

Date:

04 March 2011

Enquiries:

Melonie Kariem

Tel: (011) 800 2419

Fax: 086 684 5311

**The Portfolio Committee on Justice and Constitutional Development
Committee Secretary
Mr V Ramaano**

Our reference: LEG 0291

Per email: vramaano@parliament.gov.za

Dear Mr. V Ramaano

ESKOM'S COMMENTARY ON THE STATE LIABILITY AMENDMENT BILL [B2 - 2011]

Eskom appreciates the opportunity to comment on the aforementioned Bill.

We trust that our comments have been constructive and that they are of assistance in finalising the Bill. In the event that further clarification or information is required, Eskom would be more than happy to provide same.

We hope our input adds value.

Yours sincerely



WJJ du Plessis

GENERAL MANAGER (LEGAL)

Regulatory and Governance Unit

Head Office

Megawatt Park Maxwell Drive Sunninghill Sandton PO Box 1091 Johannesburg 2000 SA

Tel +27 11 800 8111 Fax +27 11 800 5503 www.eskom.co.za

Directors: PM Makwana (Chairman) BA Dames (Chief Executive) LCZ Cele SD Dube BL Fanaroff LG Josefsson (Swedish)

HB Lee (Korean) WE Lucas-Bull B Mehlomakulu J Mirenge (Rwandan) JRD Modise PS O'Flaherty* U Zikalala

(*Executive Director)

Company Secretary: B Mbomvu Eskom Holdings Limited Reg. No 2002/015527/06

**Eskom comments on the State Liability Amendment Bill of 2011
published in the Government Gazette No: 33950 of 21 January 2011.**

1. Objects of the Bill

The Memorandum on the objects of the State Liability Amendment Bill (“the Bill”) provides that it “seeks to give effect to the Constitutional Court’s judgment in the *Nyathi* case, to wit, to amend Section 3 of the State Liability Act 20 of 1957 (“the Act”) to provide for the execution of a judgement sounding in money against the state.”

2. Section 3 (3)(a) Final court order

Section 3 (3)(a) should state that the appeal should not only be noted but also prosecuted within a stipulated time failing which the party can proceed to execute.

Recommendation

It is recommended to insert a time period for prosecution of an appeal to ensure finality on the appeal process and thus avoiding unnecessary delay and that the appellant must take prudent steps to prosecute the appeal within the time period stipulated in the Bill with the Registrar of the court.

We propose that Section 3 (a) should be deleted and replaced with the following wording:

“(3) (a)(i) 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 and prosecuted within six month after noting the appeal against the judgment or that order.

(ii) The Appellant must ensure to take reasonable steps to prosecute the appeal within the time period set out in section 3 (a)(i) , above, with the Registrar of the relevant High Court or Supreme Court of Appeal, failing which the judgment creditor is entitled to proceed to satisfy the judgment.”

3. Section 3 (3) (b) and Section (4) Payment and Execution process

Section 3 (3) b (ii) and Section 3 (4) makes reference that the attachment may only be executed against the **appropriate** department. If the State is considered as comprising of both the national and provincial government departments than a judgment creditor should not be restricted to secure the assets of a particular department to satisfy the judgment.

Section 3 (4) states “ ...the judgment creditor may apply for execution against movable assets **owned by the State and used by the department...**”. From this it is clear that the State owns the asset which is used by the department and therefore the judgment creditor should be in a position to execute against any department or directly against the National Treasury to recover the debt in the event it fails to successfully recover from the relevant department due to

the fact that it may not be possible to find sufficient assets to cover the judgement amount.

Recommendation

There should be flexibility to execute against **any** department irrespective whether, national or provincial, to satisfy the judgment debt or as a last resort to pursue the National Treasury directly to satisfy the judgment if the relevant department does not have sufficient assets as the State ultimately owns the assets as highlighted in the Bill.

We propose the deletion of Section 3 (b)(ii) and to be replaced with the following wording which reads as follows:

“ 3 (b)(ii) Such payment shall be charged against the appropriation account or expenditure budget of the department concerned *or the account or expenditure budget of the State*, where the department concerned has insufficient assets or no assets at all to satisfy the judgment debt .”

4. Section 3 (4) carve-outs

Section 3 (4) of the Bill sets out carve-outs in terms of which property of the State and the department , for instance, immovable property and property which would disrupt service delivery, threaten life or put the security of the public at risk, is excluded from attachment. The question is also whether the wording is clear enough to prevent the abuse of the carve-outs? However we have proposed redrafting of the clause below.

It is not clear from this section who exercises the discretion to exclude the attachment and execution against property which would disrupt service delivery, threaten life or put the public at risk.

The exemption against the attachment of property of the State and which is used by the department concerned should only be triggered, if the service delivery ceases to operate at all or the public or the State is put at risk as a result of the attachment of the property of the department concerned.

We are of the view that the limitation will significantly restrict a judgment creditor in obtaining an attachment and execution order against a national or provincial department for debts sounding in money since the department concerned may be successful in claiming that all of its movable property sought to be attached is being used for service delivery.

The same execution rules of the High Court and Magistrates' Court should apply which sets out the process for executing against movable property first and if insufficient movable property, against immovable property.

Recommendation

The Bill should make provision to attach and execute against movable property first and if insufficient against **immovable property**.

We propose the redrafting of section 3(4) which should read as follows:

“3 (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' Court Rules, as the case may be, against movable property first belonging to the State and used by the department concerned and if insufficient movable property to satisfy the debt, then the judgment creditor is entitled to proceed to execute against the immovable property belonging to the State and used by the department concerned. "

5. Section 3 (4) carve-outs

"3 (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' Court 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."

The qualification and limitation placed in the above section against the attachment and execution of movable property in the Bill, which would "severely disrupt service delivery, threaten life or put the security of the public at risk", is vague in that it does not spell out what type of asset or property is considered to "disrupt service delivery or threaten life or place the security of the public

at risk". It should be clearly spelt out in the Bill that the attachment of, an ambulance, police vans, defence equipment belonging to the State and used by the department concerned are exempted from attachment. The same rules to that of the High court and Magistrates' Court should apply in specifying, what type of assets are excluded from attachment and execution to avoid uncertainty and unnecessary litigation as to whether or not these assets would "disrupt service delivery, threaten life or put the security of the public at risk". We recommend the wording in note 6 below.

Recommendation

It is recommended that the same principles of the High Court and Magistrate Court should apply for the Sheriff when executing attachment of assets. The Bill should specify the assets which are not subject to attachment.

6. Section 3 (7) stay of proceedings

It is not clear what is meant by "in the interest of justice" at the end of the section. It should be spelt out in the Bill what constitutes in "the interest of justice" to avoid any uncertainty.

In the alternate we recommend that the phrase "in the interest of justice" be replaced with the phrase "public interest".

Furthermore, the section should make provisions for the judgment debtor to bring an application to stay the execution proceedings on the grounds that the property attached in terms of Section 3 (4) would severely disrupt service delivery, threaten life or put the public at risk.

Recommendation

We propose the deletion of section 3 (7) and replace it with the following:

“ 3 (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 property is not in the public interests and that the property attached under subsection 3 (4) are property, the attachment of which would severely disrupt service delivery , threaten life or put the security at risk ”.