

Mr V Ramaano
Committee Secretary
Portfolio Committee on Justice and Constitutional Development
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Dear Mr Ramaano

3 March 2011

STATE LIABILITY AMENDMENT BILL

We refer to the State Liability Amendment Bill (B2-2011) released for public comment recently. Standard Bank welcomes the Amendment Bill as it addresses the unintended consequences of the earlier draft released by the Department of Justice and Constitutional Development in 2009. Standard Bank appreciates that, following engagement with the Department, many of its concerns have been addressed and that the Bill is now aligned to the Interim Order issued by the Constitutional Court.

We would nevertheless wish to highlight a small number of remaining concerns with the Amendment Bill. These concerns arise from the potential impact of the Bill on the ability of government to borrow capital easily and at affordable rates in order to finance government's comprehensive infrastructure investment programme.

1 Equal treatment of creditors

In *Nyathi I* the Constitutional Court held that Section 3 of the State Liability Act does not treat judgment creditors as equal before the law and therefore limits the rights to equality before the law. The amendment to the State Liability Act must seek to address this inequality.

However, the Amendment Bill still provides for materially unequal treatment in the following two instances:

1.1 By limiting the type of assets that may be attached

The Amendment Bill only allows for moveable assets to be attached. There appears to

be no justifiable reason for this restriction, especially since the moveable assets may well be insufficient to cover the amount due and payable to satisfy the judgment debt. The Amendment Bill already provides protection against the attachment of state assets that are “*essential to the organisation and operation of the services offered in the public interest*” or “*necessary for the maintenance of public order.*” In addition, the Amendment Bill allows for a stay of execution on grounds that it would not be “*in the interests of justice*”. As these same protections would apply to immovable property there is therefore no constitutionally justifiable rationale for not allowing access to immovable state assets for the satisfaction of an unpaid judgment, where the land is not essential or necessary, and the attachment would not be prejudicial to the interests of justice.

As an alternative, if the state prefers that moveable assets be sold and attached rather than immovable assets, the Amendment Bill should provide that a litigant first excuss moveable assets, and in the event of a shortfall, allow the litigant to attach immovable assets to the extent required to settle the claim.

1.2. By attempting to ring-fence the assets that are available for attachment

The Amendment Bill only allows for the attachment of moveable assets used by the relevant department. Departments are not separate legal entities and the judgment debt owed is a debt owed by the state. If the state fails to perform, the litigant should be allowed to attach assets owned by the state, not only the relevant department. This will result in an unequal position since this would be akin to only allow attachment of assets of a division of a legal entity as opposed to a claim against the legal entity itself.

In addition, the wording “*used by the department concerned*” is problematic as it is under and over-inclusive. It is under-inclusive as it excludes other state owned assets but also over-inclusive as it potentially allows the attachment of assets that are not owned by the state but used by the relevant department, for example where the relevant department leases an asset. The Amendment Bill should allow attachment of any state asset, or allow the excussion of assets owned by the state and used by the relevant department first and, to the extent that the proceeds are insufficient, allow a litigant to settle the claim by allowing other state assets to be attached.

2 Clarity on the definition of ‘state’

It is recommended that in section 1A, a definition of the word “*state*” (which is still used in the Amendment Bill) is inserted in order to make it clear that it refers only to National and Provincial Government and excludes parastatals and municipalities.

3 Clarity on the definition of ‘final court order’

It is recommended that the definition of “*final court order*” is amended to include ‘*an agreement between the parties that has been made an order of court (consent order)*’.

4 Technical amendment

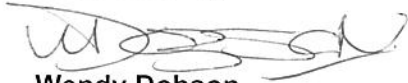
It is submitted that in Section 3(4) line 2, the “*and*” should be replaced by an ‘*or*’.

5 Removal and sale of property

It is recommended that Section 3(5) should allow for the removal and sale of the property, with the proceeds kept in trust, if the nature of the asset so requires or where the value of the asset may be materially diminished if it is not removed, and/or sold.

In conclusion, Standard Bank thanks the Portfolio Committee on Justice and Constitutional Development for the opportunity to provide comments on the State Liability Amendment Bill, and trust that they will be of value to the Committee’s consideration of the Bill. Standard Bank is available to discuss its submission further if required however given the limited extent of our comments we do not feel that it is necessary to present the submission during the public hearings.

Yours sincerely



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