CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/07
[2008] ZACC 8

DINGAAN HENDRIK NYATHI — Applicant

versus

MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, GAUTENG — First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Second Respondent

with

CENTRE FOR CONSTITUTIONAL RIGHTS — Amicus Curiae

Heard on : 30 August 2007

Decided on : 2 June 2008

JUDGMENT

MADALA J:

Introduction

[1] Sitting in the Pretoria High Court (the High Court), Davis AJ made the following order in favour of the applicant in this matter on 30 March 2007:

"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 . . . '

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".[1]

[2] In terms of section 172(2)(a) of the Constitution,[2] an order of constitutional invalidity in the High Court has no force or effect unless it has been confirmed by this Court. It is the confirmation of that order that is sought by the applicant in these proceedings. Sections 172(2)(a) and 167(5)[3] of the Constitution mandate this Court to make orders of confirmation in relation to the declaration of constitutional validity of court orders and Acts of Parliament.

[3] Section 3 of the State Liability Act (the Act)[4] reads as follows:

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

[1] *Nyathi v MEC for the Department of Health, Gauteng and Another*, 26014/2005 TPD, 30 March 2007, unreported.

[2] Section 172(2)(a) states:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[3] Section 167(5) states:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court or a court of similar status, before that order has any force."

[4] 20 of 1957.

> 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 National Revenue Fund or a Provincial Revenue Fund as the case may be."

[4] At the time this application was made, the applicant was permanently disabled and unemployed. He passed away on 4 July 2007, before the matter was heard on an urgent basis before this Court. Shortly before the hearing on 30 August 2007, Lemyiwe Angelina Nyathi, the applicant's wife, successfully applied to this Court to be substituted for the applicant.

[5] The first respondent is the Member of the Executive Council for the Department of Health, Gauteng. The second respondent is the Minister of Justice and Constitutional Development. Both respondents have been cited in their nominal capacities and are represented by the office of the State Attorney. The second respondent is the national executive authority responsible for the administration of the Act. A litigant such as the applicant in this matter brings the relevant national or provincial department before a court by citing the political head of that department as provided for in section 2 of the Act.[5]

[6] In time, the Centre for Constitutional Rights (the CFCR) applied to be admitted as amicus curiae and was granted its request to present written and oral submissions

[5] Section 2 of the Act provides:

> "(1) In any action or other proceedings instituted by virtue of the provisions of section one, the Minister of the department concerned may be cited as nominal defendant or respondent.
> (2) For the purposes of subsection (1), 'Minister' shall, where appropriate, be interpreted as referring to a member of the Executive Council of a province."

before this Court. We are indebted to the CFCR for its assistance. The application for confirmation is strenuously opposed by the respondents.

Factual background

[7] On 1 August 2002, the applicant suffered 30 percent second and third degree burn wounds after a paraffin stove was thrown at him. He was subsequently admitted at the Pretoria Academic Hospital for treatment where a central venous line was incorrectly inserted into his right carotis communis artery. On 2 August 2002, he was transferred to Kalafong Hospital in Pretoria where the medical personnel failed to timeously diagnose the incorrect insertion of the central venous line. As a result of the omissions and mistakes made by the medical personnel at the two hospitals, the applicant suffered a stroke and severe left hemiplegia. He then required full time care and medical treatment and was also liable for the payment of the medical expenses and the ensuing legal fees.

[8] The applicant used to receive a social grant of R570 per month and his wife's total monthly income was R1 600. The applicant and his wife also had to support their four children and provide for their daily living expenses.

[9] On 25 July 2005, the applicant instituted action in the High Court against the first respondent, claiming damages in the sum of R1 496 000 for the pain caused by the stroke and disability suffered as a result of the negligent and improper care administered to him at the two hospitals. The first respondent initially resisted the

applicant's claim, but later admitted liability. The only remaining issue was the amount payable to the applicant.

[10] On 27 July 2006, the applicant's attorneys wrote a letter to the State Attorney stating that the applicant's health was deteriorating rapidly and that he urgently required treatment and medication. They stated further that the applicant could not afford to pay the necessary medical and legal costs while the hearing scheduled for 23 May 2007 was pending. They requested therefore an interim payment of R317 700 and itemised how the amount was arrived at. It was stated further that should payment not be forthcoming within 14 days of the letter, they would approach the Court for relief.

[11] On 3 August 2006, the State Attorney reported that it had referred the matter to the first respondent and that he was of the opinion that it would not be necessary to proceed by way of Uniform Rule 34A.[6] The first respondent consequently asked for one week's indulgence within which to pay.

[12] On 23 August 2006, the State Attorney informed the applicant's attorneys that the first respondent had refused to make the interim payment and had instead resolved

[6] Rule 34A of the Uniform Rules of Court states:

> "In an action for damages for personal injuries or the death of a person, the plaintiff may, at any time after the expiry of the period for the delivery of the notice of intention to defend, apply to the court for an order requiring the defendant to make an interim payment in respect of his claim for medical costs and loss of income arising from his physical disability or the death of a person."

to pay an amount of R500 000 as full and final settlement of the applicant's claim. The settlement offer was rejected by the applicant.

[13] On 30 August 2006, the State Attorney advised the applicant's attorneys that the first respondent was taking issue with paying the requested amount as an interim payment instead of a final payment. It was stated further by the State Attorney that the first respondent did not dispute that it might in future be liable for payment but in the circumstances requested that payment be deferred until the trial Court had decided the issue of costs.

[14] In September 2006, having received no further response from the first respondent, the applicant lodged an application in terms of Uniform Rule 34A and served it on the State Attorney during October 2006. The matter was unopposed and the Court ordered the first respondent to make an interim payment to the applicant in the amount of R317 700 and to pay the applicant's costs on the attorney and client scale.

[15] The applicant, having received no payment, sent a copy of the court order together with a letter to the State Attorney on 1 December 2006 by registered post. The letter stated that should the first respondent fail to comply with the court order within the prescribed 30 day period, the applicant's attorneys would proceed with an application to compel them to do so. The first respondent failed to comply with the court order.

History of state liability in South Africa

[16] The concept of state liability in South Africa was statutorily introduced in terms of the Crown Liabilities Act.[7] The section relating to the attachment of the assets of the state is fundamentally similar to the impugned section in the State Liability Act. The High Court found the two pieces of legislation to be so similar that the case law in relation to the one applied to the other, and this conclusion cannot be doubted. The courts have grappled with the issue over many years; however, it is only in recent years that the courts have been faced with a flood of litigation of this magnitude in respect of unsatisfied court orders.

[17] This legislation was in line and compatible with the doctrine of parliamentary supremacy.[8] It was important in order to prevent execution, attachment or a similar process when the state was sued for damages or contract. It still does however create difficulties for a judgment creditor.

[18] The Act is a relic of a legal regime which was pre-constitutional and placed the state above the law: a state that operated from the premise that "the king can do no

[7] Act 1 of 1910.

[8] See *Schierhout v Minister of Justice* 1926 AD 99 at 111 where it was held:

> "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 Crown representatives or Crown property."

wrong".[9] That state of affairs ensured that the state and, by parity of reasoning, its officials could not be held accountable for their actions.

High Court proceedings

[19] The failure to comply with the court order compelled the applicant once again to lodge an application before the High Court on 21 February 2007. The application was in compliance with the provisions of Uniform Rule 10A,[10] in which the applicant joined the Minister of Justice and Constitutional Development. An order was sought in the following terms:

> "2. [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.
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> 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.
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> 4. Costs of suit on the scale as between attorney and own client . . . ."

[9] See the case of *Poindexter v Greenhow* 114 US 270 (1885), 291 where the following is said as regards state immunity and a democratic government:

> "Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle-field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked".

[10] Rule 10A of the Uniform Rules of Court states:

> "If in any proceedings before the court, the constitutional validity of a law is challenged, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings."

[20] Davis AJ observed that despite the lapse of all relevant time periods as set out in the Rules, the respondents had not filed a notice of intention to defend nor any answering affidavit. This failure to abide by the Rules occurred even after the applicant had delivered a notice to the Registrar of the High Court in terms of Uniform Rule 16A.[11] The respondents did not respond to the notice despite it being properly served and, consequently, the matter was heard as an unopposed urgent application. The Court a quo was "satisfied that a sufficient degree of urgency existed meriting the limited non-compliance with the Rules."[12]

[21] A handwritten note from the State Attorney to the applicant's attorneys more than 14 days before the hearing of the application indicated that the State Attorney knew of the hearing but had defaulted in appearance. The applicant's attorneys had also telefaxed a letter to the State Attorney stating that, should they not receive payment by 26 March 2007, they would proceed with the High Court application scheduled for 27 March 2007.

[22] As at the date of the hearing, no payment had been made by the first respondent despite repeated telephone calls from the applicant's attorneys. The first respondent's default in appearance was a cause for grave concern in the High Court. The High Court found this to be especially disconcerting as the State Attorney had been contacted and informed on the day of the hearing that the matter would proceed

[11] Rule 16A(1)(a) of the Uniform Rules of Court provides:

> "Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading."

[12] Above n 1 at para 3.6.

unopposed in motion Court. The Court proceeded to hear the matter having found that the applicant had done everything that could be expected in the circumstances to inform the respondents and was therefore entitled to have the matter heard.

[23] The High Court stated that as the judgment for interim payment in favour of the applicant was one sounding in money, the appropriate remedy would have been to levy execution and not proceed with contempt proceedings.[13] The Court pointed out that this was, however, precluded by section 3 of the Act. It added that the section would perhaps only allow for a declaration of unlawfulness or a finding of contempt but with no real further enforceability, such as committal. It considered the Crown Liabilities Act, the predecessor of the State Liability Act, and also considered the relevant case law. It found the case law to be equally applicable to the Act and held that both pieces of legislation merely placed a moral obligation on the state to satisfy judgment debts.

[13] Id at para 7.

[24] The High Court[14] found that sections 34,[15] 165(5)[16] and 195(1)(f)[17] of the Constitution had been violated.[18] It observed that the blanket ban in section 3 of the Act constitutes a material limitation of the right to access to courts and the consequent right to have the effects of successful access implemented. The High Court concurred with a number of judgments.[19] Davis AJ relied on Froneman J's reasoning in *Kate*,[20] that the alternative reading, namely that section 3 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 would make section 3 unconstitutional and a

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[14] Above n1 at para 23.

[15] Section 34 states:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[16] Section 165(5) states:

> "An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[17] Section 195(1) states:

> "Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
> . . . .
> (f) Public administration must be accountable."

[18] See also *York Timbers Ltd v Minister of Water Affairs and Forestry* 2003 (4) SA 477 (TPD); [2003] All SA 710 (T) at 506, where it was stated that:

> "Section 3 of the State Liability Act (properly interpreted) is inconsistent with State officials being committed for contempt of court in the exercise of the court's inherent power to protect and regulate its process and is inconsistent with the provisions of section 195(1)(f) of the Constitution that public administration must be accountable."

See also *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 BCLR (12) 1420 (CC) at para 13 where it was held that:

> "An important purpose of s34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law. Execution is a means of enforcing a judgment or order of Court and is incidental to the judicial process." (Footnotes omitted.)

[19] *Matiso and Others v Minister of Defence* 2005 (6) SA 267 (Tk); *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk).

[20] *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE); [2005] 1 All SA 745 (SE).

clear violation of section 165(5) of the Constitution.[21] As the order of the High Court declared invalid a provision of an Act of Parliament, the applicant approached this Court for confirmation of that order.

In this Court

[25] The matter was set down for hearing on 4 May 2007. On the day of the hearing, the interim payment ordered by the High Court had not been made. The Court engaged with counsel regarding the non-payment at the commencement of the hearing and the respondents thereafter gave assurances that the payment would be made. The interim payment was made on the same day. The State Attorney was directed to furnish an explanation for the tardiness of her department in complying with the High Court order. The matter was set down for hearing on 30 August 2007.

The applicant's submissions

[26] The applicant's main submission is that section 3 is unconstitutional because it prevents the attachment of the assets of the state despite a court order and should therefore be struck down as being invalid. The applicant also submitted that it is not appropriate or effective to enforce a contempt order against a nominal defendant. It was asserted that execution is the most appropriate and effective remedy. It was submitted that the red tape and bureaucracy of the state also makes it difficult to enforce contempt of court proceedings since the relevant state official cannot always be identified.

[21] Id at para 22.

[27] As to the question whether individuals can claim from the National Revenue Fund and the Provincial Revenue Fund (the funds), the applicant said that the word 'may' in section 3 is discretionary, and even if it is interpreted as 'must', there still needs to be an Act of Parliament to enable one to claim from the funds. The applicant also said that the provisions of section 213(2) of the Constitution[22] precludes one from getting money from the funds unless legislation is enacted to that effect. It was also said that it would be difficult to obtain money from the funds given the inefficiency of state departments and their defiance in complying with court orders. The applicant submitted that execution would be a more expeditious manner of obtaining satisfaction as compared with claiming from the funds. In terms of the attachment of assets of the state, the applicant submitted that concerns about the attachment of essential assets of the state would be allayed by the fact that there would be mechanisms put in place to ensure that essential assets are not attached. The applicant further submitted that the first respondent violated his rights to equality, dignity and access to courts as enshrined in the Constitution.

The respondents' submissions

[28] The first respondent submitted that section 3 does not violate the constitutional principle that orders and decisions of court bind all persons including organs of state, as it only provides that the normal means of execution are not applicable to cases

[22] Section 213(2) of the Constitution provides:

> "Money may be withdrawn from the National Revenue Fund only—
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> (a) in terms of an appropriation by an Act of Parliament; or
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> (b) as a direct charge against the National Revenue Fund, when it is provided for in the Constitution or an Act of Parliament."

where the provincial or the national government is the judgment debtor. They submitted further that it will be highly prejudicial to the public interest should the assets of the state be attached or sold in execution of a judgment debt. The respondents cited various countries in which no attachment and execution may be effected against state property.[23] They contended that the applicant was able to vindicate his rights by accessing the judicial system and his right of access to courts is not precluded by the application of section 3. However, certain other countries provide for the issuing of a certificate to a relevant officer.[24]

[29] The respondents further submitted that section 3 must be read together with the Public Finance Management Act, as amended,[25] (the PFMA), which is designed to regulate financial management in the national and provincial government together with treasury instructions, which represent an important statutory recognition of the need for the national and provincial governments to comply with court orders

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[23] For example, in Australia, section 65 of the Judiciary Act 1903 provides:

> "No execution or attachment or process in the nature thereof shall be issued against the property or revenues of the Commonwealth or a State in any such suit; but when any judgment is given against the Commonwealth or a State, the Registrar or other appropriate officer shall give to the party in whose favour the judgment is given a certificate in the form of the schedule, or to a like effect."

Section 66 of the same Act provides:

> "On receipt of the certificate of a judgment against the Commonwealth or the State, the Minister of Finance or the Treasurer of the State as the case may be shall satisfy the judgment out of the monies legally available."

In the United Kingdom, section 25 of the Crown Proceedings Act 1947 precludes the execution or attachment of state assets. In Canada, the Crime Liability and Proceedings Act (RS1985 C50) also precludes execution on a judgment against the Crown.

[24] Whilst section 8 of Tonga's Crown Proceedings Act [Cap 13] precludes execution, section 9 thereof enjoins the Minister of Finance to satisfy the judgment on production of the certificate. Western Australia through section 10 of the Crown Suits Act 1947 and British Columbia through section 13 of the Crown Proceedings Act [RSBC 1996] both preclude execution. However, they both allow for the payment of such debts from the Consolidated Fund on production of the certificate.

[25] Act 1 of 1999.

promptly. They submitted that section 3 expressly authorises payment of a judgment debt sounding in money out of the funds, and further that in any event there are other remedies available to an aggrieved applicant such as a mandatory order, committal for contempt of court and a claim for damages.

[30] They further argued that in the event of non-compliance with a court order by an organ of state, such non-compliance can be reported to the Auditor-General or the Public Protector who have powers to investigate complaints regarding any alleged maladministration or improper conduct or undue influence by a person performing a public function.

Submissions of the amicus

[31] It was advanced on behalf of the CFCR that section 3 of the Act is constitutionally compliant and that a finding of unconstitutionality would not be in the interests of the state. It was submitted that section 3 proscribed the attachment of state property - the critical point is that property does not include money. Therefore, judgment creditors can also look to the funds to satisfy judgment debts.

[32] The amicus further submitted that an urgent *mandamus* is a quicker, cheaper, efficient and more back-straightening method of getting satisfaction of a judgment debt rather than the slow, expensive, labouring steps in levying execution. It also urged us to adopt the reasoning in *Magidimisi*,[26] as it strikes a balance between

[26] *Magidimisi NO v Premier of the Eastern Cape and Others*, 2180/04, 25 April 2006, unreported.

protecting the assets of the state against execution while allowing unpaid judgment creditors to get satisfaction of judgments by holding recalcitrant public servants to account.

[33] In *Magidimisi*, the applicant was seeking an order compelling the respondents to fulfil their constitutional and statutory obligations to comply with court orders against the province, by not only taking the steps necessary to ensure payment of the sums owing by the province to the applicant and others, but also by requiring the respondents to report to the court the manner and extent of their compliance.[27] Froneman J granted a *mandamus* with a structural interdict. However, I share the applicant's view that the *Magidimisi* solution does make section 3 unconstitutional, as an invitation to a judgment creditor to seek a *mandamus* defies the harsh realities of litigation with its inherent concomitant risks and expenses.

The constitutional issues

[34] The issues raised in this case are of fundamental importance to the maintenance of our constitutional dispensation. These issues can be delineated as follows:

(i) Whether section 3 of the Act limits any of the rights in the Constitution; and if so

(ii) Whether the limitation is reasonable and justifiable;

(iii) The proper interpretation of section 3; and

(iv) The remedy to which the applicant is entitled.

[27] Id at para 29.

[35] This Court is mandated to consider this application since it is an application for confirmation of an order of constitutional invalidity.[28] There is a general acceptance by all parties in the matter that there are constitutional issues at stake; the applicability of the Constitution in this matter therefore cannot be denied.

(i) Whether section 3 of the Act limits any of the rights in the Constitution

[36] Section 3 of the Act precludes attachment of the assets of the state and has been challenged by the applicant because it prevents the enforceability of court orders and therefore limits the applicant's right to life, dignity, equality and access to courts.

[37] In this Court, the applicant contended that section 3 is inconsistent with the Constitution because it violates sections 8, 9(1), 34, 165, 173 and 195(1)(f) of the Constitution. In the light of the view I take it is not necessary to consider all these challenges. It will be sufficient to focus on the provisions of sections 9 and 10 of the Constitution as these challenges largely overlap.

[38] Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

[39] It was submitted that section 3 makes an unjustifiable differentiation between a judgment creditor who obtains judgment against the state and a judgment creditor who obtains a judgment against a private litigant. This submission is sound.

[28] See above n 2.

[40] A judgment creditor who obtains judgment against a private litigant is entitled to execute against a private litigant in order to obtain satisfaction of the judgment debt. However, a judgment creditor who obtains judgment against the state is expressly prohibited from executing against state property in order to obtain the satisfaction of the judgment debt. The effect of this differentiation is that section 3 disallows a judgment creditor who obtains judgment against the state the same protection and benefit that a judgment creditor who obtains judgment against a private litigant enjoys.

[41] The differentiation made by section 3 must of course be viewed against the provisions of sections 8, 34 and 165(5) of the Constitution. Section 8(1) provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Section 34 guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. Section 165 of the Constitution provides:

> "(1) The judicial authority of the Republic is vested in the courts.
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
> (3) No person or organ of state may interfere with the functioning of the courts.
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[42] The effect of sections 8, 34 and 165, in particular, 165(5) is that an order issued by a court is binding on all persons to whom and organs of state to which it applies. These provisions of the Constitution do not treat state litigants differently from private litigants. In *De Lange v Smuts NO and Others*,[29] Ackermann J said the following concerning the obligation of the state to assist persons to enforce civil claims against debtors:

> "In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional state) 'citizens as well as non-citizens are entitled to rely upon the state for the protection and enforcement of their rights. The state therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors.'" (Footnote omitted.)

[43] Deliberate non-compliance with or disobedience of a court order by the state detracts from the "dignity, accessibility and effectiveness of the courts." Yet section 165(4) of the Constitution expressly imposes an obligation on organs of state "through legislative and other measures [to] assist and protect the courts to ensure the dignity, accessibility and effectiveness of the courts." Indeed in *Mjeni*, Jafta J had the following to say:

> "A deliberate non-compliance or disobedience of a court order by the state through its officials amounts to a breach of [a] constitutional duty [imposed by section 165 of the Constitution]. 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 the resolution of

[29] [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 31.

> 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 s 3 of Act 20 of 1957 encroaches upon that enforcement of rights against the state by judgment creditors."[30]

In *East London Local Transitional Council v MEC for Health EC and Others,* Ebrahim J agreed with Jafta J that—

> "[p]ublic officials and even Ministers of State may be held in contempt of Court in matters such as the instant one. But, in my view, there is a further reason for concluding that contempt proceedings are justified against them even though the judgment is for payment of a debt."[31]

[44] Section 3 effectively places the state above the law. The section, as it stands, does not positively oblige the state to comply with court orders as it should. This is not compatible with the plain language of sections 8, 34, 165(4) and (5) of the Constitution.

[45] The right to dignity entails the right to have one's dignity respected and protected.[32] The circumstances of this case show the potential that section 3 has for the limitation of the right to dignity. The applicant was made to wait for an extremely long time for money required to pay for his treatment. Without the rehabilitative treatment, he stood a very slim chance of survival. The state was made fully aware of this very desperate situation but provided no relief. He was then unable to attach state

[30] See above n 19 at 452G-H and 453C-D.

[31] 2001 (3) SA 1133 (Ck) at para 20; [2000] 4 All SA 443 (Ck) at para 21.

[32] See *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 144 where this Court found that:

> "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."

assets due to the operation of section 3. It certainly cannot be said, in these circumstances, that the applicant was treated in a manner that showed recognition for his worth and importance as a human being. The state is under a duty to ensure that an individual's right to life is not infringed and is also under a duty to ensure that this right is protected.[33] The state knew how vital the treatment was to the applicant yet did not act to ensure that he received it.

[46] Having waited for many months, the applicant eventually received interim payment, but only lived for a short while thereafter. Reliance on the state's goodwill and moral standards has in this case proved to be futile. Whether this denial is justified is a separate question that needs to be considered in light of the respondents' submissions on the protection of state interests and the circumstances of this case.

[47] Section 3 does not, therefore, treat judgment creditors as equal before the law. It also violates the dignity provisions of section 10. For all these reasons, I conclude that section 3 limits the right to equality before the law and the right to equal protection and benefit of the law guaranteed by section 9(1) and the right of access to courts guaranteed by section 34 of the Constitution. It now remains to consider whether such limitations are reasonable and justifiable under section 36(1) of the Constitution.

(ii) Whether such limitation is reasonable and justifiable

[33] See section 7(2) of the Constitution which provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

[48] One of the issues to be investigated by this Court, therefore, is whether the attachment provision in section 3 of the Act is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The nature and purpose of the rights of access to courts, equality, freedom; the democratic principles of state accountability; and the rule of law are important aspects of the Constitution which are implicated in this matter.

[49] It was argued on behalf of the respondents that if this Court held that the impugned section infringed any of the rights allegedly trumped by it and in particular sections 9 and 34 of the Constitution, then such infringement is justifiable in terms of section 36(1)[34] of the Constitution. The respondents argued that it is trite that the applicant's rights in the Bill of Rights, important as they may be to our constitutional democracy, may nonetheless be constitutionally limited where that limitation serves a legitimate and acceptable purpose and there is sufficient proportionality between the harm done by the legislation and the good sought to be achieved.[35]

[50] It is my view that the limitation imposed by section 3, with regard to attachment of state assets, is neither reasonable nor justifiable in these circumstances.

[34] Section 36(1) states that:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[35] See De Waal and Currie *The Bill of Rights Handbook* 5ed (Juta, Cape Town 2005) at 176.

Furthermore, the respondents' argument that the limitation is reasonable and justifiable because it serves to protect essential state assets from being attached is not convincing. In the case of *S v Bhulwana*,[36] it was held that when considering the legitimacy of a limitation that:

> "[T]he Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."[37]

[51] Section 3 serves to protect the state interests by disallowing attachment as it has the potential to disrupt service delivery and interfere with the state's accounting procedures. I agree that the attachment of certain state assets, for example ambulances and dialysis machines, would severely disrupt service delivery and would also unjustifiably limit the rights of many other individuals. There are few countries which allow such attachment and even if it is allowed, there is very specific legislation which prescribes the assets which can be attached, such assets being deemed to be non-essential to the proper functioning of the state.[38] The respondents have therefore

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[36] *S v Bhulwana* [1995] ZACC 13; 1996 (1) SA 388 (CC); 1996 (12) BCLR 1579 (CC).

[37] Id at para 18.

[38] For example, Queensland's Crown Proceedings Act 1980 section 11(1) and (2) allows for execution of state assets except:

> "(1) A judgment for or of money, damages or costs in a proceeding against the Crown shall be satisfied by the Treasurer by payment out of money—
>
> (a) in the Treasurer's hands for the time being, lawfully applicable thereto; or
>
> (b) that may be appropriated by Parliament for that purpose.
>
> (2) Where payment specified in subsection (1) is not duly made by the Treasurer, execution may be had and levied by distress and sale on any property vested in Her Majesty in right of the State of Queensland other than—
>
> (a) all property used, held, occupied or enjoyed or intended so to be by the Governor for the time being;

made very valid submissions in this regard. The respondents have, however, not made lack of resources an issue in this case.

[52] The Act does purport to make the state liable for judgment debts that accrue against it. However, the processes involved in gaining satisfaction of such debts are not in place. The doors are closed before compliance has been achieved. An in-depth analysis of case law in regard to state liability has revealed that at the core of the issue is a problem which can be located in the legislation as well as within state departments.[39] The legislative provision prevents the attachment of state assets but it does not inhibit a state's ability to pay a judgment debt. This matter has also revealed the flaws within the office of the State Attorney. There is a desperate need for change within these departments, and such change will be monitored by this Court.

(iii) The proper interpretation of section 3

[53] The analysis of section 3 of the Act needs to be considered in light of the abovementioned facts. The effectiveness of the existing procedures in regard to the satisfaction of judgment debts is essential in determining whether the section is constitutionally compliant. Section 3 of the Act prevents attachment of state assets but provides for claims to be made against the funds. In regard to claiming from the

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(b) the parliamentary buildings at Brisbane and all property therein or appertaining thereto or used or occupied therewith for the purposes of Parliament or of the Legislative Assembly;

(c) Supreme Court houses and other court houses and offices pertaining thereto;

(d) All corrective services facilities within the meaning of the Corrective Services Act, 2006 and all property therein or appertaining thereto or used or occupied therewith."

[39] See above n 18, 19 and 20.

funds, there are various provisions in the PFMA and Treasury Regulations which are supposedly designed to assist a judgment creditor in claiming from the funds.

[54] The respondents submitted that the PFMA and the Treasury Regulations (the Regulations) made thereunder contain sufficiently accessible procedures for payment of judgment debts.[40] The PFMA[41] was enacted in order to administer and control the National and Provincial Treasuries. The provisions relating to the payment of debts owing against the state are discussed below. The PFMA and Regulations are not concerned with the payment of debts generally, but with the settlement of claims by or against the state.

[55] Section 76(1)(h) of the PFMA states that:

> "(1) The National Treasury must make regulations or issue instructions applicable to departments, concerning—
>
> . . . .
>
> (h) the settlement of claims by or against the state."

The Regulations enacted in terms of section 76(1)(h) provide for claims against the state through acts and omissions. Regulation 12.2.1 provides:

[40] Treasury Regulations in GN R225, GG 27388, 15 March 2005.

[41] The preamble to the PFMA is as follows:

> "To regulate financial management in the national government; to ensure that all revenue, expenditure, assets and liabilities of that government are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in that government; and to provide for matters connected therewith."

> "An institution must accept liability for any loss or damage suffered by another person, which arose from an act or omission of an official as a claim against the state and does not recover compensation from an official".

Regulation 12.2.4 provides that the State Attorney may only obligate the funds of an institution with the prior written approval of the accounting officer.

[56] Section 76 goes on to provide for claims by the state against other persons, claims by officials against the state and losses and damages incurred by the state. It does not deal any further with the settlement of claims. More importantly, it does not contain any procedures relating to how orders of court are to be settled. Legislation must set out the procedures required for the implementation of the state's obligations, as dictated by the Constitution. These procedures, vital to our democracy founded on the rule of law, are absent here.

[57] In a different section of the Regulations, provision is made for payment of debts within 30 days.[42] This provision has been cited extensively by the respondents in an attempt to prove the constitutionality of section 3.[43] However, in my view, it is of no practical value to a judgment creditor because there are no procedures setting out how a litigant is to approach the Treasury or whom to contact.

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[42] Regulation 8.2.3 states:

> "Unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days from receipt of an invoice or, in the case of civil claims, from the date of settlement or court judgment."

[43] It is submitted by the respondents that the provisions of the PFMA read together with the Treasury Regulations—

> "impose an obligation on public administration, and the accounting officer of the relevant department in particular, under pain of criminal sanction and disciplinary action, to pay all debts owed by the state – including judgment debts – within thirty days."

[58] The respondents' submissions in regard to the PFMA and the Regulations cannot be accepted. The procedures referred to are inaccessible to the majority of creditors and are far too complex to constitute a reasonable fulfilment of the state's obligations in terms of the Constitution. The section does not deal at all with how court orders are to be satisfied.

The response of courts to section 3

[59] An assessment of the cases that have dealt with the Act and the liability of the state for its negligent actions have revealed that courts have been facing immense challenges in this area of the law. The various High Courts have approached the matter very differently and with disparate consequences.[44] However, the common denominator is that judicial officers have recognised that there is a serious problem caused by the fact that a judgment creditor who obtains an order sounding in money, may find that order unenforceable against the state.

[60] In more recent years, and in particular the period from 2002 onwards, courts have been inundated with situations where court orders have been flouted by state functionaries, who, on being handed such court orders, have given very flimsy excuses which in the end only point to their dilatoriness. The public officials seem not to understand the integral role that they play in our constitutional state, as the right of

[44] See above n 18, 19 and 20.

access to courts entails a duty not only on the courts to ensure access but on the state to bring about the enforceability of court orders.[45]

[61] In the case of *Mjeni*,[46] Jafta J found it necessary to make innovative changes to the existing law and to interpret the law as widely as possible. The Court located the constitutional duty that bound the state to pay in section 165 of the Constitution.

[62] The various courts across the land have tried to engage with this problem as best as possible and some have crafted innovative remedies, including the recognition of a *mandamus*, which would essentially order the head of the state department to comply with court orders.[47] However, this judicial interpretation has sometimes been met with significant confusion and uncertainty. In an attempt to find a proper solution to the problem, courts have entangled themselves in a maze of arbitrary classifications in so far as the law on state liability is concerned.

[63] In my view, there can be no greater carelessness, dilatoriness or negligence than to ignore a court order sounding in money, even more so when the matter emanates

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[45] See the dictum of Mokgoro J in *Chief Lesapo* above n 18, at 415B-G; 1999 BCLR 1420 (CC) where she remarked:

> "A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the State can be invoked to enforce an obligation, or prevent an unlawful act being committed."
> . . . .
> An important purpose of s34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law. Execution is a means of enforcing a judgment or order of court and is incidental to the judicial process. It is regulated by statute and the Rules of Court and is subject to the supervision of the court which has an inherent jurisdiction . . . ." (Footnotes omitted.)

[46] See above n 18, at 452C – 453H.

[47] Id.

from a destitute person who has no means of pursuing his or her claim in a court of law. But we now have some officials who have become a law unto themselves and openly violate people's rights in a manner that shows disdain for the law, in the belief that as state officials they cannot be held responsible for their actions or inaction. Courts have had to spend too much time in trying to ensure that court orders are enforceable against the state precisely because a straightforward procedure is not available.

Conduct of the State Attorney

[64] It is here necessary to consider the manner in which the applicant sought to enforce the judgment debt against the state. The applicant approached the State Attorney and requested payment of the money owed. The State Attorney promised to pay and then failed to do so.[48] Reasons were not given for the failure to pay nor did the State Attorney offer any guidance as to when payment would be made.

[65] The State Attorney then indicated that its client, the first respondent, had decided to bring an application for rescission but could not indicate the basis of such application nor the reason for the instruction. This protracted correspondence all occurred whilst the applicant's health deteriorated steadily. The applicant requested to communicate directly with the first respondent and thereafter contacted the senior legal administrator in the first respondent's department. Communications failed

[48] The debt was referred to the Pretoria Academic Hospital, which according to Circular 17 of 2003 issued by the Head of Department, was responsible for payment of the debts arising out of any claims against the hospital. The circular provides that as from 1 April 2003 the institutions and components where the cause of a claim or litigation arises, will be required to pay such costs from their budget.

between the parties and explanations as to the lack of payment were still not forthcoming. The interim payment sought by the applicant was only received when this Court made a request for such payment to be made.

[66] The fact that payment was only made once the applicant approached this Court for relief reflects the fact that the current procedure of approaching the State Attorney is not effective. There are multiple state institutions involved in the authorisation and administration of debts against the state and this has contributed significantly to the delays in this matter and related matters. It is a convoluted and difficult method which is, as is evident in this matter, largely unsuccessful.

[67] It is evident from the factual matrix before us that there is a breakdown in communication between the office of the State Attorney and the first respondent. The first respondent is the client of the State Attorney yet there is much 'bureaucratic bungling' which impedes the delivery of justice. There is no need for such delays when there is already in existence a court order for payment.

[68] An affidavit was presented on behalf of the State Attorney's office indicating the reasons for its failure to file an appearance to defend in the High Court, as well as its failure to inform the relevant state officials of the outstanding judgment debts. The reasons given are largely unsatisfactory and provide no real solution to problems within the department.

[69] These reasons have, however, been taken into consideration, yet it must be noted that this Court commented on this very problem over a year ago in the *Liquor Traders* case.[49] Precious little has since been done to rectify the situation and I cannot accept further excuses for the ineptitude, especially after the State Attorney has been made fully aware of the alarming state of affairs. In *Liquor Traders,* this Court made the following remarks with regard to the inefficiency of the State Attorney:

> "It is serious because as a matter of common practice it is the State Attorney who is briefed by the government when it is involved in litigation. Given the government's responsibility to assist the work of courts, a lapse of this sort in the State Attorney's office gives cause for grave concern."[50]

In that case, this Court ordered costs against the office of the State Attorney *de bonis propriis* on the scale as between attorney and client, and not personally against the attorney concerned.[51] The costs order was indicative of the Court's displeasure and was "primarily directed against the office of the State Attorney in Pretoria whose systems of training and supervision appear to be woefully inadequate."[52] Relying on the moral obligation of the State Attorney and the Department of Justice to improve the state of affairs has been an exercise in futility. I, accordingly, find that the

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[49] *South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others* [2006] ZACC 7; 2006 (8) BCLR 901 (CC).

[50] Id at para 52.

[51] Id at para 54.

[52] Id. See also para 48, where O'Regan J quotes from *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607:

> "The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

relevant state institutions should take steps to rectify the problems highlighted above and report back to this Court as to the progress made.

[70] The respondents have made various submissions about the manner in which the conduct of state functionaries can be dealt with. They have referred to the provisions of the PFMA and the Regulations as well as to the option of instituting contempt of court proceedings against the relevant officials. These options are considered below.

[71] The PFMA read with the Regulations provides for disciplinary proceedings to be instituted against the relevant accounting officer or official and also makes provision for the conduct to be regarded as a criminal offence.[53] Section 85(1)(b), (c) and (d) of the PFMA read with Regulation 33 deal with financial misconduct. Section 85(1) reads as follows:

> "(1) The Minister must make regulations prescribing—

53 Regulation 33.2 read with section 86 of the PFMA provide for criminal proceedings to be instituted against an accounting officer. Section 86 of the PFMA provides as follows—

> "(1) An accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40.
>
> (2) An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55."

Regulation 33.2.1 provides—

> "The accounting authority must advise the Auditor-General and the relevant executive authority and treasury of any criminal charges it has laid against any person in terms of section 86 of the Act."

Regulation 33.2.2 provides—

> "The executive authority or relevant treasury may direct a public entity to lay charges of criminal financial misconduct against any person should an accounting authority fail to take appropriate action."

(a) the manner, form and circumstances in which allegations and disciplinary and criminal charges of financial misconduct must be reported to the National Treasury and the Auditor-General, including—

(i) particulars of the alleged misconduct;

(ii) the steps taken in connection with such financial misconduct;

(b) matters relating to the investigation of allegations of financial misconduct;

(c) the circumstances in which the National Treasury may direct that disciplinary steps be taken or criminal charges be laid against a person for financial misconduct;

. . . . "

Section 85 is to be read with Regulation 33.1 which provides the following:

"33.1.1 If an employee is alleged to have committed financial misconduct, the accounting authority of the public entity must ensure that an investigation is conducted into the matter and if confirmed, must ensure that a disciplinary hearing is held in accordance with the relevant prescripts.

33.1.2 The accounting authority must ensure that the investigation is instituted within 30 days from the date of discovery of the alleged financial misconduct.

33.1.3 If an accounting authority or any of its members is alleged to have committed financial misconduct, the relevant executive authority must initiate an investigation into the matter and if the allegations are confirmed, must ensure that appropriate disciplinary proceedings are initiated immediately.

33.1.4 The relevant treasury may, after consultation with the executive authority,—

(a) direct that a person other than an employee of the public entity conducts the investigation;

(b) issue any reasonable requirement regarding the way in which the investigation should be performed."

[72] These procedures are internal disciplinary procedures which are to be handled by the relevant Head of Department or the Treasury. There has been no indication by the second respondent as to whether these mechanisms are in fact implemented or whether they are effective. In light of the persistent inefficiency within the state departments, these procedures have not proven to be of any assistance.

[73] The provisions of the PFMA and the subsequent Regulations are not, in my view, designed to effectively deal with accounting authorities who disobey court orders. The relevant sections make provision for disciplinary proceedings following upon financial misconduct and criminal proceedings in the event that a state functionary fails to comply with the broad objectives of the PFMA. Whether or not financial misconduct includes the failure to pay judgment debts is not set out clearly.

[74] There is a desperate need for legislation to be enacted that will specifically target the areas of concern outlined in this judgment. The apathy of state officials in their failure to pay judgment debts cannot be addressed unless progressive, targeted steps are taken towards solving these problems.

[75] In regard to the possibility of contempt proceedings being instituted against state functionaries, one must bear in mind that these proceedings would have to be instituted by the judgment creditor once the relevant state functionary fails to pay the

monies owed.[54] The judgment creditor would have to obtain a *mandamus* order and if the state functionary does not comply with the *mandamus* then he or she would be held in contempt of court. This process is a tedious one which places an onerous burden on the judgment creditor and does not translate into money in the pocket for the judgment creditor. Once a litigant is in possession of a judgment debt, he or she should not be expected to pursue the payment thereof *ad infinitum*. One cannot expect the creditor who has already gone to a great deal of trouble, and spent both time and money in litigation, to launch contempt of court proceedings against the defaulting state official in the knowledge that such proceedings are unlikely to ensure that the debt is ultimately paid. This is too onerous a burden to place upon a successful litigant.[55] The state needs to take responsibility for its employees and ensure that defaulting state officials are subject to the disciplinary action as envisaged in the legislation and regulations.

[76] The English Courts have looked at the possibility of holding officials responsible for wrongs that they have committed in their official capacity.[56] They

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[54] See *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 8, where the Supreme Court of Appeal considered contempt proceedings and had the following to say as regards the institution of contempt proceedings:

> "In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law." (Footnotes omitted.)

[55] Id at para 42(c) where the court held that the standard of proof required for civil contempt of court proceedings is one of proof beyond a reasonable doubt. I agree that the standard of proof required as found by the Supreme Court of Appeal is correct but it is necessary to consider here that the onus placed on the creditor is immense and involves proving the highest standard of proof in our law. This onerous burden cannot be placed on a judgment creditor who seeks the enforcement of a debt already proven in a court of law.

[56] *M v Home Office* [1993] 3 All ER 537 at 540.

proceed on the premise that, in committing the wrongs, such officials are stepping outside of the realm of protection afforded to public officials under the Crown Proceedings Act.[57] The possibility of a similar route in South Africa is, however tempting, impractical. The committal of public officials would only result in the 'naming and shaming' of such officials and would produce no real remedy for the aggrieved litigant who is primarily concerned with the payment of the judgment debt. The potential disruption of already overburdened state departments is also a result which should be avoided.

[77] The problems faced in this matter are different. First, the procedures and mechanisms required to enforce claims against the funds are lacking and this needs to be addressed with due consideration of the competing interests involved in this matter.

[78] Secondly, state administration is inefficient and ineffective. The conduct of state officials undermines the legitimacy of both the judiciary and the state. Generally, relevant state departments are in the best position to assess the magnitude of the problems faced by their personnel and are similarly in the best position to address the systemic failure of state officials to perform their duties. These state institutions need to look at these failings holistically and consider the best manner in

[57] Section 25(4) of the Crown Proceedings Act 1947 provides:

> "Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown, or any Government department, or any officer of the Crown as such, of any such money or costs."

which to deal with the problems at hand. This Court is not in a position at this stage to assess the problems faced.

(iv) Appropriate remedy

[79] The practical effect of section 3 is that the state cannot be forced to honour court orders as there is no manner in which compliance can be enforced. In the result, the ordinary citizen has no effective remedy available in a situation where the state and its officials fail to comply with a court order. In terms of contempt proceedings the High Court found that section 3 of the Act does not mean that a Minister cannot be arrested for contempt of court. It was held that Ministers of State and other public officials can in fact be held in contempt in the exercise of the courts' inherent power to protect and regulate their process, especially in light of section 173 of the Constitution.[58] However, contempt of court proceedings do not put money in the pocket or food on the table.

[80] Certain values in the Constitution have been designated as foundational to our democracy.[59] This in turn means that as pillar-stones of this democracy, they must be

[58] Section 173 provides that:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[59] Section 1 of the Constitution states that:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.

observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That, in my view, means at the very least that there should be strict compliance with court orders.

[81] The state's function is to execute its duties in terms of the relevant legislation. The failure of the state to edify its functionaries about the very legislation which governs their duties is unacceptable. It may be true that the problem lies with the officials who do not know what their responsibilities are and, regrettably, with legal representatives who do not know who the responsible functionaries are. However, this ignorance is no justification for their failings. It may explain the cause of the problem, but it constitutes neither a good excuse nor a justification thereof and cannot serve to protect the state from being held responsible.

[82] In terms of section 172(1)(b) of the Constitution, a court which has declared a statutory provision to be unconstitutional, and therefore invalid, may make any order that is just and equitable, including "an order limiting the retrospective effect of the declaration of invalidity" and "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[83] As stated earlier, the courts have referred to the obligations of the state to pay its debts as a moral obligation[60] and one which should, as a consequence of being elected to power, be exercised in the interests of maintaining confidence in its rule. This reliance on the moral obligation of the state to pay its debts is no longer acceptable, as it has proven to be unproductive and has revealed the state's inability or refusal to abide by its own moral standards. Hence, we need legislative measures that will provide an effective way in which judgment orders may be satisfied, and mechanisms that will inform the litigants in detail on the procedures that they will need to follow regarding payment of court orders against the state. It has become necessary for this Court to oversee the process of compliance with court orders and to ensure ultimately that compliance is both lasting and effective.

[84] The legislature is mandated to ensure the impartiality and efficiency of the courts and their accessibility via legislative measures. It is apparent from the facts and history of this case that the legislature and the executive have not taken measures, legislative or otherwise, to ensure that the orders of a court are obeyed. What is required in this matter is for the state to take heed of the order made by this Court and

[60] *Minister of Finance v Barberton Municipal Council* 1914 AD 335 at 353-355 where Innes JA made the following remarks in reference to the Crown Liabilities Act:

> "But the statute seems to me to proceed upon the lines of granting to the courts jurisdiction to entertain actions against the Crown, but treating the resulting decrees as not legally, but only morally binding upon the nominal defendant. Even in the case of judgments for money the minister 'may cause' the amounts to be paid out of the Consolidated Fund, but he is not legally bound to do so.
>
> . . . .
>
> The object clearly was to ensure that judgments given against the Crown should not be enforced by legal process.
>
> . . . .
>
> The legislature has been content to rely upon the moral obligation which such decrees are bound to exercise upon all concerned."

change the manner in which it deals with the satisfaction of judgment debts. This is in line with the constitutional duty placed on it.[61]

[85] It is indeed unfortunate that judicial officers are placed in the invidious position of having to oversee state action. However, oversight is essential in the circumstances. In the interests of justice and in an effort to uphold the rights and principles that are espoused in our Constitution, there can be no other effective manner to ensure that the state complies with the order.[62]

[86] Because of the 200-odd cases against the state for payment of judgment debts, there is a need for finality in those cases. An effective manner of dealing with the problem at hand is to allow attachment against the funds. This would have a minimal impact on the proper functioning of the state as the judgment creditor would be executing against a fund and not against assets that are required for essential services. The state has not made lack of resources an issue and has recognised that the problem is an administrative one. The administrative delays can therefore be overcome if execution is allowed. I do, however, recognise the need for proper accounting procedures and the need to respect the authority of other arms of the state – even those organs that do not always accord the courts the same respect. The practice in other

[61] Above [42].

[62] In *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 19 this Court held that—

> "[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights." (Footnote omitted.)

countries is to issue a certificate, which on presentation to the relevant authorities will result in payment.

[87] Bearing in mind the many instances of state officials' inefficiency, the only effective way to ensure that all outstanding debts are satisfied is to make an appropriate order. I shall make that order.

[88] Regard needs to be had to the state's interest in monitoring and controlling its accounting procedures and in being able to account for the losses, expenditures and liabilities that the state incurs. The respondents have referred more than once to the accounting processes which this Court should bear in mind when making a decision and this is a valid submission which needs to be considered seriously. The PFMA and the Regulations contain numerous provisions relating to accounting procedures and the manner in which they are controlled and supervised. These processes are within the domain of the executive and should not be interfered with unless clear and compelling reasons exist for doing so. In as much as this Court has the power to craft any order it deems fit in the circumstances, it does have to ensure that the order is not too wide or far-reaching. Having looked at the PFMA and the complex procedures in place to account for state assets, as well as the other regulations in place to manage state finances, it is my view that the legislature should be allowed to introduce mechanisms that would enable a judgment creditor to execute against the funds. The legislature is in the best position to make this decision and also to integrate any policy changes that would then have to be made. The separation of powers doctrine needs to

be respected and due deference afforded to the other arms of government, especially when the matter relates to complex procedures beyond the expertise of this Court.[63] On the concept of deference, this Court in *Bato Star* further stated that—

> "[t]he need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself."[64]

[89] This area of law has been problematic not only for South Africa, but for other jurisdictions that have struggled to reach a balance between state immunity from tort liability and government accountability to the state's citizens. In a state that has pledged itself to redeem the dignity of its citizens, it should not be the state itself that tramples on the rights of its citizens. On the contrary, everyone should be working tirelessly to protect and promote that dignity, it being accepted that we are dealing with a majority of previously disadvantaged persons.

Appeal of the first respondent

[90] In its answering affidavit the first respondent sought to appeal against the confirmation of the order of invalidity in terms of section 172(2)(d) of the

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[63] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 46, where the following was quoted in reference to the concept of deference in regard to administrative action:

> "[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies".

[64] Id.

Constitution read with Rule 16 of the Constitutional Court Rules.[65] The retort by the applicant in this matter was sharply that such appeal should not be entertained by this Court as it was out of time and not in compliance with the requirements of Rule 16(5) of the Constitutional Court Rules.[66] This line was not pursued in argument at the hearing, correctly so in my view, as it was liable to be shot down on making its appearance.

Costs

[91] I turn now to consider the question of costs. The issues raised in these proceedings are of considerable importance. In dealing with the question of costs, we need to take into account the way in which the State Attorney's office has conducted litigation in the High Court and in this Court. This application was brought to this Court as a result of the negligent disregard of an existing court order. The ineffective negligent acts of state officials resulted in a comedy of errors which could easily have been avoided. The respondents, as organs of state, bear a special obligation to ensure that the work of the judiciary is not impeded. In the circumstances, it is appropriate for costs to be awarded against the respondents.

[65] Rule 16(2) provides as follows:

> "A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge a notice of appeal with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice."

[66] Rule 16(5) provides as follows:

> "If no notice or application as contemplated in subrules (2) and (4), respectively, has been lodged within the time prescribed, the matter of the confirmation of the order of invalidity shall be disposed of in accordance with directions given by the Chief Justice."

Order

[92] The following order is made:

(1) The order of constitutional invalidity made by the Pretoria High Court is confirmed in the following terms:

> Section 3 of the State Liability Act is declared to be inconsistent with the Constitution to the extent that it does not allow for execution or attachment against the state and that it does not provide for an express procedure for the satisfaction of judgment debts.

(2) The declaration of invalidity is suspended for a period of 12 months to allow Parliament to pass legislation that provides for the effective enforcement of court orders.

(3) a) The second respondent is required to compile and provide to this Court on affidavit a list of all unsatisfied court orders against all national and provincial state departments, indicating the parties, the case number and the amounts outstanding, by no later than 31 July 2008.

(b) Further directions may be issued by the Chief Justice, as necessary.

4) The second respondent is required to provide this Court on affidavit with a plan of the steps it will take to ensure speedy settlement of unsatisfied court orders by no later than 31 July 2008.

5) The respondents are ordered to pay the applicant's costs, such costs to include the costs consequent upon the employment of two counsel.

Moseneke DCJ, Ngcobo J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J all concur in the judgment of Madala J.

NKABINDE J:

Introduction

[93] I have had the privilege of reading the judgment of Madala J. After anxious consideration, I am unable to agree with much of his reasoning and parts of the finding. I cannot accept that the impugned portion of section 3 of the State Liability Act (the Act)[1] is inconsistent with the Constitution and therefore invalid. Although only a portion of section 3 is impugned, it is convenient to set out the section in full. It reads:

> "*No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any 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 National Revenue Fund or a Provincial Revenue Fund, as the case may be." (Emphasis added.)

[1]Act 20 of 1957.

[94] The declaration of constitutional invalidity by Davis AJ in the Pretoria High Court[2] is a sequel to the non-compliance by the first respondent or officials in his department with an order of that Court, per Mabuse AJ. This case is about the non-compliance with that order. In my view, since the non-compliance can neither be justified nor authorised under section 3 of the Act, the unlawful conduct by the state officials concerned cannot form a basis for attacking the validity of the section.

[95] The problem of non-compliance with court orders has frequently confronted our courts in recent times and various solutions have been devised to ensure the satisfaction of judgment debts. In some cases, courts have opted for contempt proceedings to enforce money judgments against the state.[3] In other cases structural interdicts have been granted.[4] The solutions in those cases appear to have been effective in satisfying the judgment debts in question.

[96] Following the judgment of the Supreme Court of Appeal in *Jayiya v Member of the Executive Council for Welfare, Eastern Cape and Another*,[5] confusion followed as to whether contempt of court proceedings could be used to enforce money judgments against the state. In that case, the Court overruled the decision of the High Court

[2] *Nyathi v MEC, Department of Health, Gauteng and Another* Case No. 26014/2005, 30 March 2007, unreported.

[3] See for example *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkHC) at 454A-G; *East London Transitional Council v MEC for Health, Eastern Cape and Others* 2001 (3) SA 1133 (Ck); [2000] 4 All SA 443 (Ck) at paras 19-21; *Federation of Governing Bodies of South Africa (Gauteng) v MEC Education, Gauteng* 2002 (1) SA 660 (T) at 678G-679H; *Lombard v Minister van Verdediging* 2002 (3) SA 242 (T) at 246G-H.

[4] See for example *Magidimisi and Others v The Premier, Eastern Cape and Others* Case No. 2180/04, 25 April 2006, unreported.

[5] 2004 (2) SA 611 (SCA); [2004] 1 BPLR 5348 (SCA); [2003] 2 All SA 223 (SCA).

which had upheld the proposition that a money judgment could be enforced by way of committal proceedings.[6] However, the Supreme Court of Appeal later clarified the position in *MEC, Department of Welfare, Eastern Cape v Kate*.[7] Nugent JA, writing for the entire Court, said:

> "It goes without saying that a public functionary who fails to fulfil an obligation that is imposed upon him or her by law is open to proceedings for a *mandamus* compelling him or her to do so. That remedy lies against the functionary upon whom the statute imposes the obligation, and not against the provincial government. If *Jayiya* has been construed as meaning that the remedy lies against the political head of the government department, as suggested by the Court below, then that construction is clearly not correct. The remarks that were made in *Jayiya* related to claims that lie against the State, for which the political head of the relevant department may, for convenience, be cited nominally in terms of s 2 of the State Liability Act 20 of 1957, though it is well established that the government might be cited instead. Moreover, there ought to be no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt, in accordance with ordinary principles, and there is nothing in *Jayiya* that suggests the contrary."[8] (Footnotes omitted.)

[97] According to the above dictum, a judgment creditor is free to seek a *mandamus* against the public official who fails to comply with a court order. What the judgment creditor is precluded from doing is seeking committal of the state official concerned for failure to satisfy a judgment debt without first obtaining a *mandamus* because, in the view of the Supreme Court of Appeal, that would constitute the creation of a crime that does not exist under the common law.[9] It must be stressed however that the

[6] Id at paras 14-15, 22-23.

[7] 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA).

[8] Id at para 30.

[9] *Jayiya* above n 5 at para 18.

remarks by the Supreme Court of Appeal must not be construed as meaning that a *mandamus* cannot be sought against political heads of state departments. The remarks were made in the context of the case before that Court. It follows that the remedy of *mandamus* is available against any public official who is obliged to do something by a statute but fails to act promptly or diligently.

Parties

[98] The applicant, Mr Nyathi, died on 4 July 2007. His wife, Mrs Lemyiwe Angelina Nyathi, successfully applied in terms of Rule 7(2)[10] of the Rules of this Court, to be appointed to substitute him. The first respondent, sued in his nominal capacity, is the Member of the Executive Council for Health in the Gauteng Province (MEC). The second respondent, also cited in her nominal capacity, is the Minister for Justice and Constitutional Development (Minister). She was joined[11] during the proceedings in the High Court in compliance with Rule 10A of the Uniform Rules of Court (Uniform Rules).[12] The amicus curiae, the Centre for Constitutional Rights, was admitted to advance submissions and present oral evidence.

Factual background

[10] Rule 7(2) provides:

> "Where an authorised or other competent person has been so appointed, the Court may, on application, order that such authorised or competent person be substituted for the party who has so died or become incompetent."

[11] The Minister is the national executive authority responsible for the administration of the Act. The purpose of joining the Minister was to enable her to advance submissions pertaining to the constitutionality of the impugned legislative provision.

[12] Rule 10A reads:

> "If, in any proceedings before the court, the constitutional validity of a law is challenged, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings."

[99] The circumstances that gave rise to the claim by the applicant have been set out comprehensively in the main judgment. I will not deal with them in great detail save for the facts upon which I base my findings and conclusion.

[100] The applicant sued the MEC for damages in the sum of R1 496 000 suffered as a result of the negligence of the professional, medical and nursing staff at Pretoria Academic Hospital and Kalafong Hospital. The MEC conceded the merits of the applicant's claim. The matter was set down for the determination of quantum. It was finally settled by the parties on 23 May 2007.[13]

[101] While waiting for the hearing on the determination of quantum, the applicant addressed a letter to the State Attorney requesting an interim payment in the amount of R317 700 so that he could, among other things, undergo medical treatment due to the deterioration of his medical condition. He informed the State Attorney that he would lodge an application for an interim payment if no payment were received within 14 days of the letter. The State Attorney advised the applicant that the request for payment had been sent to the MEC[14] and that it was not necessary to obtain an order for interim payment in terms of Rule 34A of the Uniform Rules.[15] The State

[13] The capital amount of the claim was paid on 25 June 2007, supposedly after the intervention of this Court.

[14] The official who handled the case in the MEC's department was a Mr Sithole.

[15] Rule 34A(1), insofar as is relevant, provides:

> "In an action for damages for personal injuries or the death of a person, the plaintiff may, at any time after the expiry of the period for the delivery of the notice of intention to defend, apply to the court for an order requiring the defendant to make an interim payment in respect of his claim for medical costs and loss of income arising from his physical disability or death of a person."

Attorney informed the applicant that the MEC offered to pay an amount of R500 000 in full and final settlement of the applicant's claim but the applicant rejected the offer.

[102] On 30 August 2006 the State Attorney addressed another letter to the applicant, indicating that the MEC did not dispute that it might in the future be liable for payment of some of the costs but asked that the interim payment be suspended pending a determination on the issue of costs. On 22 November 2006 the applicant applied for and was granted an order by Mabuse AJ for payment of an interim amount of R317 700. When no payment was forthcoming, another letter together with the court order was sent by registered mail to the State Attorney. In the letter the applicant indicated that he would apply for an order to compel the MEC to comply with the order by Mabuse AJ if no payment were received.

In the High Court

[103] Consistent with the procedure permitting an application for a *mandamus* as contemplated in *Kate*,[16] on 23 March 2007 the applicant launched an urgent application in the High Court against the MEC. The Minister was also cited because the relief sought included an order declaring section 3 of the Act to be inconsistent with the Constitution and thus invalid. Part of the relief sought was formulated thus:

> "[The MEC] 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 [MEC] to

[16] Above n 7 at para 30.

> be in contempt of court and an order committing the [MEC] to gaol for a period of 90 days."

[104] The basis upon which an order for constitutional invalidity was sought in the High Court needs to be clearly set out. Having pointed out that the court order had been ignored for three months, the deponent to the founding affidavit formulated the cause of action for the declaration of constitutional invalidity in the following terms:

> "34. By virtue of the provision of section 3 of [the Act] no execution, attachment or like process can be issued against the [MEC] to satisfy the judgment debt.
>
> 35. Applicant finds himself in a stalemate position in that there is nothing he can lawfully do to enforce the judgment in his favour. Because [the MEC] blatantly ignores the court order, the Applicant gradually sinks further and further in the quagmire and is powerless to do anything about it.
>
> 36. I respectfully submit that the provisions of section 3 of [the Act] is unconstitutional in that it infringes the right of the Applicant to human dignity, his right to life and his right to access to court. The provisions of Section 3 furthermore have the result that there is no equality before the law in that there is no mechanism available to the Applicant to enforce his right to payment of the judgment debt against the State."

[105] While it is true that section 3 prohibits execution or attachment against a nominal respondent, it is incorrect for the applicant to say that there was nothing he could lawfully do to enforce the judgment debt. It is self-evident from his papers that he could apply for and did in fact ask for a *mandamus.* Furthermore, the assertion that the MEC "blatantly ignore[d] the court order" is incorrect. In his papers the applicant did not show that the order and papers were served on the MEC despite the mandatory

relief sought against him. Instead he stated that the order was served on the State Attorney. It has since transpired that the MEC was not aware of the order in question.

[106] It appears that at the hearing of the application, the State Attorney handed up a note indicating that the court order had been forwarded to the accounts department to process payment which would reflect in the applicant's banking account within 14 days.[17] The State Attorney applied for a postponement of the application. The Court, imputing knowledge of the application to the MEC and the Minister on the basis of the handwritten note from the State Attorney and the request for a postponement by the latter, refused to postpone the case. It then proceeded with the matter on an unopposed basis despite the fact that the issue, as apparent from a reading of the judgment, was a profoundly contentious one.[18]

[107] The High Court, having considered the constitutional validity of the impugned provision on the applicant's version, granted an order by default declaring section 3 to be inconsistent with the Constitution.[19] Relying on *Jayiya*,[20] the Court said that the appropriate remedy for payment of a money judgment would be to levy an execution and not proceed with contempt proceedings.[21] The Court seemingly implied that a mandatory order would be inappropriate. It relied also on *N and Others v The*

[17] Above n 2 at para 3.7.1.

[18] Id.

[19] Id at para 30.

[20] Above n 5 at paras 14-15. The application in *Jayiya* was for committal for non compliance with an order for payment of a certain lump sum of money with interest claimed by way of constitutional damages. The Court held that the application for committal was misconceived in a number of respects.

[21] Above n 2 at para 7.

Government of the Republic of South Africa (No 3),[22] *York Timbers Ltd v Minister of Water Affairs and Forestry and Another,*[23] *Kate v MEC for the Department of Welfare, Eastern Cape*[24]and *Matiso and Others v Minister of Defence*[25] for the view that the money judgment in the present case could not be enforced against the state. In this view the High Court found support in the Crown Liabilities Act[26] which, the Court found, "equally prohibited the enforcement of orders of court."[27] The High Court said[28] that the ratio for the prohibition was stated in *Schierhout v Minister of Justice.*[29] In that case Innes CJ said:

> "The policy of the Act . . . .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 Crown representatives or Crown property."[30]

[108] I am unable to understand how the object of the Act fortifies the view that judgment debts cannot be enforced against the state. The Act shows instead that

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[22] 2006 (6) SA 575 (D&CLD) at paras 28-29.

[23] 2003 (4) SA 477 (T) at 500I-501A; [2003] 2 All SA 710 (T) at 731d-f.

[24] 2005 (1) SA 141 (SE); [2005] 1 All SA 745 (SE) at para 21. The Court in this matter sought to overcome the prohibition contained in the Act by reading and interpreting *Jayiya* so as to allow for an "adapted common law rule 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."

[25] 2005 (6) SA 267 (TkD) at para 19. The Court held that an application for committal for contempt of court as a means of enforcing a money judgment against the state is precluded by section 3 of the Act.

[26] Act 1 of 1910, the predecessor of the Act.

[27] Above n 2 at para 10.

[28] Id.

[29] 1926 AD 99. In that case the Court, per Innes CJ, considered the provisions of the Crown Liabilities Act 1 of 1910 and the enforcement of orders made pursuant to that legislation.

[30] Id at 110-11. The passage is also quoted by the High Court, above n 2 at para 10.

Parliament intended the state to be bound by courts' decisions although it did not provide for an enforcement agency in the event of non-compliance by the state. In *S v Mamabolo (E TV and Others Intervening)*,[31] this Court, per Kriegler J, said:

> "In our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights—even against the State."[32]

It is in the above context that the remarks in *Schierhout*, referred to by the High Court in this matter, must be read and understood.

[109] Relying on its incorrect construction of *Jayiya* and the MEC's failure to comply with the court order, the High Court concluded that the applicant's right of access to courts as enshrined in section 34 of the Constitution[33] had effectively been infringed.[34] The Court held that section 3 of the Act places the state and its officials above the law

[31] [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC).

[32] Id para 16.

[33] Section 34 of the Constitution states:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[34] Above n 2 at paras 13 and 19.

and beyond the very orders which should bind it or hold it accountable as it is inconsistent with sections 165(5)[35] and 195(1)(f)[36] of the Constitution.

[110] A prohibition in section 3 against execution or attachment of state property or personal property of a nominal respondent or defendant cannot, in my view, be construed to mean that the state or public officials are above the law or beyond the reach of court orders. As mentioned above, the High Court's reasoning is based on an incorrect premise that judgment cannot be enforced against the state. Moreover, the Court's reliance on sections 165(5) and 195(1)(f) for the finding that section 3 is inconsistent with the Constitution fell outside the pleaded case.[37]

[111] Regarding the prayer for an order to compel the MEC to comply with the order dated 22 November 2006 within three days of the order to be granted by the High Court, Davis AJ remarked:

> "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

[35] Section 165(5) of the Constitution states:

> "An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[36] Section 195(1) of the Constitution requires that the public administration must be governed by the democratic values and principles enshrined by the Constitution. Subsection 195(1)(f) specifically requires that the public administration must be accountable.

[37] The outline of the applicant's cause of action is quoted in full at para 12 above.

> 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."[38] (Emphasis added.)

In this Court

[112] When this matter was called for the first time in this Court the payment of the interim amount had, regrettably, not yet been made. The matter was postponed and the Court issued further directions in the following terms:

> "The respondents shall file their answering affidavits on or before Friday 22 June 2007. The first respondent is called upon to set out, in the affidavits filed on his behalf, the reasons for his failure to comply with the order of court made by Mabuse AJ on 24 November 2007 as well as identify by name those officials who were responsible for the failure. Once those affidavits have been filed, the Chief Justice may issue further directions.
>
> . . . .
>
> The State Attorney, Pretoria, Ms Mosidi, is directed to file an affidavit fully explaining the reason for the failure by her staff to take instructions adequately from the respondents in this matter as well as the matter in which her staff has generally conducted the litigation on behalf of the respondents in this matter. She is also called upon to set out what steps she is taking to prevent the recurrence of unprofessional conduct in future. Ms Mosidi is requested to be present at the hearing of this matter on 30 August 2007."

The matter was finally heard on 30 August 2007.

[113] It was contended on behalf of the applicant that the impugned provision infringes a person's right of access to courts under section 34, is inconsistent with section 165(5) and frustrates the constitutional injunction under section 195(1). It was

[38] Above n 2 at para 26.

contended that there is absolutely nothing a litigant can do when there is no compliance with court orders by the state.

[114] The MEC and the Minister opposed the confirmation of constitutional invalidity on the basis that the impugned section does not constitute a violation of any of the rights in the Constitution because the section does not prohibit the payment by the state. They argued that the section expressly authorises payment and that section 3 should be construed in a manner consistent with the relevant provisions of the Constitution. It was argued further that the provision is a barrier against the disruption of public services.

[115] The Minister contended that section 3 must be read with other legislation, in particular, the Public Finance Management Act 1 of 1999 (PFMA) read with the Treasury Regulations made under the PFMA.[39] Reference was made to the legal mechanisms available to a money judgment creditor in the form of the granting of a mandatory order against the responsible official. The respondents argued that neither section 3, nor any part of it, is inconsistent with the Constitution, alternatively, that if it were so, the limitation is justifiable in terms of section 36 of the Constitution.

[116] The amicus made helpful written and oral submissions for which I am grateful. It contended that section 3 is not inconsistent with the Constitution, and argued that

[39] Treasury Regulations published in GN R225, GG 27388, 15 March 2005. Para 8.2.3 of the Regulations reads:

> "Unless determined otherwise in a contract or other agreements, all payments due to creditors must be settled within 30 days as from receipt of an invoice or, in the case of civil claims, from the date of settlement or court judgment."

the granting of a mandatory order was a "quicker, cheaper and a more back-straightening method" of ensuring payment of a money judgment instead of the expensive and cumbersome process of attachment. The amicus urged this Court to follow the approach adopted by the Bisho High Court in *Magidimisi*[40] so as to force recalcitrant state officials to be accountable.

Constitutional validity of section 3

[117] The fundamental issue is whether the legislative bar in section 3 is inconsistent with the Constitution. The applicant's attack is confined to the first part of that section which prohibits execution or attachment of state property or property of the nominal respondent or defendant. It is not clear to me why the applicant wants execution to be levied against the property of the nominal respondent or defendant for satisfaction of a judgment debt against the state. As far as I can ascertain, our law does not permit a nominal respondent or defendant, for example the MEC, to be held personally liable for a state debt. It goes without saying that section 3 does not apply against his personal property. It follows that the constitutional challenge, insofar as it was directed at the part of section 3 that restricts execution or attachment on the property of the nominal respondent or defendant, was misconceived.

[118] In determining whether the section will pass constitutional muster, it is important to consider the manifest underlying purpose of the Act. The law regarding state liability developed from principles such as sovereign immunity to a system that

[40]Above n 4.

recognises that the state can be held liable in legal actions and that it is bound to comply with court orders. The national interest inherent in the provision was recognised even before the advent of the present constitutional era.

[119] The correct approach to constitutional adjudication was delineated by Chaskalson CJ in *Van Rooyen and Others v The State and Others (General Council for the Bar of South Africa Intervening)*:[41]

> "[L]egislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with judicial independence. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or subsection be made."[42] (Footnotes omitted.)

[120] In *Coetzee v Government of the Republic of South Africa*[43] this Court, per Kriegler J, referred to the approach laid down by this Court:

> "[o]rdinarily, one adopts a two-stage approach for determining the constitutionality of alleged violations of rights in chap 3 of the Constitution. The first stage is an enquiry whether the disputed legislation or other governmental action limits rights in chap 3 of the Constitution. If so, the second stage calls for a decision whether the limitation can be justified in terms of . . . the Constitution."[44]

[41] [2001] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC); 2002 (2) SACR 222 (CC).

[42] Id para 88.

[43] [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC).

[44] Id para 9.

[121] The following remarks by this Court, per Ackermann J in *Shaik v Minister of Justice and Constitutional Development*,[45] are apposite in this case:

> "It is constitutionally a serious matter for any Court to declare a statutory enactment of Parliament – or for that matter of any legislature – invalid, because it constitutes a serious invasion, albeit a constitutionally sanctioned one, by one arm of the State into the sphere of another. Moreover, an order by this Court that a statutory provision is constitutionally invalid does not operate between litigating parties only, but is generally binding on all persons and organs of State."[46]

In that case the Court cited with approval the remarks in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[47] regarding the principles of objective constitutional invalidity:

> "The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach."[48]

The Court correctly stated that the principle is equally applicable under the 1996 Constitution.[49]

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[45] [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC).

[46] Id para 23.

[47] [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 26.

[48] Above n 45 at para 27.

[49] Id.

[122] It was contended that the impugned part of the section is unconstitutional because it places the state and its officials beyond orders which should bind them or hold them accountable. When addressing the fundamental question in this judgment, I deal with whether the impugned section (a) frustrates the constitutional injunctions under sections 165(5) and 195(1)(f) of the Constitution; (b) violates the right of access to courts; (c) violates the right to equality (and, if it does, whether the limitation is justifiable in an open and democratic society); and (d) whether there are any available legal remedies.

Constitutional injunctions under sections 165(5) and 195(1)(f)

[123] The applicant argued that section 3 frustrates constitutional injunctions including the constitutional principles of judicial authority and accountability in terms of sections 165(5) and 195(1)(f), respectively.[50] The argument, as I understand it, is premised on the fact that the relevant state officials failed to comply with and/or blatantly ignored the order. As I have indicated earlier, the unlawful conduct of the state officials concerned cannot, in my view, form the basis for attacking the validity of section 3.

[124] The endemic non-compliance with court orders by state officials, more particularly in the Eastern Cape Province, and elsewhere as illustrated by court decisions, is at odds with the values and injunctions in the Constitution. Such conduct should not be tolerated. In the present case, the incompetence and negligence of state

[50]Above n 35 and n 36.

officials regrettably resulted in substantial prejudice to the applicant. That should not and ought not to have occurred.

[125] There is no question that the MEC was obliged, under section 3, read with sections 1 and 2 of the Act and the injunctions in the Constitution, to comply with the court order in question.[51] In the affidavits filed pursuant to this Court's directions, the MEC stated that he was unaware of the case. He made the point that had he been made aware of the order he would have ensured that it was promptly complied with. The MEC stated that he only became aware of the details of the matter after receiving a memorandum dated 4 May 2007 from Messrs S Sithole and TE Monyemangene, the officials of his department. This evidence remained unchallenged. Needless to say, the MEC's explanation does not detract from the objectionable conduct on the part of the state officials concerned.

[126] The memorandum and annexures thereto reveal that the following had occurred: (a) a memorandum dated 19 April 2007 was sent to the Head of Department, Ms SN Ngcobo, requesting that the MEC authorise payment of the interim amount; (b) a memorandum dated 20 April 2007 was sent from Mr Sithole to a senior clerk in the Medico-Legal Services department requesting that payment of the

[51] Section 1 of the Act reads:

> "Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant."

Section 2(1) of the Act reads:

> "In any action or other proceedings instituted by virtue of the provisions of section one, the Minister of the department concerned may be cited as nominal defendant or respondent."

interim amount be effected (seemingly, the memorandum was accompanied by a payment authorisation); (c) a letter from Mr Sithole dated 20 April 2007 was sent to the State Attorney advising that the interim payment had been made; and (d) a memorandum from the CEO: Medico-Legal Services dated 20 April 2007 was sent to the CEO Pretoria Academic Hospital instructing that payment of the interim amount be effected in terms of circular No. 17 of 2003.[52] The MEC explained that he had convened a meeting to discuss the matter and thereafter instructed the head of the department to commission a forensic investigation into the case of the applicant. In her affidavit the head of the State Attorney, Ms Mosidi explained the challenges confronting her office. She stated that Mr Mapheto[53] had not sent the relevant documents to the MEC. It is apparent from the affidavit, that a forensic investigation was conducted on the behaviour of Mr Mapheto in regard to the manner in which he had handled the matter. The affidavit states also, that the report recommended that he be reported to the Law Society. Ms Mosidi stated that her office had conducted the litigation on behalf of the MEC to the best of its ability but that the problems arose as a result of the delay in processing the payment of an interim amount by the Department of Health.

[127] It is evident from the explanations advanced by the MEC and the head of the State Attorney that the genesis of the problem is not inherent in section 3. In my

[52] The issued circular addressed three issues, namely: budgetary responsibility for costs of claims and litigation, ways of mitigating such risks and management of claims and risks generally. A portion of the circular reads:

> "[A]s from 1 April 2003 the institutions and components where the cause of a claim or litigant arises, will be required to pay such costs from their budget."

[53] Assistant State Attorney, responsible for handling the matter.

view, section 3 does not offend the constitutional principle that orders and decisions of courts bind all persons including organs of state nor does it offend the constitutional obligation of accountability on the part of public administration.

[128] The special nature of government, its legislative and executive processes and other considerations relevant to the way government generally functions, including its obligation to deal with limited state resources in the public interest, are important considerations to be taken into account when determining the validity of the impugned section.

[129] The ineptitude, inefficiency and the tardy manner in which the matter was handled both by the State Attorney and the officials in the department is undoubtedly inimical to the principle of accountability owed by public officials to the people they serve. But *non constat* that the unlawful conduct on the part of the state officials can be said to have had the effect that the impugned provision renders the state and its officials immune from complying with their constitutional injunction. In the view I take of the matter, the constitutional validity of section 3 cannot be tested on the basis that state officials, on occasion, fail to act competently or properly. The proper resolution of the administrative inertia seems to lie in the public administration getting its house in order and that cannot, in my view, be achieved by the striking down of section 3.

[130] In my view, by its very wording, the section, properly construed and applied, neither prohibits the payment of a money judgment by organs of state nor detracts from the core value of compliance with court orders. Furthermore, it does not affect the capacity of those upon whom duties are imposed by sections 165(5) or 195(1)(f) and the Constitution to implement court orders. A reading of the impugned provision which suggests the contrary would, in my view, be unduly strained.

[131] This section indicates that absent execution payment of any amount which may be required to satisfy any judgment debt given or made against the nominal defendant or respondent may be paid out of the National or Provincial Revenue Funds. Put differently, it evidences not only that execution process against the state is not available, but also the intention of the legislature that the court order must be complied with by the relevant nominal defendant or respondent, as the case may be, by paying the judgment debt from the relevant fund. The section may also be reasonably interpreted as imposing a duty on the relevant nominal defendant or respondent to act in terms of the Act. It follows that the nominal defendant or respondent who acts in disregard of the law acts outside his or her authority and exposes himself or herself to personal liability.

[132] I proceed to consider whether the prohibition against execution or attachment of state assets limits the applicant's right of access to courts.

Access to courts

[133] The High Court found that the MEC's failure has effectively prevented the applicant's proper preparation for the quantum portion of his trial.[54] In doing so, it is argued, the MEC has effectively encroached on or prejudiced the applicant's right of access to courts in terms of section 34 of the Constitution. That section provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[134] In this Court the applicant maintained that failure to comply with the court order in question encroached upon his right of access to courts as enshrined in the Constitution. It seems plain to me that the prohibition in section 3 does not infringe this right. Execution is a process which comes into play only after a court has given its decision on a case. It is but a process incidental thereto. This Court, per Mokgoro J, in *Chief Lesapo v North West Agricultural Bank and Another*,[55] describes execution in the following terms:

> "An important purpose of s 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law. Execution is a means of enforcing a judgment or order of court and is incidental to the judicial process. It is regulated by statute and the Rules of Court and is subject to the supervision of the court which has an inherent jurisdiction to stay the execution if the interests of justice so require."[56] (Footnotes omitted.)

[54] Above n 2 at para 13.

[55] [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

[56] Id at para 13.

[135] In *President of the RSA and Another v Modderklip Boerdery (Pty) Ltd*[57] this Court, per Langa ACJ, echoed the views expressed in *Chief Lesapo* about the foundational importance of the right of access to courts. The Court stressed that:

> "[t]he mechanisms for the resolution of disputes include the legislative framework, as well as mechanisms and institutions such as the courts and an infrastructure created to facilitate the execution of court orders. In this case, the legislative framework includes the provisions of the Act which are directed at assisting both the landowner and the unlawful occupier."[58]

The Court continued:

> "The obligation on the State goes further than the mere provision of the mechanisms and institutions referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the State's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk, as well as on the circumstances of each case."[59]

[136] In my view, section 3 of the Act and section 38[60] of the PFMA when read together with the Treasury Regulations made in terms of the PFMA,[61] impose general

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[57] [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC).

[58] Id at para 41.

[59] Id at para 43.

[60] Section 38, insofar as is relevant, reads:

> "(1) The accounting officer for a department, trading entity or constitutional institution—
> . . . .
> (d) is responsible for the management, including the safeguarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;
> (e) must comply with any tax, levy, duty, pension and audit commitments as may be required by legislation;
> (f) must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period.

responsibilities on the nominal respondents and the accounting officers, respectively. These statutory enactments constitute the legislative framework for the benefit of both money judgment creditors and the state.

[137] The fact that the applicant approached the High Court illustrates that section 3 does not violate his right of access to courts. Indeed, the applicant was frustrated and inconvenienced by the delays in effecting payment by the state officials but that cannot be said to flow from the application of section 3. As I indicated earlier in this judgment, there is no evidence that the MEC was served with the papers and/or was aware of the claim and its details before 2 April and 4 May 2007, respectively, and that prior to those dates he refused to satisfy the judgment debt. The evidence shows that immediate steps were taken after 4 May 2007 to set in motion departmental procedures so that payment could be made in accordance with the relevant departmental treasury instructions. As evident from the affidavit by the MEC, the applicant's problem might well have been addressed had the MEC been notified of the judgment prior to 2 April 2007. In the circumstances of this case, it cannot be said that the impugned provision in itself violates the right of access to courts.

[138] I now turn to the alleged infringement of the right to equality.

Equality

[61] Treasury Regulations published in GN R225, GG 27388, 15 March 2005. Para 8.2.3 of the Regulations provides:

> "Unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days as from receipt of an invoice or, in the case of civil claims, from the date of settlement or court judgment."

[139] It was contended on behalf of the applicant that section 3 infringes his right to equality enshrined in section 9(1) of the Constitution because it unjustifiably differentiates between a judgment creditor who obtains a court order against a private citizen and one who obtains an order against the state.[62] The disparate circumstances between money judgment creditors against the state and those that are not, were succinctly set out by the High Court:

> "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. The aforesaid situation is not the position when the Defendant is the State".[63]

[140] It is beyond doubt that money judgment creditors against the state are, due to the prohibition in section 3 of the Act, treated differently from similarly placed money judgment creditors against private citizens or corporate entities. The latter are usually entitled to the remedy of execution against their debtors' assets, whereas the former are denied that remedy. The question is whether the differentiation, by itself, constitutes an infringement of the right to equality. The standard for testing the validity of differentiation in terms of section 9(1) is that of rationality. In *Prinsloo v*

[62] Section 9(1) provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[63] Above n 2 at paras 4-5.

Van der Linde and Another,[64] Ackermann, O'Regan and Sachs JJ dealt with a challenge under section 8(1) of the interim Constitution (now section 9(1) of the Constitution). They said:

> "In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. Accordingly, before it can be said that mere differentiation infringes section 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8."[65] (Footnotes omitted.)

The question, therefore, is whether there is a rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it.

[141] It cannot be disputed that government functions differently from private individuals and legal entities and that it has no resources which are truly its own. As I have indicated, the special nature of the state, its legislative and executive processes and other relevant considerations as to how government functions, including its obligation to deal with limited state resources in the public interest, must be taken into account. As correctly pointed out by counsel for the respondents, there are

[64] [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

[65] Id at paras 25-26.

mechanisms which apply to the administration of state resources, particularly as to how state funds are to be expended in order to ensure proper accountability.

[142] Section 3 is designed to prevent disruptions in the social fabric which may take place in the wake of attachments and executions against state assets. The High Court did not apply the test laid down in *Prinsloo* before making the finding of constitutional invalidity. In my view, the prohibition serves a legitimate governmental purpose. The disruption that would be caused by the attachment or execution of state property, especially in essential services such as health and state security, is too frightening to contemplate. For example, the realisation of the constitutional right of access to healthcare of members of the public would be severely compromised if public assets were to be attached. While it cannot be disputed that the prohibition on executing against state assets in favour of a judgment creditor places the latter at a comparative disadvantage, generally allowing attachment and execution of public assets may have disastrous consequences. It must be emphasised, furthermore, that the impugned section does make provision for the payment of any amount required to satisfy any judgment or order by the nominal respondent or defendant out of the National or Provincial Revenue Fund, as the case may be.

[143] The prohibition of execution of state assets and how judgment debts against the state are to be paid are important governmental objectives. Indeed, section 195(5) requires the state to act accountably in what it does. As this Court stated in *Modderklip Boerdery*, the state's obligations go further than the mere provision of

institutions for the resolution of disputes. It is obliged, the Court correctly stated, "to take reasonable steps, where possible, to ensure that large-scale disruption in the social fabric does not occur in the wake of the execution of court orders, thus undermining the rule of law."[66] Notably, the High Court was alive to the fact that attachment and execution might disrupt the running of government affairs. The Court remarked:[67]

> "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 . . . .*"[68] (Emphasis added.)

For these reasons, I conclude that the differentiation contained in section 3 is rationally related to the important governmental purpose of preventing disruption of public services. It follows, therefore, that section 9(1) of the Constitution was not infringed.

[144] The next question for consideration relates to remedies available to a litigant in the position of the applicant.

Available remedies

[66] Above n 57 at para 43.

[67] Notably, the remarks were made after the finding that section 3 was unconstitutional and in the context of exercising the discretion conferred on courts in terms of section 172 of the Constitution.

[68] Above n 2 at para 28.

[145] On behalf of the applicant it was contended that because the MEC "blatantly" ignored the court order, the applicant found himself in a stalemate position in that there was nothing he could lawfully do to enforce the money judgment in his favour. It was argued that the lack of mechanisms to enforce court orders releases state officials from obeying court orders. The High Court, as I indicated earlier, mistakenly relied on *Jayiya*.[69] Although the applicant contended that there was nothing he could lawfully do to cause the state to pay the judgment debt, he did not deny that a legal remedy in the nature of a *mandamus* was available. I have mentioned earlier that he, in fact, sought a *mandamus* in the High Court but abandoned that relief during the hearing. He contended simply, before this Court, that an invitation to a judgment creditor to seek a *mandamus* defies the harsh realities of litigation with its inherent concomitant risks and extra costs occasioned by a second set of proceedings.

[146] No doubt, there may well be cases in which applying for a *mandamus* might be impractical[70] and/or increase legal costs.[71] However that, in my view, will not provide a justification for striking down section 3. The possibility of a *mandamus* as a way to enforce the order is a consideration to be borne in mind in determining whether there was nothing lawful the applicant could do to obtain payment as was submitted on his

[69] In that case, the applicant was one of the many litigants in the Eastern Cape Province who had chosen to litigate over their social welfare entitlements. Jayiya failed in his attempt to have the responsible officials concerned held in contempt of court for the failure to pay him in terms of the money judgment against the provincial government. The Supreme Court of Appeal was not persuaded that it is competent to bring contempt proceedings in circumstances in which a mere money judgment has been obtained.

[70] Such impracticality is illustrated by the Supreme Court of Appeal in *Kate* above n 7 at paras 28-31.

[71] A litigant would however, in an appropriate case, not necessarily have to bring separate proceedings after the initial proceedings have resulted in a judgment debt not being satisfied. The litigant may simply supplement the papers in the initial proceedings. Remarkably, the applicant in this case had, consistently with views expressed in *Kate* by the Supreme Court of Appeal, applied for a *mandamus* (on an urgent basis) and for an order permitting him to approach the High Court on the same papers, amplified where necessary, for an order declaring the MEC to be in contempt of court.

behalf. Whether a *mandamus* could have coerced the MEC (or any other relevant state official such as the Head of Department) to pay is, for the purpose of this case, a matter I refrain from determining lest one speculates. Without saying anything about the wisdom, expediency or efficacy of the execution scheme, the fact remains that a mandatory order is one of the remedies available to compel compliance with a court order. As I said earlier, the applicant had specifically asked the High Court to order a *mandamus*. The relief was jettisoned during argument before that Court.[72] I reiterate that the applicant cannot maintain that there was nothing he could lawfully do to enforce the judgment debt, for he did not exhaust all lawful means available to him for the execution of the judgment debt in question.

[147] It is evident from the judgment of the High Court that the applicant sought a declaration of constitutional invalidity to "goad the [MEC] into action".[73] Although a strong message of disapproval regarding the unlawful conduct of state officials must be conveyed, courts must heed the warning by this Court that declaring a statutory enactment of Parliament invalid is a serious matter which generally binds all persons and organs of state.[74] Legislation may not be struck down merely to enforce payment which may be obtained through available legal remedies. I have doubt that a declaration of invalidity would be an effective remedy in the circumstances of the case. It is doubtful also whether the declaration will be a panacea for the problems which are clearly inherent in administrative bungling. In my view, a *mandamus* is one

[72] Above n 2 at para 26.

[73] Id at para 27.

[74] See *Shaik* above n 45 at para 23.

of the legal remedies that may constitute effective alternatives to compulsory execution by way of attachment against public assets.

[148] It cannot, in the circumstances, be said that the High Court had, borrowing the words used by the Supreme Court of Appeal in *Kate*, "exhausted its lexicon of epithets in its attempts to drive [the] point home so that the impasse [could] be ended."[75] Regarding the prayer for a *mandamus* the High Court said:

> "[A]n 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."[76]

The Court had, with respect, seemingly lost sight of the fact that a common law remedy of a *mandamus* would have been a more plausible recourse because it forces a public authority to carry out a legal duty or obligation and responds to administrative inertia. In my view, a *mandamus* or a structural interdict, somewhat similar to the one granted by Froneman J in *Magidimisi*,[77] would have been appropriate in the circumstances of this case. Such an order would have been consonant with the remarks by this Court in *Fose v Minister of Safety and Security*[78] that:

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[75] Above n 7 at para 29.

[76] Above n 2 at para 26.

[77] Above n 4 at para 39. In that case the applicant and his co-applicants had unsatisfied long outstanding judgments sounding in money in their favour against the provincial government in the Eastern Cape. They applied, inter alia, for a *mandamus* directing the officials concerned to take steps to effect payment in satisfaction of the money judgment in their favour. The High Court innovatively granted a coercive relief coupled with a supervision order requiring a report to the court as to the progress in respect of implementation of the *mandamus* and the threat of contempt proceedings in the event of non-compliance.

[78] [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

> "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of all these important rights."[79]

The Court went further and said:

> "In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."[80]

[149] It is well-established that where it is possible to decide a case, civil or criminal, without reaching a constitutional issue, that route should be followed.[81] The principle was affirmed in *Zantsi v Council of State, Ciskei, and Others*[82] where Chaskalson P said:

> "It is only where it is necessary for the purpose of disposing of the appeal, or where it is in the interest of justice to do so, that the constitutional issue should be dealt with first by this Court. It will only be necessary for this to be done where the appeal cannot be disposed of without the constitutional issue being decided; and it will only be in the interest of justice for a constitutional issue to be decided first, where there

[79] Id para 19.

[80] Id at para 69. See also *Kate* above n 7 at para 25.

[81] *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (2) SACR 277 (CC); 1995 (7) BCLR 793 (CC) at para 59.

[82] [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC).

> are compelling reasons that this should be done. . . .In view of the far-reaching implications attaching to constitutional decisions, it is a rule which should ordinarily be adhered to by this and all other South African Courts before whom constitutional issues are raised."[83]

[150] The present case has highlighted another matter that I consider necessary to comment on. It relates to the procedure followed by the High Court in this matter. As indicated, the application was brought on an urgent basis. This means that the time within which the respondents were entitled to respond in terms of the Uniform Rules of Court was drastically curtailed. Ordinarily, they would have been entitled to a period of five court days within which to file a notice of intention to defend and fifteen days, from the date of filing the notice, within which to file answering affidavits.[84] Save for the fact that the State Attorney was served with the papers, it does not appear from the record whether the MEC was served with the urgent application despite the fact that a mandatory order was sought to compel him to comply with the order in question.[85]

[151] It needs to be mentioned that the applicant also lodged a notice in terms of Rule 16A(1) of the Uniform Rules,[86] for an order declaring section 3 unconstitutional. The

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[83] Id at paras 4-5.

[84] See Rule 6(5)(b) and (d)(ii) of the Uniform Rules.

[85] What appears from the record is that Form 2(a) in the First Schedule of the Uniform Rules was not used. Moreover, it does not appear that the applicant had asked the Court to dispense with the forms and services provided for in the Rules. Rule 6(12)(a) of the Uniform Rules reads:

> "In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet."

[86] Rule 16A(1) provides:

notice was displayed on the notice board at the High Court. The purpose of the Rule, as stated by this Court in *Shaik*,[87] is as follows:

> "[To] bring [the notice] to the attention of persons (who may be affected by or have a legitimate interest in the case) or the particularity of the constitutional challenge, in order that they may take steps to protect their interests. This is especially important in those cases where a party may wish to justify a limitation of a chap 2 right and adduce evidence in support thereof."

The correspondence referred to earlier between the State Attorney and the applicant's attorneys clearly indicates that the former had been served with the papers. The papers before us however reveal that the MEC had not been made aware of the proceedings even though a *mandamus* had been sought against him. Bearing in mind that the applicant also sought a declaration of constitutional invalidity of section 3, the High Court should, respectfully, have been slow in granting the default judgment which entails declaring that section invalid without the benefit of submissions by parties interested in the constitutional issue raised. This Court has correctly cautioned against courts readily declaring legislation invalid.[88] I accept that there was urgency in respect of the *mandamus* in this case but am doubtful that urgency was established in respect of the declaration of constitutional invalidity.

> "(a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.
> (b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.
> (c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.
> (d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days."

[87] Above n 45 at para 24. See also *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429; 2005 (3) BCLR 241 (SCA) at para 55.

[88] See *Shaik* above n 45 at para 23.

Conclusion

[152] For all these reasons, I am not persuaded that the impugned section, properly construed and applied, is inconsistent with the Constitution. However, I am of the view that this Court is at liberty, given the circumstances of this case and the legitimate concerns of judgment creditors as a result of the widespread perennial non-compliance with court orders by public officials, to deal with the matter beyond the relief sought by the applicant in this case. Apart from the fact that recalcitrant civil servants might be subjected to disciplinary action, meaningful proactive steps must be taken to stamp out the unconstitutional and objectionable conduct on the part of those concerned. Sadly, the applicant in this case died before he was paid what was legitimately due to him. He could not obtain medical treatment which he sorely needed due to egregious conduct by state officials who failed to discharge their duties in accordance with the law and values of our Constitution. Accordingly, I support the order proposed by Madala J at paragraphs 3, 4 and 5.

Order

[153] In the result, I would refuse to confirm the order declaring the impugned portion of section 3 of the State Liability Act 20 of 1957 to be inconsistent with the Constitution. I would make an order similar to the order set out in paragraphs 3, 4 and 5 of the order of Madala J.

Langa CJ and Mpati AJ concur in the judgment of Nkabinde J.

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