

## **State Liability Amendment Act**

### **Process of attachment**

By Mabitsela Elijah Ramonyai

In terms of s 3 (2) of the State Liability Amendment Act 14 of 2011 (SLAA), that came into operation on 30 August 2011, the state attorney or attorney of record appearing on behalf of the department concerned, must, within seven days after a court order sounding in money against a department becomes final, in writing, inform the executive authority and accounting officer of that department and the relevant treasury of the final court order.

A final order against the department for the payment of money must be satisfied –

- within 30 days of the date of the order becoming final; or
- within the time period agreed on by the judgment creditor and the accounting officer of the department concerned (s 3(a)(i) and (ii)).

The accounting officer of the department concerned must make payment in terms of the final order and payment must be charged against the appropriated budget of the department concerned (s 3(b)(ii)).

If a final court order against a department for the s 3(b)(ii) payment of money is not satisfied within 30 days of the date of the order becoming final or the time period agreed on, the judgment creditor may serve the court order on

- an executive authority and accounting officer of the department;
- the state attorney or attorney of record appearing on behalf of the department concerned; and
- the relevant treasury (s 3(4)).

The relevant treasury must, within 14 days of service of the final court order, ensure that the judgment debt is satisfied or that acceptable arrangements have been made with the judgment creditor, should there be inadequate funds in the vote of the department concerned (s 3(5)).

If the relevant treasury fails to ensure that judgment is satisfied or acceptable arrangements have been made in terms of subs 5, the registrar or clerk of the court concerned must, on the request of the judgment creditor, issue a writ of execution in terms of the applicable rules of court against movable property owned by state and used by the department concerned (s 3(6)).

The sheriff of the court must pursuant to the writ of execution attach, but not remove, movable property owned by the state and used by the department concerned. 'The sheriff and the accounting officer of the department concerned, or an official of his or her department designated in writing by him or her, may, in writing, agree on the movable property owned by the state and used by the department concerned that may not be attached, removed and sold in execution of the judgment debt because it will severely disrupt service delivery, threaten life or put the security of the public at risk' (s 3(7)(a) and (b)).

According to s 3(7)(c) '[i]f no agreement referred to in para (b) is reached, the sheriff may attach any movable property owned by the state and used by the department concerned, the proceeds of the sale of which, in his or her opinion, will be sufficient to satisfy the judgment debt against the department concerned'.

The sheriff of the court may, after the expiration of 30 days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt. This can be done if there is no application by any party having any material and direct interest for stay in execution on the grounds that execution will severely disrupt service delivery, threaten life or put the security of the public at risk, or is not in the interest of justice.

If the above application is brought by the department concerned, the application must contain a list of movable property and the location thereof, compiled by the department concerned, that may be attached and sold in the execution of judgment debt.

This Act has brought sweeping changes and imposes enormous duty on creditors executing against the state. It is no longer possible for a creditor to issue a normal writ and proceed against the state without following the provisions of the Act as outlined above. In a point form, creditors should follow the following method:

- The state attorney or attorney of record must notify the department concerned in writing within seven days after a court order sounding in money against a department.
- The amount ordered by the court should be paid within 30 days.
- If the court order is not satisfied, the creditor may serve the order on the
  - executive authority and accounting officer of the department;
  - state attorney or attorney of record appearing on behalf of the department concerned; and
  - relevant treasury.
- The relevant treasury must satisfy the court order within 14 days or make acceptable arrangements.
- If the court order is not satisfied and acceptable arrangements are not made, the registrar or clerk may issue a warrant against the movables owned by the state. The sheriff must attach but not remove the goods. The sheriff and the state officials must agree on movable property owned by the state that may not be attached, removed or sold because it will disrupt service delivery, threaten life or put public safety at risk.
- If no agreement is reached, the sheriff may attach any movable property owned by the state and used by the department concerned.
- The sheriff of the court may, after the expiration of 30 days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt.

It must be noted that the SLAA does not provide a definition for 'state'. In this regard it might be necessary to rely on the following definition of 'organ of state' provided for in the Constitution:

'Organ of state' means –

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functional or institution –
  - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution;
  - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.'

It can be argued that, by necessary implication, the SLAA applies to organs of state.

The author could not find any decided case that deals with this aspect of the Act and it will be left up to the courts to give clarity as to whether all organs of state can invoke the provisions of the SLAA.

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