REPUBLIC OF SOUTH AFRICA

STATE LIABILITY AMENDMENT BILL

(As introduced in the National Assembly (proposed section 76); explanatory summary of Bill published in Government Gazette No. 41658 of 25 May 2018)
(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 16—2018]

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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 provide for structured settlements for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State; and to provide for matters connected therewith.

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

Insertion of section 2A in Act 20 of 1957

1. The following section is hereby inserted after section 2 of the State Liability Act, 1957 (''the principal Act''):

''**Structured settlements for claims against the State resulting from wrongful medical treatment**

2A. (1) A court must, in a successful claim against the State resulting from wrongful medical treatment that exceeds the amount of R1 million, order that compensation be paid to the creditor in terms of a structured settlement which may provide for—

(a) past expenses and damages;

(b) necessary immediate expenses;

(c) the cost of assistive technology or other aids and appliances;

(d) general damages for pain and suffering and loss of amenities of life; and

(e) periodic payments for future costs referred to in subsection (2).

(2) *(a)* Where the State is liable to pay for the cost of future care, future medical treatment and future loss of earnings of an injured party, the court must, subject to subsection (4), order that compensation for the said costs be paid—

(i) by way of periodic payments at such intervals, which may not be less often than once a year;

(ii) only during the lifetime of the injured party concerned; and

(iii) on such terms as the court considers necessary.

(b) The court may—

(i) in lieu of the amount; or

(ii) at a reduced amount,

of compensation that would have been paid for the future medical treatment of the injured party, order the State to provide such treatment to the injured party at a public health establishment.

(c) Where the State is ordered to provide future medical treatment at a public health establishment, the public health establishment concerned must be compliant with the norms and standards as determined by the Office of Health Standards Compliance established in terms of section 77 of the National Health Act, 2003 (Act No. 61 of 2003).

(d) In circumstances where future medical treatment has to be delivered in a private health establishment, the liability of the State shall be limited to the potential costs that would be incurred if such care was provided in a public health establishment.

(3) The amount payable by way of periodic payments must increase annually in accordance with the average of the consumer price index, as published from time to time by Statistics South Africa established in terms of section 4 of the Statistics Act, 1999 (Act No. 6 of 1999), for the immediately preceding period of 12 months.

(4) The State or creditor referred to in subsection (1) may apply to the court for a variation of the frequency, or amount, of periodic payments, or for a variation of both the frequency and amount of periodic payments, should a substantial change in the condition or the circumstances of the injured party necessitate such a variation.

Substitution of section 4 of Act 20 of 1957, as substituted by section 3 of Act 201 of 1993

2. The following section is hereby substituted for section 4 of the principal Act:

''**Savings**

4. (1) Nothing in this Act contained shall affect any provision of any law which—

(a) limits the liability of the State or the national government or a provincial government or any department thereof in respect of any act or omission of its servants; or

(b) prescribes specified periods within which a claim is to be made in respect of any such liability; or

(c) imposes conditions on the institution of any action.

(2) Proceedings for purposes of claiming compensation from the State for damages resulting from the wrongful medical treatment of a person by a servant of the State and which have not been instituted or concluded prior to the commencement of section 2A, must be instituted, continued and concluded in accordance with the provisions of section 2A.''.

Amendment of section 4A of Act 20 of 1957, as inserted by section 3 of Act 14 of 2011

3. Section 4A of the principal Act is hereby amended by the insertion after the definition of ''appropriate budget'' of the following definition:

'' **'creditor',** for purposes of section 2A, means—

(a) an injured party who has suffered damages resulting from the wrongful medical treatment of him or her by a servant of the State; or

(b) anyone acting on behalf of an injured party who is not able to act in his or her own name.''.

Short title and commencement

4. This Act is called the State Liability Amendment Act, 2018, and commences on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE STATE LIABILITY AMENDMENT BILL, 2018

1. PURPOSE OF BILL

1.1 A person who suffers damages as a result of negligent medical treatment has to claim compensation or satisfaction for damages in terms of the common law ''once and for all'' rule. A plaintiff must therefore claim damages once for all damages already sustained or expected in future. The surge in medico-legal claims places an increasing strain on the budgets of provincial hospitals.

1.2 The State Liability Amendment Bill, 2018 (''the Bill''), therefore aims to amend the principal Act so as to provide for structured settlements for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State. The Bill is promoted in the interim pending the outcome of the larger investigation into medico-legal claims by the South African Law Reform Commission.

2. OBJECTS OF BILL

2.1 Clause 1 of the Bill aims to introduce a new provision dealing with the structured settlement of claims. The proposed new section 2A(1) provides that a court must, in a successful claim against the State that exceeds R1 million, order that compensation be paid to the creditor in terms of a structured settlement which may provide for, among others, past expenses and damages, necessary immediate expenses and periodic payments for future costs referred to in the proposed new section 2A(2). The proposed new subsection (2)*(a)* requires that, insofar as the cost of future care, future medical treatment and future loss of earnings are concerned, the court must order that compensation for those costs be paid by way of periodic payments. The proposed new subsection (2)*(b)*, *(c)* and *(d)* make provision for those instances where the State can provide treatment to injured parties.

2.2 Provision will also be made that the amount payable by way of periodic payments will increase annually in accordance with the consumer price index. The proposed new section 2A finally makes provision for any party to apply to the court for a variation of the periodic payment order if a substantial change in the condition or the circumstances of the injured party necessitate such a variation.

2.3 Since the proposed new section 2A will exclude medico-legal claims insofar as future medical expenses are concerned from the ''once and for all'' rule, it is necessary to amend section 4, the savings provision, of the principal Act. Clause 2 aims to insert a provision in section 4 in order to clarify that proceedings resulting from the negligent medical treatment which have not been instituted or concluded prior to the commencement of section 2A must be instituted, continued and concluded in accordance with the new section 2A.

2.4 The term ''creditor'' is used in the proposed new section 2A. The term implies the injured party or anyone acting on behalf of an injured party who is not able to act in his or her own name. Clause 3 of the Bill, therefore, aims to amend section 4A of the principal Act, which section is the definitions section, by inserting a definition of creditor for purposes of the proposed new section 2A.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

3.1 The Department of Justice and Constitutional Development (Department) requested comments from the National Treasury, the National Department of Health and the Directors-General in the offices of the Premiers.

3.2 The Department received comments from the National Treasury, the National Department of Health, the Office of the Director-General: Mpumulanga, the

Office of the Director-General: Western Cape, the Provincial Treasury of the Eastern Cape province and Legal Aid South Africa.

4. IMPLICATIONS FOR PROVINCES

The introduction of periodic payments with regard to future medical expenses will require that provincial hospitals have the necessary capacity for the administration of periodic payments.

5. FINANCIAL IMPLICATIONS FOR STATE

The surge in medico-legal claims places an increasing strain on the budgets of provincial hospitals. The introduction of structured payments is intended to reduce the impact of lump sum payments.

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 76 of the Constitution, since it contains a provision to which the procedure set out in section 76 of the Constitution applies.

6.2 The principles in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) (the ''*Tongoane case*'') is important when determining if a Bill ought to be tagged as either a section 75 or 76 Bill. The test for determining the procedure to be followed in enacting a Bill is whether the provisions of the Bill fall within a functional area listed in Schedule 4 or, in substantial measure, affect the interests of the provinces.

6.3 The tagging of the Bill requires firstly, considering all the provisions of the Bill and determining whether they substantially impact the interests of the provinces. Thereafter a consideration of whether or not the impact of these provisions is not so small as to be regarded as trivial must be carried out.

6.4 The tagging of Bills before Parliament must be informed by the need to ensure that 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.

6.5 If we have to take into consideration the legal principles expounded by the Tongoane case, the following may be deduced from a reading of this Bill:

- The introduction of periodic payments with regard to future medical expenses will require that provincial hospitals have the necessary capacity for the administration of periodic payments.

- It would seem that the Bill, in its current form, would substantially affect the provinces. The Bill, therefore, should be dealt with in terms of section 76 of the Constitution.

6.6 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.

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