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**GENERAL NOTICE**  
**ALGEMENE KENNISGEWING**

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**NOTICE 689 OF 2009**

**DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

**PUBLICATION OF THE STATE LIABILITY BILL, 2009**

The Minister of Justice and Constitutional Development hereby publishes—

The State Liability Bill, 2009 for public comment. Any person wishing to comment on the proposed amendments is invited to submit written comments to the Minister of Justice and Constitutional Development. Comments should kindly be directed for the attention of Mr J J Labuschagne, Private Bag X 81, Pretoria, 0001, by not later than **1 July 2009**. (Electronic mail address: [Jolabuschagne@justice.gov.za](mailto:Jolabuschagne@justice.gov.za) or facsimile no. 086 501 8053)

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**ANNEXURE B**
**STATE LIABILITY BILL, 2009**

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

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**BILL**

To make provision for reasonable notice to be given and for the proper service of process before the institution of legal proceedings against certain organs of state; to regulate the manner in which a final court order sounding in money against the state must be satisfied; to provide for better control of and accountability for legal proceedings or any form of litigation in which the state is involved; to amend or repeal certain laws; and to provide for matters connected therewith.

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:—

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LIABILITY ACT, 2009**

*Definitions and interpretation*

**Definitions and interpretation**

1. (1) In this Act, unless the context indicates otherwise—
- (i) **"accounting officer"**, in relation to—
- (a) a national or provincial department, or a constitutional institution, means a person mentioned in section 36 of the Public Finance Management Act;
- (b) a municipality or a municipal entity, means the municipal official mentioned in section 60 or the official of the entity mentioned in section 93 of the Local Government: Municipal Finance Management Act, as the case may be;
- (c) any other organ of state, means the person or accounting authority responsible for the responsibilities of the organ of state in question similar to those mentioned in sections 38 to 42 of the Public Finance Management Act,  
and includes an acting accounting officer;
- (ii) **"chief litigation officer"** means the incumbent of that post on the establishment of the Department of Justice and Constitutional Development and includes an acting chief litigation officer;
- (iii) **"Constitution"** means the Constitution of the Republic of South Africa, 1996;
- (iv) **"constitutional institution"** means—
- (a) the Financial and Fiscal Commission;
- (b) the Commission on the Remuneration of Persons holding Public Office;
- (c) the Municipal Demarcation Board;
- (d) the Public Protector;
- (e) the South African Human Rights Commission;

- (f) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
  - (g) the Commission for Gender Equality;
  - (h) the Electoral Commission;
  - (i) the Independent Broadcasting Authority;
  - (j) the Pan South African Language Board; and
  - (k) the Auditor General;
- (v) **"creditor"** means a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings, and includes such person's tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be;
- (vi) **"debt"** means any debt arising from any cause of action which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any—
- (a) act performed under or in terms of any law; or
  - (b) omission to do anything which should have been done under or in terms of any law, whether such debt became due before or after the date of commencement of this Act;
- (vii) **"employee"**, in relation to an organ of state, includes any person employed by that organ of state on whatever conditions, if those conditions also include a condition, or it is otherwise inferred by law, that the state may be held liable for any debt caused by such person while so acting in his or her capacity and within the scope of his or her authority as such employee; and for the purposes of sections 11 and 12, includes any person who is not an employee in the strict sense, but who represents or acts on behalf of the state in any official capacity, whilst so acting in his or her official capacity and within the scope of his or her authority as such office bearer, including—
- (a) the President, Deputy President, a Premier of a province and an executive mayor or mayor of a municipality;
  - (b) a member of Cabinet and a deputy minister;
  - (c) a member of an Executive Council of a province;
  - (d) an executive mayor or any other member of any municipal executive committee;
  - (e) a member of the legislature in the national, provincial and local spheres of government;
  - (f) a judicial officer; and
  - (g) a member or commissioner of a constitutional institution, or any member or functionary of any institution or public entity as contemplated in paragraphs (d) and (e) of the definition of "organ of state",
- and who does not fall within the parameters of the first portion of the definition of "employee";
- (viii) **"executing authority"** in relation to—
- (a) the Presidency, means the President;
  - (b) Cabinet, means the President, acting jointly with the other members

- of Cabinet;
- (c) Parliament, means the Speaker of the National Assembly and the Chairperson of the National Council of Provinces, acting jointly;
  - (d) a provincial legislature, means the speaker of the legislature;
  - (e) a provincial executive council, means the premier of the province;
  - (f) a national department, means the Minister of the department;
  - (g) a provincial department, means the MEC of the department;
  - (h) a municipality with—
    - (i) an executive mayor, means the councillor elected as the executive mayor of the municipality in terms of section 55 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998); or
    - (ii) an executive committee, means the councillor elected as the mayor of the municipality in terms of section 48 of that Act;
  - (i) a constitutional institution consisting of a body of persons, means the chairperson of that constitutional institution, and a constitutional institution consisting of a single office bearer, means the incumbent of that office;
  - (j) the Judiciary, including the magistracy, means the head of the court in question; and
  - (k) any other organ of state, means the highest ranking office bearer in that organ of state or, if it has a board of control or equivalent governing body, the chairperson of such board or body;
- (ix) **"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 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;
- (x) **"Local Government: Municipal Finance Management Act"** means the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003);
- (xi) **"MEC"** means a member of the Executive Council of a province responsible for a provincial department;
- (xii) **"Minister"** means the Cabinet member responsible for the administration of justice;
- (xiii) **"municipal entity"** means a municipal entity as contemplated in the Local Government: Municipal Finance Management Act;
- (xiv) **"national department"** means a department mentioned in the first column of Schedule 1 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), but excludes a provincial administration;
- (xv) **"National Treasury"** means the National Treasury established by section 5 of the Public Finance Management Act;
- (xvi) **"notice"** means a notice contemplated in section 2(1)(a);
- (xvii) **"organ of state"** means—

- (a) any national or provincial department;
- (b) any municipality contemplated in Chapter 7 of the Constitution;
- (c) any functionary or institution exercising a power or performing a function in terms of the Constitution, or a provincial constitution referred to in section 142 of the Constitution, and includes Parliament, any provincial legislature, or any court or a judicial officer acting in his or her capacity as a judicial officer;
- (d) any functionary or institution exercising a public power or performing a public function in terms of any legislation; or
- (e) any person or public entity for whose debt an organ of state contemplated in paragraphs (a) to (d) is liable, but does not include any public entity or parastatal which is financed fully or substantially from—
  - (i) the National Revenue Fund;
  - (ii) a provincial revenue fund; or
  - (iii) by way of a tax, levy or other statutory money;
- (xviii) **"prescribe"** means prescribe by regulation in terms of section 13;
- (xix) **"provincial department"** means—
  - (a) a provincial administration mentioned in the first column of Schedule 1 to the Public Service Act, 1994 (Proclamation No. 103 of 1994); or
  - (b) a department within a provincial administration and mentioned in the first column of Schedule 2 to that Act;
- (xx) **"public entity"** means a national or provincial public entity as contemplated in the Public Finance Management Act;
- (xxi) **"Public Finance Management Act"** means the Public Finance Management Act, 1999 (Act No. 1 of 1999), as amended from time to time;
- (xxii) **"regulation"** means a regulation made in terms of section 13;
- (xxiii) **"state"** includes an organ of state; and
- (xxiv) **"this Act"** includes the regulations.
  - (2) For the purposes of this Act, legal proceedings are instituted by service of any process, excluding a notice, on an organ of state, in which a creditor claims payment of a debt.

## Part 1 Notice

### Notice of intended legal proceedings to be given to organ of state

2. (1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless—
- (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or
  - (b) the organ of state in question has consented in writing to the institution of that legal proceedings—

- (i) without such notice; or
  - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).
- (2) A notice must—
- (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 3(1); and
  - (b) briefly set out—
    - (i) the facts giving rise to the debt; and
    - (ii) such particulars of such debt as are within the knowledge of the creditor.
- (3) For the purposes of subsection (2)(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge.
- (4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.
- (b) The court may grant an application referred to in paragraph (a) if it is satisfied that—
- (i) the debt has not been extinguished by prescription;
  - (ii) good cause exists for the failure by the creditor; and
  - (iii) the organ of state was not unreasonably prejudiced by the failure.
- (c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.
- (5) (a) If in terms of this Act or any other Act, and subject to paragraph (b), provision is made for any claim against an organ of state or any litigation in which the state is involved, to first be dealt with in terms of any administrative mechanism or any mechanism providing or allowing for a settlement or any mediation mechanism, before the matter is proceeded with to court, any processes or procedures relating to such mechanism must be exhausted within 60 days of the notice referred to in subsection (1)(a) being served on the organ of state in question.
- (b) The period of 60 days referred to in paragraph (a) may be extended only once with the consent of all the parties to the proceedings for no longer than a further 60 days.

### **Service of notice**

**3.** (1) A notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile, in the case where the organ of state is—

- (a) a national or provincial department mentioned in the first column of Schedule 1, 2 or 3 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), to the officer who is the incumbent of the post bearing the designation mentioned in the second column of the said Schedule 1, 2 or 3 opposite the name of the relevant national or provincial department;
- (b) a municipality, to the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);
- (c) a functionary or institution referred to in paragraph (c) or (d) of the definition of "organ of state", to the chairperson, head, chief executive officer, or equivalent officer, of that functionary or institution, or where such functionary is a natural person, to that natural person; or
- (d) a person or public entity referred to in paragraph (e) of the definition of "organ of state", to that person or to the chairperson, head, chief executive officer, or equivalent officer, of that public entity.

(2) If a notice has been sent by electronic mail or transmitted by facsimile as contemplated in subsection (1), the creditor must—

- (a) take all reasonable steps to ensure that the notice has been received by the officer or person to whom it was so sent or transmitted; and
- (b) within seven days after the date upon which that notice was so sent or transmitted, deliver by hand or send by certified mail a certified copy of that notice to the relevant officer or person referred to in subsection (1), which must be accompanied by an affidavit by the creditor or the person who sent or transmitted the notice—
  - (i) indicating the date on which and the time at which, and the electronic mail address or facsimile number to which, the notice was so sent or transmitted;
  - (ii) containing any proof that it was sent or transmitted;
  - (iii) setting out the steps taken in terms of paragraph (a); and
  - (iv) indicating whether confirmation of the receipt of the notice has been obtained and, if applicable, the name of the officer or person who has given that confirmation.

## **Part 2** **Process**

### **Service of process**

4. (1) (a) Any process by which any legal proceedings contemplated in section 2(1) are instituted must be served in the manner prescribed by the rules of the court in question for the service of process.

(b) Despite paragraph (a), any process by which any legal proceedings contemplated in section 2(1) are instituted and in which—

- (i) the Minister of State Security is the defendant or respondent, may be served on the Director-General: National Intelligence Agency or the Director-General: South African Secret Service, as the case may be;



- (ii) the Minister of Police is the defendant or respondent, may be served on the National Commissioner of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995);
- (iii) the Minister of Correctional Services is the defendant or respondent, may be served on the Commissioner of Correctional Services as defined in section 1 of the Correctional Services Act, 1998 (Act No. 111 of 1998);
- (iv) any judicial officer or a court is the defendant or respondent, must be served on the judicial officer and head of court concerned, as well as the Director-General: Justice and Constitutional Development; or
- (v) any member of the National Prosecuting Authority is the defendant or respondent, must be served on the National Director of Public Prosecutions, as well as the Director-General: Justice and Constitutional Development.

(2) No process referred to in subsection (1) may be served as contemplated in that subsection before the expiry of a period of—

- (a) if section 2(5) is not applicable, 30 days after the notice has been served on the organ of state in terms of section 2(2)(a); or
- (b) if section 2(5) is applicable, 30 days after any mechanism referred to in section 2(5) has been exhausted.

(3) If any process referred to in subsection (1) has been served as contemplated in that subsection before the expiry of the period referred to in subsection (2), such process must be regarded as having been served on the first day after the expiry of the said period.

### **Claims against state cognisable in any competent court**

5. Any claim against the state for a debt which would, if that claim had arisen against a person, be the ground of an action in any competent court, is cognisable by such court, whether the claim arises out of any act or omission committed by any employee of the state acting in his or her capacity and within the scope of his or her authority as such employee.

### **Proceedings to be instituted against executing authority concerned**

6. In any action or other legal proceedings instituted under the provisions of section 5, the executing authority of the organ of state concerned must be cited as nominal defendant or respondent.

### **Part 3**

#### ***Enforcement of final court orders sounding in money***

#### **Satisfaction of final court orders sounding in money**

7. (1) No 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, but the amount, if any, which may be required to satisfy any final court order against the nominal defendant or respondent in any such action or proceedings must be paid as contemplated in this section.

(2) Despite the common law or any other law to the contrary, except for interim relief for urgent or necessary medical treatment, a court may not order any payment contemplated in subsection (1) at any stage of the proceedings except when giving a final court order.

(3) (a) Subject to this section, a final court order against an organ of state for the payment of money must be satisfied within 30 days of the order becoming final.

(b) (i) The accounting officer of the organ of state concerned must make payment in terms of such order within 30 days after the order becomes final.

(ii) Such payment must be charged against the appropriation account or expenditure budget of the organ of state, where applicable.

(c) (i) If such payment cannot be made because of a lack of such funds, such motivated reason must be submitted to the court and, where applicable, to the National or provincial treasury concerned, as the case may be, within 21 days of the final court order being given.

(ii) In such a case an application must simultaneously be made by the accounting officer to the National or provincial treasury concerned, as the case may be, applying for the provision of the necessary funds in the manner prescribed.

(d) If, in the case of such an application or otherwise, the National or provincial treasury, as the case may be, is satisfied that the organ of state concerned has the funds available to make the payment, it must, as soon as possible direct, in writing, the accounting officer concerned to make the payment within 30 days of the date of such directive.

(4) If the National or provincial treasury, as the case may be, is satisfied that the organ of state concerned has no or insufficient funds available to make the payment, or the accounting officer concerned fails to comply with any of the provisions of subsection (3) within the prescribed timeframes, the National or provincial treasury, as the case may be, must intervene within 30 days of becoming aware that no or insufficient funds are available or of such failure—

(a) if that organ of state is a department or government component, by—

(i) reducing the funds in the relevant Revenue Fund to which that

- department or government component is entitled by an amount equal to the judgment debt; and
- (b) (ii) paying the judgment debt from the relevant Revenue Fund; if that organ of state is a constitutional institution, public entity or government enterprise that is entitled to the transfer of funds from the relevant Revenue Fund, by—
- (i) reducing any such transfers by an amount equal to the judgment debt; and
- (ii) paying the judgment debt from the relevant Revenue Fund; or
- (c) if that organ of state is a municipality, by—
- (i) reducing any equitable share, allocation or other transfer from the relevant Revenue Fund to which that municipality is entitled by an amount equal to the judgment debt; and
- (ii) paying the judgment debt from the relevant Revenue Fund.
- (5) The National Treasury may intervene in terms of subsection (4)(c) only if—
- (a) there are no or insufficient funds in the Provincial Revenue Fund to which the municipality concerned is entitled; or
- (b) the provincial treasury concerned fails to intervene in terms of that subsection.
- (6) If the accounting officer of a municipal entity fails to comply with subsection (3)(b)(i), the parent municipality may intervene by paying the judgment debt from its funds.
- (7) Any amount so paid out by the National or provincial treasury, as the case may be, during any financial year in terms of subsection (4) may be deducted from any equitable share, allocation, grant or other funds from revenue raised nationally, or any other transfer to which the organ of state concerned is entitled in that or any ensuing financial year or years.
- (8) In the event of the judgment debt not having been satisfied within the timeframes contemplated in subsection (3)(a), (d) or (4), the judgment creditor may, on not less than 10 days' notice, issue a notice calling upon the accounting officer and the heads of the organ of state and the treasury concerned to show cause why payment has not been made.
- (9) The court may, in determining the matter, make such order as it may deem fit, including—
- (a) the payment of damages occasioned by the delay;
- (b) an order for costs, including cost on an attorney and client scale or *de bonis propriis*; or
- (c) the issue of a Rule *nisi* calling upon the respondents to show cause, on a date to be determined, why any one, more or all should not be declared in contempt of court and to pay the costs, which in exceptional circumstances may include an order to pay costs *de bonis propriis* on an attorney and client scale.
- (10) On the return day of the Rule *nisi* referred to in subsection (9)(c) the court may grant any order it may deem fit.
- (11) If payment of a judgment debt has been made by the state in

terms of a final court order and application for condonation is thereafter made to the court for the lodging of a late appeal against such order, the court may not consider such application for condonation before such payment has not been returned to the state.

(12) The accounting officer of an organ of state who fails to comply with any provision of subsection (3)(b)(i) or (c)(i) or a directive issued by the National or provincial treasury concerned, as the case may be, in terms of subsection (3)(d), is liable to a charge of financial misconduct in terms of the Public Finance Management Act or the Local Government: Municipal Finance Management Act, as the case may be, and must be charged.

(13) If the National or provincial treasury, as the case may be, following an inspection, investigation or review by it, finds non-compliance with the provisions of this Act or its instructions or directions or a need for intervention in view of the financial, governance or management situation, condition or failure of the relevant organ of state, a report must be prepared and the organ of state must be instructed to take the remedial action specified in a notice to the organ of state.

(14) An organ of state under an instruction under subsection (13) may be required by the National or provincial treasury, as the case may be, to obtain specified support to rectify such non-compliance, situation, condition or failure.

#### **Part 4**

#### ***Responsibility for litigation and settlement of debt, and reporting***

#### **Authorisation by executing authority and accounting officer for litigation or settlement of debt**

**8.** (1) The executing authority of an organ of state has the responsibility to authorise any decision for an organ of state to—

- (a) initiate or institute any legal proceedings; and
- (b) defend any legal proceedings initiated or instituted against it.

(2) The executing authority must authorise any decision contemplated in subsection (1)(a) or (b) under his or her signature or designation, and that power may not be delegated.

(3) The accounting officer of the organ of state concerned must counter sign any such authorisation.

(4) The accounting officer has the responsibility to authorise any decision for an organ of state to settle any legal proceedings in which it is involved, including any debt, and that power may not be delegated.

#### **Reporting**

**9.** (1) Every head of a national or provincial department concerned must during January and July of each year submit to the chief litigation officer a report of all pending litigation matters contemplated in section 8, and falling

within that head's sphere of responsibility, or a matter referred to in section 11(1) or 12(1), in order to enable the chief litigation officer to table before Cabinet a report on such matters during the said months: Provided that all such pending litigation matters of a constitutional nature must be so reported on during January, April, July and October of each year.

(2) The particulars to be contained in the reports contemplated in subsection (1), and the timeframes, form and manner thereof, must be prescribed by the Minister after consultation with the National Treasury.

### **Statistics of litigation**

**10.** (1) Every organ of state must report the statistics of litigation contemplated in section 8(1) in which it is involved, on a monthly basis, to the chief litigation officer in the timeframe, form and manner prescribed by the Minister after consultation with the National Treasury.

(2) The chief litigation officer must report the aggregate of monthly statistics so received to Cabinet in the form and manner prescribed by the Minister after consultation with the National Treasury.

## **PART 5** ***Accountability***

### **Civil claims against state or its employees**

**11.** (1) Subject to this Act, the State Attorney deals with all civil claims and actions against the state, or its employees or former employees where the state is being held vicariously liable, and the state pays all legal costs where the state or the said employees can be held liable for such claims or costs, or where the accounting officer concerned in writing decides that such claim should be settled, or where a final court order has been given against the state or the said employees: Provided that any organ of state may only use the services of an attorney other than a state attorney in any civil matter, in exceptional circumstances as prescribed and only if the executing authority has in writing authorised same and has reported the matter to the chief litigation officer in terms of section 9.

(2) Where the claim is instituted against the said employee or former employee personally or against him or her as co-defendant with the state and the state is being held vicariously liable, and he or she desires the State Attorney to act on his or her behalf—

- (a) such employee must unconditionally sign the undertaking in the form contemplated in Schedule 2;
- (b) the accounting officer of the relevant organ of state must, thereafter, if he or she is of the opinion that such employee has not forfeited the cover in subsection (4), sign the certificate at the end of Schedule 2; and
- (c) when (a) and (b) have been complied with, the relevant organ of state must furnish the State Attorney with a written instruction to represent such

employee on whatever appropriate conditions he or she deems fit and must furnish him or her with such duly signed undertaking, including signed certificate.

(3) An instruction and signed undertaking, including a duly signed certificate, as contemplated in subsection (2), must be furnished in respect of each and every claim, application, appeal or any other civil legal proceeding of such employee, before the State Attorney may act on his or her behalf.

(4) An organ of state must accept vicarious liability for any loss or damage suffered by another person which arose from an act or omission of an employee, as a claim against the state, and does not recover compensation or costs from the employee, unless such employee forfeits the cover if he or she is liable in law and, with regard to the relevant act or omission—

- (a) did not act in the course and scope of his or her employment;
- (b) intentionally exceeded his or her powers;
- (c) made use of alcohol or drugs;
- (d) acted recklessly or intentionally;
- (e) without prior consultation with the State Attorney, made an admission that was detrimental to the state; or
- (f) failed to comply with or ignored standing instructions of which he or she was aware of or could reasonably be expected to have been aware of, which led to the loss, damage or reason for the claim, excluding damage arising from the use of a state vehicle; and
- (g) in the case of a loss, damage or claim arising from the use of a state vehicle, the employee—
  - (i) used the vehicle without authorisation;
  - (ii) did not possess a valid driver's licence or other appropriate licence;
  - (iii) did not use the vehicle in the interest of the state;
  - (iv) allowed unauthorised persons to drive or handle the vehicle; or
  - (v) deviated materially from the official journey or route without prior authorisation.

(5) Despite the provisions of subsection (4), where the employee or former employee in the opinion of the accounting officer of the organ of state loses or substantially loses the case, or it is later found that the said employee or former employee has in fact forfeited the cover contemplated in subsection (4), he or she must repay all such legal costs to the state as contemplated in the said undertaking in Schedule 2.

### **Criminal matters**

**12.** (1) Where an employee or former employee of an organ of state is charged in a criminal case or is to attend an inquest on account of conduct in the execution of his or her official duties and he or she has not forfeited the cover contemplated in section 11(4), with the changes required by the context, his or her defence will, subject to subsection (2), be undertaken by the State Attorney if he or she so requests the organ of state: Provided that an organ of state may not

use the services of an attorney other than a state attorney in respect of any criminal proceeding.

(2) If the accounting officer is satisfied that the employee or former employee is not guilty of the alleged criminal charge and has not forfeited the cover contemplated in section 11(4), with the changes required by the context, and such employee or former employee has unconditionally signed the undertaking contemplated in Schedule 3, he or she must only then sign the certificate at the end of Schedule 3 and, in writing, authorise the proposed expenditure and instruct the State Attorney to represent such employee, on whatever appropriate conditions he or she deems fit.

(3) A written instruction and duly signed undertaking, including a signed certificate, as contemplated in subsection (2), must be furnished to the State Attorney by the accounting officer of the organ of state in respect of each and every alleged criminal charge, application, or appeal or any other criminal proceeding in which such employee is involved, before the State Attorney may act on his or her behalf.

(4) (a) Subject to paragraph (b) and the provisions of Schedule 3, all the legal costs in such a case duly authorised in terms of subsection (2), read with subsection (3), will be borne by the state.

(b) Where it is later found that the said employee or former employee is guilty or substantially guilty as charged, or has in fact forfeited the cover contemplated in section 11(4), with the changes required by the context, he or she must repay all such legal costs to the state as contemplated in the said undertaking in Schedule 3.

## **Part 6** **Miscellaneous**

### **Regulations**

**13.** The Minister—

- (a) must make the regulations as required by this Act, including any regulations providing for administrative or mediation procedures which are necessary or expedient in order to give effect to the provisions of section 2(5); and
- (b) may make such regulations as are necessary or expedient for the achievement of the objects of this Act.

### **Savings**

**14.** Nothing in this Act contained affects any provision of any law which—

- (a) limits the liability of an organ of state in respect of any act or omission of its employees;
- (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.

### **Amendment or repeal of laws, and transitional provisions**

**15.** (1) The laws referred to in Schedule 1 are amended or repealed to the extent set out in the third column of that Schedule.

(2) Any legal proceedings instituted against or by an organ of state before the commencement of this Act and which have not been finalised, must be dealt with as if this Act has not been passed.

### **Short title and commencement**

**16.** This Act is called the State Liability Act, 2009, and comes into operation on a date set by the President by proclamation in the *Gazette*.



**Schedule 1**  
**LAWS AMENDED OR REPEALED BY SECTION 15(1)**

No. and year of law	Short title	Extent of amendment or repeal
Act 20 of 1957	State Liability Act, 1957	Repeal of the whole
Act 40 of 2002	Institution of Legal Proceedings against certain Organs of State Act, 2002	<p>1. Repeal of sections 3, 4 and 5.</p> <p>2. Substitution for section 6 of the following section:  <b>"Short title</b>  <b>6.</b> <u>This Act is called the Prescription of Debts of certain Organs of State Act, 2002.</u>"</p> <p>3. Substitution for the long title of the following long title:  <u>"To regulate the prescription and to harmonise the periods of prescription of debts for which certain organs of state are liable; to repeal or amend certain laws; and to provide for matters connected therewith."</u></p>

**Schedule 2**  
**APPLICATION AND UNDERTAKING IN REGARD TO CIVIL MATTER IN**  
**TERMS OF SECTION 11 OF STATE LIABILITY ACT, 2009**

I, ....., the undersigned, employed or formerly employed as ..... in ....., hereby request the State Attorney in terms of section 11 of the State Liability Act, 2009, to defend the action instituted against me by .....

1. I hereby confirm that I have read and understand section 11 of the State Liability Act, 2009 (the Act), and Schedule 2 to the Act.
2. I hereby declare that I have a proper and good defence to the civil action being brought against me, and that I have at all times relevant hereto acted in the course and scope of my duties and that I have not forfeited the cover referred to in section 11(4) of the Act in regard to the civil action brought against me.
3. I hereby undertake, on demand, to refund to the state all costs (including attorney's and client's costs) involved in the case, including the claimant's costs, if the state has paid them, and any other amounts the state may have disbursed on my behalf in terms of any settlement of the claim or any court order against me, if I, in the opinion of the accounting officer—
  - (a) lose or substantially lose the case; or
  - (b) have forfeited the cover referred to in section 11(4) of the Act.
4. I hereby authorise the state to deduct from my salary in one payment or in any number of payments the accounting officer may think fit any amount due in accordance with this agreement. I also hereby cede to the state all rights and claims to any legal costs I may obtain in terms of a court order.
5. I declare that I am aware of the provisions of section 21(3) of the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), regarding deductions in terms of and according to that section from any annuity or benefit payable to me upon my retirement or dismissal in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994), in respect of any amount due by me to the state owing to a decision contemplated in this agreement.
6. I am aware that the State Attorney may at a later date act against me on behalf of the state in a case arising out of this matter or related thereto, and I hereby agree that any information obtained from me may be used against me and that his or her action on my behalf in this case shall not prevent him or her from subsequently acting against me in other cases.
7. I undertake, if I leave the employment of the state and for as long as I owe the state any amount in terms of this undertaking, to inform the relevant organ of state of any change in address and, if I fail to do so, I could be held liable for any costs incurred to trace me.
8. I also hereby authorise the Receiver of Revenue to provide my address to the relevant organ of state, if asked for it in terms of this agreement.

9. I hereby waive any right to plead prescription with regard to any amount that I may owe the state in terms of this agreement and which may become payable.

Signed at ..... on this ..... day of .....  
20.....

.....  
*Signature*

Witnesses:

1. ....

2. ....

**CERTIFICATE**

I, ....., in my capacity as ....., declare that I am, on the basis of the information at my disposal, of the opinion that the employee/former employee has not forfeited the cover referred to in section 11(4) of the Act and that his or her defence by the State Attorney is in the interest of the state, and I therefore authorise that the above-mentioned application be accepted and that the employee's/former employee's defence be undertaken by the State Attorney, as requested, at state expense.

Dated at ..... on this ..... day of .....  
20.....

.....  
*Accounting Officer*

**Schedule 3**  
**APPLICATION AND UNDERTAKING IN REGARD TO DEFENCE BY STATE**  
**ATTORNEY IN CRIMINAL CASE IN TERMS OF SECTION 12 OF STATE**  
**LIABILITY ACT, 2009**

I, ....., the undersigned, an employee/former employee of ....., hereby apply for defence by the State Attorney in a criminal case, State vs ....., (case no.....), in which I am accused of .....

1. I hereby confirm that I have read and understand section 12 of the State Liability Act, 2009 (the Act), and Schedule 3 to the Act.
2. I hereby declare that I am not guilty of the alleged criminal charge and that I have not forfeited the cover referred to in section 11(4) of the Act, with the changes required by the context, in regard to the alleged criminal charge.
3. I hereby undertake, on demand, to refund to the state all costs incurred by the State Attorney in connection with my defence, if I, in the opinion of the accounting officer—
  - (a) am found guilty or substantially guilty of the alleged criminal charge; or
  - (b) have forfeited the cover referred to in paragraph 2.
4. I hereby authorise the state to deduct from my salary in one payment or in any number of payments the accounting officer may think fit any amount due in accordance with this agreement.
5. I declare that I am aware of the provisions of section 21(3) of the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), regarding deduction in terms of and according to that section from any annuity or benefit payable to me upon my retirement or dismissal in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994), in respect of an amount due from me to the state owing to a decision contemplated in this agreement.
6. I am aware that the State Attorney may at a later date act against me on behalf of the state in a case arising out of this matter or related thereto, and I hereby agree that any information obtained from me may be used against me and that his or her action on my behalf in this case shall not prevent him or her from subsequently acting against me in other cases.
7. I undertake, if I leave the service of the state and for as long as I owe the state any amount in terms of this undertaking, to inform the relevant organ of state of any change in address and, if I fail to do so, I could be held liable for any costs incurred to trace me.
8. I also hereby authorise the Receiver of Revenue to provide my address to the relevant organ of state, if asked for it.
9. I hereby waive any right to plead prescription with regard to any amount that I may owe the state in terms of this agreement and which may become payable.

Signed at ..... on this ..... day of .....  
20.....

.....  
*Signature*

Witnesses:

1. ....

2. ....

**CERTIFICATE**

I, ....., in my capacity as ....., declare that I am, on the basis of the information at my disposal, of the opinion that the employee/former employee is not guilty of the alleged criminal charge and has not forfeited the cover in section 11(4), with the changes required by the context, and that his or her defence by the State Attorney is in the interest of the state, and I therefore authorise that the above-mentioned application be accepted and that that employee's/former employee's defence be undertaken by the State Attorney, as requested, at state expense.

Dated at ..... on this ..... day of .....  
20.....

.....  
*Accounting Officer*

## MEMORANDUM ON THE OBJECTS OF THE STATE LIABILITY BILL, 2009

### 1. BACKGROUND

- 1.1 The State Liability Bill, 2009 (the Bill), seeks to rectify the unconstitutionality of the State Liability Act, 1957 (Act No. 20 of 1957).
- 1.2 The background information set out in paragraph 1.1 to 1.5 of the Memorandum on the Objects of the Constitution Eighteenth Amendment Bill of 2009 in Annexure A applies equally to the Bill.

### 2. PROVISIONS OF BILL

- 2.1 The Bill seeks to replace the State Liability Act, 1957, in order to make provision for—
- (a) procedural requirements for the institution of legal proceedings against the state;
  - (b) measures for enforcing the execution of final court orders against the state, including payments to be made by the state to comply with final court orders; and
  - (c) measures to enable the state to deal efficiently and effectively with all legal proceedings in which the state is involved.
- 2.2 The contents of the Bill are, apart from the interpretation clause, divided into 6 Parts and 3 Schedules. The first two Parts, dealing with "Notice" and "Process", respectively, were taken over from the Institution of Legal Proceedings against certain Organs of State Act, 2002 (Act No. 40 of 2002), without any substantial amendment, which also deals with "prescription of debts". The provisions in those Parts are therefore existing law being re-enacted in the Bill. Part 3 deals with "Enforcement of final court orders sounding in money", and seeks to rectify the finding of unconstitutionality discussed above in the *Nyathi* case. Part 4 deals with "Responsibility for litigation and settlement of debt, and reporting"; Part 5 deals with "Accountability" and Part 6 deals with "Miscellaneous". Schedule 1 contains laws being amended or repealed by the Bill. Schedules 2 and 3 are *pro forma* undertakings which employees or former employees of the state in the widest sense will have to agree to before being afforded legal representation in civil or criminal matters, respectively.
- 2.3 The provisions of the Bill can be summarised as follows:
- (a) Clause 1 seeks to insert a definition clause.
  - (b) Clause 2 seeks to prescribe that notice of intended legal proceedings must be given to an organ of state before such proceedings may be instituted.
  - (c) Clause 3 seeks to prescribe the manner in which such notice must be served on an organ of state.

- (d) Clause 4 of Part 2 seeks to prescribe the manner in which legal process must be served on an organ of state. Part 1 and clause 4 are existing provisions being re-enacted in the Bill.
- (e) Clause 5 of Part 2 is an adaptation of section 1 of the State Liability Act, 1957, and seeks to prescribe that claims against the state are cognisable in any competent court.
- (f) Clause 6 of Part 2 seeks to prescribe that legal proceedings against the state should be instituted against the executing authority of the organ of state concerned.
- (g) Clause 7 of Part 3 seeks to prescribe how final court orders sounding in money should be satisfied, and thereby addresses the ruling in the *Nyathi* case. It starts from the same premise that there should be no execution, attachment or like process against the state or the property of the state, but provides that a final court order sounding in money must be satisfied within 30 days of the order being given. The accounting officer of the organ of state concerned is responsible for making that payment. If there is a lack of funds, other measures are prescribed, including an intervention by the National or provincial treasury in order to make the payment. If all else fails, the judgment creditor may, on 10 days' notice, call on the accounting officer, the head of the treasury and the head of the department concerned to explain to the court why payment was not made. The court then has a wide discretion to act as it deems fit. An accounting officer who fails to comply with the provisions regarding payment is liable to contempt of court or to a charge of financial misconduct.
- (h) Clause 8 of Part 4 seeks to provide that the executing authority of an organ of state has the responsibility to authorise any decision for an organ of state to—
  - (i) initiate or institute any legal proceedings; and
  - (ii) defend any legal proceedings initiated or instituted against it.That power may not be delegated. The accounting officer may decide to settle in any such proceedings, which power may also not be delegated.
- (i) Clause 9 of Part 4 seeks to prescribe that every head of a national or provincial department must submit reports of all pending litigation matters falling within their sphere of responsibility twice per annum to the chief litigation officer, who must table a joint report before Cabinet. All such matters of a constitutional nature must be reported on four times per annum.
- (j) Clause 10 of Part 4 seeks to prescribe that every organ of state must report the statistics of litigation contemplated in clause 8(1) in which it is involved, on a monthly basis to the chief litigation officer, who must report the aggregate of statistics so received to Cabinet.
- (k) Clause 11 of Part 5 seeks to prescribe what should happen in cases of civil claims against the state or its employees in a wider

sense, and provides who shall be responsible for legal costs incurred when the state is liable for such claims.

- (l) Clause 12 of Part 5 is similar to clause 11, but relates to criminal matters.
- (m) Part 6 contains miscellaneous provisions regarding the making of regulations (clause 13), savings (clause 14), amendment and repeal of laws (clause 15) and the short title (clause 16). Schedule 1 contains the laws being amended and repealed, namely the State Liability Act, 1957, and the Institution of Legal Proceedings against certain Organs of State Act, 2002.