REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 1277/2009

In the matter between:

GOLDEN ARROW BUS SERVICES (PTY) LTD	Applicant
and	
THE MINISTER OF TRANSPORT FOR THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF FINANCE FOR THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
MEC FOR THE DEPARTMENT OF PUBLIC TRANSPORT, ROADS AND WORKS FOR WESTERN CAPE PROVINCE	Fourth Respondent

---

JUDGMENT DELIVERED ON 30 JANUARY 2009

BINNS – WARD AJ:

[1] The Applicant, which provides a metropolitan bus service to Cape Town area applied as a matter of urgency for the following relief:

Orders-

1. Condoning the Applicant's non-compliance with the forms and time periods stipulated in the Uniform Rules of Court and directing that this matter be heard as one of urgency in terms of Rule 6(12).

2. That the amount of R94 505 098,24 (being the total of the amounts set out in paragraph 2 of the Order of this Court issued under case number 21303/2008 on Thursday 15 January 2009 ("the Court Order"), together with interest calculated in terms of the provisions of the said paragraph until 20 January 2009), forthwith and in any event before 16h00 on Friday 30 January 2009 be paid to the Applicant by the First and/or Second and/or Third Respondent, jointly and severally, from the National Revenue Fund, in accordance with the provisions of section 3 of the State Liability Act, Act no.20 of 1957 ("the Act").

3. Declaring that the Second Respondent and/or the department of which he is the nominal head pursuant to the provisions of section 2 of the Act is/are not entitled in law to frustrate, block or refuse to render the necessary assistance to implement and effect the said payments which the First and/or the Second and/or Third Respondents are liable to pay in terms of the previous paragraph.

4. Directing the Second Respondent, insofar as he may be requested to do so by the First and/or Third Respondent, to forthwith and immediately pay, alternatively, to forthwith and immediately do what is necessary to effect payment, of the said amount referred to in paragraph 2 above from the National Revenue Fund in order to satisfy the Court Order.

5. In the alternative to paragraphs 2, 3 and 4 above and only in the event of payment not occurring on or before 16h00 on Friday, 30 January 2009, that the First and Second Respondents are ordered to appear before this court in person on Monday, 2 February 2009 at 10h00 and to furnish the names of each and every individual in their respective departments who would in the ordinary course of business be responsible for remittance of the said amount in order to comply with the provisions of the Court Order and to furnish full reasons as to why these individuals have failed to make the said remittance.

6. To the extent that the above honourable court may deem it necessary and appropriate, granting the Applicant condonation in terms of Section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002.

7. Further and/or alternative relief.

8. That the costs of this application, including the costs of two counsel, be paid by the First, Second and Third Respondents jointly and severally, the one to pay the others to be absolved, on the scale of attorney and client, save in the event of the Fourth Respondent opposing this application in which case the costs order is sought against all the Respondents jointly and severally on the same scale.

[2] The current proceedings, which were brought before this court on 28 January 2009, are a sequel to an application by applicant under case no. 21303/2008 in which certain declaratory relief was sought which is essentially reflected in the order made in the earlier matter by Motala J, by agreement between the parties on 15 January 2009, in the terms set out below.

'The following order is made by agreement between the Applicant and the First, Second, Third and Fourth Respondents pursuant to and with due recognition of the provisions of the State Liability Act, No. 20 of 1957:

1. The interim contract number IC68/97 (*"the contract"*) entered into between the Applicant and the First Respondent, as representing the Third Respondent (of which the Fourth Respondent has subsequently become the successor in law), has since then by agreement between the parties been extended from time to time and is still legally operative and binding.

2. The total amounts due and payable to the Applicant in terms of the contract as at the date hereof are –

   2.1 R49 234 447,67 as from 1 December 2008 (in respect of which it recorded that the Applicant and the Fourth Respondent will co-

operate to determine whether or not an additional amount of R512 946,00 is due and payable);

2.2 75% of R53 596 991,30, i.e. R40 197 743,47, as from 17 December 2008; and

2.3 R43 097 421,10 minus R40 197 743,47, i.e. R2 899 677,63, as from 1 January 2009,

together with interest calculated at the rate of 15,5% per annum *a tempore morae* on the aforesaid amounts.

3. The Third Respondent, represented by the First Respondent, is in law liable to make funds available in the aforesaid amounts to the Fourth Respondent for payment to the Applicant, as well as for the amounts due in respect of January to March 2009 as and when those amounts become due, subject to compliance by the Applicant with its obligations in terms of the contract.

4. The First Respondent has to pay the Applicant's costs of this application, including the costs of two counsel, as taxed or agreed.

5. The question of costs between the Applicant and the Second Respondent is fully and finally settled on the basis that the Applicant pays the Second Respondent's party and party costs incurred up until close of business on Tuesday, 13 January 2009, including the costs of two counsel, as taxed or agreed.

[3] The aforementioned declaratory relief, obtained with the consent of the first and second respondents, understandably gave rise to an expectation by the applicant that payment of the admitted indebtedness would be forthcoming from government. That expectation has been disappointed. The second respondent's department has taken the position that there are insuperable legal obstacles standing in the way of its ability to lawfully satisfy the claim at this time. It is that position that

precipitated the application brought before me on 28 January 2009. The fourth respondent did not participate in the proceedings; and there is no basis in law to ascribe a separate identity to the Government of the Republic of South Africa, which was cited as the third respondent, from that of the first and second respondents.

[4] Although the question of urgency was placed in issue on the papers, especially by the second respondent, I was advised at the commencement of the hearing that counsel had decided that the matter could indeed properly be entertained on an urgent basis. This decision was manifestly correct. The evidence is that if the money sum owed to the applicant is not paid before the end of this month there is every prospect that the applicant will be unable to continue with its operations. The calamitously adverse human and economic consequences of the cessation of the bus services to the commuting public of greater Cape Town are so obvious as not to require description. The prospect that such consequences might be visited on the community should, I would have thought, have been sufficient consideration for an urgent political or administrative solution to have been sought.

[5] The matter has instead been put before the court because the second respondent has taken the position that the existing statutory framework ties his hands and prevents him from making payment even if he wished to. The exigencies have necessitated the argument and determination of the issues in circumstances far from ideal having regard to the importance of the legal and practical matters involved. I have had to prepare this judgment amidst the other demands of dealing with yesterday's enlisted motion roll. The court's ability to assist the applicant in obtaining payment of the admitted liability is in any event limited because it is well-established that, as the law currently stands, any order of the court sounding in money against the government cannot be executed against the property of the State as would ordinarily be the case in equivalent litigation between private individuals or entities. This is an incidence of the provisions of s 3 of the State Liability Act 20 of 1957, which provides:

> 'Satisfaction of judgment
>
> 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.'

[6] The unconstitutionality of the inherent inequality before the law that this statutory situation creates has been acknowledged in the Constitutional Court's judgment in *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC). The Constitutional Court has confirmed that s 3 of the State Liability Act is 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. Parliament has been afforded until 1 June 2009 to pass legislation that provides for the effective enforcement of court orders sounding in money against the State.[1] There was no suggestion by counsel for the State in *Nyathi* that judgment debts sounding in money against the State were not charges on the National Revenue Fund ('the NRF'), or that a special parliamentary appropriation had been necessary before the claimant's judgment claim in that matter could be settled. To the contrary, the argument on behalf of the State in the *Nyathi* matter was that the Public Finance Management Act 1 of 1999 ('the

[1] See para [92] of the judgment in *Nyathi*.

PFMA') provided a sufficiently effective framework for the satisfaction of judgment debts against the State to save s 3 of the State Liability Act from any suggestion of unconstitutionality on account of its prohibition against execution of such judgments against the State. Against that backdrop, the irony of the position adopted by the second respondent's department in the current matter cannot escape notice.

[7] As at the time of the institution of the current proceedings there was in fact no money order in existence against the State in favour of the applicant that might, other than for the factor mentioned in the preceding paragraphs, have been executable. The issue in the current matter, however, does not go the applicant's ability to execute any judgment it might obtain in respect of the money admittedly owed to it by the government, which was the central question in *Nyathi*. The question in the current matter is not the unwillingness of the State to pay the debt; it is its legal ability to do so. Accordingly the submission by Mr *Simenya* SC who appeared, with Ms *Platt*, for the second respondent that the judgment in *Nyathi* was dispositive of the

current application in a manner adverse to the applicant was misplaced.

[8] It is apparent from those provisions of s 3 of the State Liability Act that were not impugned in *Nyathi* that satisfaction of any judgment or order sounding in money may be paid out of the NRF or a Provincial Revenue Fund, as the case may be. The administration of the NRF falls within the responsibilities of the second respondent as the minister responsible for the National Treasury. The position that confronts the applicant is that the first respondent desires that the applicant's claim be settled, but the second respondent as administrator of the NRF contends that the because the Treasury is allowed to withdraw monies from the NRF only when the withdrawal has been authorised in terms of an appropriation by an Act of Parliament or authorised as a 'direct charge' within the meaning of s 15 of the Public Finance Management Act 1 of 1999 ('the PFMA') he is unable to allow payment to occur. Neither of the aforementioned prerequisites for the release of funds from NRF has been satisfied, according to Mr Kuben Naidoo, the Deputy Director General: Budget Office, who

deposed to the answering affidavit on behalf of the second respondent.

[9] Section 15 of the PFMA provides:

> 15 Withdrawals and investments from National Revenue Fund
>
> (1) Only the National Treasury may withdraw money from the National Revenue Fund, and may do so only-
>
> (a) to provide funds that have been authorised-
>
> (i) in terms of an appropriation by an Act of Parliament; or
>
> (ii) as a direct charge against the National Revenue Fund provided for in the Constitution or this Act, or in any other Act of Parliament provided the direct charge in such a case is listed in Schedule 5;
>
> (b) to refund money invested by a province in the National Revenue Fund; or
>
> (c) to refund money incorrectly paid into, or which is not due to, the National Revenue Fund.
>
> (2) A payment in terms of subsection (1) (b) or (c) is a direct charge against the National Revenue Fund.
>
> (3) (a) The National Treasury may invest temporarily, in the Republic or elsewhere, money in the National Revenue Fund that is not immediately needed.
>
> (b) When money in the National Revenue Fund is invested, the investment, including interest earned, is regarded as part of the National Revenue Fund.

[10] Schedule 5 to the PFMA reads as follows:

> Schedule 5
>
> DIRECT CHARGES AGAINST NATIONAL REVENUE FUND
>
> Payments in terms of the following Acts:

1. Remuneration of Public Office Bearers Act, 1998 (Act 20 of 1998) (Covering the President's salary and the salaries of members of Parliament sections 2 (7) and 3 (7));

2. Remuneration and Allowances of Deputy Presidents, Ministers and Deputy Ministers Act, 1994 (Act 53 of 1994) (Covering the salary of the Deputy President section 4(a));

3. Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989) (Covering salaries and allowances of Judges and Judges seconded to governments of other countries in terms of section 2).

4. Magistrates Act, 1993 (Act 90 of 1993) (covering remuneration of magistrates in terms of section 12).[2]

[11] The operation of the proviso to s 15(1)(a)(ii) of the PFMA commenced on 31 August 2001, whereas the general provisions of the Act as a whole came into operation on 1 April 2000. Counsel advanced no submissions on the reason for the staggered manner of the full bringing into effect of s 15(1)(a)(ii), and the intended significance of the proviso is by no means apparent to me. I suspect that the draftsman might have been seeking in the proviso

[2] The provisions of s 15 of the Act are not disabling of government's ability to incur discretionary expenditure when the exigencies of a situation require it in the public interest. Section 16 of the PFMA empowers the second respondent to authorise the use of funds from the NRF to defray expenditure of an exceptional nature which might not be currently provided for and which cannot, without serious prejudice to the public interest, be postponed to a future parliamentary appropriation of funds. It was striking to me that the second respondent's answering papers contained no indication that the Minister had given consideration to effecting payment of the debt to the applicant under this provision having regard to the gravity of the situation should Cape Town's bus commuters be left stranded as a result of the applicant's financial inability to continue operations. I directed an enquiry through counsel to the Minister asking if consideration had been given by him to this provision. I am appreciative of the Minister's prompt response to the court, through the State Attorney, from Davos, Switzerland, where he was attending important business at the time of the hearing. The Minister has informed the court that he did consider the provisions of s 16, but concluded that they were not directed at a situation of the nature posed by the current case. In the context of the relief sought and the conclusions on the law to which I have come it has ultimately become unnecessary to consider the practical scope of s 16, or to express any view on the Minister's construction of the provision.

to refer to enactments dealing with 'direct charges' expressly identified as such in the Constitution. Whatever the reason, the existence of the proviso has the effect of materially narrowing the broader provisions of s 213 of the Constitution of which s 15(1)(a) of the PFMA is otherwise a direct reflection. Section 213(2) of the Constitution provides:

> (2) Money may be withdrawn from the National Revenue Fund only-
>
> (a) in terms of an appropriation by an Act of Parliament; or
>
> (b) as a direct charge against the National Revenue Fund, when it is provided for in the Constitution or an Act of Parliament.

No attack was made by the applicant, however, on the constitutionality of the proviso to s 15(1)(a)(ii) of the PFMA.

[12] Mr *Le Roux* SC, .who appeared for the applicant together with Mr *Smalberger*, submitted that the provisions of s 3 *of* the State Liability Act, which plainly authorise the settlement of judgment debts by payment from the NRF, constitute '*an appropriation*' within the meaning of s 15(1)(a)(i) of the PFMA. With reference to the Concise Oxford Dictionary he pointed out that the word 'appropriation' is not specially defined in the Act and pointed to dictionary definitions which indicate that the word can

mean a 'devotion to a special purpose'. The Shorter Oxford Dictionary provides an even more felicitous definition for the purpose of Mr Le Roux's argument: It defines the word as meaning, amongst other things, 'Assignment of anything to a special purpose'. As I understood Mr *Heunis* SC who appeared, with Mr *Oliver*, for the first respondent, his submissions supported those of the applicant in this respect. It is however trite, of course, that dictionary definitions are only applicable if the context in which the word or term in question is used supports the application of the definition.

[13] Mr *Simenya* submitted that the expression 'appropriation by an Act of Parliament' had a well understood meaning related especially to budgetary allocations. In my judgment the use of the expression within in the context of the PFMA, considered as a whole, supports the construction advanced by Mr *Simenya*. I refer in particular to s 26 which provides: 'Parliament and each provincial legislature must appropriate money for each financial year for the requirements of the state and the province, respectively.' A consideration of the broader provisions of the Act demonstrates that the exercise of legislative appropriation entails

the budgetary allocation or assignment of expenditure allowances for particular purposes from the NRF or the Provincial Revenue Fund. These dedicated statutory appropriations constitute the authorisation for the expenditure of State funds for the purposes identified and within the monetary limits therein determined. Section 3 of the State Liability Act identifies the NRF as a source from which the State's judgment debts may be paid, but it contains nothing having the effect of an appropriation of funds for that purpose. If anything, s 3 of the State Liability Act characterises judgment debts rather as a 'direct charge' on the NRF because it authorises that payments in satisfaction of money judgments may be made from the NRF.

[14] The focus of enquiry must therefore shift to s 15(1)(a)(ii) of the PFMA. Can it be said that a judgment debt against the State constitutes a 'direct charge' on the NRF? The expression 'direct charge' is not defined in the PFMA, nor – in respect of s 213(2) of the Constitution – in the Constitution of the Republic of South Africa, 1996.[3] The Constitution expressly characterises certain monetary demands on the NRF and the Provincial Revenue Funds

[3] The term 'direct charge' is also employed in ss 58(3), 71(3), 77(1) and (2), 117(3), 120 and 226 of the Constitution. I have not undertaken an exhaustive search.

as 'direct charges'. For example, the salaries, allowances and benefits payable to members of the National Assembly are a direct charge against the NRF in terms of s 58(3) of the Constitution. The PFMA also contains examples of 'direct charges' expressly so labelled: see s 12 of the Act which provides, amongst other matters, that tax refunds shall be a direct charge on the NRF.

[15] No submissions were made to the court by any of the parties on the meaning of the term 'direct charge'. In context, both with regard to the Constitution and the PFMA, the meaning is clear. It denotes a demand on the Fund in question (be it the NRF or a Provincial Revenue Fund) that arises directly from a generally authorising provision, as distinct from expenditure that is provided in terms of an act of appropriation in the sense explained in paragraph [[13], above. It is the absence of the intervening requirement for an act of appropriation as authority for a withdrawal from the Fund that makes the charge direct. The expenditure from the Fund that is permissible when a direct charge is involved is lawful and authorised notwithstanding the absence of a budgetary allocation.

[16] The need for 'direct charges' in the sense just mentioned is understandable in the general constitutional framework of a functioning democracy, especially one – like ours – characterised by a system of separation of powers. It is therefore not surprising to find that the salaries and benefits of parliamentarians and of the judiciary are direct charges. This means that these office bearers (in the legislative context, parliamentarians representing minority or opposition parties would be particularly protected by the characterisation) cannot be kept from recovering their determined remuneration and benefits by reason a failure of the legislature, perhaps because of an obstructive disposition of the majority party or a coalition amounting to a majority, to make special provision in the budget by way of appropriations to satisfy the payments from the Fund necessary to meet these needs. Parliament cannot as a result hold the Executive or the Judiciary or any of its own members from claiming payment of their remuneration and benefits directly from the Fund notwithstanding the absence of a budgetary appropriation of funds for the purpose. The existence of direct charges places a constraint on the powers of the budgeting office of government. It limits the scope for abuse of power.

[17] The PFMA does not contain within itself any provision that justifies the characterisation of judgment debts against the State as direct charges against the NFR and the State Liability Act is not an Act listed in Schedule 5 to the Act. It follows, in the absence of any challenge to the constitutionality of the proviso to s 15(1)(a)(ii) of the PFMA, that a judgment debt might only be regarded as a direct charge against the NFR if it is provided for in the Constitution.

[18] Reference has already been made above to various sections of the Constitution in which there is express mention of direct charges. It does not follow however that the label 'direct charge' must be expressly attached in the text of the Constitution for provision of a debt of the State of that nature to arise by virtue of the Constitution. There is, for example, no express provision in the Constitution for a separation of powers, but the incidence of that characteristic is clearly implied and has been recognised by the Constitutional Court on that basis to be provided. See *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) (2001 (1) BCLR 77).

[19] In the context of its role as the supreme law of the Republic the Constitution, and indeed all law in South Africa, must be construed in manner that gives effect to its founding provisions. Particularly relevant in the context of the issue before the court in this matter is the recordal in s 1 of the Constitution that the Republic of South Africa is a democratic state founded on the values, amongst others, of human dignity, equality, the advancement of human rights and freedoms, and the rule of law. The relevance of the values of human dignity and equality, which are enshrined in the Bill of Rights, to the ability of any person to obtain payment of judgment debts owed by the State is confirmed in the *Nyathi* judgment.

[20] A further relevant consideration in the context of the arguments about statutory construction, which are centrepiece of the second respondent's opposition to the application, is the provisions of s 39 of the Constitution. The questions in contention bring especially s 39(1) and(2) into consideration:

> '(1) When interpreting the Bill of Rights, a court, tribunal or forum-
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[21] It would be plainly inimical to the founding values of the Constitution and to several of the fundamental rights described in chapter II thereof if the effect of the statutory framework in place were to prohibit the National Treasury from promptly satisfying any judgment debt sounding in money against the State and the courts should not easily be driven to the conclusion that the framework in place has that effect.

[22] Absent special provision identifying an alternative source of payment in respect of such debts, the funding for the satisfaction of the State's creditors must be the NRF or a Provincial Revenue Fund as the case might be. This follows necessarily from s 213(1) of the Constitution which provides:

'There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament.'

Section 213(1) of the Constitution has its equivalent in respect of Provincial Revenue Funds in s 226(1).

[23] Where then does one find a basis for holding that judgments against the State sounding in money constitute debts which are direct charges against the NRF or Provincial Revenue Fund as the case might be? In my judgment the answer lies in s 165(5) of the Constitution which provides:

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

[24] Section 165(5) of the Constitution would be rendered an empty provision if the binding nature of orders or decisions of the courts did not denote an obligation on all persons and organs of state to which such orders decisions might be directed, to comply with them. Judgments sounding in money obviously fall within the ambit of orders or decisions referred to in s 165(5). If such orders or decisions were not to form a direct charge on government funds, the authority of the courts, established in terms of s 165 of the Constitution, would be undermined and if the efficacy of the courts' decisions in regard to judgments sounding in money

against the State were rendered subject to permissive authority by another arm of government, namely the legislature, by the adoption of appropriating legislation the separation of powers between the judicial, legislative and executive arms of government which is part of the basic Constitutional framework of government in South Africa would be contradicted.

[25] The contextual interpretation of s 165(5) which I have given is consonant with the constitutional principles emphasised in a related context by the Constitutional Court in *Nyathi*. I refer in particular to paragraphs [42], [44], and [60] of the judgment written by Madala J, in which the majority of the Court concurred. On the other hand the argument advanced on behalf of the second respondent would have it that there was no obligation on the State to comply with a judgment sounding in money until legislative authorisation had been obtained. I find nothing in s 15 of the PFMA, read in context, that supports any such untenable intention by the legislature. The objects of the Act are good financial management of public finances and accountability for expenditure undertaken in that context. See s 2 of the Act. There is nothing in the general purpose of the Act, or any of its provisions to which my

attention was drawn, that suggests any intention to render the settlement of judgment debts - which arise from the institution of actions by persons outside the State and judgments given thereon by the courts, without any duty to have regard to the State's budgetary provisions - subject to parliamentary acts of appropriation.

[26] The fact that the State Liability Act, which is a relic from the pre-constitutional era, is not an Act within the meaning of s 15(1)(a)(ii) of the PFMA is of no consequence in the context of the effect of the provisions of the Constitution described above, notwithstanding that, but for the provisions of the PFMA, s 3 of the Liability Act would undoubtedly, by itself, have given rise to the characterisation of judgments sounding in money as being direct charges on NRF. It is however worth observing that had there been any legislative intention in the enactment of s 15 of the PFMA to bring about the unwholesome situation that judgment debts sounding in money were not to be treated as direct charges on the NRF as provided in s 3 of the State Liability Act some express cross-reference to the State Liability Act would have been made. Mr *Simenya* argued that the provisions of s 3(3) of the PFMA,

which state 'In the event of any inconsistency between this Act and any other legislation, this Act prevails' served such a purpose. In the light of my principal findings it is unnecessary to dwell on this submission other than to remark that as an indication of special legislative intent it is about as opaque as any statutory provision could possibly contrive to be.

[27] I accordingly find that there is no statutory bar to the immediate settlement of the applicant's claim from the NRF.

[28] The applicant seeks judgment in the amount of R94 505 098, 24 in paragraph 2 of the notice of motion. The validity of the claim is established in the order granted earlier by Motala J and, unsurprisingly in the circumstances, no defence was advanced on the merits of the claim. Any dispute that there might be between the first and second respondents as to whether the liability should have been incurred is an internal government matter and of no relevance to the applicant's entitlement to judgment in the amount claimed.

[29] I consider that it follows from what has been held earlier in this judgment that the applicant has also established an

entitlement to relief substantially in accordance with paragraph 3 of the notice of motion.

[30] I am not disposed to grant any relief directing the payment to be effected in any particular manner. Inasmuch as second respondent's position is premised in the answering affidavit filed on his behalf on the existence of a statutory obstacle and inasmuch as it has been found by this court that the perceived obstacle is illusory, it should follow that if the government is acting in good faith payment will follow promptly. The limits on the court's ability to assist practically if it does not are set out extensively in the *Nyathi* judgment and it would be a supererogation to revisit them. The applicant is however at liberty to seek appropriate relief - the nature of some of which is discussed in the majority judgment in *Nyathi* - if payment does not follow on this judgment. Having regard to the urgency of the situation I shall as a precautionary measure afford the applicant leave to do so on the same papers, duly supplemented if needs be.

[31] The first respondent has found himself caught in the middle in these proceedings. On the other hand some of the relief sought

against the first respondent in this application would appear to have been inappropriate and required him to appear represented by separate counsel from those representing the second respondent. In all the circumstances, I have determined that it would be fair to make no costs order either in favour or against the first respondent.

[32] The applicant made a contingent application for condonation in terms of s 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. To the extent that such condonation might be necessary, as to which I express no opinion, no-one suggested it should not be granted.

[33] In the circumstances the following orders are made:

1. The Applicant's non-compliance with the forms and time periods provided in the Uniform Rules of Court is condoned in terms of Rule 6(12) to the extent necessary by reason of the urgency of the application.
2. To the extent necessary the Applicant is granted condonation in terms of Section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002.

3. Judgment is granted in the Applicant's favour against the First Respondent in the amount of R94 505 098,24 (being the total of the amounts set out in paragraph 2 of the Order of this Court issued under case number 21303/2008 on Thursday 15 January 2009, together with interest calculated in terms of the provisions of the said paragraph.

4. It is declared that the Second Respondent is not prohibited by the provisions of s 213(2) of the Constitution or s 15(1)(a) of the Public Finance Management Act 1 of 1999 from effecting immediate payment of the judgment debt arising from paragraph 2 hereof from the National Revenue Fund upon the request of the applicant and/or the first respondent.

5. In the event of payment of the aforementioned judgment debt not being effected promptly upon request, the Applicant is granted leave to apply for such further relief as it might be advised to seek upon the same papers duly supplemented and upon appropriate notice to the affected parties.

6. The second respondent is ordered to pay the applicant's costs of suit, including the costs of two counsel.

[34] First respondent brought what was labelled as an 'interlocutory application' seeking to protect - as far as it remained possible to do so after the annexure thereof to the papers – the confidentiality of the Cabinet Memorandum attached as annexure MM1 to the affidavit by Ms Mpumi Mpofu in the proceedings before Motala J. The effectiveness of any such relief is doubtful, but insofar as the applicant and the first respondent agreed on the terms of a relevant order I have acceded to making it in order to afford the Government whatever residual benefit therefrom that it might be able to derive in the circumstances. Accordingly, in the 'interlocutory application' an order in the terms framed by the parties will issue as follows:

> 'The contents of the Treasury Committee Memorandum No. 1 of 2008, dated 5 September 2008 with reference File No.: M7/1/2008 that was filed of record in this application and in the application under Case No.: 21303/2008 and marked "*Secret*" may not, to the extent that it has not yet occurred, be disseminated or publicised.'

A.G BINNS-WARD
Acting Judge of the High Court