncertainty about the Act's impact on debts as defined in the Act. The Act deals expressly with them:

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12 1997 (1) SA 124 (CC) at128 D-E

(a) Those which have prescribed or in respect of which action has been instituted before the Act comes into effect are not affected by the Act[13]

(b) Those which arise after the Act has come into effect, will prescribe in terms of Chapter lll of the Prescription Act, read with the provisions of that act relating thereto and s3's notice requirements apply to these debts.[14]

(c) Those in respect of which the prescription period has commenced to run but has not yet been completed, will prescribe after the expiry of the relevant period prescribed by the Prescription Act, but no earlier than one year after the Act came into effect, and s3's notice requirements apply to these debts.[15]

[21] What the Act does not deal with in detail is non-damages debts owed by organa of state. The prescription of some of these was governed by various laws which were repealed by the Act.[16] The prescription of the rest was either governed by laws which were not repealed or by the Prescription Act.[17] The Act left the Prescription Act unscathed and so any non-damages debts governed by that act or the unrepealed laws before the Act came into operation were unaffected by the Act. However, the Act repealed some of the 'prescription' laws. Some of these repealed laws, as will be seen, dealt with both damages and non-damages debts. However, in repealing these laws the Act only dealt with the consequences of that repeal on damages debts. As a result there is uncertainty about the effect of the repeal of these laws on those non-damages debts which were previously governed by them.

[22] Non-damages debts which had prescribed before the Act came into effect present no difficulty. They remain unaffected by the Act. Non-damages debts which arise after the Act came into effect also present no problems. They prescribe in terms of the

13 S1(2) and (3)

14 S(2)(2)(b)

15 S2(2)(2)(a), (3) and(4)

16 S2(1) read with the schedule

17 S16 of the Prescription Act

Prescription Act.

[23] The difficulty arises in relation to non-damages debts which were partially prescribed when the Act came into effect, and which were governed by one of the laws repealed by the Act. An example of these is s26 of The Intelligence Services Act, 38 of 1994, ss(1) of which reads :

> ' (1) Any civil proceedings against the State or any person in respect of anything done in pursuance of this Act, shall be instituted within three years after becoming aware that the cause of action arose, and notice in writing of any such proceedings and of the cause thereof shall be given to the defendant not less than one month before it is instituted.'

[24] As I have mentioned the Act merely repeals these governing laws and does not provide for the consequences of that repeal, namely, what, if any, notices must be given and what prescription periods apply to those debts. As a result the rules of interpretation of statutes have to be utilised. In *Transnet v Ngcezula*[18] at issue was the effect of the repeal of The South African Transport Services Act, 65 of 1981 with effect from 1 April 1990. S 64 (3) of that act required claimants against SATS to lodge a claim within three months of it becoming due on pain of losing the right to enforce the claim. However, the subsection provided for a court to grant leave to lodge the claim late. The repealing act, Act 9 of 1989 did not deal with the consequences of the repeal and contained no counterpart to S 64 (3) of the repealed act. The respondent was injured on 15 August 1989 and held SATS liable for her damages. A claim was lodged on 7 March 1990, well out of time.

[25] The Appellate Division held that the primary consideration was what the intention of the legislature was in repealing the legislation in question and when the wording of the repealing act offers no guidance, the answer is to be found in S 12 (2) (c) of the Interpretation Act, 33 of 1957. The relevant parts of s12 of that act provide as follows:-

18 1995 (3) SA 538 (A)

'12 (1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.

(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-

…..

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

….

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.'

The court went on to hold that S 12 (2) had the effect of preserving the status quo and that the rights of both the claimant and the defendant survived the repeal of S 64 (3). This in turn meant that whilst the respondent's right to sue was still dependant on giving timely prior notice of the intention to do so, the court still had the right to allow late notice.

> [26] In my view the legislation dealt with in the *Transnet* case is on all fours with that in the present one, and so the effect of this is that unless a contrary intention appears from the Act, the repealed legislation like s26(1) of the Intelligence Services Act continued to apply to non-damages debts, both in relation to prescription and pre-litigation notices. This would lead to the anomaly that different prescription periods applied to damages claims and non-damages claims, even against the same defendant, and even where the two categories were previously governed by the same legislation. This would not be entirely unprecedented because a similar situation was possible in relation to provincial departments and municipalities prior to the repeal of The Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 94 of 1970 by the Act[19].

19 And subject of course to the finding of unconstitutionality in Moise v Greater Germiston TLC 2001 (4) SA 491

However that would have been in relation to delictual claims on the one hand and all other claims on the other, because Act 94 of 1970 only applied to delictual claims. What is now possible is that different notice requirements could apply to a claim for damages arising from breach of contract and one for specific performance of the same contract. Secondly, the provisions which would constitute a greater erosion of a plaintiff's constitutional right to access to the courts would apply to cases in respect of which an organ of state is less in need of protection, namely, non-damages claims. Finally, and most importantly, it would, on the strength of judgments like *Mohlomi v Minister of Defence*[20] and *Brummer v Minister for Social Developmen* [21]*,* possibly mean the retention of unconstitutional legislation. An example is s 26(1) of the Intelligence Services, which, like s113 of the Defence Act, which was struck down in the *Mohlomi* case, not only prescribes a notice period, but makes no provision for condonation.[22]

[27] It seems to me that there are two possible ways in which this consequence could be avoided. Firstly, the two paragraphs of the definition of debt could be read disjunctively. This would widen the definition to include non-damages debts and ss2 and 3 of the Act would also apply to these debts. Whilst this interpretation would remove an unjust and possibly unconstitutional result of the other interpretation and could therefore be justified[23], there is a compelling factor weighing against this interpretation. That is that it would result in a far greater erosion of constitutional rights than the ordinary meaning would, by making the Act's notice requirements applicable to non-damages debts. Although the failure to give timeous notice is not fatal to a plaintiff, condonation is not for the asking.[24] In addition, as I have mentioned there are strong

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(CC)

20 1997 (1) SA 124 (CC)

21 2009 (6) SA 323 (CC)

22 Other examples are s32A of the Black Administration Act,38 of 1927, ss343 and 344(4) of the Merchant Shipping Act, 57 of 1951 and s68(4) of the Mental Health Act, 18 of 1973.

23 Ngcobo's case at 1068C-D

24 Minister of Agriculture v CJ Rance 2010 (4) SA 109 (SCA) particularly paras 35 and 36

indications in the rest of the Act which point to 'debt' not having an extended meaning. Finally, this interpretation would mean that paragraph (a) would not make it clear that a debt was something owed by an organ of state. As a result, the definition would not make sense. I conclude therefore that a disjunctive interpretation of the definition is not justified.

[28] The second possibility is to find that 'the contrary intention ' does in fact appear from the Act read with the Constitution, namely, that what was intended was that the repealed laws should no longer apply but that the provisions of ss2 and 3 of the Act should apply to the (non-damages) debts in question in the same way that they apply to the corresponding (damages) debts. There are indications in the Act which suggest that such a consequence was what was intended by the legislature. For example, the need to harmonise and standardise the law relating to prescription and notice periods in relation to claims against organs of state. Secondly, and more importantly, to allow the offensive provisions to remain in force would limit the right enshrined in s34 of the Constitution, and these provisions may well be unconstitutional. I might add that the last paragraph of the preamble does not seem to apply to the repealed laws but to ones which were not repealed[25].

[29] On the other hand, the Act is not consistent in its attempts to protect the s 34 constitutional right. In certain cases that right has been partially sacrificed in the interests of standardisation. For example, prior to the Act, notice requirements in respect of claims against national government departments were the exception and not the rule, but the Act has made them applicable to all departments, albeit only in respect of damages claims. Secondly, one is not dealing here with a case of the legislature introducing potentially unconstitutional legislation but of it allowing that legislation to remain on the statute book. This means that those affected by the legislation are in no worse position than they were before. Thirdly, the legislation affects a minority of litigants because of the limited number of laws involved and because it only affects claims which arose in the transitional period between the old and new orders. Finally,

25 See *Erasmus, Superior Court Practice* E7-16 to E7-37 for a list of these laws

because the debts in question arose in a fixed period in the past, the prejudicial effect of the repealed laws will last for a limited period.

[30] Weighing up the factors I have mentioned, I am of the view that the repealed laws should not apply to the non-damages claims in question and as a result the potential anomaly does not arise. However, what is most important for this case is that it is not necessary or possible to deviate from the ordinary meaning of the definition of debt in order to avoid the unacceptable consequences in question.

[31] The applicant's counsel argued that the decisions in the *Nicor* and *Kovacs Investments* cases were wrong. This argument was based principally on *Holeni v Land Bank*[26]. It was suggested that it would appear from the judgment in that case that had the court found that the Land Bank was an organ of state, the Act would have applied to the case even if the claim concerned was not one for damages. That case did not deal with the Act at all, but with The Prescription Act. Furthermore the claim in question was not one against the Bank but one by the Bank for the recovery of a loan. At issue in that case was whether or not the Land Bank was part of the State for purposes of the Prescription Act. The case is therefore of no relevance to this case.

[32] Alternatively counsel argued that condonation should be granted as a precaution in case the applicant decided at some stage to introduce alternative claims based on enrichment. I do not agree. Even if such an amendment were to be made, the enrichment claims would not be hit by S 3 of the Act because an enrichment claim is not one for damages.

[33] I find therefore that the ordinary meaning of the definition of debt is the correct one and I therefore agree with the decisions in the *Nicor* and *Kovacs Investments* cases.

[34] As a result, I find that because the applicant's claims are not damages claims, the Act does not apply to them and it is unnecessary for the applicant to apply for

26 2009 (4) SA 437 (SCA)

condonation in terms of S 3 of the Act.

[35] In the light of this conclusion, the applicant is not entitled to the substantive relief it seeks. However, the respondents did not oppose the application. It follows therefore that the respondents are not entitled to a costs order. Instead, there should be no order for costs, which means that the parties will bear their own costs.

[36] I accordingly make the following order:-

1. The application is dismissed;
2. There will be no costs order.

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RALL AJ

Date of Judgment: 22 June 2011
Appearance for Applicant: K Naidu instructed by Mahomed Khan and Associates.
Appearance for Respondent: None

Thabani Zulu & Company, judgment 3.6.11