Submission to the
Portfolio Committee on Justice and Constitutional Development
on the State Liability Amendment Bill, 2011

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Introduction

1. Idasa, the Institute for Democracy in Africa, is an independent public interest organisation building sustainable democratic societies in collaboration with African and global partners. Idasa's Political Information and Monitoring Service has been extensively involved in work aimed at strengthening South Africa's constitutional framework in accordance with the principle of separation of powers established by the Constitution. We are grateful for the opportunity to comment on this Amendment Bill tabled by the Department of Justice and Constitutional Development (the Department).

Comments on particular provisions

Definitions

Ad Clause 3 [Insertion of section 4A]

2. It is unclear why this Amendment Bill proposes the inclusion of only provincial and national departments, rather than all organs of state in terms of s. 239 of the Constitution, 1996. The Department's presentation to the Portfolio Committee included an explanation of why local government is not included within the scope of this Bill, ie that the Local Government: Municipal Finance Management Act is applicable in that sphere. However, neither the presentation nor the Memorandum on the Bill offers any explanation of why other functionaries and institutions are also not included.

3. In the absence of a clear explanation of, and rationale for, not applying the Bill to all organs of state, the Committee should require such scope of application.

Satisfaction of final court orders sounding in money

Ad Clause 2 [Substituted for section 3 of the principal Act]

Re: The term 'State'

4. The term 'State' used in section 3 is apparently not defined in the principal Act or in the Amendment Bill (the Bill). The term is significantly wider than the bodies that the Bill proposes will be subject to the application of the Bill, viz. 'departments'. This inconsistency is confusing, and could conceivably lead to situations where it is unclear whether bodies or entities that are not departments but are part of the State may have their movable property attached and sold in execution even though they were not party to the initial litigation and court order. That affected body or entity would then be obliged to intervene and apply to the court for a stay of execution, as envisaged by s. 3(7).

5. As we seek to show below, this can only unreasonably frustrate a legitimate creditor who will then be without the relatively quick and effective remedy envisaged by the Constitutional Court's ruling in *Nyathi.* In addition, an increase in legal costs will be the almost inevitable further outcome.

6. This inconsistency should be resolved in favour of adoption of the wider term, as we believe that this would be more consistent with the Constitutional Court's intention.

Ad s.3(4): Limitations on property that may be attached

7. The subsection proposes several limitations on the right to execute against public property. Most significantly, the Bill includes and allows attachment of and execution against only movable property, and then only such movable property as is owned by the State and is used by the Department concerned.

8. These strike us as arguably reasonable limitations, but this provision of the Bill continues to provide for several further preconditions that have the effect of severely and, we submit, unreasonably limiting the scope for an effective remedy for a lawful creditor.

9. This subsection states that only property that conforms to the above requirements may be attached and disposed of in execution, and then only provided that it 'would [not] severely disrupt service delivery, threaten life or put the security of the public at risk'.

10. While we have some understanding for the concerns that appear to us to inform these further constraints, they are couched in excessively broad and vague terms that are likely be the subject of extensive and extended debate, and litigation. The effect of this is, once again, to deny lawful creditors a readily available and effective remedy. All too often, in our estimation, the result will be that creditors will be no better off than they are in terms of the current law and without an Amendment Bill that appropriately and fairly allocates and balances risk.

Ad proposed s.3(7)

11. This provision introduces the possibility that a 'party with a direct and material interest' may apply to court for a stay of execution. The stipulated grounds for such an application, viz. that attachment and execution are 'not in the interests of justice', are, once again, so broad and subject to interpretation, that the effect of this provision is to undermine the intention of the Constitutional Court to ensure a speedy resolution for plaintiffs whose earlier judicial remedies are rendered empty and worthless by inefficient or

deliberately obstructive public servants or, simply, unreasonably lengthy bureaucratic processes.

12. It seems to us to be reasonable that:

(a) once a court has granted a final order envisaged in the new s.3;
(b) the State has failed to satisfy the judgment or make arrangements acceptable to the judgment creditor within the 30 days provided for in the new s.3(3)(a);
(c) the creditor has subsequently obtained a writ or warrant of execution, as the case may be, as envisaged in the new s.3(4);
(d) the Sheriff has, in terms of the new s.3(5), exercised his/her discretion and has identified (but not removed) the movable property subject to attachment and possible execution that would not 'severely disrupt service delivery, threaten life or put the security of the public at risk'; and
(e) no appeal has been lodged by the State within the further period of 30 days allowed in terms of the new s.3(6),

then the State should be obliged to accept execution without further delay.

13. Putting aside, for the moment, any reservations we have concerning this already lengthy, laborious and time-consuming proposed process, there are numerous opportunities within this scheme proposed by the Bill for the State to either satisfy the various court orders or otherwise secure resolution of the debt.

14. If the State is unable to take advantage of all of these periods of grace and opportunities for resolution, it should be compelled to accept the consequences. No further opportunities for delay should be permitted, such as are proposed in this subsection. The effect of this provision in the Bill would be to allow the State to frustrate the creditor almost indefinitely. This cannot have been the court's intention in the *Nyathi* judgments.

15. We submit further that, in the event that the identified property is no longer available, for whatever reason (asset management by organs of state being as widely inadequate as the Auditor-General has reported repeatedly to Parliament), the Bill should explicitly allow the Sheriff to identify similar or equivalent property.

ENDS