



8 March 2011

OVERVIEW: STATE LIABILITY AMENDMENT BILL [B2-2011]

1. INTRODUCTION

The State Liability Bill [B2 of 2009] was tabled in Parliament on 4 February 2011. The Bill seeks to amend the State Liability Act, 1957 to provide for a procedure through which monetary awards in court judgments against the state must be satisfied. The amendment is necessitated by the Constitutional Court ruling in *Nyathi v MEC for Department of Health, Gauteng* [2008] ZACC where the Court confirmed an order of constitutional invalidity. Section 3 of the State Liability was declared to be inconsistent with the Constitution.

This paper briefly considers the background to the matter and examines the State Liability Amendment Bill.

2. BACKGROUND

For some time now, in response to judgment creditors seeking to enforce orders sounding in money against the State, the courts have been facing considerable challenges when interpreting section 3 of the State Liability Act 20 of 1957.¹ In the absence of a straightforward procedure and in an effort to make state officials more accountable the courts have crafted various remedies. In some cases this meant opting for contempt proceedings to enforce money judgments² in others structural interdicts have been awarded.³ Finally, however, the High Court found the section to be invalid and the Constitutional Court in its judgment in the first Nyathi case ordered a resolution through the drafting of legislation, which would provide for the effective enforcement of court orders in such matters.

3. THE NYATHI CASES

In **2002**⁴ Mr Nyathi suffered a stroke and became permanently disabled because of the negligence of certain medical personnel at Pretoria Academic Hospital and Kalafong Hospital. As a consequence of the negligent treatment he then required full-time care and medical treatment.

¹ Section 3 of the State Liability Act: **Satisfaction of judgement:** no execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State, but the amount, if any, which may be required to satisfy any judgement or order given or made against the nominal

² For instance, *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) Sa 446 (TkHC) at 454 H-G and *East London Transitional Council v MEC for Health, Eastern Cape and Others* 2001 (3) SA 1133 (Ck) paras 19-21

³ *Magadimisi and Others v The Premier, Eastern Cape and Others* Case No 2180/04, 25 April 2006, unreported.

⁴ On 1 August 2002 Mr Nyathi suffered severe burns and was initially admitted to the Pretoria Academic Hospital for treatment where a central venous line was incorrectly inserted into his right carotis communis artery. On 2 August 2002, he was transferred to Kalafong Hospital in Pretoria where the medical personnel failed to timeously diagnose the incorrect insertion of the central venous line. As a result of the omissions and mistakes made by the medical personnel at the two hospitals, the applicant suffered a stroke and severe left hemiplegia (total paralysis of the arm, leg, and trunk on the same side of the body.) He then required full time care and medical treatment and was also liable for the payment of the medical expenses and the ensuing legal fees.



3.1 High Court Proceedings

In **2005**⁵ Mr Nyathi instituted an action for R1 496 000 against the state (specifically the MEC for Department of Health (Gauteng) and the Minister for Justice and Constitutional Development). The state admitted liability but disputed the amount being claimed.

On 27 July **2006** a letter was submitted to the State Attorney stating that Mr Nyathi's health was deteriorating rapidly and that he urgently required treatment and medication. He could not afford to pay the necessary medical and legal costs while the hearing scheduled for 23 May 2007 was pending. Therefore, an interim payment of R317 700 was requested. The High Court ordered the state to make the interim payment and to pay Mr Nyathi's costs.

The state failed to comply with the court order and although several attempts were made by Mr Nyathi's lawyers to secure payment the matter remained unresolved.

In March **2007** Mr Nyathi's lawyers again approached the High Court for the interim payment. The Court found that as this application sounded in money, the appropriate remedy would have been to order execution against state assets. However, the Court pointed out that section 3 of the State Liability Act prohibited the court from making this order by providing that there can be no execution or attachment of state assets.⁶

The High Court found that consequently Mr Nyathi had no way to enforce the court order against the state for the payment of the money owed to him. The court observed that the blanket ban in section 3 of the Act constituted a material limitation of the right to access the courts and the consequent right to have the effects of successful access implemented. This would also place the government above the law as far as the binding nature of court orders is concerned.⁷ The Court found this to be inconsistent with the Constitution and declared section 3 of the State Liability Act to be invalid.

The interim payment was finally made on **4 May 2007**. On **4 July 2007** Mr Nyathi died. His wife successfully applied to be substituted as the applicant in his matter.

The Constitutional Court must confirm any order of constitutional invalidity made by the High Court.⁸ The hearing at the Constitutional Court was heard on an urgent basis on **30 August 2007**.

⁵ *Nyathi v MEC for the Department of health, Gauteng and Another* 26014/2005 TPD, 30 March 2007

⁶ Section 3 of the State Liability Act. In addition, Section 76(1)(h) of the PFMA states that: (1) The National Treasury must make regulations or issue instructions applicable to departments, concerning....(h) the settlement of claims by or against the state. However, s76 does not deal any further with the settlement of claims. More importantly, it does not contain any procedures relating to how orders of court are to be settled.

⁷ Such a reading would make section 3 unconstitutional and would be a clear violation of section 165(5) of the Constitution.

⁸ In terms of section 172(2)(a) of the Constitution, an order of constitutional invalidity in the High Court has no force or effect unless it has been confirmed by the Constitutional Court.



3.2 Constitutional Court Proceedings

3.2.1 Nyathi (1) - First Constitutional Court Judgement (confirmation of the order of constitutional invalidity).⁹

In **June 2008** the majority judgement of the Constitutional Court¹⁰ in *Nyathi v MEC for Department of Health, Gauteng* [2008] ZACC 8 noted that the State Liability Act 20 of 1957 was:

“a relic of a legal regime which was pre-constitutional and placed the state above the law: a state that operated from the premise that ‘the king can do no wrong’ and this meant that the effect of the section was that the State and its officials could not be held accountable for their actions (or lack thereof)”.

Effectively, it was argued that section 3 did not treat judgment creditors as equal before the law as it disallowed a judgment creditor who obtains judgment against the state the same protection and benefit that a judgment creditor who obtains judgment against a private litigant enjoys. Nor does it provide for an express procedure for the satisfaction of judgment debts against the State.¹¹

Justice Madala noted that deliberate non-compliance with a court order by the state detracts from the dignity, accessibility and effectiveness of the courts.¹² Section 165(4) of the Constitution expressly imposes an obligation on organs of state through legislative and other measures [to] assist and protect the courts to ensure the dignity, accessibility and effectiveness of the courts. Section 3 of the State Liability Act, however, *“effectively places the State above the law as it does not positively oblige the State to comply with court orders as it should.”* This is not compatible with the provisions of the Constitution.¹³ Section 3 effectively violated Mr Nyathi’s right to dignity (section 10), his right to life (section 11) and his right to be treated as equal before the law (section 9(1)). Such limitations were not reasonable and justifiable under section 36(1) of the Constitution.¹⁴ Furthermore, any assistance provided to creditors through the Public Finance Management Act 1

⁹ The first respondent is the Member of the Executive Council for the Department of Health, Gauteng. The second respondent is the Minister of Justice and Constitutional Development. Both respondents have been cited in their nominal capacities and are represented by the office of the State Attorney.

¹⁰ Moseneke DCJ, Ngcobo J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J all concurred in the judgment of Madala J. Langa CJ and Mpati AJ concurred in the minority judgment of Nkabinde J.

¹¹ *Nyathi v MEC for Department of Health, Gauteng* [2008] ZACC 8 para [26]. (Nyathi 1). The amicus, the Centre For Constitutional Rights submitted that a mandamus would be cheaper, quicker and more efficient. However, the court was of the view that this denied the harsh realities of litigation with its risks and expenses (para [33] and [75]).

¹² Nyathi (1) para [43]

¹³ Namely, Section 8(1) of the Constitution, which provides that the Bill of Rights applies to all law and binds the legislature, executive and the judiciary and all organs of state. Section 34 guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. Section 165(5) states that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. Section 165(4) requires organs of state, through legislative and other measures, to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of courts.

¹⁴ In a minority judgement Justice Nkabinde was not persuaded that section 3 was inconsistent with the Constitution and found that a mandamus or structural interdict would have been an appropriate remedy in the matter para [152].



of 1999 and Treasury Regulations for payment of debts was limited and the court found that the procedures referred to in the legislation and regulations are far too complex to constitute a reasonable fulfilment of the states obligations.¹⁵

Legislation that would address these problems was required. Parliament, when fixing the problem identified by this judgment was therefore required to provide reasonable measures to assist litigants to enforce court orders by enacting legislation that would allow mechanisms that would enable judgment creditors to execute against the funds.¹⁶

The Court confirmed the order of invalidity of the High Court of section 3 of the State Liability Act but suspended the order for 12 months (**until 2 June 2009**) to allow Parliament to pass legislation that would provide for the effective enforcement of court orders.¹⁷

Comment

The Constitutional Court also expressed concern about the 'flaws within the office of the State Attorney' perhaps the Department could highlight any changes made to the State Attorneys office following the concerns raised in the judgement.¹⁸

What is the status of the legal blueprint framework to ensure efficient management of state litigation?

3.2.2 Urgent application for an extension

On **1 June 2009**, the State filed an urgent application with the Constitutional Court to extend the period of suspension for a further 12 months as the legislation, giving effect to the effective enforcement of court order, was yet to be enacted.

The Department's reasons for failing to finalise the legislation included the National elections, the need to engage further with National departments and a shorter parliamentary session in 2009.¹⁹

In response to the urgent application the court granted a limited extension of the period of suspension to 31 August 2009.

¹⁵ Nyathi (1) para [58]

¹⁶ Ibid para[92]

¹⁷ The Court ordered the Minister of Justice and Constitutional Development to provide to the court on affidavit a list of all unsatisfied court orders against all national and provincial state departments, indicating the parties, the case numbers and the amounts outstanding by 31 July 2008. The Minister of Justice and Constitutional Development was ordered to provide the Court with a plan of the steps it would take to ensure speedy settlement of unsatisfied court orders by no later than 31 July 2008. Reports were filed by the DOJ on 31 July 2008, 12 December 2008, and 5 August 2009.

¹⁸ Nyathi (1) para 52

¹⁹ Minister of Justice and Constitutional Development v Nyathi and Others: In re Nyathi v Member of the Executive Council for Health, Gauteng and Another(CCT53/09) Nyathi (2) para [12]



3.2.3 Nyathi (2) - Further extension and Interim mechanism

On **31 August 2009** the Court issued an order granting a further extension of the order of invalidity to **31 August 2011**. The order also proposed a ‘tailored’ interim procedure for the attachment and execution of state movable assets, which would be operative during the period of suspension. Responses were requested from the parties and the Minister of Finance regarding the proposed interim order or an alternative, which would operate during the period of suspension (or until the legislation had been drafted), whichever came first.²⁰

The Minister of Finance in his submission made a proposal to allow for a judgment creditor to serve the relevant Treasury with a final judgment order for payment.²¹ The amount paid by the Treasury would then be set off against the budget allocation of the relevant Department.²² The Court found this proposal helpful but was concerned that it did not make any provision should the treasury functionaries themselves then fail to pay the judgment debt.²³

The court (in *Minster of Justice and Constitutional Development v Nyathi and Others: In re Nyathi v Member of the Executive Council for Health, Gauteng and Another (CCT53/09)*) delivered judgment on the matter on 9 October 2009. Justice Mokgoro was of the view that an interim remedy would serve to protect creditors against continued infringement of their rights resting from the failure to pass the legislation timeously and would protect vital state property from attachment.²⁴ Consequently in its order the Court provided a tailored interim procedure, which combined the proposal from the Minister of Finance with the original interim measure provided by the Court.²⁵

This order can be set out as follows:

If a final order for payment of money against a provincial or national department remains unpaid 30 days after the judgment against the State, the judgment creditor may serve notice²⁶ on the relevant Provincial or National Treasury, the State Attorney, and the Accounting Officer and Executive Authority of the relevant Department.²⁷



²⁰ Ibid

²¹ Nyathi (2) para [37]

²² Ibid para[38]. If 14 days after service the judgment debt remains unpaid, the relevant Treasury shall cause it to be settled, settle it itself or make acceptable arrangements with the creditor for settlement.

²³ Ibid para [48]

²⁴ Nyathi (2) para [34]

²⁵ Ibid para [51]

²⁶ In terms of Rule 4 of the Uniform Rules of Court

²⁷ This order should be accompanied by a certificate from the registrar or clerk of court certifying that no review, appeal or rescission proceedings are pending.



The relevant treasury shall within 14 days of receiving the notice cause the judgement debt to be settled or itself settle the debt, or make arrangements with the judgement creditor for settlement of the debt



If the debt remains unpaid after 14 days, the judgment creditor may apply to court to execute against the State's movable property²⁸ and the sheriff may attach the property.



Once the property has been attached, parties with a direct and material interest may apply to court for a stay of execution on the basis that it would not be *in the interests of justice*²⁹ for the property of the state to be sold.



If no such application is made, the sheriff may remove and sell the moveable property in execution of the judgment debt 30 days from the date of attachment.³⁰

This would provide a time period of 75 days from date of final judgement to date of final execution.³¹

Comment:

Perhaps some information could be provided on the application of the Constitutional Court's interim attachment and execution mechanism.

What are current statistics in respect of outstanding judgments against the State?³²

²⁸ Through a writ of execution in terms of Rule 45 of the Uniform Rules of Court or warrant of execution in terms of s46 of the Magistrates Court Rules

²⁹ The Court did express some concern that although the interests of justice test will be determined by a court on the circumstances of each case, its relative and broad basis may unduly immunize state assets from attachment and execution. However, the Court was of the view that application of the interests of justice test, which takes into account considerations similar to those set out in the Local Government Municipal Finance Management Act 56 of 2003 makes sense. Clearly it will be in the interests of justice to grant a stay where the "assets to be attached are reasonably necessary to sustain effective administration or to provide a minimum level of basic services." Nyathi (2) para[43]

³⁰ Thus the period from date of final judgement to date of execution would be 75 days

³¹ Nyathi (2) para [51]

³² The Department of Justice reported that at the end of July 2008, there were 309 unsatisfied judgments against the state, totalling approximately R34 million. On 29 May 2009 the majority of the outstanding judgments had been paid, a remaining amount of R3.5 million was unpaid.

(Applicant's heads of Argument <http://www.constitutionalcourt.org.za/Archimages/13664.PDF>)



4. THE DRAFT CONSTITUTION EIGHTEENTH AMENDMENT BILL (CAB) AND THE DRAFT STATE LIABILITY BILL

On 1 June 2009 the Department of Justice and Constitutional Development (DoJCD) published the draft Constitution Eighteenth Amendment Bill (CAB) and the draft State Liability Bill for public comment.

Wide ranging concerns were expressed that the proposed State Liability Bill failed to give effect to the Nyathi judgment while the CAB sought to fundamentally alter the Constitution³³ effectively insulating the proposed Bill from any constitutional review by a court and in so doing altering the basic structure of the Constitution by placing an Act of Parliament beyond constitutional scrutiny.³⁴

Commentators contended that it would mean the Bill of Rights would not apply to the State Liability Act once passed and section 1 of the Constitution, which proclaims the founding values, would be undermined.

5. ANALYSIS OF STATE LIABILITY AMENDMENT BILL [B2-2011]

The State Liability Amendment Bill was revised and tabled without an accompanying Constitutional Amendment Bill. The Bill provides as follows:

Clause 1

Clause 1 seeks to amend section 2 of the principal Act by substituting the word ‘*Minister*’ for ‘*executive authority*’. Executive authority is defined in Clause 3 as either a Cabinet member in case of a national department and in a provincial department means the member of an executive council of a province.³⁵

Comment:

- Is the term ‘executive authority’ (upon whom service of a court order is made) broad enough to fulfill the purpose of the Bill namely, to ‘to regulate the manner in which a final order sounding in money against the State must be satisfied?’³⁶

³³ <http://www.ngopulse.org/press-release/new-bills-are-serious-threat-constitution-and-should-be-withdrawn>

³⁴ <http://constitutionallyspeaking.co.za/coming-soon-2/>

³⁵ The decision of the Supreme Court of Appeal in *Mateis v Ngwathe Plaaslike Munisipaliteit* (2003 4 SA 361 (SCA)) that a municipality is not affected by the provisions of the State Liability Act, had the effect that a municipality was regarded as a normal, private litigant and that the normal enforcement processes were available to judgment debtors. Subsequently, the Local Government: Municipal Finance Management Act (56 of 2003) was adopted. Sections 152 to 155, provide for the staying, suspension or even termination of a municipality's financial commitments, including execution processes.

³⁶ See Long Title, State Liability Amendment Bill [B2-2011]. Similarly see submission from the IDASA to the Portfolio Committee on Justice and Constitutional Development on the State Liability Amendment Bill, 2011. p2



- How are claims sounding in money made against other organs of state presently processed after final judgment? Will the Bill be applicable to these organs of state not contemplated by the definition 'executive authority'?
- Should a broader definition be used that is more reflective of the definition of organ of state as defined by section 239 the Constitution?³⁷
- It should be noted that claims sounding in money made against municipalities are governed by section 151 to 156 the Local Government: Municipal Finance Act 56 of 2003.³⁸

Clause 2

Clause 2 seeks to amend Section 3 of Act 20 of 1957. The Bill provides for the following mechanism for final court orders sounding in money:

Section 3(1) will provide that no execution or attachment may be issued against the State as a defendant or respondent except in terms of section 3(4) and (5) of the Act. Any amount paid to satisfy a judgment debt against the State must only be paid out after a final court order has been granted and according to the procedure set out in the proposed section 3.

Section 3(2) provides that the State Attorney or attorney on record shall inform the executive authority and accounting officer of the defendant/respondent Department of the court order sounding in money within 7 days of the court order being granted.

Section 3(3)(a) provides that a final court order against the Department must be paid within 30 days of the order becoming finalised unless an appeal has been lodged against the judgment.

Comment:

- Does the phrase "final court order" include the finalisation of a possible appeal? The proposed definition of final court order in section 4A means an order given or confirmed by a court of final instance or the order given by any other court where the time for noting an appeal has expired

³⁷ Section 239 defines an organ of state as

(a) any department of state or administration in the national, provincial or local sphere of government, or

(b) any other functionary or institution –

(i) exercising a public power or performing a function in terms of the Constitution or the provincial constitution; or

(ii) exercising the public power or performing a public function in terms of any legislation, but does not include a court or judicial officer.

³⁸ Section 151 provide that 'Except expressly provided for in this Part, nothing in this Chapter limits or affects-

(a) the rights of any creditor or other person having a claim against a municipality;

(b) any person's access to ordinary legal process in accordance with the common law and relevant legislation; or

(c) the rights of a municipality or municipal entity, or of the parties to a contract with a municipality or municipal entity, to alternative dispute resolution mechanism, notice procedure and other remedies, process or procedures.'



or no appeal has been lodged. An exception to this is where an application for condonation has been granted. In this instance the final court order would be the order granted by that court.

Section 3(3)(b)(ii) provides that the accounting officer of the relevant Department must make payment of the judgment debt within 30 days of the court order becoming final. The payment must be charged against the appropriation account or expenditure budget of that Department.

Section 3(4) provides for the attachment of movable property owned by the relevant Department where the Department has failed to pay the amount owing in terms of the final court order or has failed to make arrangement with the judgment creditor regarding the payment of this judgment debt. Only movable property may be attached. Property may not be attached if its attachment and execution will severely disrupt service delivery, threaten life or put the security of the public at risk.

Comment:

- There are two limitations placed on the property that may be attached: firstly the property must be movable property and secondly the attachment and execution against the property must not severely disrupt service delivery, threaten life or put the security of the public at risk. Is this limitation too broad or is it a reasonable limitation on the right of the judgment creditor?
- What happens where there is insufficient movable property to satisfy a judgment debt?

Section 3(5)

The Sheriff of the court may attach the property in terms of the writ of execution or warrant of execution but may not remove it.

Section 3(6)

The Sheriff of the court may remove and sell the attached property 30 days after attaching the property in execution of the judgment debt. However this may only occur if no application for a stay of execution is brought by a third party as contemplated by section 3(7).

Section 3(7)

A party having a direct and material interest may apply for a stay of the execution of movable property on the basis that the execution is not in the interest of justice.



Comment:

- The Interim arrangements made by the Constitutional Court provide for a similar application by a third party to stay the execution if it is in the interest of justice.
- However, is the phrase 'interest of justice' too broad? The proposed section 3(4) only allows for the attached of movable property where the attachment and execution will not severely disrupt service delivery, threaten life or put the security of the public at risk. In light of this does the further procedure that allows for an application by a third party to stay the execution, reasonably limit the rights of the judgment creditor?
- At this stage of proceedings the Department would have had ample opportunity to appeal the judgment order and further to argue that the property should not be attached in terms of section 3(4). Will allowing a third party with a direct and material interest claiming staying the execution in the interest of justice cause an unnecessary burden to the judgment creditor and delay the finalisation of the matter?
- Should the third party's interest in the matter be limited to instances where they have a direct or personal interest in the subject matter of the execution?

Clause 3

Clause 3 inserts Section 4A with additional definitions: accounting officer (as contained in section 36 of the PFMA); Department; Executive Authority; final court order; magistrates' court rules and uniform rules of court.

6. TIMELINE- FROM JUDGMENT TO SALE OF ATTACHED PROPERTY

FINAL COURT ORDER

No execution or attachment may be issued against the State except if a final court order sounding in money has not been paid out.



ALERT THE EXECUTIVE AUTHORITY

The state attorney shall within 7 days of a final court order against a Department inform the executive authority and accounting officer of that court order.





PAY JUDGMENT DEBT

A final court order shall be satisfied within 30 days of the order becoming final (unless an appeal has been lodged). The accounting officer shall make payment and this payment must be charged against the appropriation account/ expenditure budget of the Department concerned.



JUDGMENT DEBT NOT SATISFIED



APPLICATION FOR WRIT OF EXECUTION

If the payment is not made the creditor may apply for a writ of execution against movable property owned by the State and used by the Department (*other than property the execution of which would severely disrupt service delivery, threaten life or put the security of the public at risk*)



ATTACH MOVABLE PROPERTY

The sheriff must then attach the movable property



SALE OF MOVABLE PROPERTY

The sheriff may remove and sell the property after 30 days unless any party having a direct and material interest applies to the court for a stay on grounds that the execution *is not in the interests of justice*.

7. GENERAL COMMENTS ON THE BILL



Comments

Interim Measures for State Liability

- The Interim measures in the order of the Constitutional Court provided for the relevant Treasury to cause the judgment debt to be settled, (the amount paid by the Treasury would then be set off against the budget of the relevant Department).³⁹ This process allows for a central authority to deal with judgment debts and promotes uniformity and efficiency.
- No provision was made in the Constitutional Court mechanism for the exclusion of property the execution of which would 'severely disrupt service delivery, threaten life or put the security of the public at risk'. It's not clear how this will be determined? The Constitution Court mechanism provided that once assets had been attached 'parties with a direct and material interest may apply to court for a stay of execution on the basis that it would not be in the interests of justice.'⁴⁰

Local Government: Municipal Finance Act 56 of 2003

- Claims sounding in money made against municipalities are governed by section 151 to 156 the Local Government: Municipal Finance Act 56 of 2003. The procedure set out in this Act provides that any claim made against a municipality may be made through ordinary legal processes in accordance with the common and relevant legislation.⁴¹ Should the processes for claims sounding in money be similar at national and provincial and municipal level?

Tagging of the Bill

- In terms of the Joint Tagging Mechanism the Bill has been tagged as a section 75 Bill. This was the tagging recommended by the State Law Advisers and the Department of Justice and Constitutional Development as according to their assessment the Bill 'contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.'⁴²
- In *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10 the Court set out the test for bill tagging a Bill according to each section 75 and section 76.⁴³

³⁹ Nyathi (2) para[37] The Court noted that the proposal by the Minister of Finance 'allows for a measure of accountability, which is likely to foster compliance with the defaulting departments and avoid attachment and execution of state property'. [at para 49]

⁴⁰ Nyathi (2) para[57]

⁴¹ Section 151 Local Government: Municipal Finance Act 56 of 2003

⁴² State Liability Bill Memorandum on the Objects of the State Liability Amendment Bill.

⁴³ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10



Plain English

- The proposed section 3 uses the word “shall” in respect of mandatory duties. The use of ‘must’ makes the meaning of a provision clearer and is in keeping with the principle of writing legislation in plain English.
- Amendments are effected to the original section 3(1). The wording of the new section 3(1) is not simple and clear.
- Section 3(2) - Is the phrase ‘as the case may be’ redundant as the attorney referred to in this section will be either the State Attorney or the Attorney of record?
- Section 3(4) - Is the phrase ‘as the case may be’ redundant?

“In resolving this issue, this Court held that the heading of section 76, namely, “Ordinary Bills affecting provinces” provides “a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4, be dealt with under section 76.”⁴³

The test for tagging and for determining legislative competence is not the same.

Para [59] ...the tagging test is distinct from the question of legislative competence. It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.

Par [60]...The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.

Para [69]...The tagging of Bills before Parliament must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. The subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification.

Para [72]...To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in section 76(3)(a)-(f), over which the provinces have no legislative competence, as well as Bills the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.



Sources:

Minster of Justice and Constitutional Development v Nyathi and Others: In re Nyathi v Member of the Executive Council for Health, Gauteng and Another (CCT53/09) Nyathi

Nyathi v MEC for Department of Health, Gauteng *and Another* [2008] ZACC 8

State Liability Amendment Bill [B2-2011]

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

Submission from the Section 27 to the Portfolio Committee on Justice and Constitutional Development on the State Liability Amendment Bill, 2011

Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC 10