



LAW SOCIETY
OF SOUTH AFRICA

4 March 2011

Email: vramaano@parliament.gov.za

Mr V Ramaano
Portfolio Committee on Justice and Constitutional Development
CAPE TOWN

Dear Sir

COMMENTS: STATE LIABILITY BILL

We attach hereto comments by the Law Society of South Africa on the above Bill.

Kindly acknowledge receipt.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'Lizette'.

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Law Society of South Africa
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The Law Society of South Africa brings together the Black Lawyers Association, the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the National Association of Democratic Lawyers in representing the attorneys' profession in South Africa.

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA)
ON THE STATE LIABILITY AMENDMENT BILL (B2-2011)

The Law Society of South Africa (LSSA) has considered the State Liability Amendment Bill and comments as follows:

1. INTRODUCTION

There are numerous reported and unreported judgments of the High Court in which:

- 1.1 the Government was criticized for unjustly refusing to pay in fulfilment of a final judgment sounding in money;
- 1.2 the executive authority (as now defined in the Bill) faced contempt of court proceedings following upon a decision by the Government to refrain from paying in fulfilment of a final judgment.

It is not necessary to cite those cases, but they are to be borne in mind to ensure that it will not be possible for the Government to in future frustrate judgment creditors with regard to obtaining fulfilment of judgment.

Even after the judgment in the case of *Nyathi vs MEC for Department of Health 2008(5) SA 94(CC)*, the introduction of a Bill to enable judgment creditors to enforce their judgments against the Government was delayed as follows:

- a. On 2 June 2008 Section 3 of the State Liability Act was declared unconstitutional and the Government was granted 12 months to pass appropriate legislation;

- b. The new legislation was not finalised in time and on 1 June 2009 the Government requested and was granted a further extension until 31 August 2009;
- c. The legislation was again not finalised and on 31 August 2009 the time limit was extended to 31 August 2011.

Fortunately for judgment creditors, the Constitutional Court had introduced an interim arrangement which has forced the Government to finalise the new legislation.

Against this background, it is only natural that the attorneys' profession, which has a duty to protect the rights of citizens, will approach proposed legislation in this regard with the greatest care, concern and caution.

2. THE CONSTITUTION EIGHTEENTH AMENDMENT BILL

In Government Gazette No 32289 dated 1 June 2009 the Constitution Eighteenth Amendment Bill was published for comment. The aim of this Eighteenth Amendment, according to the Government Gazette, was to enable the Government to amend the State Liability Act in order to provide for satisfaction of judgments.

The Eighteenth Amendment endeavours to authorize payment by Government where a liability has not been budgeted for. It also deals with Provincial Revenue Funds. It must therefore be ensured that there will not be any uncertainty as to the powers of the Central Government or the Provincial Government to make payment.

There is however uncertainty as to the status of the Constitution Eighteenth Amendment Bill. We are of the view that the State Liability Amendment Bill should be considered in conjunction with the Constitution Eighteenth Amendment Bill and that there must be no uncertainty that the *Act of Parliament* referred to in the Eighteenth Amendment, is in fact the State Liability Amendment Bill.

3. THE STATE LIABILITY AMENDMENT BILL

- 3.1 The LSSA is of the view that the word "*state*" in Section 1 of the Act should not be replaced with the words "*organ of state*" as the latter also includes Local Government. It is however submitted that the word "*state*" in Section 1 be defined to include any department of state or administration in the National Government and in the Provincial Government.
- 3.2 We submit that it is to be made clear that the provisions of the Amendment Act will have retrospective effect. However, it may be possible that a judgment or order was not obtained against the "*nominal defendant or respondent*". Provision must therefore be made that in such an event execution may also be levied.
- 3.3 With regard to the proposed Section 2(1), it is to be noted that the "*executive authority*" (now defined for the first time) "*may*" be cited as nominal defendant or respondent. It is obvious that, despite the decision in Jayjai v MEC for Welfare, 2004(2) (6001) SCA, plaintiffs or applicants still continue to institute proceedings against the political head of a department. In this regard see Treatment Action Campaign and Another v Roth and Others 2008(4) ALL SA 360(C) on 364.

It is therefore suggested that the word "*may*" should be replaced by the word "*must*".

The LSSA is however concerned that the realignment of government departments by the President could lead to confusion. For instance, agriculture now falls under two departments, each with its own Minister.

It is sometimes not possible with reference to an Act, to determine the relevant Minister. Furthermore, in some legislation the Minister is defined as "the Minister appointed by the President", without describing his or her full designation.

- 3.4 It is envisaged that an action or an application against the state may not always involve payment of money, but return of goods with an order authorizing the Sheriff to attach the goods and to return it to the plaintiff or the applicant. The "*execution, attachment or like process*" referred to in the proposed Section 3(1) must therefore be limited to fulfilment of a judgment sounding in money. It is suggested that the wording should be amended to ensure that this be clarified.
- 3.5 Proposals had previously been made to the effect that judgments should be registered with the Department of Finance, which would be responsible for payment of such judgments and that funds of the Government should be capable of being attached by the Sheriff should payment not be made. It appears that such procedure was not acceptable to the Government and in dealing with the Bill, the LSSA will limit its comment to the Bill as it is and not to other alternatives to the Bill. The remainder of this document is therefore to be read against this background.
- 3.6 The proposed amendment of Section 3(2) places a liability on the State Attorney or attorney of record to give notice of a final judgment sounding in money. The words "or attorney of record" should be amended to ensure that reference is made to the attorney acting on behalf of the State. We also suggest that it be provided that failure to advise, or advise timeously, would not affect the rights of the claimant.
- 3.7 There may be cases where legislation or rules of a court or tribunal does or does not provide for suspension of a judgment where an appeal or a review or a rescission is requested. It is therefore suggested that the proposed Section 3(3)(a) should refer to the judgment being suspended in terms of any legislation or in terms of any rule. We refer to Section 78 of the Magistrate's Court Act as an example.
- 3.8 As far as the proposed Section 3(4) is concerned, we suggest the following:

- 3.8.1 Section 3(4) states that *"If a final court order was not satisfied and acceptable arrangements made ..."* The word *"and"* should be deleted and replaced with the word *"or"*;
- 3.8.2 The word *"apply"* causes a problem as it implies that an application would have to be brought to Court. In this regard the following:
- 3.8.2.1 In Section 62 of the Magistrate's Court Act it is provided that the Court shall have jurisdiction "to issue" process in execution of its judgment;
- 3.8.2.2 Rule 36 of the Rules of the Magistrates' Courts provides that the process for execution shall be by warrant "issued";
- 3.8.2.3 The Supreme Court Act in Section 36 provides that the Sherriff shall execute all writs directed to the Sherriff;
- 3.8.2.4 Rule 45 of the Rules of Court provide that a judgment creditor may "sue out" writs for execution;

Nowhere in these Acts or rules does the word "apply" appear.

The word "apply" is therefore foreign in the execution of a judgment and it may create further confusion. It should not be necessary to bring an interlocutory application and the judgment creditor has the right to have the writ or warrant issued forthwith. It is therefore suggested that the section be amended to simply state that a writ or warrant of execution may be issued.

3.8.3 The Bill only provides for writs and warrants issued in terms of the Magistrates' Courts Rules and the Uniform Rules of Court. There may be other courts, such as the Labour Court, the Labour Appeal Court, the Competition Appeal Court or other tribunals which may give a ruling or a judgment against the State sounding in money. To therefore limit the execution of a writ or warrant in terms of the Magistrates' Court Rules and the Uniform Rules, is unnecessary limiting the execution of judgments which may be granted by other courts or tribunals. It is suggested that the Bill should be amended to provide that a warrant or writ could be issued in terms of any act or rule applicable to any court or tribunal.

3.8.4 It is of concern that the warrant or the writ is against property "*... other than property, the attachment and execution of which would severely disrupt service delivery...*" It therefore strictly speaking means that such property should be specifically excluded in the warrant or writ.

Furthermore, it is uncertain as to who would identify such property. Section 67 of the Magistrate's Court Act provides which property is exempted from execution. When executing the warrant, the Sherriff must accordingly not attach such property. It must therefore be left to the discretion of the Sherriff to decide which property would disrupt service delivery if the property is removed or sold. However, the attachment can be over all property. It is only the removal and sale of property which will disrupt service delivery, which may be exempted from removal and sale. The Government is protected in the proposed Section 3(5) in that the attachment can take place but the removal is deferred.

3.9 The proposed Section 3(5) again creates the impression that there must be an application where property will be identified for exclusion. The reference to "*identified moveable properties*" in this section implies that there was some or other process which identified either removable property or property which could not be removed.

- 3.10 It is suggested that Sections 3(6) and 3(7) be replaced *in toto*. Our suggestions in this regard are annexed hereto.
- 3.11 A new Section 4A is inserted. The definition of "*Magistrates' Courts Rules*" should be deleted as these rules have been repealed. Furthermore, we submit that it is unnecessary to define the Court Rules.
- 3.12 The definition of "*final court order*" should be considered against the background of an appeal as opposed to an application for a rescission of a judgment.

The LSSA has taken the liberty to draft its submissions in legislative format for your convenience and trust that you find this in order.

3. (1) Subject to subsections (4) and (5), no execution, attachment or like process for payment of a final court order sounding in money may be issued against the defendant or respondent in any 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 final court order given or made against the state in any such action or proceedings shall be paid as contemplated in this section.
- (2) The State Attorney or attorney of record of the state concerned, as the case may be, shall, within seven days after a court order sounding in money against a department is granted, in writing, inform the executive authority and accounting officer of that department of the court order provided that failure by the attorney to comply with this sub-section shall not be a reason for delaying the attachment or execution.
- (3) (a) A court order against a department for the payment of money shall be satisfied within 30 days of the final court order, 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 or acceptable arrangements 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 issue a writ or warrant of execution in terms of the applicable legislation and rules of the court or tribunal, as the case may be against moveable property owned by the State and used by the department concerned.
- (5) The sheriff of the court concerned shall
- (a) pursuant to the writ of execution or warrant of execution, as the case may be, attach, but not remove, the moveable property.
- (b) In the absence of any application contemplated in subsection (6), after the expiration of 30 days from the date of attachment, remove and sell the attached property if the full judgment has not been paid.

(6) The state may, during the period referred to in subsection (5(b)), apply to the court which granted the order, for a stay on grounds that the execution of the attached moveable property is not in the interests of justice.”

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);

‘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 or tribunal of final instance; or

(b) given by any other court or tribunal where the time for noting an appeal against the 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 granting such condonation from the date of granting such condonation;

Short title and commencement

4. 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*.