



## CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

**CASE SUMMARY: AUGUST 2010**

### **MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT v NYATHI AND OTHERS**

Constitutional Court

(CCT 53/09) 2010 (4) SA 567 (decided: 9 October 2009)

**FACTS:** This case is about the State's constitutional obligation to pass legislation within a specific time frame, ensuring that monetary judgment debts owed by the State are satisfied. Specifically, this case concerns an application by the Minister for Justice and Constitutional Development ("the Minister") for an extension of the suspension period of the order of constitutional invalidity made by the Constitutional Court on 2 June 2008, in the matter *Nyathi v MEC for Department of Health, Gauteng and Another* 2008(5) SA 94 (CC) ("Nyathi I").

In *Nyathi I*, the court declared section 3 of the State Liability Act 20 of 1957 ("State Liability Act") constitutionally invalid. Section 3 prohibited attachment, execution or similar process against the State or any State property for the satisfaction of monetary judgment debts. The court suspended this declaration of invalidity for a period of twelve months until 2 June 2009, to allow Parliament to pass legislation that provided for the effective enforcement of court orders. That order also required the Minister to compile and provide to the court a list of all unsatisfied court orders against all national and provincial departments. The reports detailed, amongst other things, the steps the Department had taken to satisfy the outstanding judgment debts against the State, including progress with preparation of the State Liability Bill and the Constitution Eighteenth Amendment Bill. Since both bills were published in an Extraordinary Government Gazette for public comment only on 1 June 2009, the Minister filed an urgent application for an order extending the suspension period for twelve months. The court granted the request and made an order extending the suspension period until 31 August 2009. On 31 August 2009, the suspension period was extended for a further 24 months, until 31 August 2011, and parties were requested to lodge written argument on the question of whether a proposed interim procedure for the attachment and execution of

State movable assets to satisfy judgment debts against the State sounding in money, should be made an order of court to operate during the extended suspension period.

**ISSUE:** Whether an extension of the suspension period of the declaration of invalidity, with respect to section 3 of the State Liability Act, is necessary if the court were to grant an interim order as proposed.

**CONSTITUTIONAL COURT:** The court stated that the order extending the suspension period was granted for the following reasons: Firstly, the Bills were published for public comment on 1 June 2009. Since the issues are complex, and there are a number of Government departments and spheres of Government involved, and also taking into consideration the substantial public response, it is reasonable to anticipate a protracted time span before the Bills are passed. The period granted was for a further period of two years, subject to an interim order regulating the effective enforcement of judgment debts against the State. The form in which the interim order was issued enabled all parties, including the Minister for Finance, to comment on its terms.

Secondly, an interim order should be granted for two reasons: Firstly, an interim order is necessary to protect judgment creditors against the continued infringement of their rights resulting from the failure to pass the required legislation timeously. The potential for prejudice to judgment creditors requires an interim order that is carefully crafted to balance the interests of the State against those of judgment creditors, particularly people who lack access to legal resources. Secondly, in the absence of an appropriately tailored mechanism which in the interim regulates the satisfaction of judgment debts against the State, the rules of both statutory and common law might apply and there would be no guarantee against the attachment and execution of vital state property, such as ambulances and police vehicles, which would affect essential public service delivery.

After considering arguments, the court provided the following interim order to regulate the satisfaction of judgment debts against the State, until 31 August 2011, unless remedial legislation is enacted first:

- (a) If a final order against a national or provincial department for the payment of money is not satisfied within thirty (30) days of the date of judgment, the judgment creditor may serve the court order on the relevant national or provincial treasury, the State attorney, the accounting officer of the relevant national or provincial department, as well as the Executive Authority of the department concerned;
- (b) The court order served on the officials referred to in paragraph (a) must be accompanied by a certificate by the registrar or clerk of the relevant court, certifying that no appeal, review or rescission proceedings are pending in respect thereof;
- (c) The relevant treasury shall within fourteen (14) days of service of the order, cause the judgment debt to be settled, or itself settle the judgment debt, or make acceptable arrangements with the judgment creditor, for the settlement of the judgment debt;

- (d) Should the relevant treasury fail to cause the judgment debt to be satisfied, itself settle the debt or make acceptable arrangements with the judgment creditor for the settlement of the judgment debt within the time period specified in paragraph (a), the judgment creditor may apply for a writ or warrant of execution in terms of the applicable court rules, against movable property owned by the State and used by the relevant department, whichever is applicable;
- (e) The sheriff of the relevant court shall attach but not remove the movable property identified in the writ or warrant of execution;
- (f) In the absence of any application contemplated in paragraph (g) of this order, the sheriff of the relevant court may after the expiration of thirty (30) days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt; and
- (g) A party having a direct and material interest may, during the periods referred to in paragraph (f), apply to the court which granted the order, for a stay on grounds that the execution of the attached assets is not in the interests of justice.

**ANALYSIS:** In deciding the matter, the court first considered the protracted time span before Bills are passed, and the implications in this case with reference to the State Liability Act 20 of 1957 ("State Liability Act"). Secondly, the court considered the reasons for granting an interim order extending the suspension period of the declaration of invalidity, with respect to section 3 of the State Liability Act. Further application of the law to the facts is included in the case summary portion of this report, and is consequently not repeated.

The court provided the following interim order to regulate the satisfaction of judgment debts sounding in money against the State, until 31 August 2011, unless remedial legislation is enacted first:

- (h) If a final order against a national or provincial department for the payment of money is not satisfied within thirty (30) days of the date of judgment, the judgment creditor may serve the court order on the relevant national or provincial treasury, the State attorney, the accounting officer of the relevant national or provincial department, as well as the Executive Authority of the department concerned.
- (i) The court order served on the officials referred to in paragraph (a) must be accompanied by a certificate by the registrar or clerk of the relevant court, certifying that no appeal, review or rescission proceedings are pending in respect thereof.
- (j) The relevant treasury shall within fourteen (14) days of service of the order, cause the judgment debt to be settled, or itself settle the judgment debt, or make acceptable arrangements with the judgment creditor, for the settlement of the judgment debt.
- (k) Should the relevant treasury fail to cause the judgment debt to be satisfied, itself settle the debt or make acceptable arrangements with the judgment creditor for the settlement of the judgment debt

within the time period specified in paragraph (a), the judgment creditor may apply for a writ or warrant of execution in terms of the applicable court rules, against movable property owned by the State and used by the relevant department, whichever is applicable.

- (l) The sheriff of the relevant court shall attach but not remove the movable property identified in the writ or warrant of execution.
- (m) In the absence of any application contemplated in paragraph (g) of this order, the sheriff of the relevant court may after the expiration of thirty (30) days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt.
- (n) A party having a direct and material interest may, during the periods referred to in paragraph (f), apply to the court which granted the order, for a stay on grounds that the execution of the attached assets is not in the interests of justice.

The court did not make an order as to costs.