CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 53/09
[2009] ZACC 29

In the matter between:

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Applicant

and

DINGAAN HENDRIK NYATHI — Respondent

with

LAW SOCIETY OF SOUTH AFRICA — Intervening Party

and

LEGAL RESOURCES CENTRE — First Amicus Curiae

FREEDOM UNDER LAW — Second Amicus Curiae

AIDS LAW PROJECT — Third Amicus Curiae

In re:

Case CCT 19/07

DINGAAN HENDRIK NYATHI — Applicant

and

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

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Second Respondent

Heard on : 12 August 2009

Orders made on : 1 June 2009 and 31 August 2009

Reasons for orders and supplementary order delivered on : 9 October 2009

JUDGMENT

MOKGORO J:

Introduction

[1] This matter is about the state's constitutional obligation to pass legislation within a specific time frame, ensuring the effective satisfaction of judgment debts sounding in money against the state.

[2] Specifically, the case concerns an application by the Minister for Justice and Constitutional Development (the Minister) for an extension of the period of suspension of the order of constitutional invalidity made by this Court on 2 June 2008 in *Nyathi v MEC for Department of Health, Gauteng and Another*[1] (*Nyathi I*). In that case, section 3 of the State Liability Act 20 of 1957, which prohibited the attachment, execution or like process against the state or any state property for the satisfaction of judgment debts sounding in money, was declared to be unconstitutional for its failure to provide effectively for the satisfaction of those judgments.

[1] [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC).

[3] The order in *Nyathi I* provided:

> "(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 applicants' costs, such costs to include the costs consequent upon the employment of two counsel."

The parties

[4] The Minister for Justice and Constitutional Development is the applicant in this matter, and the respondent is Mr Dingaan Hendrik Nyathi, previously the applicant in *Nyathi I*, who passed away on 4 July 2007. In order that the views of interested and affected parties could be canvassed before this Court, directions were issued by the Chief Justice on 10 June 2009, inviting any party or person wishing to oppose the application, to file submissions before 22 June 2009. The response to this invitation was substantial. The AIDS Law Project (the ALP), the Legal Resources Centre (the LRC) and Freedom Under Law (FUL) all applied and were admitted as amici curiae. In addition the Law Society of South Africa (the Law Society) applied to be admitted as an intervening party.

Application for leave to intervene by the Law Society

[5] On 21 June 2009 the Law Society made an application to this Court for leave to be admitted as an intervening party in the matter. It sought leave to intervene opposing the application on the basis that their members' clients would suffer severe prejudice if the relief sought by the Minister was granted.

[6] The decisive criterion in determining whether or not to grant leave to intervene under Rule 8 of this Court's Rules[2] is whether it is in the interests of justice to do so. One aspect of this consideration is whether the applicant has a direct and substantial

[2] Rule 8(1) provides:

> "Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party."

interest in the litigation.[3] The Law Society clearly has a material interest in this matter. Its members represent the majority of people who normally litigate against the state. The rights of its members' clients are profoundly affected by the absence of effective enforcement of judgment debts and the state's delay in providing remedial legislation. Further considerations which may be of relevance include the stage of the proceedings during which the application is made; the attitude of the parties to the main proceedings; and the question whether the submissions which the applicant seeks to advance raise substantially new contentions that may assist the Court.[4] Since the Law Society has applied at an early stage, it advances new contentions which are helpful to the Court, and it has a direct and substantial interest in the matter, it is admitted as an intervening party.

Facts

[7] In the order of this Court in *Nyathi I*, the declaration of invalidity was suspended for a period of 12 months to allow Parliament to pass legislation providing for the effective enforcement of court orders. That order also required the Minister to compile and provide to the Court a list of all unsatisfied court orders against all national and provincial departments, by no later than 31 July 2008.[5] These reports were filed on 31 July 2008, 12 December 2008 and 5 August 2009 respectively.

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[3] *Gory v Kolver NO and Others* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at paras 11-3; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at paras 29-30.

[4] *Gory v Kolver* above n 3 at para 13.

[5] See paragraph 3(a) of the order in *Nyathi I* which required that the case number, the parties in the cases and the outstanding amounts should also be included in the report.

[8] The reports detailed, amongst other things, the steps the Department for Justice and Constitutional Development (the Department) had taken to satisfy the outstanding judgment debts against the state. They describe developments taking place within the department to ensure the speedy settlement of judgment debts. In that regard, the reports gave details of progress made in preparation of the State Liability Bill and the Constitution Eighteenth Amendment Bill (the Bills).

[9] The State Liability Bill has been in preparation since 2003 and has been the subject of debate amongst the relevant Portfolio Committees, departments and researchers.[6] By May 2007, the Bill had been revised several times. However, because of a number of objections and amendments by the relevant departments, it was only tabled before the Cabinet Committee on Governance and Administration on 3 December 2008. It was then approved for public comment, subject to consultation with the Minister for Finance prior to its publication.

[10] Consultation with the Minister for Finance did not, however, take place instantaneously. Indeed the communications only commenced four months later. Both Bills were subsequently published in an Extraordinary Government Gazette for public comment only on 1 June 2009, one day before the expiry of the suspension period of this Court's order of invalidity in *Nyathi I.* Consequently, on the same day, the Minister filed

[6] These included, amongst others, the Department, the National Treasury, the Department of Education, the Minister for Finance, the Cabinet Committee of Governance and Administration, the Portfolio Committee on Justice and Constitutional Development as well as researchers at the University of Cape Town.

an urgent application with this Court for an order extending the period of invalidity for 12 months.[7]

[11] Pursuant to that application this Court on 1 June 2009 made an order that the period of suspension would be extended until 31 August 2009. The Court also ordered that the remainder of the urgent application for the variation of the order of 2 June 2008 in *Nyathi I* be postponed to 12 August 2009 for hearing. This limited extension was initially granted in order to afford an opportunity for a full airing of the issues and for consideration of the interests of the public.

The Minister's submissions for an extension

[12] In his affidavit, Advocate Simelane, the Director-General in the Department (the DG), on behalf of the Minister, stated that the national elections in April of this year, together with the shorter Parliamentary session, contributed substantially to the inability to pass the envisaged remedial legislation within the stipulated period of time. The situation had been exacerbated by the need to engage other government departments, in particular the National Treasury, and the "difficult consultations and research to resolve conflicting views" that followed. It was also aggravated by the fact that the team responsible for the Bills was simultaneously tasked with a range of other legislative responsibilities, including work related to fifteen other urgent bills.

[7] See *Zondi v MEC, Traditional and Local Government Affairs, and Others* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) at para 55 (*Zondi II*).

[13] The DG was particularly apprehensive that administrative chaos would ensue should the extension not be granted. He stated that the lapse of the suspension of the declaration of invalidity would render the administration dysfunctional. The prejudice that would flow if essential assets were attached would be wide-ranging with unimaginable effects on essential services. The machinery of the state might come to a halt.

[14] The Minister submitted that he had shown "good cause" for the extension to be granted. He argued that there would be little prejudice to the public as the government had in any case satisfied the majority of judgment debts which were still outstanding on 31 July 2008. On balance, the Minister asserted, there would be greater prejudice to government than to those who still had outstanding judgment debts, if the extension was refused.

[15] The DG submitted that there had been "an unrealistic optimism that remedial legislation would be enacted by 1 June 2009." With hindsight, he conceded that the expectation had been irrational and idealistic. He averred that it ought to have been apparent shortly after this Court's order on 2 June 2008 that an application for an extension of the period of the suspension of invalidity was inevitable. Despite having realised the folly of his optimism, he continued wishfully to predict that it was likely that the Bills would be introduced in Parliament on 14 October 2009. It was then submitted

that, within the minimum time frames that Parliament could employ, the Bills could, in the DG's estimate, be passed by 1 April 2010. Accordingly, he requested that the declaration of invalidity be suspended until 31 May 2010.

[16] A parallel disillusionment with this earlier optimism was to befall the Deputy Director-General of Legislative Development in the Department, Mr Trevor Rudman, who later stated that the proposed time-frame was no longer "realistic" or "achievable." No alternative time period was, however, suggested. In written and oral argument, the Minister subsequently returned to his original position, submitting that an extension should be granted until 31 May 2010 to allow Parliament to pass the remedial legislation. The Minister could not, however, with certainty predict when the Bills would be passed into law.

Submissions by the amici curiae and intervening party

[17] The amici curiae were, however, not convinced that administrative chaos would ensue as had been submitted on behalf of the Minister. Based on the Minister's own submissions that only R3,5 million in debt remains outstanding, the ALP argued that it could not reasonably be contended that there is a serious risk of widespread attachment of state assets, rendering the state unable to provide essential services. Instead, it averred that the prejudice to the public, in particular those whose interests the ALP served, outweighed any prejudice the state might suffer.

[18] The ALP further submitted that the extension of a suspension order in this instance was not warranted in the light of the factors provided in *Ex Parte Minister of Social Development*.[8] To this end, they pointed to the non-compliance with the suspension order, the inadequate explanation for the delay in enacting the legislation, and the indefinite plan proposed by the Minister as justification for declining to grant an extension. They also argued, in view of the lateness of the application, that the urgency pleaded by the Minister was mostly occasioned by his own making. They contended that the Minister had also been ambivalent as to when the Bills were expected to be passed into law.

[19] The ALP submitted that it would be appropriate to grant interim relief to protect constitutional rights, pending the remedial legislation. It proposed that the Court grant an order directing the Minister to designate a fund within one month of this Court's order, against which execution of judgment debts may be levied.

[20] The LRC made submissions similar to those of the ALP. It made particular reference to the prejudice to be suffered by indigent clients and their own inability to recover costs, asserting that the Minister had failed to provide sufficient explanation for the failure to comply with the time limit as ordered by this Court. It contended that there was insufficient evidence regarding the anticipated public prejudice.

[8] *Ex Parte Minister of Social Development and Others* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC). *See also Zondi II* above n 7.

[21] The nub of FUL's submissions was that, by failing to enact the relevant legislation timeously, the conduct of the Minister had infringed the rule of law. To allow for an extension of time, it submitted, would imply a sanctioning of the continued violation of the Constitution which is at odds with the imperatives of a constitutional democracy and the rule of law. For these reasons it contended that the application for an extension be dismissed.

[22] In oral argument, however, FUL conceded that, if this Court made an interim order allowing for the effective enforcement of judgment debts against the state in the interim, it did not matter whether the extension is granted or not. It argued that an interim order should direct the state to designate a fund to which application may be made by judgment creditors for the satisfaction of judgment debts against the state.

[23] Also urging the dismissal of the application, the Law Society made submissions similar to those of the amici curiae. In oral argument, it pointed to the practical difficulties that judgment creditors face when seeking to execute judgment debts against state property.[9] Like the amici curiae, it made helpful submissions regarding possible formulations of an interim order, if any were to be made.[10]

[9] These include the costs of storage, security to the sheriff, sheriffs' fees as well as the extensive time period required for demand to be made together with attachment and execution.

[10] It made various suggestions in oral argument relating to the budgetary implications of an order which allows for attachment against a designated fund. It also made helpful suggestions relating to service and time limits if this Court's order were to provide for a tailored attachment and execution procedure.

The applicable law

[24] This is not the first time that this Court has had to consider, on an urgent basis, an application by the state for an extension of this nature. Indeed this Court was faced with a similar application in *Zondi II*.[11] That case was a sequel to this Court's order in *Zondi I*,[12] in which sections 16(1), 29(1), 33, 34 and 37 of the Pound Ordinance (KwaZulu-Natal),[13] were declared unconstitutional and invalid. At issue was whether the Court had the power to vary and extend the period of suspension of a declaration of invalidity. The Court held:

> "The power to make an order that is just and equitable is not limited to the time when the Court declares a statutory provision inconsistent with the Constitution and suspends the order of invalidity. During the period of suspension this Court retains the power to reconsider the continued suspension of the declaration of invalidity and the period of suspension as well as the conditions of suspension in the exercise of its power to make an order that is just and equitable. When the facts on which the period of suspension was based have changed or where the full implications of the order were not previously apparent, there seems to be no reason both in logic and principle why this Court should not, before the expiry of the period of suspension, have the power to extend the period, if to do so would be just and equitable."[14]

[11] Above n 7.

[12] *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC).

[13] 32 of 1947.

[14] *Zondi II* above n 7 at para 40.

[25] The Court found that the determination of what is "just and equitable" is fact specific, and in view of the principle of finality, the power to extend the period of suspension should, as a general matter, be "very sparingly exercised".[15]

[26] In a separate concurring judgment in *Ex Parte Minister of Social Development*,[16] Ngcobo J outlined the principles which guided the Court's exercise of the discretion as follows:

> "[T]he sufficiency of explanation for failure to comply with the original period of suspension; the potentiality of prejudice being sustained if the period of suspension were extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the constitutional project and prevent chaos.
>
> What is required is a balancing of all the relevant factors, bearing in mind that the ultimate goal is to make an order that is just and equitable."[17] (Footnotes omitted.)

[15] Id at para 47.

[16] Above n 8.

[17] Id at para 50. The Court also held:

> "An application for the extension of the period of suspension must be made within a reasonable time. It must be made in sufficient time to allow the matter to be considered by this Court before the expiry of the period of suspension.
>
> The explanation for failure to correct the constitutional defect within the time limit set out in the court order 'must be set out fully, candidly, timeously and in a manner that conforms with the Rules of the Court.'
>
> It should not be assumed that an extension of the period will be granted as a matter of course and in the public interest. If a proper case for the extension of the period of suspension is not made out, an applicant for the extension of the period of time runs the risk of the request being refused." (Footnotes omitted.)

[27] The irony of the facts and circumstances of this case cannot be escaped. The suspended order of invalidity made in *Nyathi I* was made specifically with a view to curb non-compliance with court orders against the state, relating to the payment of judgment debts and resulting in prejudice to judgment creditors. Through the state's inadequate response to give effect to that order, this Court is yet again called upon to consider the extent to which people, due to the state's inadequate response, are required to endure the continued infringement of their rights implicated in extending the period of suspension. This application therefore invites this Court once more to have regard to the greater constitutional imperatives of the respect for the rule of law when determining the issue of compliance with court orders, particularly, as in this case, in relation to satisfying judgment debts against the state. Although the relevant constitutional imperatives and obligations of the state were emphasised in the above decisions,[18] it is necessary to emphasise once more the relevant constitutional provisions when deciding whether a further extension should be granted. It is important to highlight yet again that applications of this nature must not be resorted to lightly.[19]

[28] One of the fundamental values in the Constitution gives express recognition to South Africa as a constitutional democracy founded on the supremacy of the Constitution and the rule of law.[20] The Constitution also provides that no person or organ of state

[18] See *Zondi II* above n 7 and *Ex Parte Minister of Social Development and Others* above n 8.

[19] See *Zondi II* above n 7 at para 47.

[20] Section 1(c) of the Constitution.

shall interfere with the functioning of the courts.[21] It stipulates that organs of state have a duty to assist and protect the courts to ensure, amongst other imperatives, the dignity and effectiveness of the courts.[22]

[29] Similarly, the Constitution provides that an order or decision by a court binds all persons to whom and organs of state to which it applies.[23] The Constitution further places an obligation upon the public administration, which encompasses a value based public service,[24] to be accountable.

[30] In *Nyathi I*, Madala J, writing for the Court cautioned:

> "Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be 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."[25] (Footnote omitted.)

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[21] Section 165(3) of the Constitution. See *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at paras 17-8 and *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para 7.

[22] Section 165(4). See *Van Rooyen and Others* above n 21.

[23] Section 165(5). See *Minister of Home Affairs v Liebenberg* [2001] ZACC 3; 2002 (1) SA 33 (CC); 2001 (11) BCLR 1168 (CC) at para 7.

[24] In particular the public service policy values of batho pele. See section 195(1) of the Constitution. See also *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23, Case No CCT 53/08, 25 August 2009, as yet unreported, at para 62 and *Van Der Merwe and Another v Taylor NO and Others* [2007] ZACC 16; 2008 (1) SA 1 (CC); 2007 (11) BCLR 1167 (CC) at para 71.

[25] Above n 1 at para 80.

Thus, any decision to grant an extension to an order of suspension over a declaration of invalidity accordingly, must not only be informed by the principles illuminated in *Ex Parte Minister of Social Development*,[26] but must also be rooted in them.

The summary order of 31 August 2009

[31] Having given due consideration to the applicable law, this Court on 31 August 2009 issued the following order to operate in the interim, stating that reasons would follow in due course:

> "1. The period of suspension of invalidity in paragraph 2 of the order granted in *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC), as extended by an order of this Court granted on 1 June 2009, is further extended until 31 August 2011.
>
> 2. The parties to this case, as well as the Minister for Finance, are requested to lodge written argument on or before 15 September 2009 on the question of whether an order in the following terms should be made an order of Court to be operative during the period of suspension made in paragraph 1 of this order:
>
> > 'During the extended period of suspension granted by this Court on 31 August 2009, or until legislation regulating the matter is brought into effect, the following process for the enforcement of court orders against the state sounding in money shall apply:
> >
> > (a) If a final court order against the state for the payment of money is not satisfied within 30 days of the date of

[26] Above n 8.

judgment, the judgment creditor may serve notice on the State Attorney and the relevant Accounting Officer in the National or Provincial Department or the local government of the intention to attach movable property owned by the state and used by the department which is, in effect, the judgment debtor for the purposes of a sale in execution to satisfy the judgment debt.

(b) If, within 14 days after the notice in paragraph (a) of this order has been served, the judgment debt remains unpaid, the judgment creditor may apply for a writ of execution against movable property in terms of Rule 45 of the Uniform Rules of Court or in terms of Rule 36 of the Magistrates' Courts Rules of Court, whichever is applicable.

(c) The sheriff of the relevant court shall, pursuant to the writ of execution, attach movable property owned by the state and used by the relevant department.

(d) 30 days after the date of the attachment, and in the absence of any application as contemplated in paragraph (e) of this order, the sheriff of the relevant court may sell the attached movable property in execution of the judgment debt.

(e) Any affected party may, during the periods referred to in paragraphs (b) and (d) of this order, apply to the court which granted the judgment in question for an order staying the execution contemplated in paragraph (d) on the ground that it is not in the interests of justice and good governance to attach and sell in execution the movable property of the state which has been attached.

(f) The duty to establish that it would not be in the interests of justice and good governance for the property of the state which has been attached to be sold in execution rests upon the party seeking the relief sought in paragraph (e) of this order.'

3. The parties to this case, as well as the Minister for Finance, may also submit written argument on or before 15 September 2009 proposing an alternative order for the timeous and effective enforcement of judgment debts.

4. The Registrar of this Court is instructed to arrange for service of a copy of this order, as well as a copy of this Court's judgment in *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) on the Minister for Finance.

5. Costs are reserved."

The order of extension was granted for the reasons that follow.

[32] The Bills were published for public comment on 1 June 2009. Therefore a resolution of the constitutional difficulties arising from the absence of a legislative mechanism seems in sight. Public responses are said to be substantial and expensive debates may ensue, considering the importance of the issues. It is reasonable to anticipate a protracted time span before the Bills are passed given the complexity of the issues and the number of government departments and spheres of government involved. Considering the power of the Court to craft a just and equitable remedy to govern the interim period, a longer period of extension than usual was warranted. The inevitable need for an interim remedy to protect both creditors and vital state assets in these

circumstances cannot be gainsaid. Consequently, a further extension was considered just and equitable. The period granted was for a further period of two years, subject to an interim order regulating the effective enforcement of judgment debts against the state. The interim order was issued in the form of a rule nisi, enabling all parties, including the Minister for Finance, to comment on its terms.

[33] The need for an interim order had been debated in oral argument on 12 August 2009. Both the ALP and FUL agreed that if this Court were to grant an interim order that would regulate a procedure under which judgment creditors could effectively and timeously have their judgment debts satisfied, it would make little practical difference whether the extension was granted or not. There are two important reasons why an interim order should be granted. First, an interim order would be necessary to protect judgment creditors against the continued infringement of their rights resulting from the failure to pass the required remedial legislation timeously. For those with sufficient resources and tenacity, and those who can rely on the invaluable assistance of various legal aid institutions, the continuation of the legal status quo may not present a substantial infringement of their rights. However, as the amici correctly submitted, the potential for prejudice to judgment creditors places a high premium on the fashioning of an interim order that is carefully crafted to balance the interests of the state against those of judgment creditors, particularly people who lack access to legal resources.

[34] In the absence of an appropriately tailored mechanism which in the interim regulates the satisfaction of judgment debts against the state, the rules of both statutory and common law might apply and there would be no guarantee against the attachment and execution of vital state property, affecting essential public service delivery. As all parties conceded in oral argument, although the chances of attachment and execution are slim, the attachment of state assets such as ambulances and police vehicles should be strenuously avoided. However, without a further suspension, coupled with an interim order to protect judgment creditors' interests in the meanwhile, the broader public prejudice may in some instances be grave.

Submissions relating to the proposed interim regime in the order of 31 August 2009

[35] Having granted the extension prayed for by the Minister, this Court in its order of 31 August 2009 proposed a tailored interim procedure for the attachment and execution of state movable assets, to satisfy judgment debts against the state, sounding in money. This Court invited the parties to this application as well as the Minister for Finance to make written submissions regarding the proposed interim order as well as any proposed alternative on or before 15 September 2009. I discuss these submissions in turn.

Application for condonation

[36] Both the Minister and the Minister for Finance filed their written submissions one day late. This caused no prejudice and given the satisfactory explanations tendered it is appropriate to grant condonation.

The submissions by the Minister for Finance

[37] The Minister of Finance presented this Court with a procedure which allows for a judgment creditor simply to serve the relevant treasury with a final judgment order for payment. The amount paid by the Treasury would then be set off against the budget allocation of the relevant department for the current or future financial year under the relevant vote. These submissions are largely supported by the applicant.

[38] The procedure submitted by the Minister for Finance allows a judgment creditor, if the department concerned does not pay the judgment debt within 30 days from the date of judgment, to serve it on the relevant treasury, the State Attorney, the accounting officer of the national or provincial department, as well as the executive authority of the department concerned in terms of Rule 4 of the Uniform Rules of Court.[27] The judgment order served is to be accompanied by certification of its validity and finality by the registrar or clerk of the court. If 14 days after service the judgment debt remains unpaid, the relevant treasury shall cause it to be settled, settle it itself, or make acceptable arrangements with the judgment creditor for settlement.

Local government

[27] Rule 4 of the Uniform Rules of Court details the different ways in which the sheriff of the court may effect service. Equally applicable, although not mentioned in the submissions of the Minister for Finance, is Rule 9 of the Magistrates' Courts Rules of Court which similarly provides for how service is to be effected in that court.

[39] A reservation made by both the ALP and FUL, concerns the inclusion of an attachment and execution procedure against property of the local government in the proposed order. This inclusion, they correctly point out, is unnecessary, as section 3 of the State Liability Act does not regulate the execution of judgment debts against local government. I need say nothing further about this.

Who may apply for the stay of an execution order?

[40] The proposed interim order permits "any affected party" to apply for a stay of execution on the grounds that it is not in the interests of justice and "good governance" to attach, remove and sell state movable property. FUL argues that the term "affected party" may be unduly wide in the context of the state as a judgment debtor. They aver that it would be more appropriate that the term "a party having a direct and material interest" be used. I agree. State property being utilised for public service delivery may indeed affect a wide array of people, creating a nearly unlimited class of affected parties, not directly affected or prejudiced by the execution of state assets. It is appropriate to confine the group of those entitled to apply for the stay of an execution order to those who have a direct interest of a material nature. This, of course, does not affect any party other than the state who has a basis in law to prevent the execution.

When should a stay of an execution order be granted?

[41] FUL also contend that the term "good governance" connotes a standard of probity in executive control, and is not to be confused with the truly essential requirements of

discharging core responsibilities. They submit that the appropriate standard for the stay of execution is whether it would be in the interests of justice and necessary to prevent disruption to the performance of an essential public service. They further contend that the latter test is more specific and less lenient and would permit sufficient preservation of essential state assets, without limiting more than necessary the ability of judgment creditors to have their judgment debts satisfied.

[42] The test of "good governance" may indeed be elusive. The Local Government: Municipal Finance Management Act (MFMA)[28] regulates the circumstances in which a financial obligation owed by a municipality may be suspended or terminated. In determining whether to terminate or suspend an obligation the court must be satisfied that "all assets not reasonably necessary to sustain an effective administration or to provide the minimum level of basic municipal services"[29] have been liquidated in terms of an approved financial recovery plan. It may therefore be better to simply use the test of "interests of justice".

[43] Although the interests of justice test will be determined by a court on the circumstances of each case, its relative and broad basis may unduly immunise state assets from attachment and execution. The application of the interests of justice test, which takes into account considerations similar to those set out in the MFMA, makes sense.

[28] 56 of 2003.

[29] Id at sections 154(b) and 155(1)(b).

Ordinarily it will be in the interests of justice to grant a stay where the assets to be attached are reasonably necessary to sustain effective administration or to provide a minimum level of basic services. That will be for a court to decide.

[44] The ALP submits that paragraph 2(e) of the proposed interim order may cause undue delay as it is possible that a successful application for an order staying the execution may be followed by another application for a stay in the event that the judgment creditor obtains a second writ of execution in respect of other property. The imposition of a stay may frustrate a judgment creditor repeatedly. To avoid this, when considering whether it is in the interests of justice for a stay to be granted, a court must assess whether the party seeking the stay has identified suitable alternative property that may be attached. Undue litigation and further prejudice might indeed be averted in this manner.

Costs orders in stay applications

[45] Lastly, the LRC points out that a judgment creditor who defends an application for a stay of execution, even if successful, may nonetheless be out of pocket. Accordingly, it submits that the proposed interim order must provide for costs against an unsuccessful applicant on a scale of attorney and client, save for exceptional circumstances. As appropriate as it may be, especially where the state has been dilatory in payment, the issue of costs will remain in the discretion of the court deciding the matter, based on the

applicable legal principles on the facts and circumstances. Therefore the submission cannot prevail.

[46] The discretion relating to costs should not be fettered. The applicable legal principles are well settled and, properly construed, give sufficient protection against undue costs orders.[30] Specifically, the determination of whether to stay the execution based on the interests of justice may at times involve difficult considerations which may not be self evident and require the determination of the Court. Similarly, instances may occur in which litigants with malicious or vexatious intent attach vital state assets. The court seized with the matter should decide whether a costs order on a scale of attorney and client is appropriate. Therefore the submission of the LRC cannot prevail.

Interim order

[47] The suggestions of the Minister for Finance are helpful. They provide a quicker and more accessible avenue for judgment creditors to have their judgment orders satisfied, whilst ensuring some degree of accountability in state functionaries of the

[30] See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para 3 where, in a judgment on costs given separately from the judgment on the merits, Ackermann J noted that courts have over the years, developed a flexible approach to costs proceeding from two basic principles, the first being that the award of costs, unless otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general principle, have his or her costs. He continued to note:

> "Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings." (Footnotes omitted.)

See also *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14, Case No CCT 80/08, 3 June 2009, as yet unreported, at para 9.

relevant departments. These are important considerations. A quick and accessible process goes a long way in mitigating the hardships of a litigant who might be in dire need, importantly enhancing access to justice.

[48] However, the proposal by the Minister for Finance does not make provision for any remedy should treasury functionaries fail to pay the judgment debt within a reasonable time, or at all. The disadvantage of the Minister's proposed mechanism is that it makes no room for likely systemic difficulties which might affect administrative efficiency. For these reasons, the Minister's proposal should be combined with the updated attachment and execution procedure embodied in this Court's order on 31 August 2009.[31]

[49] The proposal of the Minister for Finance allows for a measure of accountability which is likely to foster compliance within the defaulting departments and avoid attachment and execution of state property. At the same time, it provides a more cost effective and expeditious avenue for judgment creditors seeking to enforce judgment debts. It is hoped that judgment debts will be satisfied at the first instance and judgment creditors will never need to resort to the attachment and execution of state assets. To have to do so would be unfortunate.

[31] This Court's interim order takes the submissions of the intervening party and the amici curiae into account.

[50] It is important that the execution procedure must operate with tight time frames to minimise prejudice to a judgment creditor. Since the judgment creditor will already have waited 44 days from the date of judgment under the treasury payout procedures, it would not be necessary to allow for an extensive time period under the subsequent attachment and execution procedures. Accordingly, the time-lines of the attachment procedure must be tightened making the further 30 day period in the proposed interim order of 31 August 2009 unnecessary. Similarly the proposed waiting periods in the submissions of the Minister for Finance have also been curtailed.

[51] The integration of the payout plan by the Minister of Finance with this Court's proposed interim order of 31 August 2009 will work as follows: should the judgment debt remain unpaid 30 days after date of judgment, the judgment creditor may serve notice on the relevant officials[32] The relevant treasury shall within 14 days of service of the order cause the judgment debt to be settled or itself settle the judgment debt or make acceptable arrangements with the judgment creditor for the settlement of the judgment debt. If the debt remains unpaid after those 14 days have expired, the judgment creditor may apply to court to execute against movable property owned by the state and used by the relevant department, empowering the sheriff to attach the property. Once the property has been attached, parties with a direct and material interest may apply to court for a stay of execution on grounds that it is in the interests of justice for the execution to

[32] The relevant treasury, the State Attorney, the accounting officer of the national or provincial department as well as the executive authority of the department.

be stayed. If no application to that effect is made, the sheriff may remove and sell the property in execution of the judgment debt, 30 days after the attachment. The aggregate time period from the date of final judgment until the date of execution would thus be approximately 75 days. Naturally, these procedures and time periods will operate within the applicable statutory frameworks and provisions, including those of the Magistrates' Courts Act 32 of 1944 and the Supreme Court Act 59 of 1959.

[52] The Minister for Finance submits that a treasury pay-out procedure should not apply to default judgments granted against the state by either the registrar or clerk of the court as "the seriousness of judgments against the state . . . warrants the attention of either a Judge or a Magistrate, and not the Registrar or the Clerk of the Court." This proposition does not have a powerful attraction. The state will always have the option of applying for rescission of a default judgment if it has been granted erroneously or fraudulently.[33] On the other hand, it is important that judgment creditors are able to obtain effective relief. Accordingly, I decline to adopt the Minister's suggestion.

[53] The Minister for Finance also proposes that this Court invite the provincial treasuries to comment on his submissions. Obtaining the views of provincial treasuries for consideration and incorporation could have been an internal process which should have fed into the submissions of the Minister, who speaks on behalf of the Department of

[33] The seriousness of judgments against the state can indeed not be gainsaid. For that reason the state must be seen to take them seriously ensuring that it issues an appearance to defend and acts within the prescribed time period of the court at all times.

Finance as a whole and the National Treasury. Stalling the issue of an interim order to accommodate further submissions will further delay the fulfilment of the state's constitutional obligations and cause added prejudice to judgment creditors. The need for finality is important.

Costs

[54] In this matter, the applicant contended for costs of the application only in the event that the application was opposed. The Law Society, together with the ALP, asked that costs of their applications should be costs in the cause. The LRC and FUL however did not seek costs. Although the applicant has received an extension, it would not be appropriate to make a costs order against the Law Society as the intervening party, since it has raised important constitutional issues. It is a general rule in this Court that no costs awards are made against private litigants who have raised substantial constitutional issues against the state even when unsuccessful.[34] In addition, although joining in the litigation as a party, the Law Society in effect played the part of an amicus. All these parties made helpful submissions for which the Court is grateful.

[34] *Biowatch Trust* above n 30 at paras 21–5; *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138; *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3; 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) at para 30.

[55] With regard to the ALP, the rule is that amici curiae are generally not entitled to costs unless exceptional circumstances exist. As this Court held in *Hoffmann v South African Airways*:[35]

> "An amicus . . . joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join, unless requested by the court to urge a particular position. An amicus, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs."[36]

[56] I find no exceptional circumstances in this case that warrant a departure from this general rule. Accordingly, I make no order as to costs.

Order

[57] In the result, the following order is made:

1. The application of the Law Society of South Africa to be admitted as an intervening party is granted.
2. The applicant's application for condonation for late filing is granted.
3. The following interim order shall apply during the period of extension in paragraph 1(1) of this Court's order of 31 August 2009:
   (a) If a final order against a national or provincial department for the payment of money is not satisfied within thirty (30) days of the date of judgment, the judgment creditor may serve the court order in

[35] 2000 [ZACC] 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC).

[36] Id at para 63.

terms of Rule 4 of the Uniform Rules of Court or Rule 9 of the Magistrates' Court Rules of Court, on the relevant national or provincial treasury, the State Attorney, the accounting officer of the relevant national or provincial department, as well as the Executive Authority of the Department concerned;

(b) The court order served on the officials referred to in paragraph (a) of this order must be accompanied by a certificate by the registrar or clerk of the relevant court, certifying that no appeal, review or rescission proceedings are pending in respect thereof;

(c) The relevant treasury shall within fourteen (14) days of service of the order, cause the judgment debt to be settled, or itself settle the judgment debt, or make acceptable arrangements with the judgment creditor, for the settlement of the judgment debt;

(d) Should the relevant treasury fail to cause the judgment debt to be satisfied, itself settle the debt or make acceptable arrangements with the judgment creditor for the settlement of the judgment debt within the time period specified in paragraph (c) of this order, the judgment creditor may apply for a writ of execution in terms of Rule 45 of the Uniform Rules of Court or a warrant of execution in terms of Rule 36 of the Magistrates' Courts Rules, against movable property

owned by the state and used by the relevant department, whichever is applicable;

(e) The sheriff of the relevant court shall, pursuant to the writ of execution or warrant of execution, attach but not remove the identified movable property;

(f) In the absence of any application contemplated in paragraph (g) of this order, the sheriff of the relevant court may after the expiration of thirty (30) days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt; and

(g) A party having a direct and material interest may, during the periods referred to in paragraph (f) of this order, apply to the court which granted the order, for a stay on grounds that the execution of the attached assets is not in the interests of justice.

5. There is no order as to costs.

Langa CJ, Moseneke DCJ, Cameron J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Mokgoro J.

Counsel for the Applicant:	Advocate NA Cassim SC and Advocate SK Hassim instructed by the State Attorney, Pretoria.
Counsel for the Intervening Party:	Advocate CFJ Brand, Advocate A Granova and Advocate N Ngwala instructed by Damons Magardie Richardson (DMR) Attorneys.
Counsel for the First Amicus Curiae:	Advocate R Moultrie instructed by the Legal Resources Centre.
Counsel for the Second Amicus Curiae:	Advocate K Pillay instructed by Bowman Gilfillan.
Counsel for the Third Amicus Curiae:	Advocate A Hassim instructed by the Aids Law Project.