

BETWEEN MORAL AUTHORITY AND FORMALISM:
*NYATHI V MEMBER OF EXECUTIVE COUNCIL
FOR DEPT OF HEALTH, GAUTENG*

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1 Introduction

Wholesale non-compliance with court orders is a distressing phenomenon in modern day South Africa, both in the Eastern Cape and elsewhere.¹ Where this non-compliance with court orders is rooted in the ‘laziness and incompetence’ of state officials² and where it negatively affects often poor and vulnerable members of society who are, in effect, denied access to life-sustaining resources (which would otherwise have been provided by the state) because of the tardiness of state officials, courts are confronted with difficult issues that strike at the heart of the rule of law, and for respect for the moral authority of the judiciary. What is at stake in such cases is nothing less than the legitimacy of the legal system and the courts that underpin it. When indigent members of society turn to the courts (itself a rare occurrence, given the prohibitive cost and technical difficulties faced by many such individuals) to have the legal obligations of the state owed to them enforced and the system fails them due to a lack of respect for court orders, the rule of law – which EP Thompson controversially called an ‘unqualified human good – is fundamentally threatened.³ Courts therefore have, both in pragmatic and ethical terms, a duty to take steps – within the limits of what is permissible by the Constitution and the law – to ensure that court orders are enforced and the court’s legitimacy and authority is preserved. However, courts seldom have either the vast powers, or

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¹ See *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 2 SA 611 (SCA) para 17.

² n 1 above, para 18.

³ EP Thompson *Whigs and hunters: The origins of the Black Act* (1975) 263.

the necessary technical skills to ensure that endemic problems relating to the various failures in state administration are permanently eradicated. Courts must determine in each case what is practically achievable and how far it can go to eradicate endemic problems relating to state administration or breaches of human rights, while taking great care not to get involved in open-ended interventions for which it is not institutionally suited. It must be remembered that courts rely on their moral authority and the co-operation of the state and its officials, rather than brute force or other powers to ensure that its orders are complied with. As Krieger J stated in *S v Mamabolo*:⁴

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

Courts are thus often confronted with difficult and complex questions relating to both its effectiveness and its legitimacy. In *Nyathi v Member of Executive Council for Dept of Health, Gauteng*⁵ the majority of judges of South Africa's Constitutional Court was once again faced with such difficult choices. In that case the court took into account the broader context which had led to the wide-scale disobedience of court orders and took drastic action in the hope that its chosen path would shock a lethargic bureaucracy into action, without undermining its own authority and legitimacy. On the other hand, it is my contention that the minority judgment in effect closed its eyes to the broader context and opted for a more cautious approach in the hope that innovative litigators with deep pockets will use existing legal tools to prod state officials into addressing the structural and endemic problems at hand. While it is not always clear what would constitute the best strategic choice – as this will depend

⁴ 2001 5 BCLR 449 (CC) para 16. Of course it could be argued that the judiciary has several constituencies, including the lawyers and academics who read, analyse and apply its judgments and the general public on whose support the legitimacy and, to some extent, the power and influence of the judiciary depends. Although South Africa's Constitutional Court stated in *S v Makwanyane* 1995 6 BCLR 665 (CC) para 88 that public opinion was no substitute for the duty to uphold the provisions of the Constitution without fear or favour, it conceded that public opinion may have some relevance for court when enquiring into the constitutionality of legislative provision.

⁵ 2008 9 BCLR 865 (CC).

on the factual matrix of a particular case or set of cases, the available legal tools, the moral authority and standing of the particular court and the institutional competence of that court – it is my contention that given the vast scale of the problem of non-compliance with court orders in South Africa, the seemingly intractable nature of the problem, and the disastrous effect this is continuing to have on especially poor and marginalised individuals who turn to our courts for relief, the majority in the *Nyathi* judgment opted for the correct approach. The minority judgment, I fear, might represent a rather too timid and unnecessary cautious approach and may well be seen to border on an abdication of the Court’s self-styled role as perceived champion of the poor. Because the minority decided to approach the issue in an overly formalistic manner, its decision seemed to have underestimated the practical problems of endemic laziness and impunity which have led to widespread disobedience of court orders by state officials. In the light of the very complex but deeply rooted problems relating to state impunity, the minority decision in the *Nyathi* case would not – if it had prevailed – have preserved or enhanced the moral authority of the Constitutional Court by acting in a careful and restrained manner in order to preserve the dignity and authority of the other branches of government – as the minority apparently believed. Instead the minority decision would have eroded the moral authority of the court exactly because it would have signaled that the court is not alert to the practical problems faced by indigent litigants who try to enforce court orders against the state but are confronted by lazy and careless officials who believe they have a right to act as they please – the law be damned. Potentially, the minority approach may also have endangered the institutional integrity of the court as it might have ensnared the court in a never-ending cycle of ineffectual oversight and engagement, which would slowly have eroded the moral authority of and respect for the court.

2 The judgment

2.1 Factual background

Mr Nyathi suffered a stroke and became permanently disabled due to the negligence of medical personnel at the Pretoria Academic Hospital and the Kalafong Hospital – both state institutions. He then required full-time care and medical treatment and was also liable for the payment of medical expenses and the ensuing legal fees. He instituted an action for R1 496 000 against the state and the state eventually admitted liability but disputed the amount owing to Mr Nyathi. After some legal manoeuvring, the court ordered the state to make an interim payment of R317 700 to pay for Mr Nyathi’s medical expenses and care. It also ordered the state to pay Mr Nyathi’s cost

on the attorney and client scale. The state failed to comply with this court order, despite several attempts on Mr Nyathi's behalf to effect payment. Ordinarily in circumstances like this where a court order sounding in money was not obeyed, the appropriate remedy would be to levy execution against the state and to attach state assets to satisfy the judgment debt. However, section 3 of the State Liability Act⁶ presented an obstacle to this course of action as it stated as follows:

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

Mr Nyathi's lawyers thus approached the High Court for an order declaring invalid the above quoted section 3 of the State Liability Act and a further order for the state to honour the previous court order within 3 days, failing which the applicant sought permission to approach the court for an order declaring the MEC in contempt of court and ordering the MEC to be committed to prison for 90 days. The respondents failed to file a notice of intention to defend or any answering affidavit and the matter was heard unopposed. The first respondent's default in appearance was a cause for grave concern to the High Court. The High Court found this to be especially disconcerting as it claimed that the State Attorney had been contacted and informed on the day of the hearing that the matter would proceed unopposed in motion Court. The High Court proceeded to hear the matter having found that the applicant had done everything that could be expected in the circumstances to inform the respondents and was therefore entitled to have the matter heard. The High Court found that as this was an application sounding in money, the appropriate remedy would have been to levy execution against state assets and not to proceed with contempt proceedings.⁷ The Court pointed out that section 3 of the State Liability Act precluded the court from making this order and that, in effect, Mr Nyathi had no other way of enforcing the court order for the payment of the money owed to him. The High Court subsequently declared invalid section 3 of the State Liability Act as it infringed on section 34 of the Constitution. Mr Nyathi died before his case reached the Constitutional Court where this order of invalidity had to be confirmed, and his widow took up the case on his behalf. The majority found that section 3 of the State Liability Act was unconstitutional as

⁶ Act 20 of 1957.

⁷ See *Nyathi v MEC for the Department of health, Gauteng* 2007 JOL 19612 (T) para 7.

it precluded the applicant from enforcing a court order sounding in money and declared that section invalid. The minority disagreed, arguing that the applicants had other remedies available to enforce the judgment debt and that section 3 therefore did not limit any of the rights in the Bill of Rights.

2.2 Court orders and the rule of law

In a constitutional democracy based, *inter alia*, on the values of ‘the supremacy of the constitution and the rule of law’⁸ and a ‘multi-party system of democratic government, to ensure accountability, responsiveness and openness’,⁹ the obligation on the state to obey orders validly handed down by a court of law takes on a particular significance. This obligation is of great importance, also, because it goes to the heart of the right of everyone ‘to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court’.¹⁰ In a country like South Africa, where the rule of law is threatened by the fact that many individuals simply do not have the financial or other resources to approach courts in order to have the legal duties owed to them enforced, the failure by the state to obey court orders obtained by the very few individuals who have indeed been lucky enough to have gained access to the legal process, pose even greater problems. In this context, the failure of the state to obey court orders in a diligent manner fatally undermines this right and undermines respect for the rule of law, as it potentially places the state above the law as interpreted and enforced by the courts.¹¹ Where the state is seen to be placed above the law through deliberate non-compliance or disobedience of court orders, the effect will be to detract from the ‘dignity, accessibility and effectiveness of the courts’.¹² This potentially has serious consequences for the independence and legitimacy of the courts and, once again, for respect for the rule of law as ordinary individuals will become disheartened and will lose faith in the ability of the law to make any difference to their lives.

The seriousness of the problem of the state’s non-compliance with court orders is further underscored by the fact that the rule of law is a founding value of the South African Constitution. The Constitutional Court has confirmed that, read with section 34 and section 165 and

⁸ Constitution of the Republic of South Africa, 1996 (the Constitution), sec 1(c).

⁹ n 1 above, sec 1(d).

¹⁰ n 1 above, sec 34.

¹¹ See generally on the rule of law in South Africa FI Michelman ‘The rule of law, legality and the supremacy of the Constitution’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, December 2005) Chapter 11.

¹² The Constitution (n 1 above) sec 165(4). See also *Mjeni Minister of Health and Welfare [sic]*, *Eastern Cape* 2000 4 SA 446 (Tk) 452G-H & 453C-D.

173 of the Constitution, it places positive duties on the state to ensure respect for the law and adherence to the law by providing citizens with effective mechanisms for resolving disputes between themselves and between them and the state.¹³ Where a citizen approaches a court and obtains a court order against the state and that court order is deliberately ignored by the state officials or where the state officials fail to obey the court order because of tardiness or neglect, the right of access to court is undermined because it fatally attacks the effectiveness of the legal system on which ordinary citizens rely to have their rights against the state, and the legal duties owed towards them by the state, enforced.

This is not to say that the implementation of court orders vindicating the legal rights of individuals vis-à-vis the state never poses practical problems and that such orders will not have a potentially disruptive effect on the effective and efficient functioning of the state. Courts obviously have a duty to take care when handing down court orders against the state to minimise disruptions while striving to uphold the rights of ordinary citizens and ensuring that legal duties owed to them are effectively vindicated. Where systemic problems, relating to human resource constraints within the state or a lack of political will on the part of state officials, lead to a consistent failure on the part of the state to obey court orders, courts are placed in a particularly invidious position when crafting court orders. If courts merely accept systemic problems as a given and fashion court orders in ways that attempt to circumvent such problems, the interest of citizens will not always be served well as the court itself might contribute to a further erosion of respect for the rule of law. When courts begin to micro-manage such problems they run the risk of getting embroiled in drawn-out battles with officials and organs of state that will bog them down and will waste enormous resources and time. But if courts completely ignore systemic problems relating to the implementation of court orders by the state, the danger arises that such orders will not be obeyed with the resultant eroding effect on the legitimacy of courts and the rule of law.

The state itself has a duty when implementing court orders to address systemic problems and to minimise the potentially disruptive effect such orders may have. What is required is for the state, at all times, to act reasonably, that is to take all reasonable steps to ensure that its officials implement court orders diligently and to the letter while also taking 'reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders'. The state cannot choose which orders

¹³ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC) para 45; *Chief Lesapo v North West Agricultural Bank* 1999 12 BCLR 1420 (CC) para 22.

it will obey and which one's it will disobey because where court orders are not executed the Rule of Law will be undermined.

The precise nature of the state's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case.¹⁴

This is important for the rule of law because it prevents citizens from taking the law into their own hands to prevent the kind of social upheaval that could destroy the fabric of our society and confirms the principle that everyone is equal before the law. This means that where a court issues an order such an order had to be executed, it must be done in a manner 'that prevents social upheaval. Otherwise the purpose of the rule of law would be subverted by the very execution process that ought to uphold it'.¹⁵ Courts will often be faced with questions about what action they should take to minimise upheaval or more chaos and how to balance the need for respect for the law on the one hand, with effective enforcement of rights and duties on the other.

In the *Nyathi* case, in which section 3 of the State Liability Act 20 of 1957 was declared invalid, the Constitutional Court was confronted by these very difficult issues. The case poses serious questions about the role of the Constitutional Court in addressing systemic failures on the part of the state in implementing court orders, while it also demonstrates the hardship and suffering that may be caused by the inability or unwillingness of state officials to implement court orders.

2.3 The majority judgment

The starting point of the majority judgement of the Constitutional Court (per Madala J) was that the State Liability Act was 'in line and compatible with the doctrine of parliamentary supremacy' and was thus

a relic of a legal regime which was pre-constitutional and placed the state above the law: a state that operated from the premise that 'the king can do no wrong'.¹⁶

It focused not on the form of section 3, but rather on its practical effect – given the endemic failure of state officials to comply with court orders sounding in money and the practical difficulties faced by litigants who wished to enforce such court orders against the state.

¹⁴ *Modderklip* (n 13 above) para 45.

¹⁵ *Modderklip* (n 13 above) para 47.

¹⁶ *Nyathi* (n 5 above) para 17.

The majority found that, given this context, the effect of the impugned section was that the State and its officials could not be held accountable for their actions (or lack thereof)¹⁷ and the upshot of this sad state of affairs was that the dignity of ordinary citizens were constantly trampled upon.¹⁸ What section 3 of the State Liability Act did was to preclude the attachment of assets of the State where State officials failed to comply with a court order to pay a litigant money owed to him or her. This section thus prevented the effective enforcement of court orders and therefore limited Mr Nyathi's rights as enshrined in the Bill of Rights.

The majority of the Constitutional Court found that the effect of section 3 of the State Liability Act was to limit various rights in the Bill of Rights without justification and that this, in effect, constituted a failure on the part of the state to redeem the dignity of its citizens. First, section 3 limited the right to equality before the law and the right to equal benefit and protection before the law.¹⁹ This was because section 3 unjustifiably differentiated between a judgment creditor who obtains judgment against the state and a judgment creditor who obtains judgment against a private litigant. The majority came to this conclusion by viewing this differentiation against other provisions of the Constitution, including section 8(1), 34 and 165, and focusing on the fact that these provisions do not treat state litigants differently from private litigants.²⁰ The majority thus concluded that an order issued by a court is binding not only on all individuals but also on all organs of state and grappled with the question of what the state could legitimately do to limit the potential disruptive effects that might ensue where state officials ignore court orders and private litigants turn to the courts to try and force the state officials to do what they are constitutionally obliged to do. Section 8(1) of the Constitution provides that the Bill of Rights applies to all law and binds the legislature, executive and the judiciary and all organs of state, while section 34 of the Bill of Rights guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. Moreover, section 165(5) of the Constitution states that an order or decision issued by a court binds all persons to whom and organs of state to which it applies while section 165(4) requires organs of state, through legislative and other measures, to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of courts. The court pointed out that the deliberate non-compliance with or disobedience of a court order by the state detracts from the

¹⁷ *Nyathi* (n 5 above) para 18.

¹⁸ *Nyathi* (n 5 above) para 89.

¹⁹ *Nyathi* (n 5 above) para 40. Section 9(1) states: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

²⁰ *Nyathi* (n 5 above) para 41.

‘dignity, accessibility and effectiveness of the courts’.²¹ Section 3 of the Act ‘effectively places the State above the law as it does not positively oblige the State to comply with court orders as it should’. This, the court found, is not compatible with the language of sections 8, 34, 165(4) and (5) of the Constitution.²²

Moreover section 3 also limited other rights enshrined in the Bill of Rights. According to Madala J this was so because:

The applicant was made to wait for an extremely long time for money required to pay for his treatment. Without the rehabilitative treatment, he stood a very slim chance of survival. The state was made fully aware of this very desperate situation but provided no relief. He was then unable to attach state assets due to the operation of section 3. It certainly cannot be said, in these circumstances, that the applicant was treated in a manner that showed recognition for his worth and importance as a human being.²³

In the light of the above the court found that section 3 violated Mr Nyathi’s right to dignity (section 10), his right to life (section 11) and his right to be treated as equal before the law (section 9(1)), while he was also denied the right of access to the law (section 34).

The Court also found that this limitation of Mr Nyathi’s rights was not justified in terms of section 36 of the Constitution which allows for the limitation of rights. The state had argued that section 3 was just and reasonable within the meaning of section 36 because it served to protect essential state assets from being attached. It disallows attachment of state assets as such attachment has the potential to disrupt service delivery and to interfere with state accounting procedures. The Constitutional Court agreed that there are few countries who would allow the attachment of certain state assets such as ambulances and dialysis machines as this would unjustifiably (and thus unreasonably) limit the rights of many other individuals. Where legislation in other jurisdictions allows for the attachment of state assets such legislation prescribes the assets that can be attached and limits this to assets that are non-essential to the proper functioning of the state.²⁴

The problem in South Africa – according to the majority judgment – is that while the State is made liable for judgment debts that accrue against it, an *effective* process that would allow a litigant to gain satisfaction of such debts are not in place. There are several reasons for this problem. First, section 3 of the State Liability Act prevents the

²¹ *Nyathi* (n 5 above) para 43, quoting from *Mjeni* (n 12 above).

²² *Nyathi* (n 5 above) para 44.

²³ *Nyathi* (n 5 above) para 45.

²⁴ *Nyathi* (n 5 above) para 51.

attachment of all state assets in all circumstances and therefore seems (at the very least) overbroad. It denies private litigants access to one of the most potent legal instruments to ensure that judgment debts sounding in money are honoured. Second, state officials – for various reasons – do not always comply with court orders. Courts have faced immense challenges in this area of the law and various High Courts have dealt with this problem in different ways – apparently to no avail.²⁵ As Madala remarked, ‘public officials seem not to understand the integral role that they play in our constitutional state’:²⁶

In my view, there can be no greater carelessness, dilatoriness or negligence than to ignore a court order sounding in money, even more so when the matter emanates from a destitute person who has no means of pursuing his or her claim in a court of law. But we now have some officials who have become a law unto themselves and openly violate people’s rights in a manner that shows disdain for the law, in the belief that as state officials they cannot be held responsible for their actions or inaction. Courts have had to spend too much time in trying to ensure that court orders are enforceable against the State precisely because a straightforward procedure is not available.²⁷

Third there are flaws and lacunae within the legal framework which further bedevils attempts by individuals to force state officials to comply with court orders. While the Public Finance Management Act regulates the payment by the state of claims against it, it does not contain any procedures relating to how orders of court are to be settled. According to the Constitutional Court

[l]egislation must set out the procedures required for the implementation of the state’s obligations, as dictated by the Constitution. These procedures, vital to our democracy, founded on the rule of law, are absent here.²⁸

Present procedures are inaccessible to the majority of creditors and are far too complex to constitute a reasonable fulfilment of the state’s obligations in terms of the Constitution. Worse, the relevant sections of the PFMA and its regulations fail to deal at all with how court orders are to be satisfied where the relevant officials fail to give effect to such an order.²⁹ The majority of the Court pointed out that the convoluted and difficult method prescribed by law for payments

²⁵ For discussion of the way in which various courts have dealt with this problem see *Nyathi* (n 5 above) para 59-63. See for example *York Timbers Ltd v Minister of Water Affairs and Forestry* 2003 4 SA 477 (T); *Matiso & Others v Minister of Defence* 2005 6 SA 269 (Tk).

²⁶ *Nyathi* (n 5 above) para 60.

²⁷ *Nyathi* (n 5 above) para 63.

²⁸ *Nyathi* (n 5 above) para 55.

²⁹ *Nyathi* (n 5 above) para 58.

of debts by the state resulted in bureaucratic bungling and a breakdown of communication between the State Attorney's office and the relevant departments. What was required was more than the internal disciplinary procedures prescribed by the PFMA. Legislation that would address the problems outlined above was therefore desperately needed. Parliament, when fixing the problem identified by this judgment was therefore required to provide reasonable measures to assist litigants to enforce court orders by enacting legislation that would allow mechanisms that would enable judgment creditors to execute against the funds. The practice in some other countries is to issue a certificate, which on presentation to the relevant authorities will result in payment.³⁰ Lastly, there are also flaws within the office of the State Attorney in dealing with court orders sounding in money in favour of private litigants. There is therefore 'a desperate need for change within these departments'.³¹ The fact that payment was only made in this case once the applicant had approached the Constitutional Court reflects the sad fact that the current procedure of approaching the State Attorney's office for relief was not effective. Because of ongoing 'bureaucratic bungling' in this office – already commented on in several other judgments³² – the majority refused to accept 'further excuses for the ineptitude', given the fact that the State Attorney's office had been made fully aware of the problem.³³

Although there was a possibility of contempt proceedings being instituted against state functionaries, these proceedings were essentially reactive in nature and were also expensive and time-consuming. Such proceedings would have to be instituted by judgment creditors once the relevant state functionary failed to pay the monies owed. The judgment creditor – often an indigent individual with no easy access to the legal process – would have to obtain a mandamus order and if the state functionary fails to comply with this order, that official could be held in contempt of court. This process was tedious and placed an onerous burden on the judgment creditor, who might be out of pocket even after following these procedures, given the tardiness of state officials and the general lack of respect for court orders.³⁴ As the state has a positive obligation to ensure a right of access to court and respect for court orders, the contempt of court route placed too onerous a burden on a judgment creditor. Such creditors therefore was entitled to attach state assets to satisfy a

³⁰ *Nyathi* (n 5 above) para 86.

³¹ *Nyathi* (n 5 above) para 52. For full discussion of the way in which the State Attorney dealt with this particular case see para 64-78.

³² See generally *South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others* 2006 8 BCLR 901 (CC).

³³ *Nyathi* (n 5 above) para 69.

³⁴ *Nyathi* (n 5 above) para 75.

judgment debt as this was an effective and efficient remedy – something the contempt procedure was not.³⁵

The majority of the Court thus confirmed the order of invalidity of the High Court of section 3 of the State Liability Act but suspended this order for 12 months to allow parliament to pass legislation that would provide for the effective enforcement of court orders.³⁶ The Minister of Justice and Constitutional Development was ordered to compile and provide to the court on affidavit a list of all unsatisfied court orders against all national and provincial state departments, indicating the parties, the case numbers and the amounts outstanding by 31 July 2008. The Minister of Justice and Constitutional Development was ordered to provide the Court with a plan of the steps it would take to ensure speedy settlement of unsatisfied court orders by no later than 31 July 2008.

2.3 The minority judgement

The minority (per Nkabinde J) disagreed with the majority decision because it argued in essence that the broader systemic problems relating to the non-compliance with court orders could not make an otherwise constitutional provision unconstitutional. At the heart of its disagreement with the majority, it seems to me, is a belief that other less drastic but nevertheless effective remedies were available to a litigant owed money by the state to ensure compliance with court orders sounding in judgment debt. Relying on the Supreme Court of Appeal judgment in *Kate*,³⁷ Nkabinde found that a judgment creditor is free to seek a mandamus against a public official who fails to comply with a court order. Although a judgment creditor cannot seek the imprisonment of a state official or the political head of a department concerned for failure to comply with the original court order to pay a judgment debt, a mandamus can be obtained against a state official or the political head of a department.³⁸ A state official who failed to obey such a second order could then be imprisoned for contempt of court. Nkabinde's judgement is based on the assumption that the practical problems faced by this particular litigant, because of the blatant failure by state officials to comply with or ignore a court order, cannot make an otherwise constitutional provision unconstitutional.³⁹ This would amount to a subjective determination of constitutional invalidity which would not be acceptable as an order of invalidity operates against everyone in society – not only against the parties before the court. The effect of section 3 of the State

³⁵ As above.

³⁶ *Nyathi* (n 5 above) para 92.

³⁷ *MEC, Department of Welfare, Eastern Cape v Kate* 2006 4 SA 611 (SCA) para 30.

³⁸ *Nyathi* (n 5 above) para 96-97.

³⁹ *Nyathi* (n 5 above) para 124.

Liability Act is not to render the State immune from complying with a constitutional injunction – even though state officials have acted unlawfully (and often do). ‘The proper resolution of the administrative inertia,’ according to Nkabinde, ‘seems to lie in the public administration getting its house in order’ and that cannot be achieved by striking down section 3 of the Act.⁴⁰ In effect: there is nothing wrong with the Act. It is the application of the Act that causes problems. This is because a reasonable interpretation of section 3 makes it clear that the section imposes a duty in the relevant nominal defendant or respondent to act in terms of the Act. It allows that the nominal defendant or respondent who acts in disregard of the law acts outside his or her authority and exposes himself or herself to personal liability.⁴¹

Nkabinde found that the impugned section cannot be said to infringe on the right of access to court as execution is a process that comes into play only after the court has given its decision on a case and is therefore merely ‘a process incidental thereto’.⁴² Section 3 read with section 38 of the Public Finance Management Act and the relevant Treasury regulations made in terms of the PFMA ‘impose *general* responsibilities on the nominal respondents and the accounting officers, respectively’.⁴³ Had the MEC been informed of the original court judgment, the applicant’s problem might well have been addressed. In fact, the applicant’s right of access to court was not infringed as he had indeed been able to approach the High Court. Although the applicant was frustrated and inconvenienced by delays in effecting payment by the state officials, this ‘inconvenience’ (which led to the applicant’s untimely death) cannot be said to flow from the application of section 3 of the State Liability Act.⁴⁴ The minority judgment seems to assume that the applicant’s problems might have been prevented had he notified the MEC of the existence of judgment which was ignored by the MEC’s officials. It is based on the premise that while state officials might be tardy and unresponsive, the nominal political head of a department will never act in such a tardy way. At the heart of this assumption is a very optimistic view of the way in which the political process will help to ‘correct’ tardiness on the part of state officials who will be held to account by their political heads who, in turn, would be responsive to the problem for fear of political fall-out. Even if a political head were not as politically responsive as the minority assumed, this would not be a problem, it suggested because a mandamus could be obtained to compel the nominal political head of a Department to comply with a

40 *Nyathi* (n 5 above) para 129.

41 *Nyathi* (n 5 above) para 131.

42 *Nyathi* (n 5 above) para 134.

43 *Nyathi* (n 5 above) para 136.

44 *Nyathi* (n 5 above) para 137.

court order sounding in money, which would be the end of the problem.

Nkabinde also rejected the contention of the majority that the impugned part of section 3 of the State Liability Act infringed of the right to equality before the law entrenched in section 9(1) of the Constitution. Correctly noting that the test for section 9(1) is whether there is a rational relationship between the differentiation in question and the government purpose which is proffered to validate it,⁴⁵ the minority pointed out that the government functions differently from private individuals and legal entities and that given the unique nature of the state, section 3 was legitimately designed to achieve an important purpose, namely to prevent disruptions in the social fabric which may take place in the wake of attachments and executions against state assets. If individuals were allowed to attach state assets it may have disastrous consequences for service delivery. It can therefore not be said that section 3 was irrational and hence that it was in breach of section 9(1) of the Constitution.⁴⁶

The appropriate remedy, according to the minority, in this case was to seek a mandamus or a structural interdict. Although there may be cases in which applying for a mandamus might be impractical and increase legal costs, this does not provide a justification for striking down section 3.⁴⁷ Remarkably, Nkabinde stated that

[w]hether a mandamus could have coerced the MEC (or any other relevant state official such as the Head of a Department) to pay is, for the purposes of this case, a matter I refrain from determining lest one speculates.⁴⁸

In other words, the minority does not express any opinion on whether the remedy it claims would have been appropriate for dealing with the very real problem of the enforcement of court orders sounding in money against the state would *in fact* have been effective. Because other legal methods were available to enforce the judgment debt – no matter whether such remedies were academic or real – it meant that there was no infringement of any of the rights that the applicant had relied on.

⁴⁵ *Nyathi* (n 5 above) para 140. See generally *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 25-26.

⁴⁶ *Nyathi* (n 5 above) para 143.

⁴⁷ *Nyathi* (n 5 above) para 146.

⁴⁸ *Nyathi* (n 5 above) para 146.

3 Discussion

It is common cause that a money judgment given against a provincial government is not enforceable by incarcerating for contempt a defendant who has been cited nominally for the government if the government fails to comply with the order. However, as the minority judgment in *Nyathi* points out, the Supreme Court of Appeal confirmed in *Kate* that where a judgment creditor obtains a mandamus against a public official who is then ordered by a court to do or to refrain from doing a particular act and fails to do so, that official is liable to be committed for contempt in accordance with ordinary common law principles relating to contempt of court.⁴⁹ In *Kate* the Supreme Court of Appeal stated that the

remedy of *mandamus* thus has the capacity to be effective where there is a breach or a threatened breach by a public official of a duty that is imposed upon him or her by a statute or by the Constitution and in most cases that ought to be sufficient without an additional remedy in damages.⁵⁰

Could it therefore be said that the minority was correct in declining to invalidate section 3 of the State Liability Act on the basis that other effective and practical remedies are available to a judgment creditor to have court orders against the state enforced? It is my contention that it cannot.

It is clear that the SCA in *Kate* found that a mandamus would not always be an effective remedy to enforce court orders against public officials. It pointed out that a mandamus was a remedy that requires prompt action if the wrong is to be averted before any loss occurs. Where the rights that are being denied are ‘directed towards the very poorest in our society, who have little or nothing to sustain them, and who can be expected to have little or no knowledge of where their rights lie nor the resources readily to secure them’⁵¹ such litigants would not have the means to act swiftly once the delay sets in. While there was therefore a remedy – as the minority suggested – this remedy would not always be *effective*, especially for poor and indigent litigants.⁵² The minority recognised that a mandamus might be impractical or increase legal cost and hence, that it would not always be effective, yet it failed to take this into account when considering the constitutionality of a provision which treated the state differently than private debtors. By failing to take into account the practical difficulties faced by poor litigants and by bending over

⁴⁹ *Nyathi* (n 5 above) para 96. See *Kate* (n 37 above) para 30.

⁵⁰ *Kate* (n 37 above) para 31.

⁵¹ *Kate* (n 37 above) para 31.

⁵² *Kate* (n 37 above) para 31.

backwards to accommodate the concerns of the state, it seems to me the minority failed to interpret and apply the constitution in its broader context as required by its own jurisprudence.⁵³

The minority also failed to face up to the endemic nature of the problem and the difficulties experienced by litigants in the face of endemic non-compliance with court orders. The minority judgment seems to suggest that such systemic problems should be of no concern to a court when it decides whether a provision infringes on the rights of individuals. In *Kate* the SCA noted in this regard that:⁵⁴

The pattern that emerges from cases that have been brought in the High Court is that an application that has been made by an individual and is being delayed usually rises to the surface only when legal proceedings are brought, which must necessarily mean that at least for the moment similar applications by others move a step down in the pile. There is no reason to think it will be otherwise if the individuals concerned seek to enforce their rights by proceedings for a *mandamus*, raising the spectre of even more litigation, with each applicant attempting to leap-frog over others in order to secure their benefits. Anything that is conducive to that occurring is in my view most undesirable. There is no doubt that the proper resolution lies in the administration getting its house in order so that all applications are dealt with expeditiously rather than in encouraging yet more litigation.

The SCA points to a very real problem faced by courts in cases like this and ignored by the minority judgment: if a court fails to strike decisively at the heart of the problem it may be inundated by an endless stream of cases by those who are lucky enough to have been able to have secured the services of a lawyer and might have to micro-manage the actions of state officials in order to ensure that the rights of individuals are vindicated. This is not a role that courts are institutionally ideally suited for and might also negatively affect the legitimacy of the court if its engagement is not seen to contribute to any improvement in the endemic problems faced by individual litigants. The question is whether the administration would ever get its house in order — as assumed by the minority — if it is not threatened (at least in circumscribed circumstances) with an

⁵³ See for example *S v Zuma* 1995 4 BCLR 401 (SA) (CC) 411 para 15 ('... regard must be paid to the legal history, traditions and usages of the country concerned ...'); *S v Makwanyane* 688 para 39 per Chaskalson ('we are required to construe the South African Constitution ... with due regard to our legal system, our history and circumstances ...'); *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 10 BCLR 1289 (CC) per Chaskalson (nature and extent of the power of parliament to delegate its legislative powers ultimately depends 'on the language of the Constitution, construed in the light of the country's own history.');

⁵⁴ *Kate* (n 37 above) para 31.

attachment of state assets. The minority view that the right to equality and the right of access to court is not limited in any way merely because litigants sometimes face insurmountable hurdles in getting court orders sounding in money enforced against the state, thus seems untenable as it fails to take into account that these hurdles are very real and has the practical effect of limiting the rights of individuals to have their dispute resolved by a court of law. What is the use of accessing a court if the order issued by that very court is ignored? Although this is not an absolute limitation on the right, it is a limitation nevertheless. It also fails to take cognisance of the fact that the state has a positive obligation to take steps that would facilitate the right of individuals to have access to court. Where the state officials fail to adhere to court orders and the state fails to take decisive action against such individuals, this in itself constitute a breach of section 34 of the Constitution read with the principle of the rule of law. Unfortunately the minority failed to grasp this point and focused, in a rather formalistic way, on the question of whether individual litigants have any legal remedies bar that of attaching state assets. This approach bends over backward to give state officials and the nominal political heads of departments the benefit of the doubt in the face of overwhelming evidence that the problem is deep-rooted and endemic.

In the light of these concerns the approach of the majority, who focused on the actual effect of section 3 of the State Liability Act on the ability of many litigants to have court orders against the state sounding in money enforced, seems to be to be preferred. The approach does not conflate substance with form and recognises the fact that the drastic remedy of allowing state assets to be attached in cases where state officials fail to obey court orders may well have a salutary effect in addressing the problem at hand. Because of an acknowledgement that courts have a duty not to provide remedies that would create large scale disruption and a concomitant acknowledgement that the state has a duty to take steps to prevent such disruptions, the majority gave parliament one year in which to fix the problem while at the same time requiring the respondents to provide it with information required to manage this process. The majority approach seems also to have been vindicated to some degree by subsequent events. Although the Constitutional Court suspended its order of invalidity for one year in order for parliament to pass legislation to deal with the consequences of its original judgment, this never happened and the Minister of Justice and Constitutional Development approached the court for an extension towards the end of the one year period. The Constitutional Court granted the

extension but commented as follows:⁵⁵

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.

However, given the tardiness of the state's response to the original court order, the Constitutional Court, confronted by the non-compliance with its *own* order, took a more interventionist approach. It thus handed down a preliminary order which would be in effect until such time as the other branches of government have dealt with the original problem. This order aims to provide an effective remedy to individuals who wished to enforce a order sounding in money against the state. The Court ruled that – until such time as the original court order had been complied with a regime designed by the court would be in place to assist litigants. This regime provides that where a final order against a national or provincial department for the payment of money is not satisfied within thirty days of the date of judgment, the judgment creditor may serve the court order 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. The Court prescribed that this court 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. The relevant treasury is then required either to settle the debt itself within fourteen days or to make acceptable arrangements with the judgment creditor, for the settlement of the judgment debt within that period. If the relevant treasury fail to do so, the judgment creditor may apply for a writ of execution or a warrant of execution, against movable property owned by the state and used by the relevant department, whichever is applicable. 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.

⁵⁵ *Minister for Justice and Constitutional Development v Nyathi & Others* (CCT 53/09) [2009] ZACC 29 para 27.

4 Conclusion

The turn of events in this case has been more than ironic. The very order of the Constitutional Court dealing with a failure by state officials to adhere to court orders was in effect ignored. In my view, this underlined the correctness of the approach followed by the majority in the original *Nyathi* judgment as it demonstrated the severity of the problem faced by courts when their orders are not adhered to timeously. The legitimacy of the judiciary itself is called into question when its orders are not adhered to. Courts must tread a fine line between respecting the powers of the other branches of government and not intruding unnecessarily onto its terrain, while also jealously safeguarding its own legitimacy by taking all reasonable steps to ensure that it provides effective remedies to those who legitimately approach it for help. Although judges have limited powers – given the separation of powers doctrine and the institutional limitations of the judiciary – they have a duty to craft orders in a manner that would take cognisance of the practical problems that arise when its orders are not adhered to. A more activist approach regarding the formulation of remedies might then be necessary. The majority judgment in the original *Nyathi* case grasped this fact and handed down an order that took sufficient account of the practical problems faced by litigants. When the case again came to the court because its own order had not yet been adhered to, the full court took the bull by the horns, rightly setting aside its scruples about the dangers of intruding on the for the respect of separation of powers, by putting in place an interim order that would provide effective relief to litigants until such time as the legislature and the executive got its house in order. This turn of events should therefore be welcomed as it will help to safeguard the legitimacy of the court.

