



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER
P/bag X9069, Cape Town, 8000
12th Floor, Atterbury House, 9 Riebeeck Street, Cape Town, 8001 - Tel (021) 441-4900 Fax (021) 421-7923

//sv170511

Ref: 8/7/Constitutional Law/2010/66
Enq: B Lufundo
Tel: (021) 441-4900
e-mail: BLufundo@justice.gov.za
website: <http://www.justice.gov.za>
Date: 01/06/2011

Ms N Msomi
Director-General
Department of Justice and Constitutional Development
Private Bag X81
PRETORIA
0001

Dear Director-General Msomi

STATE LIABILITY AMENDMENT BILL

1. The Department posed the question whether the amendments proposed by the Portfolio Committee: Justice may affect the classification of the introduced State Liability Bill, [B 2 of 2011].
2. The Bill was originally classified as a section 75 Bill that means the procedure to be followed in terms of the Constitution for the Bill to pass through Parliament is regulated by section 75 of the Constitution, 1996.
3. Section 75 of the Constitution provides that:
 - “(1) When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
 - (a) The Council must—
 - (i) pass the Bill;
 - (ii) pass the Bill subject to amendments proposed by it; or
 - (iii) reject the Bill.
 - (b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.
 - (c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may—
 - (i) pass the Bill again, either with or without amendments; or

- (ii) decide not to proceed with the Bill.
- (d) A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent.

(2) When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead—

- (a) each delegate in a provincial delegation has one vote;
- (b) at least one third of the delegates must be present before a vote may be taken on the question; and
- (c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote."

4. The Committee in its deliberations of the amendments to the State Liability Act intends to introduce a procedure in terms whereof National Treasury and where applicable provincial treasury must be able to effect payment of final court orders sounding in money on the behalf of national or provincial departments .

5. The Bill provides amongst other things for the following:

- An obligation to make payment within 30 days of the date of the order becomes final;
- or within the period agreed upon by the judgment creditor and the accounting officer of the department concerned;
- where payment is not effected within 30 days of the date the order of court becoming final or within the agreed period of time, the judgment creditor may serve the court order on the executive authority, the accounting officer of the department concerned, the State Attorney or attorney of record and the relevant treasury;
- the relevant treasury then has to ensure that the judgment debt is satisfied, or acceptable arrangements have been made to satisfy the judgment debt;
- if payment is not effected as required the judgment creditor may proceed to apply for a writ of execution or a warrant of execution against movable property owned by the State and used by the department concerned;
- a procedure for attachment and identification of movable assets that may be sold in execution is provided (the procedure allows for exclusion of certain assets from the execution process if the selling of those assets will lead to a situation where service delivery will be severely disrupted, life will be threatened or the security of the public will be placed at risk);
- the relevant treasury is given an obligation to make or issue appropriate regulations, instructions, circulars, guidelines and reporting rules; or issue a direction to a department to make a payment in order to satisfy any outstanding final court order; conduct an investigation, inspection or review any failure by a department to pay any outstanding final court orders; issue an instruction to take remedial action or to obtain specified support if there is non-compliance with the Act, regulations, instructions, circulars, guidelines and reporting lines or a need for intervention in view of the

financial, governance, or management situation, condition or failure of a department; withhold from a department's voted funds sufficient funds to satisfy any outstanding final court order; satisfy any outstanding final court order on behalf of a department.

6. The amendments listed above create a legislative procedure that purports to ensure the relevant department effects timely payment in the event where a court made a final order sounding in money court order against the State.

7. The judgment creditor is afforded certainty that payment will be made in the event where a court has granted a final court order sounding in money against the State.

Classification

8. In terms of the Rules of the National Assembly, Rule 249 (3)(f), the Committee may not propose an amendment that-

- (i) Affects the classification of the Bill, except as provided for in Subrule (4) and Joint Rule 163; or
- (ii) renders the bill constitutionally or procedurally out of order within the meaning of Joint Rule 161:

"(4) The committee may propose an amendment that changes the classification of a section 75 or section 76 bill to a mixed 75/76 bill only if the JTM is of the view that the bill as amended is unlikely to lead to unmanageable procedural complications."

9. In terms of the Joint Rules of Parliament the Joint Tagging Mechanism may change the classification of a Bill.

10. Joint Rule 163 provides that:

- " (1) The JTM may change the classification –
 - (a) of a mixed section 75/76 Bill to a section 75 and section 76 Bill, if the Bill is split in terms of joint Rule 194(2)(a)(i), 196(2)(a) or 200(2) into separate section 75 or section 76 Bills;
 - (b) of a mixed section 75/76 Bill to either a section 75 or a section 76 Bill, if the Bill is amended in terms of joint Rule 194(2)(a)(ii) to become a section 75 or a section 76 Bill; or
 - (c) of a section 75 or a section 76 Bill to a mixed section 75/76 Bill, or a section 75 Bill to a section 76 Bill, or a section 76 to a section 75 Bill, but only if-
 - (i) the Bill was introduced in the Assembly; and
 - (ii) the Bill is amended before the Second reading of the Bill in the Assembly to become a mixed section 75/76 Bill, a section 76 Bill or a section 75 Bill, as the case may be.
- (2) if the JTM reclassifies a Bill as a mixed section 75/76 Bill it must take a decision on the Bill as required by joint rule 191 (1) (a).
- (3) The JTM may change the classification of a Bill in respect of whether the Bill pertains to customary law or customs of traditional communities in accordance with section 18(1) of the Traditional Leadership and Governance

Framework Act 2003 and amend its findings in terms of Rule 160(5A).".

11. In terms of Joint Rule 164, the JTM may—

- “ (1) At any time before a House decides on an amendment to a Bill, the JTM may—
- (a) rule the amendment constitutionally or procedurally out of order in terms of Joint Rule 161, whether or not the amendment has been referred to the JTM; and
 - (b) prescribe an *ad hoc* procedure with regard to the Bill to meet any procedural complications arising from its ruling in terms of paragraph (a).
- (2) An amendment ruled out of order by the JTM may not be proceeded with.
- (3) The JTM must without delay report to both Houses on any decision taken in terms of sub rule (1).”

12. The Constitution under section 76 provides that:

- “(1) When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
- (a) The Council must—
 - (i) pass the Bill;
 - (ii) pass an amended Bill; or
 - (iii) reject the Bill.
 - (b) If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.
 - (c) If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.
 - (d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on—
 - (i) the Bill as passed by the Assembly;
 - (ii) the amended Bill as passed by the Council; or
 - (iii) another version of the Bill.
 - (e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.
 - (f) If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if the Council passes the Bill, the Bill must be submitted to the President for assent.
 - (g) If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.
 - (h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent.
 - (i) If a Bill referred to the Council in terms of paragraph (f) or (h) is not passed by the Council, the Bill lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members.
 - (j) If a Bill referred to the Assembly in terms of paragraph (g) or (h) is not passed by the Assembly, that Bill lapses, but the Bill as originally passed by the Assembly may again be passed by the Assembly, but with a supporting vote of at least two thirds of its members.
 - (k) A Bill passed by the Assembly in terms of paragraph (e), (i) or (j) must be

submitted to the President for assent.

(2) When the National Council of Provinces passes a Bill referred to in subsection (3), the Bill must be referred to the National Assembly and dealt with in accordance with the following procedure:

- (a) The Assembly must—
 - (i) pass the Bill;
 - (ii) pass an amended Bill; or
 - (iii) reject the Bill.
- (b) A Bill passed by the Assembly in terms of paragraph (a) (i) must be submitted to the President for assent.
- (c) If the Assembly passes an amended Bill, the amended Bill must be referred to the Council, and if the Council passes the amended Bill, it must be submitted to the President for assent.
- (d) If the Assembly rejects the Bill, or if the Council refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill must be referred to the Mediation Committee, which may agree on—
 - (i) the Bill as passed by the Council;
 - (ii) the amended Bill as passed by the Assembly; or
 - (iii) another version of the Bill.
- (e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses.
- (f) If the Mediation Committee agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.
- (g) If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.
- (h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Council and the Assembly, and if it is passed by the Council and the Assembly, it must be submitted to the President for assent.
- (i) If a Bill referred to the Assembly in terms of paragraph (f) or (h) is not passed by the Assembly, the Bill lapses.

(3) A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:

- (a) Section 65(2);
- (b) section 163;
- (c) section 182;
- (d) section 195(3) and (4);
- (e) section 196; and
- (f) section 197.

(4) A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation—

- (a) envisaged in section 44 (2) or 220 (3); or
- (b) envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government.

(5) A Bill envisaged in section 42 (6) must be dealt with in accordance with the procedure established by subsection (1), except that—

- (a) when the National Assembly votes on the Bill, the provisions of section 53 (1) do not apply; instead, the Bill may be passed only if a majority of the members of the Assembly vote in favour of it; and
- (b) if the Bill is referred to the Mediation Committee, the following rules apply:
 - (i) If the National Assembly considers a Bill envisaged in subsection (1) (g) or (h), that Bill may be passed only if a majority of the

members of the Assembly vote in favour of it.

- (ii) If the National Assembly considers or reconsiders a Bill envisaged in subsection (1) (e), (i) or (j), that Bill may be passed only if at least two thirds of the members of the Assembly vote in favour of it.
- (6) This section does not apply to money Bills¹."

13. Is envisaged that the National Treasury and where applicable the relevant provincial Treasury will make payment on behalf of a department if that department fails to satisfy a judgment debt arising from a final court order sounding in money.

14. The Constitution provides for financial matters in Chapter 13 to the Constitution and more specifically provides in section 215 of the Constitution that:

"(1) National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.

(2) National legislation must prescribe—

- (a) the form of national, provincial and municipal budgets;
- (b) when national and provincial budgets must be tabled; and
- (c) that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation.

(3) Budgets in each sphere of government must contain—

- (a) estimates of revenue and expenditure, differentiating between capital and current expenditure;
- (b) proposals for financing any anticipated deficit for the period to which they apply; and
- (c) an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year."

15. Under section 216 of the Constitution:

"(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing—

- (a) generally recognised accounting practice;
- (b) uniform expenditure classifications; and
- (c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material

¹ (1) A Bill is a money Bill if it—

- (a) appropriates money;
- (b) imposes national taxes, levies, duties or surcharges;
- (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
- (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except—

- (a) a subordinate matter incidental to the appropriation of money;
- (b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;
- (c) the granting of exemption from national taxes, levies, duties or surcharges; or
- (d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament

breach of those measures.

(3) A decision to stop the transfer of funds due to a province in terms of section 214 (1) (b) may be taken only in the circumstances mentioned in subsection (2) and—

- (a) may not stop the transfer of funds for more than 120 days; and
- (b) may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 76 (1) and prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the national treasury.

(4) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection (3).

(5) Before Parliament may approve or renew a decision to stop the transfer of funds to a province—

- (a) the Auditor-General must report to Parliament; and
- (b) the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee.”.

15. The provision that is inserted in the proposed clause 2 of the State Liability Bill referred to in paragraph 5 will enable the relevant treasury to pay on behalf of a department any outstanding final court order which satisfaction must be recorded and debited against the appropriated budget of the department concerned.

16. The Constitutional Court considered the question pertaining to classification in the **Tongoane and others v National Minister for Agriculture and Land Affairs 2010 ZACC 10** and remarked that “to apply the pith and substance test to the tagging question therefore undermines the constitutional role of provinces in legislation where they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) requires to be enacted in accordance with the section 76 procedure. It does this because it focuses on the substance of a Bill and treats provisions which fall outside its main substance as merely incidental to it and consequently irrelevant to tagging. In so doing, it ignores the impact of those provinces. To ignore this impact is to ignore the role of the provinces in the enactment of legislation substantially affecting them. Therefore the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence the substantial measure test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects provinces will be enacted in a accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. [par 70-71].

17. As mentioned the Bill was classified as a section 75 Bill, namely an ordinary Bill not affecting the provinces. The legislative scheme provided for in the proposed amendments serve a legitimate purpose namely it provides a procedure that benefits all judgment creditors with a procedure to satisfy their claims against the State.

18. The inclusion of powers to pay or withhold funds from a department's voted funds to effect payment on behalf of the department concerned do not affect the classification of the Bill. The amendment to the State Liability Act is the result of a constitutional court judgement in the Nyathi case² where the court pronounced on section 3 of the State Liability Act. The Court remarked that though "the Act purports to make the state liable for judgment debts that accrue against it.. the processes involved in gaining satisfaction of such debts are not in place. The doors are closed before compliance has been achieved... the legislative provision prevents the attachment of state assets but it does not inhibit a state's ability to pay a judgment debt" [par 52]

19. Although the section 76 of the Public Finance Management Act provide for claims by the state against other persons, claims by officials against the state and losses and damages incurred by the state .. it does not deal any further with the settlement of claims. It does not contain any procedures relating to how an order of court is to be settled. The Court remarked that legislation " must set out the procedures required for the implementation of the state's obligation as dictated by the Constitution and these provisions, vital to our democracy, founded on the rule of law are absent here [par 56]

20. The amendments give effect to the constitutional Court's ruling in the Naythi judgment and provides for a procedure in terms whereof a judgment creditor is able to obtain payment of a final court order sounding in money against the state.

21. Currie³ pointed out that the "fundamental idea of constitutionalism is that state power should be governed and constrained by the Constitution.. This principle is bolstered by the specific entrenchment of the rule of law in the founding provisions of the Constitution. In Fedsure Life assurance v Greater Johannesburg Metropolitan Council the Constitutional Court stated that:

"it is a fundamental principle of the rule of law , recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."⁴

22. The Premier exercises the executive authority together with the other members of the Executive Council by-

² Dinga Hendrik Nyathi v Member of the Executives Council for the Department of Health and others CCT 19/07 [2008] ZACC 8

³ Currie and De Waal Volume 1 The New Constitutional and Administrative Law page 77

⁴ 1998 (2) SA 374 CC

- (a) Implementing provincial legislation in the province;
- (b) Implementing all national legislation within the functional areas listed in schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
- (c) Administering in the province, national legislation outside the functional areas listed in Schedule 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
- (d) Developing and implementing provincial policy;
- (e) Co-ordinating the functions of the provincial administration and its departments;
- (f) Preparing and initiating provincial legislation;
- (g) Performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament⁵.

23. The proposed amendments to the State liability Amendment Bill incorporate procedures whereby payment of debt arising from final court orders sounding in money may be made from the voted funds of provincial departments or where applicable paid by the relevant provincial treasury these amendments do not constitute for the purpose of classification of the Bill a matter that substantially affects the provinces for the purposes of the substantial measure test as formulated in the Tongoane matter.

24. The mere fact that the Bill affords the judgment creditor with a means to satisfy a judgment debt creates effective, transparent, accountable and coherent government for the Republic as a whole thereby ensuring that good governance principles are achieved.

25. The legislative scheme adopted in the proposed amendments therefore in our view does not change the original classification of the Bill, namely an ordinary Bill not affecting the provinces as contemplated under section 75 of the Constitution. The process for satisfaction of a final court order sounding in money afforded to a claimant who has a claim against the State is clearly provided and does not affect the classification of the Bill

CONCLUSION

26. The proposed amendments to the State liability Amendment Bill incorporate procedures whereby payment of debt arising from final court orders sounding in money may be made from the voted funds of provincial departments or where applicable paid by the relevant provincial treasury. These amendments do not constitute for the purpose of classification of the Bill a matter that substantially affects the provinces for the purposes of the substantial measure test as formulated in the Tongoane matter.

⁵ Section 125 of the Constitution

27. The mere fact that the Bill affords the judgment creditor with a means to satisfy a judgment debt creates effective, transparent, accountable and coherent government for the Republic as a whole thereby ensuring that good governance principles are achieved.

28. The legislative scheme adopted in the proposed amendments therefore in our view does not change the original classification of the Bill, namely an ordinary Bill not affecting the provinces as contemplated under section 75 of the Constitution. The process for satisfaction of a final court order sounding in money afforded to a claimant who has a claim against the State is clearly provided and does not affect the classification of the Bill.



ENVER DANIELS
CHIEF STATE LAW ADVISER