

REPUBLIC OF SOUTH AFRICA

**STATE LIABILITY
AMENDMENT BILL**

*(As amended by the Portfolio Committee on Justice and Constitutional Development
(National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 2B—2011]

ISBN 978-1-77037-834-6

No. of copies printed 1 800

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the State Liability Act, 1957, so as to regulate the manner in which a final court order sounding in money against the State must be satisfied; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Substitution of section 2 of Act 20 of 1957, as amended by section 1 of Act 201 of 1993

1. The following section is hereby substituted for section 2 of the State Liability Act, 1957 (hereinafter referred to as the principal Act): 5

“Proceedings to be taken against [Minister] executive authority of department concerned

2. (1) In any action or other proceedings instituted by virtue of the provisions of section [*one*] 1, the [**Minister**] executive authority of the department concerned [**may**] must be cited as nominal defendant or respondent. 10

(2) [**For the purposes of subsection (1), ‘Minister’ shall, where appropriate, be interpreted as referring to a member of the Executive Council of a province**] The plaintiff or applicant, as the case may be, or his or her legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney.”. 15

Substitution of section 3 of Act 20 of 1957, as amended by section 36 of Act 9 of 1989 and substituted by section 2 of Act 201 of 1993

2. The following section is hereby substituted for section 3 of the principal Act:

“Satisfaction of [judgment] final court orders sounding in money

3. (1) [No] Subject to subsections (4) to (8), no execution, attachment or like process [shall] for the satisfaction of a final court order sounding in money may be issued against the defendant or respondent in any [such] 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 [judgment or] final court order given or made against the nominal defendant or respondent in any such action or proceedings [may] must be paid [out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be] as contemplated in this section. 5 10

(2) The State Attorney or attorney of record appearing on behalf of the department concerned, as the case may be, must, within seven days after a court order sounding in money against a department becomes final, in writing, inform the executive authority and accounting officer of that department and the relevant treasury of the final court order. 15

(3) (a) A final court order against a department for the payment of money must be satisfied— 20

- (i) within 30 days of the date of the order becoming final; or
- (ii) within the time period agreed upon by the judgment creditor and the accounting officer of the department concerned.

(b) (i) The accounting officer of the department concerned must make payment in terms of such order within the time period specified in paragraph (a)(i) or (ii). 25

(ii) Such payment must be charged against the appropriated budget of the department concerned.

(4) If a final court order against a department for the payment of money is not satisfied within 30 days of the date of the order becoming final as provided for in subsection (3)(a)(i) or the time period agreed upon as provided for in subsection (3)(a)(ii), the judgment creditor may serve the court order in terms of the applicable Rules of Court on the executive authority and accounting officer of the department concerned, the State Attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury. 30 35

(5) The relevant treasury must, within 14 days of service of the final court order as provided for in subsection (4), ensure that—

- (a) the judgment debt is satisfied; or
- (b) acceptable arrangements have been made with the judgment creditor for the satisfaction of the judgment debt, should there be inadequate funds available in the vote of the department concerned. 40

(6) If the relevant treasury fails to ensure that—

- (a) the judgment debt is satisfied; or
- (b) acceptable arrangements have been made with the judgment creditor for the satisfaction of the judgment debt, should there be inadequate funds available in the vote of the department concerned, 45

within the time period specified in subsection (5), the registrar or clerk of the court concerned, as the case may be, must, upon the written request of the judgment creditor or his or her legal representative, issue a writ of execution or a warrant of execution in terms of the applicable Rules of Court against movable property owned by the State and used by the department concerned. 50

(7) (a) Subject to paragraph (b), the sheriff of the court concerned must, pursuant to the writ of execution or the warrant of execution, as the case may be, attach, but not remove, movable property owned by the State and used by the department concerned. 55

(b) The sheriff and the accounting officer of the department concerned, or an official of his or her department designated in writing by him or her, may, in writing, agree on the movable property owned by the State and used by 60

the department concerned that may not be attached, removed and sold in execution of the judgment debt because it will severely disrupt service delivery, threaten life or put the security of the public at risk.

(c) If no agreement referred to in paragraph (b) is reached, the sheriff may attach any movable property owned by the State and used by the department concerned, the proceeds of the sale of which, in his or her opinion, will be sufficient to satisfy the judgment debt against the department concerned.

(8) In the absence of any application contemplated in subsection (10), 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.

(9) Subject to this Act, the Rules of Court, where applicable, apply to the issuing of a writ of execution or a warrant of execution, as the case may be, and the attachment, removal and sale of movable property in execution of a judgment debt against the State.

(10) (a) A party having a direct and material interest may, before the attached movable property is sold in execution of the judgment debt, apply to the court which granted the order, for a stay on grounds that the execution of the attached movable property—

- (i) would severely disrupt service delivery, threaten life or put the security of the public at risk; or
- (ii) is not in the interests of justice.

(b) If an application referred to in paragraph (a) is brought by the department concerned, the application must contain a list of movable property and the location thereof, compiled by the department concerned, that may be attached and sold in execution of the judgment debt.

(c) Notice of an application in terms of paragraph (a) must be given to the judgment creditor and sheriff concerned.

(11) In order to comply with its obligations in terms of subsection (5), and in general to ensure that final court orders are satisfied by departments without any delay, the relevant treasury may—

- (a) make or issue appropriate regulations, instructions, circulars, guidelines and reporting rules;
- (b) issue a direction to a department to make a payment in order to satisfy any outstanding final court order;
- (c) conduct an investigation, inspection or review into any failure by a department to pay any outstanding final court orders;
- (d) issue an instruction to take remedial action or to obtain specified support, where—
 - (i) there has been non-compliance by a department with the provisions of this section, or regulations, instructions, circulars, guidelines or directions made or issued by the relevant treasury; or
 - (ii) there is a need for intervention in view of the financial, governance or management situation, condition or failure of a department;
- (e) withhold from a department's voted funds sufficient funds to provide for the satisfaction of any outstanding final court order against a department, which funds may only be released to the department upon the submission of proof acceptable to the relevant treasury that the court order in question has been satisfied;
- (f) satisfy any outstanding final court order on behalf of a department, which satisfaction must be recorded and debited against the appropriated budget of the department concerned; or
- (g) debit the costs associated with the satisfaction of a final court order provided for in paragraph (f), an administration charge and a penalty from the appropriated budget of the department concerned.

(12) Should there be insufficient funds available in the appropriated budget of the department concerned for the current financial year, the withholding of funds in terms of subsection (11)(e) or the satisfaction of the final court order in terms of subsection (11)(f) may extend to the

appropriated budget of the department concerned for more than one financial year in terms of an arrangement provided for in subsection (5)(b).

(13) (a) Satisfaction of an outstanding final court order on behalf of a department by the relevant treasury in terms of subsection (11)(f) is regarded as the satisfaction thereof by the department concerned, and not by the relevant treasury, for which the accounting officer of the department concerned is responsible, accountable and liable in terms of the Public Finance Management Act. 5

(b) Satisfaction of an outstanding final court order in terms of subsection (11)(f) does not absolve the accounting officer of liability for financial misconduct in terms of subsection (16). 10

(14) (a) Satisfaction of a final court order by an accounting officer must be made in accordance with the Public Finance Management Act, and all applicable regulations, instructions, circulars, guidelines and reporting rules which may be made or issued by the relevant treasury. 15

(b) An accounting officer must classify and process the settlement of a final court order, including a final court order satisfied by the relevant treasury in terms of subsection (11)(f).

(c) The classification in terms of paragraph (b) must indicate the type of expenditure and whether it is unauthorised, irregular, or fruitless or wasteful expenditure. 20

(d) The accounting officer of the department concerned must comply with the requirements relating to the applicable type of expenditure as set out in the Public Finance Management Act, and all applicable regulations, instructions, circulars, guidelines and reporting rules which may be made or issued by the relevant treasury. 25

(15) (a) The accounting officer of a department must put in place appropriate budgeting procedures in accordance with all regulations, instructions, circulars, guidelines and reporting rules which may be made or issued by the relevant treasury, to ensure the timeous satisfaction of final court orders. 30

(b) The budgeting procedures referred to in paragraph (a) must include measures for the appropriate identification and recording of potential contingent liabilities which may arise as a result of claims which have been initiated against the department concerned. 35

(16) (a) An accounting officer of a department who fails to comply with any provision of this section, or any applicable regulation, instruction, circular, guideline, reporting rule or directive made or issued by the relevant treasury in order to ensure the satisfaction of final court orders and adherence to this section, constitutes financial misconduct as referred to in the Public Finance Management Act, and is guilty of an offence provided for in that Act. 40

(b) The duty to ensure the timeous satisfaction of final court orders in accordance with the requirements of this section, may not be assigned by the accounting officer to another official of the department in terms of the Public Finance Management Act.”. 45

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— 50
‘accounting officer’ means a person referred to in section 36 of the Public Finance Management Act;

‘appropriated budget’ means the budget of a department which is appropriated in terms of appropriation legislation in the annual budget or an adjustments budget; 55

‘department’ means a national or provincial department;

‘executive authority’ in relation to—

(a) a national department, means the Cabinet member who is accountable to Parliament for that department; and

- (b) 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 of final instance; or
- (b) given by any other court where the time for noting an appeal against the judgment or 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 hearing such appeal;
- ‘Public Finance Management Act’** means the Public Finance Management Act, 1999 (Act No. 1 of 1999);
- ‘relevant treasury’** means—
- (a) the National Treasury established by section 5 of the Public Finance Management Act; or
- (b) a provincial treasury established by section 17 of the Public Finance Management Act, as the case may be; and
- ‘Rules of Court’** include—
- (a) the Uniform Rules of Court published under Government Notice No. R. 48 of 12 January 1965;
- (b) the Magistrates’ Courts Rules published under Government Notice No. R. 740 of 23 August 2010; and
- (c) any other rule applicable to any other court, established by an Act of Parliament.”.

“Transitional measures

4. The provisions of section 3(3)(b)(ii) to (16) of the State Liability Act, 1957 (Act No. 20 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 is not satisfied within 30 days after the commencement of this Act.”.

Short title and commencement

5. This Act is called the State Liability Amendment Act, 2011, and comes into operation on 30 August 2011 or an earlier date set by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE STATE LIABILITY
AMENDMENT BILL, 2011**

1. BACKGROUND

- 1.1 On 2 June 2008 the Constitutional Court, in *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) (the “*Nyathi One* case”), declared section 3 of the State Liability Act, 1957 (Act No. 20 of 1957) (the “Act”), which deals with the satisfaction of judgments against the State, to be inconsistent with the Constitution of the Republic of South Africa, 1996, “to the extent that it does not allow for execution or attachment against the State and that it does not provide for an express procedure for the satisfaction of judgment debts”. The declaration of invalidity was suspended for a period of 12 months in order to allow Parliament to pass legislation that provides for the effective enforcement of court orders.
- 1.2 The Minister of Justice and Constitutional Development applied for an extension of the period of suspension of the order of constitutional invalidity made by the Constitutional Court on 2 June 2008 in the *Nyathi One* case in order to introduce a State Liability Bill in Parliament, and for Parliament to pass the Bill. On 1 June 2009 the Constitutional Court, in *Minister for Justice and Constitutional Development v Nyathi and Others* 2010 (4) SA 567 (CC) (the “*Nyathi Two* case”), extended the period of suspension of invalidity to 31 August 2009, and on 31 August 2009 it was again extended to 31 August 2011.
- 1.3 On 9 October 2009 the Constitutional Court handed down judgment in the *Nyathi Two* case which provides for an order that will regulate the satisfaction of judgment debts against the State until 31 August 2011 or until remedial legislation is enacted, whichever occurs first. The order provides for a tailored attachment and execution procedure against movable assets of the State.

2. OBJECTS OF THE BILL

- 2.1 The Bill seeks to give effect to the Constitutional Court’s judgment in the *Nyathi One* case and its order in the *Nyathi Two* case, to wit, to amend section 3 of the Act accordingly.
- 2.2 The objects of the Bill are to create an effective execution process to be used by successful litigants in civil actions against the State in cases where the State has failed to comply with final court orders sounding in money. The provisions of the Bill can be summarised as follows:
- 2.2.1 Ad clause 1: Clause 1 substitutes section 2 of the Act. The substitution of section 2 of the Act is mainly required as a result of the insertion of a definition of “executive authority” in the Act (see clause 3). Provision is also made that in any action or other proceedings instituted by virtue of the provisions of section 1 of the Act, the executive authority of the department concerned must be cited as nominal defendant or respondent (see proposed new subsection (1)). In order to ensure that the State Attorney is, at the initial stages of proceedings against the State, informed thereof, provision is made that the plaintiff or applicant or his or her legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney (see proposed new subsection (2)).
- 2.2.2 Ad clause 2: Clause 2 substitutes section 3 of the Act in order to give effect, as far as possible, to the Constitutional Court’s judgment in the *Nyathi One* case and its order in the *Nyathi Two* case. Provision is, among others, made for the following:

- (a) The proposed new section 3 provides that no execution, attachment or like process for the satisfaction 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, except if a final court order sounding in money against the State has not been satisfied in accordance with the remainder of the provisions of that section (see proposed new subsection (1)).
- (b) The State Attorney or attorney of record appearing on behalf of the department concerned must, within seven days after a court order sounding in money against a department (national or provincial) becomes final, in writing, inform the executive authority and accounting officer of that department and the relevant treasury (National Treasury or provincial treasury) of the final court order (see proposed new subsection (2)).
- (c) A final court order against a department for the payment of money must be satisfied—
 - (i) within 30 days of the date of the order becoming final; or
 - (ii) within the time period agreed upon by the judgment creditor and the accounting officer of the department concerned (see proposed new subsection (3)(a)).
- (d) The accounting officer of the department concerned must make payment in terms of such final court order within the time periods specified in the proposed new subsection (3)(a), and such payment must be charged against the appropriated budget of the department concerned (see proposed new subsection (3)(b)).
- (e) If a final court order against a department for the payment of money is not satisfied within 30 days of the date of the order becoming final or within the time period agreed upon by the judgment creditor and the accounting officer, the judgment creditor may serve the court order in terms of the applicable Rules of Court on the executive authority and accounting officer of the department concerned, the State Attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury (see proposed new subsection (4)).
- (f) The relevant treasury must, within 14 days of service of the final court order (as provided for in the proposed new subsection (4)), ensure that—
 - (i) the judgment debt is satisfied; or
 - (ii) acceptable arrangements have been made with the judgment creditor for the satisfaction of the judgment debt, should there be inadequate funds available in the vote of the department concerned (see proposed new subsection (5)).
- (g) If the relevant treasury fails to ensure that—
 - (i) the judgment debt is satisfied; or
 - (ii) acceptable arrangements have been made with the judgment creditor for the satisfaction of the judgment debt, should there be inadequate funds available in the vote of the department concerned, within the time period specified in the proposed new subsection (5), a writ of execution or a warrant of execution must, upon the written request of the judgment creditor or his or her legal representative, be issued against movable property owned by the State and used by the department concerned (see proposed new subsection (6)).
- (h) The sheriff of the court concerned must, pursuant to the writ of execution or the warrant of execution, attach, but not remove, movable property owned by the State and used by the department concerned. The sheriff and the accounting officer

of the department concerned, or an official of his or her department designated in writing by him or her, may, in writing, agree on the movable property that may not be attached, removed and sold in execution of the judgment debt because it will severely disrupt service delivery, threaten life or put the security of the public at risk. If no such an agreement is reached, the sheriff may attach **any** movable property owned by the State and used by the department concerned, the proceeds of the sale of which, in his or her opinion, will be sufficient to satisfy the judgment debt against the department concerned (see proposed new subsection (7)).

- (i) In the absence of an application for a stay (see paragraph (k) hereunder), the sheriff 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 (see proposed new subsection (8)).
- (j) Subject to the Act, the Rules of Court (which are defined in clause 3) apply to the issuing of a writ of execution or a warrant of execution and the attachment, removal and sale of movable property in execution of a judgment debt against the State (see proposed new subsection (9)).
- (k) A party having a direct and material interest may, before the attached movable property is sold in execution of the judgment debt, apply to the court which granted the order, for a stay on grounds that the execution of the attached movable property—
 - (i) would severely disrupt service delivery, threaten life or put the security of the public at risk; or
 - (ii) is not in the interests of justice.

If such an application is brought by the department concerned, the application must contain a list of movable property and the location thereof that may be attached and sold in execution of the judgment debt. Notice of such an application must be given to the judgment creditor and the sheriff (see proposed new subsection (10)).

- (l) The relevant treasury, in order to comply with its obligations set out in the proposed new subsection (5) (see paragraph (f) above), and in general to ensure that final court orders are satisfied by departments without any delay, may, among others—
 - (i) make or issue appropriate regulations, instructions, circulars, guidelines and reporting rules;
 - (ii) withhold from a department's voted funds sufficient funds to provide for the satisfaction of any outstanding final court order against a department, which funds may only be released to the department upon the submission of proof acceptable to the relevant treasury that the court order in question has been satisfied; and
 - (iii) satisfy any outstanding final court order on behalf of a department, which satisfaction must be recorded and debited against the appropriated budget of the department concerned (see proposed new subsection (11)).
- (m) Should there be insufficient funds available in the appropriated budget of the department concerned for the current financial year, the withholding of funds or the satisfaction of the final court order by the relevant treasury may extend to the appropriated budget of the department for more than one financial year (see proposed new subsection (12)).
- (n) Satisfaction of an outstanding final court order on behalf of a department by the relevant treasury will be regarded as the satisfaction thereof by the department concerned, and not by the relevant treasury, for which the accounting officer of the department is responsible, accountable and liable in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999)

(the “Public Finance Management Act”). Such satisfaction does not absolve the accounting officer of liability for financial misconduct in terms of the proposed new subsection (16) (see proposed new subsection (13)).

- (o) Satisfaction of a final court order by an accounting officer must be made in accordance with the Public Finance Management Act, and all applicable regulations, instructions, circulars, guidelines and reporting rules which may be made or issued by the relevant treasury. An accounting officer must classify and process the settlement of a final court order, including a final court order satisfied by the relevant treasury. Such classification must indicate the type of expenditure and whether it is unauthorised, irregular, or fruitless or wasteful expenditure. The accounting officer of the department must comply with the requirements relating to the applicable type of expenditure as set out in the Public Finance Management Act and all applicable regulations, instructions, circulars, guidelines and reporting rules which may be made or issued by the relevant treasury (see proposed new subsection (14)).
- (p) The accounting officer of a department must put in place appropriate budgeting procedures in accordance with all regulations, instructions, circulars, guidelines and reporting rules which may be made or issued by the relevant treasury, to ensure the timeous satisfaction of final court orders. Such budgeting procedures must include measures for the appropriate identification and recording of potential contingent liabilities which may arise as a result of claims which have been initiated against the department (see proposed new subsection (15)).
- (q) An accounting officer of a department who fails to comply with any provision of the proposed new section 3 or any applicable regulation, instruction, circular, guideline, reporting rule or directive made or issued by the relevant treasury in order to ensure the satisfaction of final court orders and adherence to that section, constitutes financial misconduct as referred to in the Public Finance Management Act, and is guilty of an offence provided for in that Act. The duty to ensure the timeous satisfaction of final court orders in accordance with the requirements of the proposed new section 3 may not be assigned by the accounting officer to another official of the department in terms of the Public Finance Management Act (see proposed new subsection (16)).

2.2.3 Ad clause 3:

Clause 3 inserts a new section 4A in the Act containing definitions of various expressions in the Act. Those definitions are required as a result of the proposed amendments to the Act that the Bill seeks to effect (see paragraphs 2.2.1 and 2.2.2 above).

2.2.4 Ad clause 4:

Clause 4 provides for transitional measures in respect of final court orders sounding in money against departments which were given before the commencement of the State Liability Amendment Act, 2011, and which are not satisfied within 30 days after the commencement of that Act.

2.2.5 Ad clause 5:

Clause 5 contains the short title of the Bill and provides for the commencement of the Act.

- 2.3 As the Constitutional Court extended the period of suspension of constitutional invalidity of section 3 of the Act to 31 August 2011, the Bill has to be passed by Parliament and implemented before that date.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 3.1 The Bill was prepared in close conjunction with National Treasury, being the main role-player.
- 3.2 On 1 June 2009 a State Liability Bill, 2009, was published in the *Gazette* for public comments. The comments received were accommodated, where appropriate.

4. IMPLICATIONS FOR PROVINCES

The Bill seeks to regulate the manner in which a final court order sounding in money against a department, including a provincial department, must be satisfied.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.