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**CONTENTS**

<i>No.</i>		<i>Page No.</i>	<i>Gazette No.</i>
<b>GENERAL NOTICE</b>			
<b>Justice and Constitutional Development, Department of</b>			
<i>General Notice</i>			
689	Publication of Constitution Eighteenth Amendment Bill of 2009 and State Liability Bill, 2009 .....	3	32289

**INHOUD**

<i>No.</i>		<i>Bladsy No.</i>	<i>Koerant No.</i>
<b>ALGEMENE KENNISGEWING</b>			
<b>Justisie en Staatkundige Ontwikkeling, Departement van</b>			
<i>Algemene Kennisgewing</i>			
689	Publikasie van Agtiende Wysigingswetsontwerp op die Grondwet van 2009 en Wetsontwerp op Staatsaanspreeklikheid, 2009 .....	30	32289

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## GENERAL NOTICE ALGEMENE KENNISGEWING

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### NOTICE 689 OF 2009

#### DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

#### PUBLICATION OF CONSTITUTION EIGHTEENTH AMENDMENT BILL OF 2009 AND STATE LIABILITY BILL, 2009

The Minister of Justice and Constitutional Development hereby publishes—

- (a) the Constitution Eighteenth Amendment Bill of 2009, as contained in Annexure A; and
  - (b) the State Liability Bill, 2009, as contained in Annexure B,
- for public comment. Any person wishing to comment on the proposed amendments is invited to submit written comments to the Minister of Justice and Constitutional Development. Comments should kindly be directed for the attention of Mr J J Labuschagne, Private Bag X 81, Pretoria, 0001, by not later than **1 July 2009**.

(Electronic mail address: Jolabuschagne@justice.gov.za or facsimile no. 086 501 8053)

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### ANNEXURE A

#### CONSTITUTION EIGHTEENTH AMENDMENT BILL OF 2009

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

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#### GENERAL EXPLANATORY NOTE:

\_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments.

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### BILL

**To amend the Constitution of the Republic of South Africa, 1996, in order to provide for an Act of Parliament to regulate legal proceedings in which the state is involved; and to provide for matters connected therewith.**

Parliament of the Republic of South Africa enacts as follows:—

## **Insertion of section 173A in the Constitution of the Republic of South Africa, 1996**

1. The following section is hereby inserted in the Constitution of the Republic of South Africa, 1996, after section 173:

### **"Legal proceedings against state**

**173A.** (1) Despite any other provision of the Constitution, an Act of Parliament must prescribe reasonable—

- (a) procedural requirements for the institution of legal proceedings against the state;
- (b) measures for enforcing the execution of final court orders against the state, including payments to be made by the state to comply with final court orders; and
- (c) measures to enable the state to deal efficiently and effectively with all legal proceedings in which the state is involved.

(2) Section 226(2)(b) does not apply if the measures referred to in subsection (1)(b) authorise provincial governments to make payments as direct charges against the Provincial Revenue Funds when complying with final court orders.

(3) Different limitations, procedures and measures may be prescribed for different spheres of government or categories of the state or organs of state."

### **Short title and commencement**

2. This Act is called the Constitution Eighteenth Amendment Act of 2009, and comes into operation on a date set by the President by proclamation in the *Gazette*.

## MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION EIGHTEENTH AMENDMENT BILL OF 2009

### 1. BACKGROUND

- 1.1 Section 3 of the State Liability Act, 1957 (Act No. 20 of 1957), provides as follows:

**"Satisfaction of judgment**

**3. No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be."**

- 1.2 On 30 March 2007 the then Pretoria High Court in *Nyathi v MEC for the Department of Health, Gauteng and Another* (TPD case No. 26014/2005), made the following order:

**"1. The following portion of section 3 of the State Liability Act No 20 of 1957, is hereby declared to be inconsistent with the Constitution of the Republic of South Africa and therefore invalid:**

**'No execution, attachment or like process shall be issued against a defendant or a respondent in any such action or proceedings or against the property of the State ... .'**

**2. ..."**

- 1.3 In terms of section 172(2)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution), an order of constitutional invalidity in the High Court has no force unless it has been confirmed by the Constitutional Court. Consequently, the matter was referred to the Constitutional Court for confirmation of the High Court's order of constitutional invalidity.

- 1.4 On 2 June 2008 the Constitutional Court in *Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Another* 2008 (9) BCLR 865 (CC) (the *Nyathi* case), at par 92, made, amongst others, the following order:

**"(1) The order of constitutional invalidity made by the Pretoria High Court is confirmed in the following terms:**

**Section 3 of the State Liability Act is declared to be inconsistent with the Constitution to the extent that it does not allow for execution or attachment against the state and that it does not provide for an express procedure for the satisfaction of**

**judgment debts.**

- (2) The declaration of invalidity is suspended for a period of 12 months to allow Parliament to pass legislation that provides for the effective enforcement of court orders.**
- (3) ...**
- (4) ...**
- (5) ...".**

1.5 In order to address the Constitutional Court's judgment in the *Nyathi* case, as well as other practical problems that are being experienced with the execution of court orders against the state, it appears to be more appropriate to promote and enact a new State Liability Act rather than to effect amendments to the already obsolete State Liability Act, 1957. An accompanying Constitution Amendment Bill, namely, the Constitution Eighteenth Amendment Bill of 2009 (the Bill), is also required.

**2. PROVISIONS OF BILL**

2.1 The Bill seeks to insert a new section 173A in the Constitution that provides, amongst others, that an Act of Parliament must prescribe reasonable—

- (a) procedural requirements for the institution of legal proceedings against the state (new subsection (1)(a));
- (b) measures for enforcing the execution of final court orders against the state, including payments to be made by the state to comply with final court orders (new subsection (1)(b)); and
- (c) measures to enable the state to deal efficiently and effectively with all legal proceedings in which the state is involved (new subsection (1)(c)).

2.2 Provision is further made that section 226(2)(b) of the Constitution (that provides that money may be withdrawn from a Provincial Revenue Fund as a direct charge against the Provincial Revenue Fund if it is provided for in the Constitution or a provincial Act) does not apply if the measures referred to in the new subsection (1)(b) above authorise provincial governments to make payments as direct charges against the Provincial Revenue Funds when complying with final court orders (new subsection (2)). Provision is also made that different limitations, procedures and measures may be prescribed for different spheres of government or categories of the state or organs of state (new subsection (3)).

2.3 The new section 173A is intended to lay the basis for the substitution of the State Liability Act, 1957, as mentioned in paragraph 1.5 above. The State Liability Bill, 2009, is intended to be the "Act of Parliament" envisaged in the new section 173A(1).

2.4 In view of the interrelationship between the Bill and the State Liability Bill, 2009, the two Bills should, as far as possible, be considered as a package.