



20 June 2011

The State Liability Bill [B2B – 2009]: Overview of Portfolio Committee Amendments and selected responses to Civil Society Submissions¹

The State Liability Bill [B2B-2011] as amended by the Portfolio Committee on Justice and Constitutional Development was presented by the Department of Justice and Constitutional Development to the Select Committee on Security Constitutional Development on 14 June 2011.

Committee Members are referred to the research paper by G Nesbitt and S Isaac which contains an analysis of the original version of the Bill that was tabled in Parliament in February 2011, as well as a discussion of the Constitutional Court cases that gave rise to the Bill.

This paper will give an overview of the main Portfolio Committee amendments affected to the Bill as reflected in the “B” version of the Bill presented on 14 June 2011. Where relevant, selected issues raised in submissions will be discussed, as well as the Department’s responses to those issues.

- **Objectives of the Bill**

The Bill seeks to amend the State Liability Act of 1957 as directed by the Constitutional Court in the Nyathi² cases, which highlighted the failings of the original Act and identified serious deficiencies in the office of the State Attorney, by providing a procedure to regulate the satisfaction by the State of monetary debts owed by the State, referred to in the Bill as “a final court order sounding in money” (Clause 4). The Bill provides that, where the State failed to satisfy a claim or debt within a set period of time, a writ of execution may be obtained in terms of which moveable property of the State can be attached to satisfy a judgement debt as ordered by the court.

- **Attachment of moveable State property only**

The Bill only applies to moveable State property and thus immovable property of the State is excluded from the provisions of the Bill. During the deliberations in the Portfolio Committee on Justice and Constitutional Development the Committee had obtained a legal opinion from the Chief State Law Adviser regarding the Constitutionality of the limitation in the Bill to the attachment of moveable State property only, thereby differentiating the State from other judgment debtors.

The Chief State Law Adviser (“Chief SLA”) was of the opinion that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and therefore in line with section 36 of the Constitution. It was felt that the attachment and execution of immovable State property could result in “large scale

¹ As reflected in the “B” version of the Bill.

² Dingaon Hendrik Nyathi v Member of the Executive for the Department of Health, Gauteng and Minister of Justice and Constitutional Development (CCT 19/07)



disruptions”, and “would severely disrupt service delivery and would also unjustifiably limit the rights of many other individuals”.³

There were some criticisms in the submissions directed at the reasoning of the Chief SLA to justify the exclusion of immoveable State property on the grounds of service delivery disruptions. While this criticism may have some merit in respect of its reasoning, the exclusion of immoveable property in the Bill is supported by the author of this paper on the grounds that there is a shortage of available land for housing and for satisfying land claims against the State in terms of the Restitution of Land Rights Act⁴, and these should be prioritised.

Recommendation

The Select Committee could enquire from the Department or the State Law Adviser whether the Bill could possibly contain an **exception** to allow the State’s immoveable property to be attached if the original claim against the State involved compensation for land expropriated or bought by the State, or in respect of land claimants suing the State for the restoration of land. If an exception will prove impractical or too tedious or cause delays, the Department should indicate whether future legislation will make provision for such situations.

It is noted that the Centre for Constitutional Rights was of the opinion in its submission that the Bill would pass Constitutional muster in its current form.

- **Selected Portfolio Committee on Justice and Constitutional Development amendments**

Clauses 1 and 2 of the Bill substitute certain provisions for sections 2 and 3 of the State Liability Act (the principal Act).

Clause 1: the word “may” was replaced to read that the executive authority (the Minister or Member of the Executive Committee) “must” be cited as a defendant or respondent in court proceedings against the State in terms of the State Liability Act.

Clause 2: A number of new sub-clauses were inserted to among other things,

- i. Clarify that the State attorney appears on behalf of the State in the matter concerned. [section 3(2)]
- ii. The relevant national or provincial treasury must also be notified of a final court order in respect of a monetary claim against the State. In addition the Bill spells out the obligation on the treasury, and the steps it must take within 14 days after it has received notice, to ensure that the judgement debt is paid promptly by a department. [sections 3(4) and 3(5)]

³ Chief State Law Adviser (2011)

⁴ Act 22 of 1994



- iii. The satisfaction of a final court order for payment of money by a department within 30 days or within the time agreed by the judgment creditor and the accounting officer of a department. [section 3(3)(a)]
- iv. The process to be followed by a judgment creditor to obtain a writ of execution against moveable State property. The Rules of Court apply to the writ or warrant of execution. [section 3(6)]
- v. Provides for the Sheriff and State department or Accounting Officer to agree on which items cannot be attached as this would disrupt service delivery, threaten life or put public security at risk. [section 3(7)(b)]
- vi. A party with a material interest in the matter can at any time **before** the attachment apply to court for the staying of an order of execution on the grounds that it would disrupt service delivery, threaten life or put public security at risk, or was not in the interest of justice. [section 3(10)]
- vii. Provide that the satisfaction of a final court order by an accounting officer must be made in accordance with the Public Finance Management Act (PFMA), and all applicable regulations, guidelines, instructions issued by the relevant treasury. [section 3(14)(a)]

Comment

In the first briefing on the Bill the Select Committee was concerned about how the Department will ensure that the Bill is implemented and given effect to within the shortest period of time, in instances where an accounting officer continued to defy a court order by not paying the judgment debt or where there is insufficient funds to pay the debt.

The Department responded that the PFMA makes adequate provision for disciplinary action and even prison sentences where Accounting Officers have been found to be liable for failing to comply with certain provisions. The Portfolio Committee was reluctant to hold one individual accountable for a department's accounts, as a transgression of the provisions of the PFMA could have been flowed from the actions or omissions of a predecessor.

In the working draft of the Bill that was before the Portfolio Committee dated 19 April 2011, **Clause 2 contained a sub-clause 6(c)** which provided that the relevant treasury "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 judgements should not be paid".

This part is not included in the "B" version of the Bill before the Select Committee.

The Department should explain why this provision was left out as this may address the concerns raised by Members of the Select Committee regarding implementation, as it was felt that the PFMA does not make adequate provision for this.

The Chief SLA also referred to the Constitutional Court's remarks on the shortcomings of the PFMA in his legal opinion, namely that despite the provision for disciplinary processes against public officials who fail to comply with the provisions of the PFMA, such steps are rarely or never taken. Thus the only remedy left for judgement creditors is to issue contempt of court proceedings against public officials or a mandatory order to enforce compliance, but these are "tedious and onerous options".



Clause 3 – Definitions Clause

Organisations in their submissions criticised the location of **definitions in Clause 3** **whereas these are usually contained in the first clause in most Bills.**

The Department conceded that the current location of the **Definitions Clause (Clause 3)** was not ideal and not in line with most drafting styles. However, the department explained that because the Bill is an implementation Bill which gives effect to a constitutional court ruling concerning clauses 1 and 2 of the State Liability Act, it was necessary that the definitions only came after these amendments as reflected in the “B” version of the Bill. Clause 3 inserts a Definitions section into the principal Act, section 4A, containing definitions of, for example, the “relevant treasury” as meaning a provincial or national treasury; and that of “executive authority” to mean a Cabinet member of a national department or the member of the Executive Council in respect of a provincial department.

One of the terms that was changed is that of “**appropriation account**” which was corrected to “**appropriation budget**” as was pointed out in one of the submissions.

Clause 4–Transitional measures

One of the most important Portfolio Committee Amendments is the inclusion of transitional arrangements as was spelled out by the court in the Nyathi case as these were not included in the original Bill. This serves to restrict the application of the Act to recent final court orders in order to ensure a smooth transition from the old to the new law.

On this basis, in terms of Clause 4, the provisions of the State Liability Act of 1957 “apply in respect of a final court order sounding in money against a department which was given before the commencement of this Act and which was not satisfied within 30 days after the commencement of this Act”.

Clause 5 - Typographical error: “Agusut” must be changed to “August”.

Sources

1. State Liability Amendment Bill [B2B – 2011]
2. State Liability Amendment Bill [B2 – 2011]
3. State Liability Amendment Bill [B2 – 2011]. Working Document as at 19 April 2011.
4. Nesbitt, G and S Isaac (2011). Overview: State Liability Bill [B2 – 2011]
5. Chief State Law Adviser (2011). Legal Opinion on State Liability Amendment Bill (undated).
6. Department of Justice and Constitutional Development (2011). Briefing Document: State Liability Amendment Bill [B2B – 2011]. 14 June 2011
7. Department of Justice and Constitutional Development (2011). Working Document. Summary of submissions: State Liability Amendment Bill, 2011.