



# DEPARTMENT of the PREMIER

Provincial Government of the Western Cape

## OFFICE OF THE DIRECTOR-GENERAL

e-mail address: Michelle.Melim@pgwc.gov.za  
tel: +27 21 483 4000 fax: +27 21 483 5637  
15 Wale Street, Cape Town, 8001  
PO Box 659, Cape Town, 8000  
www.capecapegateway.gov.za

**REFERENCE:** NAC/5/2011  
**ENQUIRIES:** Ms M Melim

**For attention: Mr. V Ramaano**

**Per e-mail: [vramaano@parliament.gov.za](mailto:vramaano@parliament.gov.za)**

### **RE: COMMENTS ON THE STATE LIABILITY BILL, 2011**

We refer to the State Liability Amendment Bill, 2011 introduced in the National Assembly on 4 February 2011. Kindly find attached herewith our comments on the above Bill.

Yours faithfully

**ADV. B GERBER**  
**DIRECTOR GENERAL**  
**WESTERN CAPE PROVINCIAL ADMINISTRATION**  
**3 MARCH 2011**

REFERENCE: NAC/5/2011  
ENQUIRIES: M Melim

## MEMORANDUM

### COMMENTS ON THE STATE LIABILITY AMENDMENT BILL, 2011

Kindly find herewith our comments on the above Bill.

#### Ad clause 2 (amending section 3)

- 1.1 The heading is amended to read "**Satisfaction of final court orders sounding in money**". The concept of "final court order" is defined in clause 3 of the Bill. It defines a final order as:  
"an order-
- a) given or confirmed by a court of final instance; or
  - 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;".
- 1.2 The definition of "final court order" is problematic as paragraph (b) of the definition does not make provision for where a matter is taken on review after judgment has been given in the case by the court. Paragraph (b) of the definition only makes provision for instances where a case may be taken on appeal. The review procedure may also be initiated by a party after a judgment is given by the court. As the definition does not make provision for this it means that a litigant may execute a judgment against the State even though the State has applied for review of the proceedings within the timelines dictated by the various court rules.
- 1.3 The new amended Section 3(1) provides that: "...but the amount, if any, which may be required to satisfy any final court order given or made against the nominal defendant or respondent in any such action or proceedings .... shall be paid as contemplated in this section". The change in wording from "may" to "shall" is significant and requires every department of State to comply without deviation.
- 1.4 Clause 2 inserts new subsections (2) to (7) into section 3 of the Act.

The sequence of new subsections effectively sets out the procedure to be followed for executing a final court order sounding in money against the State, as follows:

1.4.1 Subsection (2):

Provides that the "State Attorney or the 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." Following our comments on the 2009 Bill, it appears that our suggestion of inserting a notification requirement of the judgment to the accounting officer in particular was accepted. The provision does not provide for the situation where the state attorney or attorney of record fails to deliver such notice.

1.4.2 Subsection (3)(a):

- (a) Provides that 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. In this provision a distinction is made between an appeal against a judgment and an appeal against an order. No such distinction is made in paragraph (b) of the definition for "final court order". Does the distinction only apply to the new subsection (3)(a)? It is proposed that there should be consistency between this provision and the word "appeal" in the definition for "final court order" and that the two be given the same meaning.
- (b) This provision obliges the State to pay the final court order within a period of 30 days of the order becoming final. Under certain circumstances the time period may be unreasonable. Subsection (2) allows for a period of 7 days for the state attorney or attorney of record to notify the executive authority and accounting officer of the final court order. Already 7 days may lapse before the accounting officer has received notice of the judgment. In reality the accounting officer will therefore have 30 days less 7 to effect payment of the judgment. The 30-day period runs from the time that the order is made final and not from the time that the accounting officer or the executive authority is notified of the judgement.
- (c) In the instance that the State Attorney or attorney of record does not notify the executive authority or the accounting officer timeously, the 30-day period continues to run and remains unaffected by the lack of timeous notification. This provision is onerous on the accounting officer, who is still obliged in terms of subsection (3)(b)(i) to pay the order within the 30 days of the date of the order, as provided for in subsection (3)(a), notwithstanding the fact that he/she may not have received it. It is proposed that the 30-day period starts running from the time that the accounting officer and the executive authority is notified of the final court order. In order to accommodate for the situation where the

attorney or the attorney of record does not notify the accounting officer at all, it is proposed that this subsection provides for personal service of the final court order on the accounting officer or executive authority.

1.4.3 Subsection (3)(b) (ii):

- (a) This new proposed subsection provides that the payment of a final court order shall be charged against the appropriation account or expenditure budget of the department concerned, where applicable.
- (b) The term "appropriation account" is not defined and it is uncertain what is meant by this term. Does it refer to money that has been appropriated in terms of appropriation legislation?
- (c) Section 21 of the Public Finance Management Act, 1999 provides that money may only be withdrawn from the Provincial Revenue Fund in terms of appropriation legislation or as a direct charge, if it is provided in the Constitution or provincial legislation.
- (d) Therefore, the payment of a liability in respect of a final court order, in incidents where a department did not budget for the payment of the liability and where it is not authorised through existing appropriation legislation, would have to be provided for in provincial legislation as a direct charge. An accounting officer is not in control of the legislative process and will not be able to ensure that such legislation is passed within 30 days, to ensure compliance with the time frame for payment thereof as proposed in the Bill.
- (e) The payment of such a liability may also not always qualify as the use of funds in emergency situations which the MEC for Finance may authorise as contemplated in section 25 of the Public Finance Management Act.

1.4.4 Subsection (4):

The subsection provides that: *"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 Magistrate's 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"*.

- a) The litigant is now entitled to instruct the sheriff to attach the movable assets of the responsible department if the period in subsection (3)(a) has lapsed or if no acceptable arrangements have been made with the judgment creditor to pay the judgment debt within 30 days. The words "acceptable arrangements" imply that it would be possible for the State to enter into an agreement with the judgment creditor to liquidate the judgment debt. If this is indeed the intent of the provision, then the Bill needs to provide expressly for it. It is proposed that such a provision be included in subsection (3)(b)(i).
- b) The provision however states that the arrangements should be made to pay the judgment debt within the 30-day period. From our previous comments at paragraph 1.4.2, it was noted that the 30 day period was unreasonable. Such unreasonableness would be remedied if arrangements to pay the debt beyond the 30 day period could be concluded. It is proposed that the Bill makes express provision for this. Such an inclusion will align this provision with regulation 8.2.3 of the Treasury Regulations to the Public Finance Management Act, 1999.

#### 1.4.5 Subsection 6:

- (a) This subsection provides that in the absence of an application to stay the execution, the sheriff may after 30 days from the date of attachment remove and sell the attached movable property in execution of the judgment debt. This provision gives the State a further 30 day period within which to settle the judgment debt. In this regard the provision is supported.
- (b) The provision is a deviation from the standard procedures for execution contained in the Magistrates and Superior Courts.<sup>1</sup> The provision is silent on whether the judgment creditor's sale in execution is regulated by these standard procedures for execution. It is proposed that the provision refers to the aforementioned standard procedures contained in the relevant rules in the same way that subsection 4 refers to its regulating procedure.

#### 1.4.6 Subsection 7:

- (a) The subsection provides that: "*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*".

The provision introduces a procedure whereby despite the fact that the judgment debt remains unpaid, a party having a direct and material interest

---

<sup>1</sup> Rule 41 of the Magistrate's Court Rules issued in terms of the Magistrate's Court Act, 1944  
Rule 45 of the Uniform Rules of Court issued in terms of the Supreme Court Act, 1959.

may before the sale of the property in execution, approach the court for a stay of the proceedings, if it can be shown that such sale is not in the interests of justice. This gives the State one more opportunity to stop the sale of state property in execution and in this regard the provision is supported.

- (b) However, the provision introduces problematic concepts such as "direct and material interest" which is not trite in our law and therefore subject to interpretation. The provision also introduces the legal standard of "interests of justice". This is more problematic than the former. The notion of "interests of justice" is a deviation from the standard procedures for execution. The relevant rules in the Magistrates and Superior Courts require ownership to be proven in order to stay execution proceedings by means of its interpleader procedure. The requirement of "interests of justice" is not supported as this legal standard is not trite in our civil jurisprudence and remains open to interpretation by the courts.

Ad clause 3 inserting Section 4A

- 2.1 (a) This provision inserts new definitions. The most noteworthy are those for "department" and "executive authority". From this it is clear that the Bill applies to the state at national and provincial spheres and not the local government sphere.
- (b) In order to align the applicability of the above Bill with contemporary legislation and with the concept of "the state" as it is secularly understood and reaffirmed by the Constitution, it is proposed that the Bill defined the concept of the "state" to include local government.
- 2.2 The definition for "final court order" is problematic for the reasons stated above at paragraph 1.1 above.
- 2.3 The insertion of section 4A is at the end of the Act which is not very user friendly and not in accordance with generally accepted legislative drafting practise. It would have been preferable to have the definitions at the start of the Act.
- 2.4 From our comment on the 2009 Bill, it appears that the numbered listing of the definitions clause has been abandoned and our comment that an alphabetical listing be followed has been accepted.



**Michelle Melim**

**State Legal Adviser**

**Date: 3 March 2011**