



FACTSHEET ON *MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT V NYATHI*

Introduction

On 9 October 2009, the Constitutional Court handed down its reasons and final order in *Minister for Justice and Constitutional Development v Nyathi* [2009] ZACC 29 (“*Nyathi (2)*”).¹ This followed interim orders made on 1 June and 31 August 2009 respectively, as well as a full hearing of the matter on 12 August 2009.

At its most basic, *Nyathi (2)* concerns an application by the Minister of Justice (“the Minister”) to extend a deadline by which an unconstitutional law was to be amended. At its core, however, the case is about the rule of law, the enforcement of court orders, and the right of ordinary people to hold the state to account.

As of 9 October 2009, any person who is owed money by the state, has secured a court order and has not been able to extract payment will now be able to get final relief. This is because the Court has provided a lawful means for attaching movable property of the state and selling it in execution of a judgment debt.

Before this, there was no effective mechanism available to compel the state at the provincial or national sphere of government to comply with court orders sounding in money. In short, section 3 of the State Liability Act 20 of 1957 (“the SLA”) prevented attachment and execution against such organs of state.

In respect of local government, however, the law did not apply. Thus, for example, if a court ordered the City of Johannesburg to pay you a certain amount, you could effect attachment and execution of municipal assets to settle the debt in the event of non-payment. This did not change after the order in *Nyathi (2)*.

Background to the case

The tragic facts leading to the constitutional challenge are detailed in *Nyathi v MEC for the Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) (“*Nyathi (1)*”). A short summary is set out in an AIDS Law Project (ALP) press release available at http://www.alp.org.za/index.php?option=com_content&task=view&id=79.

In essence, the Court declared section 3 of the SLA unconstitutional in *Nyathi (1)*. However, it suspended the declaration of invalidity for a year “to allow Parliament to pass legislation that provides for the effective enforcement of court orders.”² This did

¹ A summary of the decision is available at <http://www.constitutionalcourt.org.za/site/Nyathi3.htm>

² *Nyathi (1)* at paragraph 92

not happen.

Instead of ensuring that the law was amended in time, the Minister requested the Court – at the eleventh hour – to extend the period of suspension. In effect, he asked that an unconstitutional state of affairs be allowed to continue because of government’s failure to comply with the Court’s order in *Nyathi (1)*.

A short extension – until 31 August 2009 – was granted on 1 June 2009. Full argument on the matter was heard on 12 August 2009. Alongside other interested parties, the ALP – as *amicus curiae* (“a friend of the court”) – argued against the extension of the status quo.

ALP’s role in the case

In her judgment in *Nyathi (2)*, Justice Mokgoro refers to a number of the ALP’s submissions. Some of these were made in our written submissions³ and in oral argument; others were made in response to the draft order of 31 August 2009 in respect of which the Court requested further input.

Importantly, the judgment considers and appropriately addresses the following three submissions made by the ALP:

- If interim relief were to be provided, there would be no problem – in principle – with extending the suspension of invalidity;⁴
- As section 3 of the SLA does not apply to local government, the Court’s final order should not apply to this sphere of government;⁵ and
- Applications to prevent sales in execution that are “not in the interests of justice” should not be unduly delayed by the state’s failure to identify alternative property that may be attached and sold in execution.⁶

In addition to substantive input, the ALP led in drawing attention to the case and the Court’s call for interested parties to oppose the Minister’s application.⁷ It has also ensured a coordinated civil society response to draft bills that – if promulgated in their current form – would fail to give effect to *Nyathi (1)*.⁸

What is the process to follow in the event the state does not pay?

Should the relevant national or provincial department fail to pay within 30 days of a

³ These submissions are available at <http://www.constitutionalcourt.org.za/Archimages/13737.PDF>

⁴ Paragraph 33

⁵ Paragraph 39

⁶ Paragraph 44

⁷ The Law Society of South Africa successfully applied to be admitted as an intervening party. Like the ALP, the Legal Resources Centre and Freedom Under Law successfully applied to be admitted as *amici curiae*. Justice Mokgoro expressly recognises the value of their submissions in her judgment.

⁸ This submission is available from the ALP upon request

final court order, the following steps should be taken:

1. The judgment creditor – the person to whom the state owes money – must serve the court order in accordance with the relevant rules of court on the following persons: the relevant treasury, the State Attorney, the relevant accounting officer and the relevant Minister or MEC;
2. Together with this court order, the judgment creditor must provide the officials identified above with a certificate issued by the registrar or clerk of the relevant court certifying that no appeal, review or rescission proceedings are pending in respect of the relevant order – in other words, that it is a final order;
3. The relevant treasury then has 14 days to ensure that the judgment debt is settled – which may include the treasury itself making payment on behalf of the relevant department – or that “acceptable arrangements” have been made with the judgment creditor for the money to be paid;
4. If the relevant treasury fails to do this, the judgment creditor may then apply for a writ/warrant of execution in terms of the relevant rules of court against movable state property used by the relevant department;
5. Once the writ/warrant of execution has been issued, the sheriff of the relevant court shall attach but not remove the identified property; and
6. Once 30 days have passed, the sheriff may ordinarily remove and sell the attached movable property in execution of the judgment debt.

Importantly, the sheriff may not remove and sell the attached movable property if the court that granted the original order stays the execution of the attached assets – this may only be done upon application by a party having a direct and material interest.⁹ In practice, only the relevant department has such an interest.

If a department wants to stay the execution, it will not only have to justify why execution of the attached property is not in the interests of justice, it will also ordinarily have to identify suitable alternative property that may be attached. At this point, it may simply be easier for the state to settle the debt directly.

According to Justice Mokgoro, “it will [ordinarily] be in the interests of justice to grant a stay where the assets to be attached are reasonably necessary to sustain effective administration or to provide a minimum level of basic services.”¹⁰ This, however, will be for a court to decide on the basis of the available evidence.

What about the SLA?

Government has until 31 August 2011 to amend or replace the SLA. If it fails to do so, section 3 will automatically become invalid and the interim order – the essence of which

⁹ This application must be made within 30 days of the writ/warrant of execution having been issued.

¹⁰ Paragraph 43

is described above – will fall away. If that happens, the protections introduced by the Court in its order will no longer apply.

The draft State Liability Bill 2009 and the accompanying draft Constitution Eighteenth Amendment Bill were published for public comment on 1 June 2009. Revised bills have yet to be released. In the result, it is unclear whether the substantive concerns raised by civil society are indeed being addressed.

What is clear from *Nyathi (1)* and *(2)* is that the Constitution requires any new or amended law to include some form of attachment and execution procedure. Anything less will render the statute unconstitutional. Importantly, however, this needn't apply to physical property, but could be limited to monetary assets.
