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(As on 21/04/2011)

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]

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.

NB: Words in bold type in square brackets and in italics e.g. *[aaaa]* indicate omissions from the Bill as introduced, whilst words underlined with a solid double line and in italics e.g. *aaaaa* indicate insertions in the Bill as introduced.

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, 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 department concerned [may] must 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 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)] to (7), no execution, attachment or like process [shall] for the satisfaction of a final court order sounding in money may be issued against the defendant or respondent in 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 appearing on behalf of the department 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 and the relevant treasury of the final court order.

(3) (a) A final court order against a department for the payment of money shall be satisfied—

(i) within 30 days of the order becoming final, unless an appeal has been lodged against the judgment or that order]; or

(ii) within the time period agreed upon by the judgment creditor and the accounting officer of the department concerned.

(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)(i) or (ii).

(ii) Such payment shall be charged against the **[appropriation account]** appropriated budget 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 within 30 days of the date of judgment, the judgment creditor may serve the court order in terms of the applicable Rules of Court on the executive authority and accounting officer of the department concerned, the State Attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury.

(5) The relevant treasury shall, within 14 days of service of the court order, ensure that—

(a) the judgment debt is settled; or

(b) acceptable arrangements have been made with the judgment creditor for the settlement of the judgment debt, should there be inadequate funds available in the vote of the department.

(6) Should the relevant treasury determine that it would be inadvisable or impermissible for a particular court order to be paid, the relevant treasury—

(a) is not required to comply with subsection (5);

(b) must advise the department concerned and the judgment debtor {creditor??} in writing of the determination; and

(c) must include in its annual report to the relevant legislature a section indicating the judgments which the treasury determined should not be paid, and the reasons why it was determined that the judgments should not be paid.

~~[(4)]~~ (7) If a final court order against a department for the payment of money is not satisfied **[and]** or 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)(i) or (ii), the registrar or clerk of the court concerned, as the case may be, may, upon a written request by the judgment creditor or his or her legal representative, [may apply for] issue 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,] applicable Rules of Court 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)] (8) (a) [The] Subject to paragraph (b), 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.

(b) The sheriff and the accounting officer of the department concerned, or an official of his or her department designated in writing by him or her, may, in writing, agree on the movable property owned by the State and used by the department concerned that may not be attached, removed and sold in execution of the judgment debt as such attachment, removal or selling will severely disrupt service delivery, threaten life or put the security of the public at risk.

(c) If no agreement contemplated in paragraph (b) is reached, the sheriff may attach any movable property owned by the State and used by the department concerned, the proceeds of the selling of which, in his or her opinion, will be sufficient to satisfy the judgment debt against the department concerned.

[(6)] (9) In the absence of any application contemplated in subsection [(7)] (11), 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.

(10) The Rules of Court, shall, where applicable and with the necessary changes, apply to the issuing of a writ of execution or a warrant of execution, as the case may be, attachment, removal and selling of movable property in execution of a judgment debt against the State.

[(7)] (11) (a) A party having a direct and material interest may, [during the period referred to in subsection (6)] before the attached movable property is sold in execution of the judgment debt, apply to the court which granted the order, for a stay on grounds that the execution of the attached movable property—

(i) would severely disrupt service delivery, threaten life or put the security of the public at risk; or

(ii) is not in the interests of justice.

(b) An application referred to in paragraph (a) must contain a list of movable property that may be attached and sold in execution of the judgment debt.

(c) Notice of an application in terms of paragraph (a) must be given to the judgment creditor and sheriff concerned.

(12) In order to comply with its obligations in terms of subsection (5), and in general to ensure that court orders are promptly paid by departments, the relevant treasury may—

- (a) issue appropriate regulations, instructions, circulars, guidelines, and reporting rules;
- (b) issue a direction to a department to make a payment to satisfy any outstanding court order;
- (c) conduct an investigation, inspection or review into a failure to pay by a department;
- (d) issue an instruction to take remedial action or to obtain specified support, where—
 - (i) there has been non-compliance by a department with the provisions of this Act, or regulations, guidelines, circulars, instructions or directions issued by the National Treasury; or
 - (ii) there is a need for intervention in view of the financial, governance or management situation, condition or failure of a department;
- (e) withhold from a department's voted funds sufficient to provide for the payment of any outstanding court order against a department, which funds shall only be released to the department upon the submission of proof acceptable to the relevant treasury that the payment has been effected;
- (f) effect payment of any outstanding court order on behalf of a department, which payment shall be recorded against and offset against the appropriated budget of the department;
- (g) debit the costs associated with effecting a payment contemplated in paragraph (e), an administration charge and a penalty from the appropriated budget of the relevant department.

(13) Should there be insufficient funds available in the appropriated budget of the department for the current financial year, the withholding of funds in terms of subsection (12)(e) or the effecting of payments made in terms of subsection (12)(f) in terms of an arrangement contemplated in subsection (5)(b), may relate to the appropriated budget of the department for more than one financial year.

(14) (a) Payment of an outstanding court order on behalf of a department by the relevant treasury in terms of subsection (12)(f) is a payment of the department, and not a payment of the relevant treasury, for which the accounting officer of the department is responsible and accountable in terms of the PFMA, and liable for.

(b) Payment of an outstanding court order in terms of subsection (12)(f) does not absolve the accounting officer of liability for financial misconduct in terms of subsection (17).

(15) (a) Payment in terms of a court order by an accounting officer must be made in accordance with the PFMA, and all

applicable regulations, instructions, circulars, guidelines, and reporting rules which may be issued by the National Treasury or relevant provincial treasury.

(b) An accounting officer must classify and process the payment of a court order, including a court order paid by the relevant treasury in terms of subsection (12)(f), including as unauthorized, irregular, or fruitless or wasteful expenditure, if necessary, and the accounting officer and the department must comply with the requirements relating to the applicable type of expenditure as set out in the PFMA, and all applicable regulations, instructions, circulars, guidelines, and reporting rules which may be issued by the National Treasury or relevant provincial treasury.

(16) (a) The accounting officer of a department must put in place appropriate budgeting procedures, in accordance with all regulations, instructions, circulars, guidelines and reporting rules which may be issued by the National Treasury, to ensure that payments for the satisfaction of court orders can be met timeously.

(b) The budgeting procedures described in paragraph (a) must include measures for the appropriate identification and recording of potential contingent liabilities which may arise as a result of claims which have been initiated against the department.

(17) (a) An accounting officer of a department who fails to comply with any provision of this section, or any applicable regulation, instruction, circular, guideline, reporting rule or directive issued by the relevant treasury concerned in order to ensure the payment of court orders and adherence to this section constitutes financial misconduct as described in the PFMA, and is guilty of an offence specified in the PFMA.

(b) The duty to ensure the timeous payment of court orders in accordance with the requirements of this section, may not be assigned by the accounting officer to another official of a department in terms of the PFMA."

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);
'appropriated budget' means the budget of a department which is appropriated in terms of appropriation legislation in the annual budget or an adjustments budget;

'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
- (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
- (b) given by any other court where the time for noting an appeal against the *judgment or* 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;

'Magistrates' Courts Rules' means the rules published under Government Notice No. R. [1108 of 21 June 1968] 740 of 23 August 2010, as amended;

[and]

'PFMA' means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

'Rules of Court' include—

- (a) the Uniform Rules of Court;
- (b) the Magistrates' Courts Rules; and
- (c) any other rule applicable to any other court, established by an Act of Parliament, that provides for the issuing of a writ of execution or a warrant of execution, as the case may be, attachment, removal and selling of movable property in the execution of a judgment debt;

'State' means a national or provincial department listed in Schedules 1 or 2 to the Public Service Act, 1994, respectively; and

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

Transitional measures

4. The provisions of section 3(b)(ii) to (7) of the State Liability Act, 1957 (Act No. 20 of 1957), apply in respect of a final court order sounding in money against a department which has been given before the commencement of this Act and which has not been satisfied within 30 days after the commencement of this Act.

Short title [and commencement]

[4] 5. 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].