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National Assembly
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Dear Chairperson Landers

LEGAL OPINION ON STATE LIABILITY AMENDMENT BILL

1. Introduction

1.1 We were asked during the meeting of the Portfolio Committee for Justice and Constitutional Development (Committee) in its deliberations of the State Liability Bill, (Bill) to consider the question whether the Bill as certified and introduced into Parliament is constitutional in light of the fact that it only provides for the attachment of movable property of the relevant State Department but excludes its immovable property, from being attached.

1.2 The Bill was drafted as a result of a Constitutional Court decision namely, *Dingaan Hendrik Nyathi v Member of the Executive for the Department of Health, Gauteng and Minister of Justice and Constitutional Development (CCT 19/07)* (Nyathi case), where the Constitutional Court declared section 3 of the

State Liability Act, 1957 (Act No.20 of 1957) (the Act), inconsistent with the Constitution to the extent that it does not allow for execution or attachment against property of the State and that it does not provide for an express procedure for the satisfaction of judgement debts.

1.3 The Constitutional Court required Parliament to introduce legislation in accordance with the Nyathi judgement to provide for the effective enforcement of court orders against the State. The Bill must be passed in Parliament before the end of August 2011, the 12 months period originally stipulated by the court having been extended.

2. Discussion

2.1 The question that needs to be answered, in respect of the Nyathi judgement, is whether the Bill provides for an express procedure for the satisfaction of judgement debts against the State.

2.2 In the Nyathi case the court had to decide whether section 3 of the Act limits any of the rights provided in the Constitution and if there is a limitation, whether such limitation is reasonable and justifiable under section 36 of the Constitution.

2.3 The applicant submitted that section 3 of the Act makes an unjustifiable differentiation between a judgement creditor who obtains a judgement against the State and a judgement creditor who obtains a judgement against a private individual.

2.4 The court stated that section 3 does not positively oblige the State to comply with court orders as it should and so it effectively places the State above the law, in violation of section 8 of the Constitution which provides that the Bill of rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State. The applicant was not treated with the recognition to his worth and importance as a human being.

2.5 For these reasons the court held that section 3 violates the right to dignity and so limits the right to equality before the law and the right to equal protection and benefit of the law guaranteed by section 9 and the right of access

to courts guaranteed by section 34 of the Constitution.

2.6 The respondents argued that if section 3 of the Act limits any of the rights in the Bill of Rights then this limitation is justified where the limitation serves a legitimate and acceptable purpose and there is sufficient proportionality between the harm done by the legislation and the good sought to be achieved.

2.7 The court considered whether the limitation was reasonable and justifiable the court held that the nature of the rights of access to courts, equality, freedom, democratic principles of State accountability and the rule of law are important aspects of the Constitution that are implicated in the case.

2.8 The court held that the limitation imposed by section 3 is not reasonable and justifiable in an open and democratic society based on human dignity and freedom.

2.9 The court interpreted section 3 of the Act and outlined its shortcomings as follows:

- it makes the State liable for judgement debts but offers no process for the satisfaction of these debts;
- it prevents attachment and execution of State property but permits claims against the National Revenue Fund and the Provincial Revenue Funds;
- the applicability and availability of the Public Finance Management Act and its Regulations are not helpful because they do not provide for any procedure in terms of which court orders against the State can be settled i.e. how to approach Treasury and whom to contact.
- The Public Finance Management Act, 199 (Act No. 1 of 1999) and its Regulations provide for disciplinary processes that can be invoked against officials that do not comply with court orders but these steps are not taken;
- Non-compliance with court orders by the State leaves a judgement creditor with the tedious and onerous options of instituting

contempt of court proceedings against State officials, failing which the judgement creditor may apply for a mandamus to force compliance.

2.10 The proposed amendments to section 3 of the Act introduce a new procedure that enables a judgement creditor to enforce a final court order, sounding in money, against the State should the State fail to pay within the stipulated time frame. Clause 3(4), (5) and (6) of the Bill provides for the procedure as follows:

"(3) (a) 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.

(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).

(ii) Such payment shall be charged against the appropriation account 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 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' Courts 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.

(5) 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.

(6) In the absence of any application contemplated in subsection (7), 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."

2.11 Clause 3 has improved the situation and has identified that it is the State Attorney or attorney of record who is responsible for informing the accounting officer about the final court order against a department and such payment of money must be paid within 30 days unless there is an appeal lodged.

2.12 In contrast to the current section 3 of the Act, which has a blanket prohibition for the attachment and execution of State property, the proposed new clause 3 of the Bill permits the attachment and execution of State property, except immovable State property.

2.13 Paragraph 2.9 outlines the problems created by section 3 of the Act and the obstacles encountered by judgement creditors who have obtained final court orders against the State, in asserting their rights.

2.14 The account identified for payment is the appropriation account or expenditure budget of the department concerned. If no payment is forthcoming or no payment arrangement have been made the judgement creditor can apply attachment and execution of State property. The only exception to this is property the attachment and execution of which would severely disrupt service delivery, threaten life or put the security of the public at risk.

2.15 In terms of the new section 3 the onus is on the accounting officer to pay the judgement creditor the money stipulated in the final court order. If the accounting officer fails to pay the money within the stipulated 30 days he or she may be charge with misconduct in terms of the Public Finance Management Act.

2.16 The sheriff will be able to sell the attached property after 30 days if no application for stay of execution is brought by an interested party.

2.17 The proposed amendments to section 3 of the Act expand extensively on the original section 3 of the Act which lacked any process for the satisfaction of judgement debts against the State. The new clause provides a step by step process to ensure that the claim of a judgment creditor is ultimately satisfied. In our opinion these provisions sufficiently address the issue of satisfaction of judgment debts against the State by providing for an express procedure for the satisfaction of judgement debts against the State.

2.18 The proposed new section 3 excludes the attachment and execution of immovable State property. If the effect of this exclusion amounts to a limitation of section 9 of the Constitution because it differentiates between judgement creditors against the State and judgement creditors against private individuals, then such limitation must be tested against section 36 of the Constitution.

2.19 The right to equality is a fundamental right provided for in the Bill of Rights. Since rights are not absolute, they may be limited, and section 36¹ of the Constitution provides for such limitation of rights. It now remains to consider whether such limitation to the right to equality is reasonable and justifiable under s 36(1) of the Constitution.

2.20 In *Brummer vs Minister of Social Development and others (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC)* the Constitutional Court had to decide on the constitutionality of a limitation imposed by section 78(2) of the Promotion of Access to Information Act. The court held that –

“In assessing whether the limitation imposed by section 78(2) is reasonable and justifiable under section 36(1), regard must be had to, among other factors, the nature of the right limited; the purpose of the limitation, including its importance; the nature and extent of the limitation; the efficacy of the limitation, that is, the relationship between the limitation and its purpose; and whether the purpose of the limitation

¹ “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

could reasonably be achieved through other means that are less restrictive of the right in question. Each of these factors must be weighed up but ultimately the exercise is one of proportionality which involves the assessment of competing interests." (our emphasis).

2.21 The Constitution requires and mandates the State to provide basic services to the people. People have rights to basic services guaranteed by the Constitution. Although the Bill limits the attachment and execution of all State property, by excluding the execution of immovable State property, this ensures that the State has the necessary resources to ensure service delivery and that State's assets are not attached to the disadvantage of other individuals. [This exclusion of the execution of immovable State property links to sections 26 and 27 of the Constitution which provide for the State's duty of progressive realisation of constitutional rights of the people to housing, health care services, education, food, water and social security of individuals, that must be protected, and on an equitable basis distributed to everyone by the State]. Therefore the purpose of the limitation is justified.

2.22 In *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd SA and others* 2005 (5) SA 3 (CC), the court held that:

"The obligation imposed on the State [imposed by the rule of law and the right of access to court] goes further than the mere provision of the mechanisms and institutions [for dispute resolution] referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the State's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case."

2.23 The comments made in the Modderklip case apply to execution against the State as well and demonstrate the importance of ensuring that there is no disruption of service delivery on the part of the State. The State must function effectively and efficiently in fulfilling its constitutional obligation and cannot do so if its assets are attached.

2.24 In our view the attachment and execution of any immovable State property could result in "*large scale disruptions*" and in the words of Madala J in the Nyathi judgement, "*would severely disrupt service delivery and would also unjustifiably limit the rights of many other individuals*". This would prevent the State from fulfilling its constitutional mandate of providing services to the people.

2.25 Taking into account that the courts have indicated that the State has a duty to safeguard the constitutional rights of people who may be adversely affected by an attachment and execution of particular categories of State property, the exclusion of certain State property from attachment and execution in terms of clause 3(4) may be considered as justifiable.

2.26 In *S v Bhulwana (1) SA 388(CC)* at paragraph 18 the court held that- "*The Court places the purpose, effects and importance of the infringing legislation on one side of the scale and the nature and effects of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.*"

2.27 The State has a constitutional obligation to provide services to the people. It has to have means and resources to provide these services. The attachment and execution of immovable property such as a hospital building for instance would render the State completely incapable of providing health services. This would cause "*more substantial inroad into fundamental rights*" of other people, compared to judgment creditors.

2.28 Cameron AJ, in *S v Manamela (Director-General of Justice Intervening) 2000 (3) SA 1 (CC)* at paragraph 66, stated as follows:

"The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose." (our emphasis).

2.29 If the Bill permits the attachment and execution of the immovable property of the State, this may prevent other people's constitutional rights from being afforded the necessary protection.

2.30 The limitation imposed by the exclusion of the attachment of immovable State property in the Bill is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The proposed provisions in the Bill sufficiently address the issue of satisfaction of judgment debts against the State, without having to revert to the attachment and execution of immovable State property.

2.31 A balance is required between the right of an individual to attach and execute State property in satisfaction of a judgement granted in his or her favour, and the rights of other individuals to realise their rights as contained in the Constitution.

3. Conclusion

The Constitutional Court in the Nyathi judgement did not address the issue of whether the State's immovable property may be attached. We hold the view that the exclusion of immovable property of the State from attachment and execution is justifiable in terms of the law and does not render the Bill unconstitutional.

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