IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 26014/2005

In the matter between:

DINGAAN HENDRIK NYATHI Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, GAUTENG 1st Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT 2nd Respondent

Constitutional Law – legislation – validity of –State Liability Act 20 of 1957, Section 3 –offending Sections 34, 165(5) and 195(1)(f) of the Constitution of the Republic of South Africa, Act 108 of 1996 – Section 3 declared unconstitutional

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JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE

(1) ~~REPORTABLE: YES/NO.~~

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

30/3/07
DATE

SIGNATURE

DAVIS, AJ:

INTRODUCTION:

[1] In this matter the Applicant applied for an order that it be declared that Section 3 of the State Liability Act, 20 of 1957, is inconsistent with the Constitution of the Republic of South Africa. Certain ancillary relief and costs were also sought. The motivation for the

application was the fact that the First Respondent has failed to effect payment to the Applicant in the amount of R317 000,00 in terms of an order of this court.

APPLICANT'S POSITION:

[2] 2.1 During August 2002 the Applicant suffered extensive burn wounds after having had a burning paraffin stove thrown at him. He suffered burns on his thorax, abdomen, both forearms and both legs, the right leg being burnt on both the front and the back thereof. He was diagnosed as having suffered 30% 2nd and 3rd degree burn wounds.

2.2 On 1 August 2002 he was admitted to the Pretoria Academic Hospital for treatment where a central venous line was incorrectly inserted into the right carotis communis artery.

2.3 On 2 August 2005 he was transferred to the Kalafong Hospital, also in Pretoria, where there was a failure to timeously diagnose the incorrect insertion of the central venous line.

2.4 As a result of both the incorrect insertion of the central venous line and subsequent omissions by medical personnel at the aforesaid two hospitals, he suffered a stroke and severe left hemiplegia.

2.5 The Applicant is married and has been found to be totally and permanently disabled by the incident. He also needs full-time care and medical treatment. His wife works as a pizza baker at a local eatery in Pretoria from which she earns R1 400,00 plus R200,00 overtime per month. The Applicant only receives a social grant of R570,00 per month. The Applicant and his wife lives together with their 4 minor children.

2.6 The Applicant and his wife are unable to provide for their daily living expenses, let alone medical and legal expenses.

2.7 On 25 July 2005 the Applicant instituted action against the First Respondent based on the improper medical care and treatment administered to him and claimed R1 496 000,00 as damages for the *sequelae* suffered and

to be suffered in future as a result of his severe left hemiplegia.

2.8 The First Respondent entered appearance to defend and filed a 4 page plea in October 2005. Save for admission of the identity of the parties and the admission of the Plaintiff to the two hospitals in question, virtually all the other allegations contained in the Applicant's Particulars of Claim, were denied.

2.9 Pursuant to some correspondence, the First Respondent subsequently conceded the merits of the Applicant's action on 24 April 2006.

2.10 The quantum portion of the trial has been set down for hearing on 23 May 2007.

2.11 On 27 July 2006 the Applicant's attorney wrote a letter to the State Attorney, representing the First Respondent, claiming the following:

> *"We hereby notify you that due to our client's serious health condition, that is deteriorating,*

interim treatment and medication is urgently needed. As you are well aware our client is not working and his wife is supporting a family of four children, husband and [herself] on R1 600,00 salary per month.

Further to the above it is evident that Mr Nyathi can't afford to pay for any interim treatment or medication and is also not in a position to secure any medical experts and/or counsel and attorney financially, as he is not in a position to contribute any funds in this regard.

We attach hereto as Annexure "A" an outlay of costs which will be needed to cover treatment and medication together with further medical expert costs.

We hereby request an interim payment of R317 700,00 within 14 days of this letter, failing which we will have no other alternative than to approach court in this regard ..."

Further settlement meetings were also suggested and the annexure to the letter contained extensive details regarding the need for interim treatment by a physiotherapist, an orthopaedic surgeon, an occupational therapist and a neurologist as well as preparation and reservation costs for trial of the neurologist, a bio-kinethetist, an industrial psychologist, an actuary and modest figures for counsel and attorney.

2.12 On 3 August 2006 the State Attorney reported that the matter has been referred to his client, being the First Respondent, and that the State Attorney expects that it would not be necessary to proceed by way of Rule 34A of the Uniform Rules.

2.13 On 23 August 2006 the State Attorney had to report as follows:

> *"We refer to the above and to the numerous telephonic conversations between the writer and yourself and we advise that your request for interim payment was forwarded to our client*

together with the effect of your Rule 34A application you intend to make. After all the avenues were exhausted by the writer to convince our client to make interim payment, they insisted that they want to make one lumsum [sic] *payment which they are still to make in the form of final settlement in the amount of R500 000,00."*

2.14 Not surprisingly, the settlement proposal was rejected and the First Respondent was given an extension to Friday 25 August 2006 "... *to respond ...failing which we have no alternative than to bring an application in this regard.*"

2.15 As no further reaction was forthcoming, an application in terms of Rule 34A was launched during September 2006, served on the State Attorney during October 2006 and came before this court on 22 November 2006.

2.16 Yet again, no reaction was forthcoming from the First Respondent and on 22 November 2006 Mabuse AJ ordered the First Respondent to make an Interim

payment to the Applicant in an amount of R317 000,00 and to pay the Applicant's costs on an attorney and client scale.

2.17 Shortly hereafter the Applicant's attorney sent a copy of the court order together with a letter dated 1 December 2006 per registered post to the State Attorney. In the letter annexed to the court order the Respondent is requested to make payment of the aforesaid amount within 30 days in terms of an unspecified statutory requirement. The letter further contains the following warning:

> *"In the event of not complying with this order we shall proceed with an application to compel, for which application you will bear the cost as you did in the above."*

PRESENT APPLICATION:

[3] 3.1 Despite the aforesaid court order, the letter of demand and the issue of the hardship of the Applicant, as set out in the papers then already filed of record, there was

yet again, no reaction or indication that payment was forthcoming from the First Respondent.

3.2 Consequently the present application was launched on 21 February 2007 and, in compliance with the provisions of Uniform Rule 10A, the Second Respondent, being the Minister of Justice and Constitutional Development, was joined as being the national executive authority responsible for the administration of the State Liability Act, No. 20 of 1957.

3.3 In the present application, the Applicant sought an order in the following terms:

> "2. [That it] *is declared that Section 3 of the State Liability Act, 20 of 1957, is inconsistent with the Constitution of the Republic of South Africa.*
>
> 3. *First Respondent is ordered to comply with the court order dated 22 November 2006 within 3 days of this order, failing which the Applicant may approach this court on the*

same documents, amplified where necessary, for an order declaring the First Respondent to be in contempt of court and an order committing the First Respondent to gaol for a period of 90 days.

4. Costs of suit on the scale as between attorney and own client ..."

3.4 The Applicant also sought, in prayer 1 of the Notice of Motion, a ruling on the non-compliance with rules regarding time periods and that the matter be heard as one of urgency. Despite the application qualifying as an interlocutory one in terms of the provisions of Rule 6(11), having been launched for the granting of interim relief in a pending action, the Applicant has still sought as far as possible to comply with the directives of this court regarding urgent applications as well as the requirements as set out in **Luna Meubelvervaardigers (Edms) Bpk v Makin's (t/a Makin's Furniture Manufacturers)** 1977(4) SA 135 (W). So, the Notice of Motion provides for time periods for the delivery of a notice of intention to oppose as well as an answering

affidavit. The notice period in respect of the first-mentioned remained at 5 days, as for applications brought in the normal course of proceedings and the period for the delivery of answering affidavit was shortened from 15 to 5 days. In the circumstances however, nothing much turns on this as, despite the lapsing of the full 5 day period for the delivery of the notice of intention to defend after service of the Notice of Motion on 23 February 2007 and the lapsing of a further full 15 court days until the date of hearing thereof on 27 March 2007 (which date was also indicated in the Notice of Motion), no notice nor any answering affidavit was delivered by either of the Respondents.

3.5 The Applicant also, both together with the application (as pp.5 and 6 of the paginated papers) and separately, delivered a Notice in terms of Rule 16A to the Registrar. This notice sufficiently complies with the said rule and reads as follows:

> *"Be pleased to take note that the above Applicant has lodged an application with this Honourable*

Court for, inter alia, an order declaring s3 of the State Liability Act, No. 20 Of 1957 unconstitutional.

In terms of the aforesaid section no execution, attachment or like process shall be issued against the Defendant or Respondent in any action or proceedings or against any property of the state.

Applicant contends that the provisions of the aforesaid section is inconsistent with the Constitution of South Africa and should be declared unconstitutional."

This notice, so I have been informed from the Bar, has been properly displayed on a notice board at court. Yet again, not surprisingly, it elicited no response.

3.6 The application was inadvertently enrolled on the unopposed motion court roll and therefore came before me. The papers were therefore read and prepared during the course of proceedings as with all the other unopposed applications and, after consultation with the

senior judge sitting in urgent court, the matter remained on my allocated unopposed motion court roll to be dealt with insofar as necessary. Having regard to the time periods already referred to above regarding the application itself as well as the Applicant's urgent need for medical attention and treatment as well as the preparation for a quantum trial of some magnitude in less than 2 months' time, I was satisfied that a sufficient degree of urgency existed meriting the limited non-compliance with the Rules.

3.7 It further appeared that the Respondents, represented by the State Attorney, had the requisite knowledge of the court order referred to in paragraph 2.16 *supra*, the present application as well as the issues raised therein and expressly summarised in the aforesaid Rule 16A notice. The reason for this finding, is the following: At the hearing of the application, I was handed the following:

3.7.1 A handwritten note from the State Attorney, which read as follows:

"With reference to the above we transmit herewith a duly certified court order which has been forwarded to the accounts department to process payment which payment will reflect in your banking account in a period of 14 days from the date herefore (sic) *... In light of the above we request that the application be postponed pending the expiry of 14 days period."*

3.7.2 A copy of the order was also annexed to the aforesaid handwritten note, both of which had been faxed to the Applicant's attorneys of record. The copy of the order bore an internal processing stamp of either the First Respondent or his attorney and which purported to certify that payment of the amount of the interim order can be made. This was, again significantly, dated 12 March 2007, that is more than 14 days before the hearing of the application.

3.7.3 A telefaxed letter by the Applicant's attorneys in response to the aforesaid, which reads as follows:

> *"The abovementioned matter and our telephonic conversation of even date refer... We hereby confirm that should our offices not receive payment into our trust account on or before close of business Monday 26 March 2007, we will proceed with the High Court application on Tuesday 27 March 2007."*

(In this letter the Applicant's attorneys' banking details were furnished – it was never made clear to which banking details or knowledge thereof the faxed handwritten note referred to in paragraph 4.7.1 referred.)

3.8 Having regard to the Respondents' prior lack of timeous or appropriate responses, it came as no surprise that no payment was made up to the time of the hearing of this application at 11:30 on 27 March 2007.

3.9 A startling and disconcerting feature of the application, was the Respondents' default in appearance. I enquired about this. It needs to be noted that I had already, earlier during the day, indicated that, as a result of the expected length of argument, the matter should stand down to 11:30, that is after the tea adjournment. Upon my enquires I was informed from the Bar that the author of the handwritten fax referred to above and to whom the faxed letter referred to in paragraph 4.7.3 had been addressed, being the same attorney who had all along dealt with the matter in the office of the State Attorney, had been contacted earlier on the day of hearing and expressly informed that the matter is not going to be heard in the urgent court but on its enrolled place in the unopposed motion court. He was also informed of the court and the fact that the matter was standing down until 11:30. No appearance was put in on behalf of the Respondents in my court, either before, during or after the hearing of the matter and, no appearance in the urgent court has been brought to my attention. As far as service and notification goes, the Applicant has done everything

which could be expected of it and was entitled to having the matter heard, which duly occurred.

AD SECTION 3 OF THE STATE LIABILITY ACT, ACT NO. 20 OF 1957:

[4] Ordinarily a judgment creditor will have sufficient means to his disposal to enforce compliance with an order of court granted in his favour. At common law, a distinction is made between orders *ad factum praestandum* and orders *ad pecuniam solvendam*. In the first instance, such a judgment creditor can apply to court for findings and orders of contempt of court by and committal of the defaulting debtor. In the latter instance, the issue of a writ of execution followed by an attachment of assets and a sale thereof is the proper and customary way by which such a judgment debtor can recover that which is due to him in terms of the court order.

[5] The aforesaid situation is not the position when the Defendant is the State (which, in the wider terms as defined in the Act, also includes the various departments of a provincial government).

[6] Section 3 of the State Liability Act provides as follows with regard to judgments obtained against the State (which term I shall henceforth use in its wider sense):

> *"No execution, attachment or like process shall be issued against a defendant or a respondent in any such action or proceedings or against the property of the State, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the consolidated revenue fund."*

[7] As the judgment for interim payment in favour of the Applicant is one sounding in money, the appropriate remedy would have been to levy execution (and not to proceed with contempt proceedings). This is, however, precluded by the aforesaid section "... *therefore closing that avenue of obtaining satisfaction* ..." of the Applicant's debt. See **Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another** 2004(2) SA 611 (SCA) at 619E-230C.

[8] Even if one were to consider the failure to make payment in terms of a court order as a display of contempt for such an order, "... *there is* [unfortunately] *at present, precious little that can be done about that* ..." as stated by Nicholson J in **N and Others v The Govern-ment of the Republic of South Africa (No 3)** 2006(6) SA 575 (D&CLD) at 583E-G with reference to the **Jayiya** case *supra*, **York Timbers Ltd v Minister of Water Affairs and Forestry and Another** 2003(4) SA 477 (T) and **Kate v MEC for the Department of Welfare Eastern Cape** 2005(1) SA 141 (SE).

[9] To the above can be added the judgment in **Matiso and Others v Minister of Defence** 2005(6) SA 267 (TkD) where it was held that an application for committal for contempt of court as a means of enforcing an order *ad pecuniam solvendam* by the State is in any event precluded by Section 3 of the State Liability Act. Criticism was also therein expressed in respect of the aforementioned judgment of Froneman J in **Kate v MEC for the Department of Welfare, Eastern** Cape (supra) where the learned judge sought to "*overcome*" the prohibition contained in the State Liability Act by reading and interpreting the **Jayiya** judgment so as to allow for "*an adapted common law of civil contempt, shorn of its criminal elements of punishment, in the form of a declaratory order that a*

state functionary is in contempt of a court order". Furthermore, even if one were to follow the strict interpretation of the **Jayiya** judgment (which Froneman J has, with respect, to an extent conceded "*might appear rather strained*") it would still only afford limited satisfaction in that it would only allow for a declaration of unlawfulness or a finding of contempt but with no real further enforceability, such as committal.

[10] It has also been pointed out that the predecessor of the State Liability Act was the Crown Liabilities Act, No. 1 of 1910. This equally prohibited the enforcement of orders of court. The *ratio* for such prohibition was stated in **Schierhout v Minister of Justice** 1926 AD 99 per Innes CJ (as quoted in **N and Others v Government of the Republic of South Africa** (*supra*) at 584A-E as follows:

> "*The policy of the Act, it was pointed out, was to allow the jurisdiction of the Courts to be exercised against the Crown, not only in respect of claims sounding in money, but also in cases where relief was sought by way of declaration or mandatory order. But the Legislature was content to rely upon the moral obligation which the decree of a court was bound to exert. No process of any kind*

was to be exercised as against the Crown representatives or Crown property."

It has also expressly been held that, despite slight differences in the wording of the relevant sections of the aforesaid two Acts, the effects of the provisions are the same and that the statements in **Minister of Finance v Barberton Municipal Council** 1914 AD 335 and **Schierhout v Minister of Justice**(*supra*) are equally applicable to the provisions of the State Liabilities Act. See **York Timbers v Minister of Water Affairs and Forestry and Another** (*supra*) at 504G-H.

[11] This "*moral obligation*" of the State, with regard to public administration, has subsequently become entrenched in, *inter alia*, Section 195 of the Constitution of the Republic of South Africa, Act 108 of 1996. Various instances of responsible and fair public administration in the interests of those who the government serve, including proper attention to their needs, are detailed and prescribed in the relevant section.

[12] From a reading of all of the abovementioned cases and the numerous instances referred to therein, it is sadly, however, quite clear that the State and its officials all too often, be it as a result of

pure negligence, incompetence or "*laziness*" fail to honour their constitutional obligations as well as the aforesaid moral obligations (which must certainly still exist) and fail to comply with court orders, be they orders *ad factum praestandum* of, more often, *ad pecuniam, solvendam*.

[13] In the present instance, the First Respondent's failure has, due to the nature of the interim payment order, effectively prevented the Applicant's proper preparation for the quantum portion of his trial. It has therefore also effectively encroached on or prejudiced his rights of access to this court as enshrined in Section 34 of the Constitution. Although such a consequential encroachment would not apply in each instance, there are other constitutional inroads made by Section 3 of the State Liability Act which are of general application as discussed hereunder.

[14] Section 165(5) of the Constitution stipulates that "*an order or decision issued by a court binds all persons to whom and organs of state to which it applies*".

[15] In addition hereto, Section 195(1)(f) of the Constitution prescribes that public administration must be accountable.

[16] It is clear that Section 3 of the State Liability Act is inconsistent with the aforesaid constitutional provisions by placing the state and its officials above the law and beyond the very orders which should bind it or hold it accountable. I find support for this finding in the reasoning and findings of a number of prior judgments, the most apposite of which I refer to hereunder.

[17] In **Mjeni v Minister of Health and Welfare, Eastern Cape** 2000(4) SA 446 (TkH) at 452C-453H the following was, *inter alia*, stated by Jafta J:

> *"Quite clearly and just like any other party, the State is bound to comply with orders of the courts. It has a duty to honour them whenever it is directed to do something. The authority of courts of law over government departments has also received constitutional recognition. Section 165 of the Constitution of the Republic of South Africa, Act 108 of 1996 provides that orders issued by courts of law bind all persons, including organs of state, to whom they apply and state organs must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness of the courts. There is no doubt, I venture to say, that this constitutes the most*

important and fundamental duty imposed upon the state by the Constitution ... [Reference was then made to **De Lange v Smuts NO and Others** 1998(3) SA 785 (CC) and **Bernstein and Others v Bester and Others NNO** 1996(2) SA 751 (CC)] *... A deliberate non-compliance or disobedience of a court order by the State through its officials amounts to a breach of that constitutional duty. Such conduct impacts negatively upon the dignity and effectiveness of the courts ... The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order. To a great extent s3 of Act 20 of 1957 encroaches upon that enforcement of rights against the State by judgment creditors...."*

[18] Equally compelling was the reasoning of Ebrahim J in **East London Local Transitional Council v MEC for Health, Eastern**

Cape and Another 2001(3) SA 1133 (CkH) (particularly at 1138B-1141C).

[19] It must also follow from this reasoning that the blanket ban contained in Section 3 of the State Liability Act also constitutes a material limitation of the right of access to court and the consequent right to have the effects of such successful access implemented. The section therefore also offends against the provisions of Section 34 of the Constitution, the contents of which are, as they should be, jealously guarded. See for example **Moise v Greater Germiston Transitional Local Council: Minister of Justice and Consti-tutional Development Intervening (Women's Legal Centre as amicus curiae)** 2001(4) SA 491 (CC).

[20] In finding the interpretations of the similar prior legislative provisions of the Crown Liabilities Act as stated in **Minister of Finance v Barberton Municipal Council** (*supra*) and **Schierhout v Minister of Justice** (*supra*) binding on him, Southwood J stated the following in respect of the aforesaid judgments in **York Timbers v Minister of Water Affairs and Forestry and Another** (*supra*) at 505D-506C)

"I therefore reluctantly conclude that s3 of the State Liability Act would preclude the execution of a committal order against the Minister or other public official where the State has deliberately not complied with an order of court. I say reluctantly because I find the reasoning of Jafta J in ***Mleni*** *(at 452C-453H) and of Ebrahim J in the* ***East London Transitional Council*** *case (at 1138C-1140I) compelling. As pointed out by the Respondent's counsel, courts will have to comply with s3 of the State Liability Act (properly interpreted) until this section has been declared unconstitutional and there is no application before this court to declare this section unconstitutional. Counsel for the Applicant did not attempt to persuade the court that s3 of the State Liability Act is unconstitutional. They simply submitted that the committal of the Minister or the Director-General is the only remedy if, as here, there is a deliberate failure to comply with the court orders referred to and they also referred to s165 of the Constitution ... s3 of the State Liability Act, (properly interpreted) is inconsistent with state officials being committed for contempt of court and in the exercise of the court's inherent power to protect and regulate its process and is*

inconsistent with the provisions of s195(f) of the Constitution that public administration must be accountable. S3 must be declared to be inconsistent with the Constitution and invalid before this court may order the committal of the Minister and the Director-General on the grounds of contempt of court."

[21] After debating the interpretation of the **Jayiya** judgment (*supra*) and also with reference toe **Mjeni** and **East London Transitional Local Council** cases (also *supra*) and with reference to constitutional imperatives, Froneman J *inter alia* stated the following in **Kate v MEC for the Department of Welfare, Eastern Cape** (*supra*) at 157A-B:

"The alternative reading, [namely] *that s3 of the State Liability Act also forbids these orders of ensuring compliance with court orders, effectively means that this section places the government above the law insofar as the binding nature of court orders are concerned. Such a reading could make s3 unconstitutional: I cannot see how it would then be compatible with the express provisions of s165(4) and (5) of the Constitution."*

[22] A similar reasoning is to be found in the judgment of Fischer AJ in **Matiso and Others v Minister of Defence** (*supra*) at 271I-272C:

> *" ... and to the extent that the State Liability Act (as amended in 1993) as read together with the prevailing common law, frustrates the judgment creditor in attempting to compel compliance by the state with an order ad pecuniam solvendam by effectively placing the state above the law it would appear that such act and more specifically s3 thereof is in conflict with s165(5) ..."*

[23] In expressing some of the most stringent criticism against state non-compliance with court orders and the provisions of the State Liability Act, Nicolson J stated, *inter alia*, the following in **N and Others v Government of Republic of South Africa** (*supra*) at 584F-G:

> *"The effect of the above highlighted passage is that unless and until s3 of the State Liability Act is declared unconstitutional, there is no legal mechanism such as incarceration to enforce the court decrees. Should that situation continue, the effect of a court order would be*

what the law calls a brutum fulmen, in other words – a useless thunderbolt."

I am in respectful agreement with what has been stated in the above quoted authorities. To reiterate, Section 3 of the State Liability Act is incompatible with Sections 34, 165(5) and 195(1)(f) of the Constitution.

EXTENT OF THE ORDER:

[24] 24.1 It is clear from what has been stated above, that Section 3 of the State Liability Act is not capable of being "*read down*" in order to have it pass constitutional muster. That much has been attempted by Froneman J in **Kate v the MEC for the Department of Welfare, Eastern Cape** (*supra*). I respectfully differ from the interpretation placed therein on the **Jayiya** judgment and make common cause with the criticism expressed in respect thereof as already quoted above. The attempt however, serves to confirm the futility of a finding of contempt but without a consequent committal and further confirms the ineffectiveness of an attempted reading down of the section.

24.2 I have also considered "*reading in*" of certain limitation provisions into the section to the effect that attachment may or should be allowed, save in instances of assets necessary for essential functions such as medical treatment, policing, correctional services or defence. The vagaries of such "*reading in*" and the endless possibilities which might result therefrom, however preclude this mode of conduct. Although attachment and execution against state assets might cause disruption (as referred to in **Jaylva v the MEC for Welfare, Eastern Cape and Another** (*supra*) at 619I-J, this consideration is overshadowed by the constitutional considerations referred to above.

24.3 Any formulation regarding the inclusion or exclusion of certain assets of state or other mechanism to provide for the levying of execution as a possible limiting effect of the considerations contained in Section 3 to an extent that it may render the infringement of constitutional rights caused thereby justifiable in a free and democratic society, would be for the legislature to consider. As the section presently stands in the form of a blanket ban, it remains inconsistent with the Constitution.

[25] I have furthermore considered whether the section can be saved from unconstitutionality by excising from it a portion thereof, such as finding only the portion "*... or against the property of the state ...*" to be offensive. It was, however, correctly, in my view, pointed out by counsel for the Applicant that even though attachment might then be allowed, the issuing of a writ therefore will still be precluded by the remaining portion of the section. The only portion of the section which is not inconsistent with the Constitution, is the portion after the word "*but*", being that referring to satisfaction from a consolidated revenue fund.

[26] After some debate, it was indicated to me that the Applicant would not be proceeding with prayer 3 of his Notice of Motion as quoted in paragraph 4.3 *supra*. Whether a finding for contempt is precluded or not, a committal to gaol of any official is precluded and in any event, both could only properly be considered after confirmation of the finding of unconstitutionality. Even in the event of such confirmation the proper remedy would be the issuing of a writ of execution and the attachment and sale of assets (should the State at that stage still not have complied with the order). Similarly an order for payment within 3 days is superfluous: an

order for payment has already been made by this court and any time period for compliance therewith, has already expired.

[27] I also enquired as to the practical consequences of a finding of unconstitutionality. In terms of the provisions of Section 172(2)(a) such a finding would only be effective after confirmation thereof by the Constitutional Court. Such confirmation would only be considered after proper enrolment and pursuant to a reference to the Constitutional Court by way of Rule 15 of its rules. I was however assured that the Applicant's legal team would see to the most expeditious referral and enrolment possible and further that they were convinced that such a finding would goad the First Respondent into action. Whether that will happen or not and whether such a finding would act *I nterrorem* or not, I need not consider as I am, as in the **York Timbers** case convinced that, if the Applicant has made out a proper case, which I have found he had done, he would be entitled to his order if only to enforce the rule of law and obtain confirmation of the supremacy of the Constitution.

[28] I have lastly considered whether a declaration of invalidity having immediate effect would disrupt good governance. In this regard the position is to be distinguished from the situation in, for

example, **Van Rooyen and Others v The State and Others** 2001(4) SA 394 (T). Any levying of execution or attachment of assets of the State as a result of the striking down of the prohibition contained in Section 3 of the State Liability Act, could only come about as a result of the State's failure to comply with a court order and such good governance imperatives as in any event constitutionally enshrined. Any disruption, or rather, the prevention thereof, will therefore be in the hands of the State itself and that of its officials. For this reason, I do not consider an order suspending the declaration of invalidity for any period and on any conditions necessary. I might also note that no alternative or interim relief was sought by the Applicant.

COSTS:

[29] Having regard to the conduct of the First Respondent, not only in the disregard displayed to an order of this court but also to the processes followed by the Applicant to have the matter adjudicated, as well as the circumstances of the Applicant, I am, in the exercise of my discretion, convinced that a punitive costs order would be appropriate. It should be noted further that the

Applicant was represented by a senior and two junior counsel. The employment of at least two counsel in a matter of this nature appears to be a reasonably prudent step.

[30] Having regard to all of the above, I accordingly make the following order:

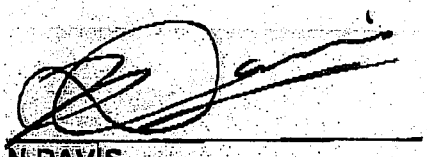
1. The following portion of Section 3 of the State Liability Act, No. 20 of 1957, is hereby declared to be inconsistent with the Constitution of the Republic of South Africa and therefore invalid:

> *"No execution, attachment or like process shall be issued against a defendant or a respondent in any such action or proceedings or against the property of the State,* [but]"

2. The First Respondent is ordered to pay the costs of the application on the scale as between attorney and client, such costs to include the costs of two counsel.

3. The Registrar of this court is directed to lodge a copy of this judgment and order as soon as practically possible

the Registrar of the Constitutional Court in terms of the provisions of Rule 16 of the Constitutional Court rules.



N DAVIS
ACTING JUDGE OF THE
HIGH COURT
TRANSVAAL PROVINCIAL DIVISION

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ADV C F J BRAND
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ATTORNEYS FOR RESPONDENTS:

STATE ATTORNEY, PRETORIA