

REPUBLIC OF SOUTH AFRICA

STATE LIABILITY AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 33950 of 21 January 2011)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 2—2011]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

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

BILL

To amend the State Liability Act, 1957, so as to regulate the manner in which a final court order sounding in money against the State must be satisfied; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Substitution of section 2 of Act 20 of 1957, as amended by section 1 of Act 201 of 1993

1. The following section is hereby substituted for section 2 of the State Liability Act, 5
1957 (hereinafter referred to as the principal Act):

“Proceedings to be taken against [Minister] executive authority of department concerned

2. [(1)] In any action or other proceedings instituted by virtue of the provisions of section [one] 1, the [Minister] executive authority of the 10 department concerned may be cited as nominal defendant or respondent.

[(2) For the purposes of subsection (1), ‘Minister’ shall, where appropriate, be interpreted as referring to a member of the Executive Council of a province.]”.

**Substitution of section 3 of Act 20 of 1957, as amended by section 36 of Act 9 of 1989 15
and substituted by section 2 of Act 201 of 1993**

2. The following section is hereby substituted for section 3 of the principal Act:

“Satisfaction of [judgment] final court orders sounding in money

3. (1) [No] Subject to subsections (4) and (5), no execution, attachment or like process [shall] may be issued against the defendant or respondent in 20 any [such] action or legal proceedings against the State or against any property of the State, but the amount, if any, which may be required to satisfy any [judgment or] final court order given or made against the nominal defendant or respondent in any such action or proceedings [may]

shall be paid [out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be] as contemplated in this section.

(2) The State Attorney or attorney of record concerned, as the case may be, shall, within seven days after a court order sounding in money against a department becomes final, in writing, inform the executive authority and accounting officer of that department of the final court order.

(3) (a) A final court order against a department for the payment of money shall be satisfied within 30 days of the order becoming final, unless an appeal has been lodged against the judgment or that order.

(b) (i) The accounting officer of the department concerned shall make payment in terms of such order within the time period specified in paragraph (a).

(ii) Such payment shall be charged against the appropriation account or expenditure budget of the department concerned, where applicable.

(4) If a final court order against a department for the payment of money is not satisfied and acceptable arrangements have not been made with the judgment creditor for the satisfaction of the judgment debt within the time period specified in subsection (3)(a), the judgment creditor may apply for a writ of execution in terms of the Uniform Rules of Court or a warrant of execution in terms of the Magistrates' Courts Rules, as the case may be, against movable property owned by the State and used by the department concerned, other than property, the attachment and execution of which would severely disrupt service delivery, threaten life or put the security of the public at risk.

(5) The sheriff of the court concerned shall, pursuant to the writ of execution or the warrant of execution, as the case may be, attach, but not remove, the identified movable property.

(6) In the absence of any application contemplated in subsection (7), the sheriff of the court concerned may, after the expiration of 30 days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt.

(7) A party having a direct and material interest may, during the period referred to in subsection (6), apply to the court which granted the order, for a stay on grounds that the execution of the attached movable property is not in the interests of justice.”.

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Insertion of section 4A in Act 20 of 1957

3. The following section is hereby inserted in the principal Act after section 4:

“Definitions

4A. In this Act, unless the context indicates otherwise—

‘accounting officer’ means a person referred to in section 36 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

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‘department’ means a national or provincial department;

‘executive authority’—

(a) in relation to a national department, means the Cabinet member who is accountable to Parliament for that department; and

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(b) in relation to a provincial department, means the member of the Executive Council of a province who is accountable to the provincial legislature for that department;

‘final court order’ means an order—

(a) given or confirmed by a court of final instance; or

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(b) given by any other court where the time for noting an appeal against the order to a higher court has expired and no appeal has been lodged: Provided that where a court thereafter grants condonation for the late lodging of an appeal, an order given or confirmed by the court hearing such appeal;

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‘Magistrates’ Courts Rules’ means the rules published under Government Notice No. R. 1108 of 21 June 1968, as amended; and

'Uniform Rules of Court' means the rules published under Government |
Notice No. R. 48 of 12 January 1965, as amended.”.

Short title and commencement

4. This Act is called the State Liability Amendment Act, 2011, and comes into operation on a date set by the President by proclamation in the *Gazette.* 5

MEMORANDUM ON THE OBJECTS OF THE STATE LIABILITY AMENDMENT BILL, 2011

1. BACKGROUND

- 1.1 On 2 June 2008 the Constitutional Court, in *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) (the “Nyathi One case”), declared section 3 of the State Liability Act, 1957 (Act No. 20 of 1957) (the “Act”), which deals with the satisfaction of judgments against the State, to be inconsistent with the Constitution of the Republic of South Africa, 1996, “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”. The declaration of invalidity was suspended for a period of 12 months in order to allow Parliament to pass legislation that provides for the effective enforcement of court orders.
- 1.2 The Minister of Justice and Constitutional Development applied for an extension of the period of suspension of the order of constitutional invalidity made by the Constitutional Court on 2 June 2008 in the *Nyathi One* case in order to introduce a State Liability Bill in Parliament, and for Parliament to pass the Bill. On 1 June 2009 the Constitutional Court, in *Minister for Justice and Constitutional Development v Nyathi and Others, In re: Nyathi v Member of the Executive Council for Health, Gauteng and Another* (Case CCT 53/09) (the “Nyathi Two case”), extended the period of suspension of invalidity to 31 August 2009, and on 31 August 2009 it was again extended to 31 August 2011.
- 1.3 On 9 October 2009 the Constitutional Court handed down judgment in the *Nyathi Two* case which provides for an order that will regulate the satisfaction of judgment debts against the State until 31 August 2011 or until remedial legislation is enacted, whichever occurs first. The order provides for a tailored attachment and execution procedure against movable assets of the State.

2. OBJECTS OF THE BILL

- 2.1 The Bill seeks to give effect to the Constitutional Court’s judgment in the *Nyathi One* case and its order in the *Nyathi Two* case, to wit, to amend section 3 of the Act accordingly.
- 2.2 The objects of the Bill are to create an effective execution process to be used by successful litigants in civil actions against the State in cases where the State has failed to comply with final court orders sounding in money. The provisions of the Bill can be summarised as follows:

2.2.1 Ad clause 1:

Clause 1 substitutes section 2 of the Act. The substitution of section 2 of the Act is required as a result of the insertion of a definition of “executive authority” in the Act (see clause 3).

2.2.2 Ad clause 2:

Clause 2 substitutes section 3 of the Act in order to give effect, as far as possible, to the Constitutional Court’s judgment in the *Nyathi One* case and its order in the *Nyathi Two* case. Provision is, among others, made for the following:

- (a) The proposed new section 3 provides that no execution, attachment or like process may be issued against the defendant or respondent in any action or legal proceedings against the State or against any property of the State, except if a final court order sounding in money against the State has not been satisfied in accordance with the remainder of the provisions of that section (see proposed new subsection (1)).

- (b) The State Attorney or attorney of record concerned must, within seven days after a court order against a department (national or provincial) becomes final, in writing, inform the executive authority and accounting officer of that department of the final court order (see proposed new subsection (2)).
- (c) A final court order against a department for the payment of money must be satisfied within 30 days of the order becoming final, unless an appeal has been lodged against the judgment or that order (see proposed new subsection (3)(a)).
- (d) The accounting officer of the department concerned must make payment in terms of such order within 30 days of the order becoming final and such payment must be charged against the appropriation account or expenditure budget of the department concerned (see proposed new subsection (3)(b)).
- (e) If a final court order against a department for the payment of money is not satisfied, and acceptable arrangements have not been made with the judgment creditor for the satisfaction of the judgment debt within the specified time period, the judgment creditor may apply for a writ of execution or a warrant of execution, as the case may be, against movable property owned by the State and used by the department concerned, except property, the attachment and execution of which would severely disrupt service delivery, threaten life or put the security of the public at risk (see proposed new subsection (4)).
- (f) The sheriff of the court concerned must, pursuant to the writ of execution or the warrant of execution, as the case may be, attach, but not remove, the identified movable property (see proposed new subsection (5)).
- (g) In the absence of any application contemplated in paragraph (h) hereunder, the sheriff of the court concerned may after the expiration of 30 days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt (see proposed new subsection (6)).
- (h) A party having a direct and material interest may, during the period referred to in the proposed new subsection (6) (see paragraph (g) above), apply to the court which granted the order, for a stay on grounds that the execution of the attached movable property is not in the interests of justice (see proposed new subsection (7)).

2.2.3 Ad clause 3:

Clause 3 inserts a new section 4A in the Act containing definitions of various expressions in the Act. Those definitions are required as a result of the proposed amendments to the Act that the Bill seeks to effect (see paragraphs 2.2.1 and 2.2.2 above).

2.2.4 Ad clause 4:

Clause 4 contains the short title of the Bill and provides for the commencement of the Act.

- 2.3 As the Constitutional Court extended the period of suspension of constitutional invalidity of section 3 of the Act to 31 August 2011, the Bill has to be passed by Parliament and implemented before that date.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 3.1 The Bill was prepared in close conjunction with National Treasury, being the main role-player.
- 3.2 On 1 June 2009 a State Liability Bill, 2009, was published in the *Gazette* for public comments. The comments received were accommodated, where appropriate.

4. IMPLICATIONS FOR PROVINCES

The Bill seeks to regulate the manner in which a final court order sounding in money against a department, including a provincial department, must be satisfied.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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