+SECTION27 incorporating the AIDS Law Project
catalysts for social justice

SUBMISSION ON THE STATE LIABILITY AMENDMENT BILL [B 2—2011]

1. SECTION27 is a non-profit law centre that seeks to influence, develop and use the law to protect, promote and advance human rights. As an organisation that – amongst other things – conducts public interest litigation, the *raison d'être* of SECTION27 is to ensure access to justice as inexpensively and expeditiously as possible. The effective enforcement of court orders sounding in money – whether as damages, compensation for unfair labour practices or costs orders – is inextricably linked to access to justice.

2. With this in mind, SECTION27 welcomes the introduction in the National Assembly of the State Liability Amendment Bill [B 2—2011] ("the Bill") and the opportunity to make a written submission. Given the limited input we have to make at this stage, in large part because the Bill addresses the substantive concerns we raised previously with the Department of Justice and Constitutional Development ("the Department"), we will not be seeking an opportunity to make oral submissions in Parliament.

Summary of our recommendations

3. SECTION27 supports how the Bill seeks to regulate the manner in which a final court order sounding in money against the State must be satisfied. In its approach, it is squarely in line with the decisions of the Constitutional Court in *Nyathi v MEC for Department of Health, Gauteng and Another* [2008] ZACC 8 (*"Nyathi 1"*) and *Minister for Justice and Constitutional Development v Nyathi* [2009] ZACC 29 (*"Nyathi 2"*) dealing with the unconstitutionality of section 3 of the State Liability Act 20 of 1957 and how it is to be remedied.

4. Notwithstanding our broad support, we have three concerns arising from the text of the Bill itself. All of these are somewhat technical in nature, and – in our view – are simple to address with minor textual amendments. In short, we propose three amendments to the proposed new section 3: one to subsection (1); and one to each of subsections (3)(a) and (4), so that the two read better together:

a. To ensure that the entire process relating to a sale in execution is permitted by section 3 (in the event that a final court order against a department for the payment of money has not been satisfied), we recommend that subsection (1) expressly be made subject to subsections (6) and (7) – and not just subject to subsections (4) and (5).

b. Instead of the phrase "unless an appeal has been lodged against the judgment or that order", which is unnecessary given the proposed definition of "final court order", subsection (3)(a) should end with the phrase "or in accordance with the timeframes as agreed to with the judgment creditor for the satisfaction of the judgment debt, as the case may be." This would help to ensure that the reference in subsection (4) covers both the stipulated and agreed-upon timelines.

c. Subsection (4) should be amended as follows: "If a final court order against a department for the payment of money is not satisfied **[and acceptable arrangements have not been made with the judgment creditor for the satisfaction of the judgment debt within the time specified]** in accordance with the provisions of subsection (3)(a), the judgment creditor …."

5. In addition, we would like to draw attention to a couple of extracts from the Constitutional Court's decision in *Nyathi 2* that assist in interpreting what is meant by "the interests of justice" in proposed new section 3(7). That subsection provides a mechanism for any party with a "direct and material interest" to stop the sale in execution of essential state assets. We provide more detail in this regard below.

Structure of this submission

6. We begin this submission by setting out a brief history of our engagement on the issue that the Bill seeks to address. We do so primarily to explain the basis upon which we take the view that the Bill addresses our previous concerns. Thereafter we focus on four subsections of the proposed new section 3 and flesh out the concerns to which reference has already been made: subsections (1); (3)(a) and (4); and (7).

History of our engagement on the issue

7. The *Nyathi 2* matter came to our attention – when we were still the AIDS Law Project (ALP) – as a result of our attempt to enforce the court order that the ALP obtained in October 2008 for Dr Malcolm Naude, a doctor persecuted for his ethics by a former

MEC for Health in Mpumalanga.[1] Naude was awarded damages of R100 000 and costs. But by mid-2009, the Mpumalanga Health Department had still failed to satisfy the debt.[2] In the course of pressing our claim, the ALP was monitoring legislative developments meant to facilitate the payment of judgment debts by the state.

8. It is common cause that a day before the Constitutional Court's deadline for legislative reform was due to expire on 2 June 2009,[3] the Minister of Justice and Constitutional Development ("the Minister") applied to the Constitutional Court for an extension. In the application, as evidence of the fact that some progress had been made in developing the remedial legislation, the Minister submitted the draft Constitution Eighteenth Amendment Bill (CAB) and the draft State Liability Bill (SLB).

9. The ALP noticed, however, that instead of remedying the defect in the State Liability Act, the SLB expressly retained the objectionable language that "*[n]o execution, attachment or like process may be issued against the defendant or respondent in any action or legal proceedings against the state or against any property of the state*." Indeed the Bill went even further by extending the prohibition against execution or attachment to local government, despite the fact that this is not addressed by section 3 of the State Liability Act.

10. For its part, the CAB proposed to insulate the SLA from constitutional scrutiny by introducing a new "override" clause into the Constitution – at section 173A – starting with the words "[d]espite any other provision of the Constitution". The SLB (or whatever legislation were eventually to emerge) would not be subject to the Bill of Rights or the founding values of the Constitution. In addition to insulating the SLB from constitutional review, the constitutional amendment would have had the effect of insulating clause 173A itself from interpretation by reference to other provisions of the Constitution.

11. Whether intentional or not, the CAB and SLB – if enacted – would have had the effect of overruling the *Nyathi 1* order.

12. In July 2009, the ALP made a joint written submission with the Legal Resources Centre (LRC) on the draft bills.[4] In short, we "request[ed] that the [CAB and the SLB] be withdrawn and, if necessary, re-drafted in a form that addresses [our] fundamental

---

[1] *Naude v Member of the Executive Council, Department of Health, Mpumalanga* [2008] ZALC 158

[2] On the day of the hearing of the *Nyathi 2* case, the state attorney called the ALP to confirm that the judgment debt was being processed. We have since secured the payment of both damages and costs.

[3] This deadline was part of the order in *Nyathi 1*.

[4] The submission is available at http://section27.org.za/wp-content/uploads/2010/04/LRC-ALP-Submission-on-SLA-and-CAB.pdf.

concerns". Our submission was endorsed by six other major legal organisations, all of whom have endorsed this submission.

13. In addition, we monitored developments at the Constitutional Court, in anticipation of the Court's response to the Minister's application for an extension.

14. On 10 June 2009 the Court issued directions inviting any interested party to oppose the application. The ALP intervened to oppose the application on numerous grounds, including that the extension seemed to have been sought in order to pass legislation that would have had the effect of evading the Court's order in *Nyathi 1* rather than complying with it. We therefore asked the Court to provide interim relief to protect constitutional rights pending the passage of remedial legislation and proposed relief that would allow for the attachment and sale in execution of state assets.[5]

15. The Court issued a provisional order on 31 August 2009 granting the Minister a two-year extension. It also gave interim relief "to provide for a tailored attachment and execution procedure against state assets". In its final judgment handed down on 9 October 2009, the Court made it clear that there is no question that in whatever legislation follows, there must be provision for attachment against – and the sale in execution of – state assets.

16. With this history in mind, it came as a welcome relief to SECTION27 that the Bill presents a clear departure from the approach suggested by the SLB and the CAB. As already indicated, it addresses the substantive concerns we raised previously with the Department and brought to the attention of the Constitutional Court. We are particularly encouraged by the fact that the Department has indeed listened to and been guided by those with whom it has consulted and engaged in the legislative development process thus far.

Section 3(1)

17. In effect, proposed new section 3(1) seeks to ensure that the attachment and sale in execution of state assets is (a) only given effect as a matter of last resort and (b) only permitted subject to certain statutory safeguards necessary to protect the public interest. But this may be undermined by the seemingly inadvertent failure of the subsection expressly to make reference to the processes set out in subsections (6) and (7): the former makes provision for the sale in execution of attached property in the

[5] The ALP's affidavits in this case are available at http://www.constitutionalcourt.org.za/Archimages/13653.PDF and http://www.constitutionalcourt.org.za/Archimages/13753.PDF

absence of any application made in terms of subsection (7); the latter makes provision for applications to prevent the sale in execution of property if such a sale "is not in the interests of justice".

18. Thus to ensure that the entire process relating to a sale in execution is permitted by section 3 (in the event that a final court order against a department for the payment of money has not been satisfied), we recommend that subsection (1) expressly be made subject to subsections (6) and (7) – and not just subject to subsections (4) and (5).

Sections 3(3)(a) and 3(4)

19. The phrase "unless an appeal has been lodged against the judgment or that order" in proposed new section 3(3)(a) is unnecessary as the proposed definition of "final court order" in clause 3 of the Bill makes it plain that finality will not have been reached if an appeal has been lodged. The definition is clear that a final court order is one that is no longer subject to any further appeal process – it must simply be implemented.

20. Drawing from the judgment in *Nyathi 2*, the Department has chosen to allow for two ways in which the state may settle its judgment debts sounding in money: either within 30 days of the order becoming final, or in accordance with timeframes as agreed to with the judgment creditor. Unfortunately the text of subsection (4) is somewhat confusing, seemingly only referring to the statutory timeline of 30 days and not making it clear if – upon agreement – a department and a judgment creditor may agree to a timeframe longer than 30 days. There appears to be no good reason why the law should preclude this option.

21. We therefore propose that the two subsections be redrafted to ensure that the legislative intent is made clear. In this regard, we propose the following:

> Section 3(3)(a): "A final court order against a department for the payment of money shall be satisfied within 30 days of the order becoming final**[, unless an appeal has been lodged against the judgment or that order]** or in accordance with the timeframes as agreed to with the judgment creditor for the satisfaction of the judgment debt, as the case may be."
>
> Section 3(4): "If a final court order against a department for the payment of money is not satisfied **[and acceptable arrangements have not been made with the judgment creditor for the satisfaction of the judgment debt within the time specified]** in accordance with the provisions of subsection (3)(a), the judgment creditor …."

Section 3(7)

22. As indicated above, we would like to draw attention to a couple of extracts from the Constitutional Court's decision in *Nyathi 2* that assist in interpreting what is meant by "the interests of justice" in proposed new section 3(7):

    a. Paragraph 43 provides that "[o]rdinarily it will 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"; and

    b. Paragraph 44 states that "when considering whether it is in the interests of justice for a stay to be granted, a court must assess whether the party seeking the stay has identified suitable alternative property that may be attached."

23. While the text of subsection 3(7) may appear as particularly broad, its genesis – in *Nyathi 2* – means that it should be interpreted in accordance with that judgment (and in particular paragraphs 43 and 44). While there is no need for this detail to be included in the Bill, it is important for Parliament to be aware that courts – in interpreting the provision – will be obliged to rely on the Constitutional Court's reasoning in *Nyathi 2*.

Conclusion

24. Once again we thank you for the opportunity to continue participating in this legislative reform process. It is particularly gratifying that through a combination of litigation and legislative reform, parties who were once far apart on the issues are finally on the same page. At the same time, however, we should not forget that Mr. Dingaan Nyathi – on whose behalf the case was originally brought – died without ever being able to vindicate his own rights.

This submission is endorsed by the Black Sash, the Socio-Economic Rights Institute of South Africa (SERI), the Centre for Child Law (University of Pretoria), ProBono.Org, the Centre for Applied Legal Studies (University of the Witwatersrand, Johannesburg), Lawyers for Human Rights and the Women's Legal Centre. For further information, please contact Jonathan Berger on berger@section27.org.za or 083 419 5779.