THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 115/09

In the matter between:

THE MINISTER OF FINANCE **APPELLANT**

and

GOLDEN ARROW BUS SERVICES (PTY) LTD **RESPONDENT**

Neutral citation: *The Minister of Finance v Golden Arrow Bus Services* (115/2008) [2009] ZASCA 174 (4 December 2009)

CORAM: **Mpati P, Snyders, Mhlantla, Bosielo JJA *et* Leach AJA**

HEARD: **3 November 2009**

DELIVERED: **4 December 2009**

SUMMARY: Constitutional law – actions against State – satisfaction of orders of courts sounding in money – whether s 3 of the State Liability Act 20 of 1957 provides for satisfaction of judgment debt as direct charge against the National Revenue Fund.

ORDER

On appeal from: Cape Provincial Division (Binns-Ward AJ sitting as court of first instance).

1. The appeal succeeds. Paragraphs 4 and 5 of the order of the court a quo are set aside.
2. Paragraph 6 of the order of the court a quo is amended to the extent that the words 'second respondent' are replaced with the words 'first respondent'.

JUDGMENT

MPATI P (Snyders, Mhlantla, Bosielo JJA *et* Leach AJA concurring):

[1] This appeal concerns the question whether the provisions of s 3 of the State Liability Act[1] ('the Act') may be construed as an appropriation by an Act of Parliament in terms of which money may be withdrawn from the National Revenue Fund ('the Fund'), or as providing for a direct charge against the Fund, as contemplated by s 213(2) of the Constitution,[2] for purposes of satisfying court orders against the State sounding in money.

[2] The respondent is a bus company which operates a commuter passenger transport business for the public in the urban and suburban areas of the Cape Metropolitan area. In terms of an agreement concluded between the respondent and the State as represented, amongst others, by the Minister of Transport, the State undertook to assist commuters financially by way of a

[1] 20 of 1957.
[2] The Constitution of the Republic of South Africa, 108 of 1996.

passenger subsidy paid to the respondent. The subsidy agreement was concluded in or about March 1997.

[3] It is not in dispute that by January 2009 an amount of R94 505 098.24 was due to the respondent in terms of the agreement. On 15 January 2009 the respondent, as applicant, obtained an order in the Cape High Court, by agreement between it and the Minister of Transport, the present appellant, the Government of the Republic of South Africa and the Member of the Executive Council for the Department of Public Transport, Roads and Works for the Western Cape Province (MEC) as first, second, third and fourth respondents respectively. The order declared, in paragraph 3, that –

'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 . . . subject to compliance by the Applicant with its obligations in terms of the contract.'

It appears that due to lack of funds in the Department of Transport the moneys admittedly owed to the respondent in terms of the court order were not paid.

[4] On 23 January 2009 the respondent instituted motion proceedings against the same parties, seeking, inter alia, the following order:

'1. . . .

2. That the amount of R94 505 098.24 . . . 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 . . ..

3. . . .

4. Directing the Second Respondent [the present appellant], 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.

. . . .'

In an affidavit filed in response to the respondent's claim, Ms Mpumi Mpofu, on behalf of the Minister of Transport and the Government of the Republic of South Africa, supported the respondent and stated that 'the amounts payable in terms of the Order (of 15 January 2009) have to be paid out of the National Revenue Fund'. The deponent, who was the Director-General of the Department of Transport, also averred that the Minister of Transport 'does not have funds available to pay over to the [MEC] with which to pay the [respondent] and is unable to move funds within his budget in order to make funds available to pay the [respondent]'.

[5] The Cape High Court (Binns-Ward AJ) granted judgment in favour of the respondent against the Minister of Transport in the amount claimed.[3] In addition, the court ordered as follows:

'4. It is declared that the [appellant] 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 . . . from the National Revenue Fund upon the request of the [respondent] and/or the [Minister of Transport].

5. In the event of payment of the aforementioned judgment debt not being effected promptly upon request, the [respondent] 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 [appellant] is ordered to pay the [respondent's] costs of suit, including the costs of two counsel.'

The appellant now appeals against paragraphs 4, 5 and 6 of that order with leave of the court below.

[6] The respondent has taken no part in this appeal. Counsel for the appellant informed us, during argument, that the judgment debt has been settled in full. That the respondent did not oppose the appeal is, therefore, not surprising. For these reasons and by reason of the latest judgment of the Constitutional Court in *Minister for Justice and Constitutional Development v*

[3] The judgment is reported sub-nom *Golden Arrow Bus Services (Pty) Ltd v Minister of Transport and others* 2009 (5) SA 322 (C).

Nyathi[4] (*Nyathi 2)* it was enquired of counsel whether the issue in this appeal had not become moot.[5] Counsel urged upon us that we should hear the appeal because of the possibility of other judgment creditors of the State, on the authority of the order of the court below, seeking satisfaction of their judgment debts against the State directly from the Fund in future. In addition, counsel submitted that in the court below the appellant, although conceding that he was a party to the consent order of 15 January 2009, denied that he consented to be liable to any payments of moneys in terms of the court order. In granting the order sought by the respondent, however, the court below did not deal with the appellant's objection. In this court, counsel persisted with that issue. I shall assume, without deciding, that the citing of the appellant in the proceedings in the court below was in order.

[7] Section 3 of the State Liability Act provides that:

'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 Provincial Revenue Fund, as the case may be.'

The Fund, established in terms of s 213(1) of the Constitution, is a fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament. Section 213(2) reads:

'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.'

I do not intend to analyse the judgment of the court a quo in depth, but, despite the disadvantage of this court not having had the benefit of argument from the respondent, I endorse the finding that s 3 of the Act, although it identifies the Fund 'as a source from which the State's judgment debts may be paid . . . contains nothing having the effect of an appropriation of funds for that

[4] [2009] ZACC 29.

[5] The *Nyathi 2* judgment has crafted certain procedures to ensure that judgment debts against the State are enforced.

purpose'.[6] Section 3, therefore, does not qualify as 'an appropriation by an Act of Parliament' as envisaged in s 213(2)(a) of the Constitution.

[8] The Fund is administered and controlled by the National Treasury, which, in terms of the Public Finance Management Act (PFMA),[7] 'must enforce compliance with the provisions of Section 213 of the Constitution' (s 11(1)). National Treasury consists of the appellant, as head of Treasury, and his department or departments responsible for financial and fiscal matters (s 5(1)). (It was perhaps for this reason, ie for the reason that the appellant is head of Treasury, and the fact that the respondent sought satisfaction of the judgment debt as a direct charge against the Fund, that the appellant was cited as a respondent in the court below.)

[9] Section 15 of the PFMA is in the following terms:

'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) . . ..'

Four Acts of Parliament are listed in Schedule 5 to the PFMA. The schedule provides that payments in terms of those Acts (or certain of their provisions) are direct charges against the Fund. The Act is not one of them.

[10] I agree, therefore, with the following statement by the court a quo:

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[6] Above n 3 para 13.
[7] 1 of 1999.

'The PFMA does not contain within itself any provision that justifies the characterisation of judgment debts against the State as direct charges against the [Fund] and the State Liability Act is not an Act listed in Schedule 5 to the [PFMA].'[8]

The court went further and said that (a) in the absence of a constitutional challenge to the proviso to s 15(1)(a)(ii) of the PFMA, a judgment debt 'might only be regarded as a direct charge against the [Fund] if it is provided for in the Constitution';[9] (b) it does not follow 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;[10] and (c) absent special provisions identifying an alternative source of payment in respect of such debts, the funding for the satisfaction of the State's creditors must be the Fund.[11] In respect of the proposition in (c) the court found the basis for it in the provisions of s 165(5) of the Constitution, which read:

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

The court said the following in this regard:

'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.'[12]

[11] I share the concerns expressed by the learned judge that the provisions of s 165(5) of the Constitution would be rendered nugatory if the binding nature of orders or decisions of courts did not denote an obligation on all those to whom they are directed, to comply with them. And it is because of this concern that the Constitutional Court has, by a majority, held s 3 of the

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[8] At para 17.
[9] Ibid.
[10] At para 18.
[11] At para 22.
[12] At para 24.

Act to be inconsistent with the Constitution to the extent that it does not allow for execution or attachment against the State and 'does not provide for an express procedure for the satisfaction of judgment debts'.[13] (My emphasis.) It is true that in *Nyathi 1* the Constitutional Court did not deal directly with the question whether or not s 3 of the Act makes provision for satisfaction of court orders sounding in money. The court dealt with the issue of the constitutionality of s 3 in the context of its direction that no execution or attachment shall be issued against State property.

[12] But certain observations in the majority judgment of Madala J are of significance. With regard to the proper interpretation of s 3 Madala J said:

'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 funds, there are various procedures in the PFMA and Treasury Regulations which are supposedly designed to assist a judgment creditor in claiming from the funds.'[14]

(The 'funds' referred to are the National and Provincial Revenue Funds.) The court then refers to s 76(1)(h) of the PFMA, which enjoins National Treasury to make regulations or issue instructions, to be applicable to all departments, concerning 'the settlement of claims by or against the State'[15] and concludes that (a) the section does not contain any procedures relating to how orders of courts are to be settled and (b) that the legislature must set out the procedures required for the implementation of the State's obligations, as dictated by the Constitution.[16]

[13] The 'obligations' referred to are obviously those envisaged by S 165(5) of the Constitution, viz that court orders must be respected and given effect to. That, in my view, is the import of the stipulation that an order or decision issued by a court binds all persons. It is thus clear from the decision of the Constitutional Court in *Nyathi 1* that although s 3 of the Act might provide for claims to be made against the Fund for payment of judgment debts, no

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[13] *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC). (*Nyathi 1*)
[14] At para 53.
[15] At para 55.
[16] At para 56.

procedures exist for the processing of such claims. In this regard Madala J concluded thus:

'[I]t 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.'[17]

The effect of the declarator by the court a quo in paragraph 4 of its order, that the appellant is not prohibited by s 213(2) of the Constitution, or s 15(1)(a) of the PFMA, from effecting immediate payment of the judgment debt owing to the respondent goes squarely against what was said by Madala J in *Nyathi 1.* It must be remembered that the Constitution does not make provision for the manner in which the Fund is to be administered. The PFMA does – it was enacted for that purpose.[18] One can only imagine the difficulties which would be encountered in the proper management and control of the Fund were effect to be given to the order of the court a quo without there being mechanisms and procedures in place so as to enable judgment creditors of the State to claim satisfaction of their judgment debts from the Fund. It follows that the orders in paragraphs 4 and 5 of the order of the court a quo cannot stand.

[14] I have come to this conclusion without having given consideration to the correctness or otherwise of the basis upon which the court a quo found that court orders or decisions are a direct charge against the Fund. I am reluctant to attempt to deal with that issue when argument from only one side was presented before us. I may mention, however, that I find it difficult to understand how the court a quo, after having made the observation that 'but for the provisions of the PFMA s 3 of the [Act] would undoubtedly by itself have given rise to the characterisation of judgments sounding in money being

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[17] At para 88.

[18] See the preamble to the PFMA which reads: '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.'

direct charges on the [fund],'[19] could still find, via s 165(5) of the Constitution, which has nothing to do with the characterisation of court orders, that judgments sounding in money are direct charges against the Fund. It seems to me that in the absence of any challenge to the constitutionality of the proviso to s 15(1)(a)(ii) of the PFMA, which restricts direct charges against the Fund to those provided for in other Acts of Parliament listed in Schedule 5 to the PFMA, s 3 of the Act does not qualify as providing for a direct charge against the Fund.

[15] Moreover, the Constitution itself (s 213(2)(b)) states emphatically that money may be withdrawn from the Fund only as a direct charge against it 'when it is provided for in the Constitution or an Act of Parliament'. The Constitution then makes provision, in a number of sections, for what constitutes a direct charge against the Fund and Provincial Revenue Fund.[20] It would be quite strange if the drafters of the Constitution had intended, under s 165(5), for orders or decisions of courts sounding in money to be paid as a direct charge against the Fund not to have said so.

[16] As I have mentioned above, the respondent took no part in this appeal. It consequently incurred no costs on appeal. As to the costs in the court below, the respondent, which was in a desperate situation of facing insolvency as a result of a failure, on the part of the State, to pay what was admittedly owed to it, merely sought to enforce its rights. Whether or not it should have cited the appellant is of no consequence, in my view. The appellant was part of Government and head of National Treasury, which is responsible for the management and control of the Fund, from which the respondent believed he should have been paid. I do not consider that it would be fair to burden it with the appellant's costs in those circumstances.

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

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[19] At para 26.
[20] See sections 58(3), 71(3), 77(1)(d), 117(3), 120(1)(d), 120(2)(d), 213(3), 226(3) and 226(4)(a).

1. The appeal succeeds. Paragraphs 4 and 5 of the order of the court a quo are set aside.
2. Paragraph 6 of the order of the court a quo is amended to the extent that the words 'second respondent' are replaced with the words 'first respondent'.

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L MPATI P
JUDGE OF APPEAL

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Counsel for Respondent:	No appearance