

**ACCOUNTABILITY: STATE COVER PROVIDED TO PUBLIC
OFFICIALS LIABLE FOR CIVIL CLAIMS AGAINST THE STATE**

A dissertation

by

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**Presented to the Faculty of Law
in partial fulfilment of the requirements for the degree**

Master of Laws

in

Public and Constitutional Law

at the

Faculty of Law

University of the Free State

Bloemfontein

November 2021

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DECLARATION

I, Walter Sutton, hereby declare that the dissertation

Accountability: State cover provided to public officials liable for civil claims against the state

reflect my own understanding and research on the above title and that all sources used and quoted are referred to in full and appropriate acknowledgement are given.

Walter Sutton

November 2021

DEDICATION

This dissertation is dedicated to my wonderful, supportive and loving wife, Anso. Her continuous encouragement provided me with the energy and inspiration needed to remain faithful and enjoy an exciting journey.

“Something completed is [indeed] better than something just began; patience is better than too much pride.” (Ecclesiastes 7:8 – CEV).

ACKNOWLEDGEMENTS

Every hour spent on this dissertation during the past three years contributed to a learning experience far beyond my expectations. I am extremely grateful to God Almighty, who spoiled me with His grace, who strengthened me and kept me safe throughout this journey. God is faithful and good.

The continuous support of my wife Anso and immediate family members (Lodewyk, Melinda, Anso, Natasha and my grandchildren Roald and Amelia) who embraced me with their love eased the burdens, challenges, doubts and uncertainties associated with research and academic writing.

I am indebted to my supervisor, Prof Mariëtte Reyneke, for her invaluable support, patience, comments, encouragement, advice, inputs concerning sources applicable to the title of this study and for sharing her vast knowledge relating to the research conducted. The many hours spend assessing the initial research proposal and each dissertation chapter is sincerely valued.

A special word of thanks to Hesma van Tonder who spend hours editing the dissertation. Her support rendered to access some sources during this study was exceptional.

I would like to thank each author that I used throughout the dissertation. Although I did not meet them in person, they were my mentors. Thanks for sharing your vast knowledge and broadening my understanding of so many concepts applicable to the focus of my research.

ABSTRACT

This study explores the meaning and different features of accountability as a constitutional value and obligation within the context of administrative action and how it relates to state cover provided to public officials liable for civil claims against the state. As accountability contributes to the realisation of just administrative action, the requirements for reasonableness and rationality are investigated and applied to decide whether such officials are entitled to state cover. A critical analysis of the criteria applicable to state cover is conducted. The analysis is preceded by a historical overview of how the criteria for state cover were developed before and since the adoption of current legislation and regulations concerned. Once a liability determination is made that an official is liable in law for compensation payments made and forfeits state cover, steps to recover expenditure involved must be initiated. Should an official enjoy state cover, the state as a bearer of its risks will accept all expenditures involved, and a claim against the official must be waived. Based on an investigation conducted to determine current trends with the waiver of claims against officials, it is evident that most claims for compensation payments against officials who are liable in law for such claims and who enjoyed state cover are waived. These trends may compromise accountability as a constitutional obligation. They may indicate due diligence that is lacking when decisions concerning the forfeiture or not of state cover are being made. The study is concluded with an investigation to determine the sufficiency or not of the criteria for state cover to secure accountability as intended by national legislation. Although the current criteria may be sufficient to pass constitutional muster to promote accountability as a constitutional value and obligation, it may not be sufficient to secure it. Recommendations are made to improve the current criteria to secure accountability and to continue with further research.

TABLE OF CONTENTS

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGEMENTS	iv
ABSTRACT	v
LIST OF TABLES	xiii
ABBREVIATIONS	xiv
CHAPTER 1 INTRODUCTION	1
1.1 BACKGROUND	1
1.2 MOTIVATION FOR THE STUDY	6
1.3 RESEARCH QUESTIONS	7
1.3.1 Primary research question	7
1.3.2 Secondary research questions	7
1.4 RESEARCH METHODOLOGY	8
1.5 RESEARCH DESIGN	9
1.5.1 Meaning and constitutional features of accountability	9
1.5.2 Textual analysis of criteria for state cover	10
1.5.3 Waiver of claims	12
1.5.4 Sufficiency of criteria for state cover to secure accountability	12
1.6 STRUCTURE OF THE DISSERTATION (CHAPTER OUTLINE)	13
CHAPTER 2 ACCOUNTABILITY	16
2.1 INTRODUCTION	16
2.2 MEANING OF ACCOUNTABILITY	17
2.2.1 Ordinary meaning of accountability	17
2.2.2 Accountability and related concepts	19
2.2.3 Connection between different concepts	20

2.2.3.1 Responsibility	20
2.2.3.2 Accountability	20
2.2.3.3 Liability	20
2.3 DIFFERENT CONSTITUTIONAL FEATURES OF ACCOUNTABILITY	21
2.3.1 Legal nature of accountability	21
2.3.2 Accountability: Interpretation of legislation	23
2.3.3 Accountability: a prerequisite for public office bearer's actions	24
2.3.3.1 Office bearers at national level	25
2.3.3.2 Office bearers at provincial level	26
2.3.3.3 Office bearers at local level	28
2.3.4 Accountability: public officials and reporting	29
2.3.5 Accountability: Checks and balances	31
2.3.5.1 Oversight role of legislatures	31
2.3.5.2 Oversight role of executive authority	32
2.3.5.3 Oversight involving accounting officers	34
2.3.6 Accountability: Compliance with empowering provisions	36
2.4 SECURING ACCOUNTABILITY AND PUBLIC OFFICE-BEARERS	38
2.4.1 Remedies available to secure accountability	38
2.4.1.1 Removal of President from office	38
2.4.1.2 Motion of no confidence in Cabinet or the President	38
2.4.1.3 Removal of public office-bearers by municipal councils	39
2.4.2 Intervention in provincial and local government	39
2.5 INSTRUMENTS UPHOLDING ACCOUNTABILITY	41
2.5.1 National legislation	41
2.5.2 Constitutional institutions	44
2.5.2.1 Public Protector	44
2.5.2.2 Auditor-General	46

2.5.3 Ethics and codes of conduct	48
2.5.3.1 Codes of Ethics	49
2.5.3.2 Codes of conduct	50
2.5.4 Official publications	53
2.6 ENFORCING ACCOUNTABILITY	54
2.7 ACCOUNTABILITY AND ADMINISTRATIVE ACTION	57
2.7.1 Requirements for reasonableness	58
2.7.1.1 Factors relevant to reasonableness	60
2.7.1.1.1 <i>Nature of the decision</i>	60
2.7.1.1.2 <i>Identity and expertise of the decision-maker</i>	60
2.7.1.1.3 <i>Factors relevant to the decision</i>	61
2.7.1.1.4 <i>Reasons given for the decision</i>	61
2.7.1.1.5 <i>Impact of the decision on those affected</i>	61
2.7.1.2 Judicial assessment of unreasonable decisions	62
2.7.2 Requirements for rationality	64
2.7.2.1 Factors relevant to rationality	65
2.7.2.1.1 <i>Purpose for which decision was taken</i>	66
2.7.2.1.2 <i>Purpose of the empowering provision</i>	66
2.7.2.1.3 <i>Information before the administrator for consideration</i>	67
2.7.2.1.4 <i>Reasons for decision offered by decision-maker</i>	67
2.7.2.2 Judicial assessment of irrational decisions	68
2.8 CONCLUSION	72
CHAPTER 3 CRITERIA FOR STATE COVER	74
3.1 INTRODUCTION	74
3.2 CONSTITUTIONAL FEATURES APPLICABLE TO ANALYSIS	74
3.3 HISTORICAL OVERVIEW	76
3.3.1 Rationale for state cover	76
3.3.2 State as a bearer of own risks	78
3.3.3 Timeframe and sources applicable to the historical overview	80

3.3.3.1	Timeframes	80
3.3.3.2	Sources	81
3.3.4	Development of criteria applicable to state cover before 1 June 2000	83
3.3.4.1	Exceeding of powers	85
3.3.4.2	Alcohol or drug-related incidents	86
3.3.4.3	Action outside course and scope of employment	87
3.3.4.4	Reckless or intentional actions	87
3.3.4.5	Admissions	88
3.3.4.6	Non-compliance with or ignoring standing instructions	89
3.3.4.7	Additional criteria applicable to state vehicles	89
3.3.4.8	Liability of superior or supervisor	92
3.4	DEVELOPMENT AND ANALYSIS OF CRITERIA SINCE 1 JUNE 2000	92
3.4.1	Purpose and scope of empowering legislation	93
3.4.2	Purpose and scope of Treasury Regulations 2005	94
3.4.3	Provisional clause preceding criteria for state cover	95
3.4.3.1	Acceptance of liability for civil claims	97
3.4.3.2	Loss or damage	100
3.4.3.3	Liability determination: A two-stage approach	102
3.4.3.4	Statutory right of recourse	105
3.4.3.5	Liable in law	105
3.4.4	Consideration of criteria for state cover	106
3.4.4.1	Exceeding of powers	107
3.4.4.2	Alcohol or drug-related incidents	110
3.4.4.3	Action outside course and scope of employment	111
3.4.4.4	Reckless or intentional actions	115
3.4.4.5	Admissions	117
3.4.4.6	Non-compliance with or ignorance of standing instructions	121

3.4.4.7 Additional criteria applicable to state vehicles	123
3.5 OUTCOME OF LIABILITY DETERMINATION	128
3.6 CONCLUSION	129
CHAPTER 4 WAIVER OF CLAIMS	131
4.1 INTRODUCTION	131
4.2 WAIVER OF CLAIMS PERSPECTIVES	132
4.2.1 Waiver of claims against officials	132
4.2.2 Waiver of claims against non-officials	133
4.3 PRINCIPLES APPLICABLE TO ANNUAL FINANCIAL STATEMENTS	134
4.3.1 Expectations for AFSs	134
4.3.2 Qualitative characteristics of presenting information in AFSs	135
4.4 DISCLOSURE REQUIREMENTS	136
4.4.1 Guidelines for disclosing contingent liabilities	137
4.4.1.1 Contingent liabilities explained	138
4.4.1.2 Determination of contingent liabilities	139
4.4.1.3 Presentation of contingent liabilities in AFSs	141
4.4.2 Guidelines for disclosing liabilities recoverable	143
4.4.2.1 Recoverability of compensation payments	144
4.4.2.2 Presentation of liabilities recoverable in AFSs	145
4.5 ANALYSIS OF DISCLOSURE NOTES PRESENTED BY SAPS	147
4.5.1 Disclosure notes on contingent liabilities	148
4.5.1.1 Compliance with disclosure standards	149
4.5.1.2 Compliance of previous disclosure notes with standards	150
4.5.2 Disclosure notes on liabilities recoverable	153
4.5.3 Trends with waiver of claims	154
4.5.3.1 Summary of trends with waiver of claims	157
4.5.3.2 Nature of claims involved with waiver of claims	158

4.6 IMPACT OF CLAIMS WAIVED ON SECURING ACCOUNTABILITY	161
4.6.1 Accountability of public functionaries for their decisions	161
4.6.2 Avoid defeating the purpose of enabling legislation	162
4.6.3 Responsibility to comply with empowering provisions	162
4.6.4 Monitoring exercise of delegated powers	163
4.7 NON-DISCLOSURE BY OTHER DEPARTMENTS	163
4.7.1 Extent of non-disclosure	164
4.7.2 Possible reasons for non-disclosure	165
4.8 CONCLUSION	167
CHAPTER 5 STATE COVER AND ACCOUNTABILITY	169
5.1 INTRODUCTION	169
5.2 VALIDITY OF DELEGATED LEGISLATION	169
5.2.1 Common law criteria for the validity of delegated legislation	170
5.2.1.1 Competency of body delegating authority to legislate	171
5.2.1.2 Conflict with the original legislation	172
5.2.1.3 Compliance with legislative procedures	173
5.2.1.4 Vagueness	173
5.2.1.4.1 <i>Mischief rule</i>	175
5.2.1.4.2 <i>Application of mischief rule to criteria for state cover</i>	177
5.2.1.5 Intra vires principle	178
5.2.1.6 Unreasonable, unfair and discriminatory legislation	178
5.2.1.7 Sub-delegation of delegated powers	180
5.3 SUFFICIENCY OF STATE COVER TO SECURE ACCOUNTABILITY	181
5.3.1 Principles to determine the sufficiency of criteria for state cover	181
5.3.2 Aim of rendering state cover	182
5.3.3 Criteria for state cover and standards for expected behaviour	183
5.3.4 Application of criteria for state cover by SAPS	183
5.3.5 Sufficiency of criteria for state cover and possible gaps involved	186

5.3.5.1 Exceeding of powers	186
5.3.5.2 Alcohol or drug-related incidents	187
5.3.5.3 Action outside course and scope of employment	188
5.3.5.4 Reckless or intentional actions	190
5.3.5.5 Admissions	191
5.3.5.6 Non-compliance with or ignoring standing instructions	192
5.3.5.7 Civil claims arising from the use of state vehicles	194
5.3.8.8 Possible gap involving superiors or supervisors	195
5.4 CONCLUSION	196
CHAPTER 6 CONCLUSIONS AND RECOMMENDATIONS	198
6.1 INTRODUCTION	198
6.2 FINDINGS REGARDING RESEARCH QUESTIONS	198
6.2.1 First secondary research question	198
6.2.2 Second secondary research question	200
6.2.3 Third secondary research question	202
6.2.4 Fourth secondary research question	204
6.2.5 Primary research question	205
6.3 RECOMMENDATIONS	207
6.3.1 Improvement of criteria for state cover	207
6.3.2 Improving decision-making capabilities	209
6.3.3 Monitoring of liability determinations	210
6.3.4 Non-disclosure of liabilities recoverable	210
6.3.5 Measures to enhance accountability	211
6.4 CONTINUOUS RESEARCH	211
6.5 CONCLUSION	212
BIBLIOGRAPHY	213

LIST OF TABLES

Table 1.1: Waiver of claims against officials	4
Table 4.1: Prescribed outlay for statement of contingent liabilities	142
Table 4.2: Prescribed outlay for statement of liabilities recoverable	145
Table 4.3: Statement of contingent liabilities for 2016/17 until 2018/19	148
Table 4.4: Statement of contingent liabilities for 2015/16	151
Table 4.5: Statement of recoverability of payments for 2015/16	153
Table 4.6: Statement of recoverability of payments for 2015/16 until 2018/19	156
Table 4.7: Summary of waiver of claims against officials	157
Table 4.8: Compensation payments and nature of claims involved	159

ABBREVIATIONS

AFSs	Annual Financial Statements
CONSTITUTION	Constitution of the Republic of South Africa
GRAP	Generally Recognised Accounting Practices
HOD	Head of Department
JSE	Johannesburg Stock Exchange
MFMA	Municipal Finance Management Act
NA	National Assembly
NCOP	National Council of Provinces
PAJA	Promotion of Administrative Justice Act
PAIA	Promotion of Access to Information Act
PAMA	Public Administration Management Act
PFMA	Public Finance Management Act
PSSC	Public Service Staff Code
SAPS	South African Police Service
SCOPA	Standing Committee on Public Accounts

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

This study focuses on state cover provided by the state to officials, who are liable for civil claims against the state, subject to certain conditions.¹ These conditions relate to the application of prescribed criteria, once compensation payments have been made, to determine whether or not such officials qualify for state cover.² If not and officials forfeited state cover, claims against officials to recover expenditure involved must be initiated.³ Likewise, claims to recover expenditure must be waived if officials enjoy state cover.⁴ The sufficiency of the current criteria for state cover to be applied during a liability determination and trends with waiver of claims against officials may pose a threat to accountability as a constitutional value and obligation that requires investigation.

Organs of state, as defined in the *Constitution of the Republic of South Africa*,⁵ (*Constitution*) involve all spheres of government that are exposed to civil claims for compensation, arising from delict, breach of contract and other damage-causing events. Since public funds are utilised to compensate a plaintiff following a settlement or a final court order, an organ of state needs to ensure that all expenditure involved is adequately determined and accounted for in terms of the *Public Finance Management Act*.⁶ (*PFMA*). Expenditure to be accounted for by an organ of state concerning a single cause of action may be vast. It may involve the capital amount paid as compensation and interest due in terms of the *Prescribed Rate of Interest Act*,⁷

¹ National Treasury 2005:reg. 12.2.1 read with reg. 12.7.3.

² National Treasury 2005:reg. 12.2.1. These criteria are also applied in practice to determine whether or not the state attorney may act on behalf of an official as a defendant in civil proceedings.

³ National Treasury 2005:reg. 12.2.3.

⁴ National Treasury 2005:reg. 12.7.3.

⁵ 1996:sec. 239; Mdumbe 2005:9.

⁶ 1/1999. The *Local Government: Municipal Finance Management Act*, 56/2003 applicable to local governments contains similar requirements.

⁷ 55/1975:sec. 1 (rate at which interest on debt is calculated), sec. 2 (interest on a judgment debt) and sec. 2A (interest on unliquidated debt).

including costs for legal services rendered to a plaintiff. Expenditure may also involve costs paid for legal services rendered to an organ of state as a defendant concerned.

According to the Treasury Regulations,⁸ the state is a self-insurer and will bear its risks, also those emanating from civil claims. It provides as follows:

Subject to the provisions of this regulation, or any other legislation or agreement, the state will bear its own damages and accident risks and be responsible for all claims and losses of state property where these arise from state activities by an official who is liable in law and who is or was employed by an institution.

Once civil claims for compensation instituted against the state have been finalised and paid, organs of state need to determine carefully whether or not expenditure involving such payments must be recovered from officials concerned. Such determination must be made in terms of Treasury Regulation 12.2.1 read with Treasury Regulation 12.7.3. These Treasury Regulations provide for a statutory right of recourse against public officials, subject to certain criteria⁹ and conditions and provide as follows:

12.2.1 An institution must accept liability for any loss or damage suffered by another person, which arose from an act or omission of an official as a claim against the state and does not recover compensation from an official, provided the official shall forfeit this cover if he or she, with regard to the act or omission, is liable in law and –

- (a) intentionally exceeded his or her powers;
- (b) made use of alcohol or drugs;
- (c) did not act in the course and scope of his or her employment;
- (d) acted recklessly or intentionally;
- (e) without prior consultation with the State Attorney, made an admission that was detrimental to the state; or
- (f) failed to comply with or ignored standing instructions, of which he or she was aware of or could reasonably have been aware of, which led to the loss, damage

⁸ National Treasury 2005:reg. 12.1.1. The Treasury Regulations are issued in terms of sec. 76 of Act 1/1999.

⁹ Identical criteria apply to independent assessors appointed to conduct investigations at higher education institutions. See *Higher Education Act 101/1997*:sec. 49A.

or reason for the claim, excluding damage arising from the use of a state vehicle;
and

(g) in the case of a loss, damage or claim arising from the use of a state vehicle,
the official –

(i) used the vehicle without authorisation;

(ii) did not possess a valid driver's licence or other appropriate licence;

(iii) did not use the vehicle in the interest of the state;

(iv) allowed unauthorised persons to handle the vehicle; or

(v) deviated materially from the official journey or route without prior
authorisation.

...

12.7.3 A claim against an official must be waived if the conditions in paragraphs
12.2.1(a) to (g) are not applicable.

If an official, according to Treasury Regulation 12.2.1, can be held liable in law for compensation payments made but did not act as described in sub-paragraphs (a) to (g) of Treasury Regulation 12.2.1 applicable to the facts under consideration, such official will enjoy state cover. Consequently, the state will bear the risks and accept liability for all expenditures relating to compensation payments made from public funds. Any claim relating to such expenditure against an official who enjoys state cover must be waived.¹⁰ However, if an official is liable in law for compensation payments concerned and acted as described in sub-paragraphs (a) to (g) of Treasury Regulation 12.2.1, such official will forfeit state cover. All state expenditure involved is then recoverable from the official concerned.¹¹ An amount legally due by an official may be vast and not recoverable due to economic, financial and other considerations.

¹⁰ National Treasury 2005:reg. 12.7.3.

¹¹ National Treasury 2005:reg. 12.7.2. It determines that, "The accounting officer must determine the amount of the loss or damage and, in writing, request that official to pay the amount within 30 days or in reasonable instalments. If the official fails to comply with the request, the matter must be handed to the State Attorney for the recovery of the loss or damage."

An assessment of Annexure 5 of the Annual Financial Statements (AFSs) submitted by the Department of Police¹² that will involve four financial years as indicated in the table¹³ below, reveals that the majority of compensation payments made from public funds in respect of civil claims were finalised on the basis that claims against officials were waived. This means that such officials are liable in law for the damages suffered by the state but enjoyed state cover.

Table 1.1: Waiver of claims against officials

WAIVER OF CLAIMS AGAINST OFFICIALS			
Financial year	Accrued value of claims paid and considered in terms of TR12.2.1	Value of claims waived in terms of TR 12.7.3	Percentage of the value of claims waived compared to the accrued value of claims considered
2015/2016	R 446,500,000.00	R 424,393,000.00	95.04%
2016/2017	R 376,825,000.00	R 370,695,000.00	98.37%
2017/2018	R 343,395,000.00	R 337,320,000.00	98,23%
2018/2019	R 535,250,00.00	R 527,988,000.00	98,64%

During the said financial years, possible claims by the state against officials who forfeited state cover were confirmed and disclosed in the AFSs as **recoverable** to the value of R13,9 million, R5,4 million, R1,9 million and R4,9 million, respectively. Such confirmation follows and is disclosed once decisions are made that officials involved forfeited state cover. However, once a notice to pay debt is served, which includes the

¹² South African Police Service 2016:366; South African Police Service 2017:409; South African Police Service 2018:385; South African Police Service 2019:426. The author of this dissertation discovered that the stats about waiver of claims and claims by the department as audited and disclosed for the 2018/2019 financial year in the AFS of the Department, are displayed in the wrong columns of Annexure 5 attached to the AFS. The responsible functionaries have been requested on 28 January 2020 to attend to the deficiencies concerned.

¹³ The number of incidents and causes of action linked with the payments made will be identified in chapter 4 to provide a different focus on the waiver of claims against officials.

reasons for decisions made, officials may still consider various options to react to such notice. The final outcome of amounts to be recovered from officials depends on whether or not:

(1) Officials succeeded with representations lodged against decisions made that they are liable in law for such claims or forfeited state cover in terms of the criteria referred to.¹⁴ Successful representations lodged based on any one of these grounds may cause a discontinuation of initial recovery procedures;

(2) Debt due by officials is written off fully or partially due to financial reasons in terms of Treasury Regulations 11.4.1.¹⁵ Only partial write-offs of debt due will result in a continuation of recovery procedures in respect of the debt amount still due; or

(3) Officials are exempted fully or partially from payment of such debt as an act of grace in terms of Treasury Regulation 22.1.1.¹⁶ Such exemptions are considered and based exclusively on the merits leading to claims against the state, extenuating circumstances submitted on behalf of an official and policy considerations determined by an accounting officer why exemption from payment of the debt (fully or partially) may be justified. Like to the previous outcomes, exemptions from payment of debt as an act of grace, fully or partially, will determine whether organs of state will proceed with recovery procedures.

The outcome of presentations lodged by officials, write-offs of debt due and exemptions as an act of grace may cause a reduction in amounts initially confirmed

¹⁴ Departmental policies provide for procedures to lodge representations as part of internal remedies available for use before an official will resort to legal proceedings to review decisions made.

¹⁵ National Treasury 2005:reg.11.4.1. It determines as follows:

11.4.1 An accounting officer may only write off debts owed to the State if he or she is satisfied that –

(a) all reasonable steps have been taken to recover the debt and the debt is irrecoverable, or,

(b) he or she is convinced that –

(i) recovery of the debt would be uneconomical;

(ii) recovery would cause undue hardship to the debtor or his or her dependants;

(iii) it would be to the advantage of the state to effect a settlement of its claim or to waive the claim.

¹⁶ National Treasury 2005:reg.22.1.1. It read as follows:

22.1.1 Where no legislative authority exists, the accounting officer may approve as an act of grace or favour –

(a) the remission of money due to a revenue fund; and (b) payments from a vote.”

and disclosed as recoverable in the AFSs. A determination of the extent of such reduction is not the focus of this study, as the accuracy of such determinations is possible only once the outcome of each recovery initiative is known.

The study includes an interpretation of the criteria for state cover rendered to public officials in terms of Treasury Regulation 12.2.1. A critical assessment of the criteria becomes relevant when one has regard to claims against officials that must be waived under Treasury Regulation 12.7.3.

1.2 MOTIVATION FOR THE STUDY

The reason for selecting the research topic is to determine whether or not the criteria prescribed for state cover will pass constitutional muster if compared with accountability as a constitutional value. During this study, it will be argued that accountability involves more than just a mere value. According to the *Constitution*, national legislation, including subordinate legislation such as Treasury Regulations,¹⁷ must ensure and promote the constitutional values and principles, including accountability.¹⁸ The requirements set for national legislation¹⁹ within the said context is mandatory in nature. According to statistics obtained about waiver of claims against officials as disclosed by organs of state, it appears that accountability as a constitutional value may be compromised. Such observation justifies investigation and a critical assessment of the criteria applicable to state cover.

This study contributes to a broader understanding of and knowledge about the criteria applicable to state cover and waiver of claims against public officials. It investigates possible gaps in the said criteria and implementation of mechanisms to monitor decision-making about waiver of claims against such officials. As the study focuses on a different dimension of accountability, it may justify further research for consideration and exploration by law scholars. Such research may focus on case studies about how the criteria for state cover is applied in practice by organs of state. It is essential to determine what happens after compensation payments have been made by organs of

¹⁷ 1996:sec. 239 (a).

¹⁸ 1996:sec. 195 (3). This section refers to the basic values and principles, applicable to organs of state, listed in sec. 195(1) which include values such as accountability and transparency.

¹⁹ 1996:sec. 195(1).

state to the relevant plaintiffs. The principle of accountability as a constitutional value is not dealt with finally nor adhered to once compensation is paid due to a settlement or a final court order. Once compensation payments have been made, expenditure relating to compensation payments must be accounted for in terms of the relevant Treasury Regulations.²⁰ Accountability is compromised if functionaries involved in decision-making do not properly apply their minds when considering the state's statutory right of recourse against officials who are liable in law for civil claims instituted against the state.

Continuous disclosure about the magnitude of civil claims for compensation instituted against certain organs of state and expenditure involved attracted and is still attracting public attention.²¹ Accountability in this context implies that public officials should face the consequences for their actions and decisions leading to civil claims for compensation. Expenditure due in respect of settlements or final court orders in favour of plaintiffs involves public funds, and members of the public are entitled to know whether or not sound accounting practices are followed. The research topic aims at exploring this phenomenon.

1.3 RESEARCH QUESTIONS

Having introduced the background and reasons for selecting the research topic, the primary and secondary research questions that will be guiding the research project needs consideration.

1.3.1 Primary research question

Will the criteria applicable to state cover applied by organs of state pass constitutional muster from an accountability perspective?

1.3.2 Secondary research questions

1. What does accountability as a constitutional value mean within the context of just administrative action?
2. What are the current criteria for state cover to determine the liability of officials for expenditure relating to civil claims against the state?

²⁰ National Treasury 2005:reg. 12.2.1.

²¹ October 2015:1; Felix 2017:1; Brand-Jonker 2019:11.

3. What do current trends reveal about the waiver of claims by organs of state against officials who enjoy state cover?
4. Do the current criteria for state cover promote and secure accountability as a constitutional value?

All state organs are bound to adhere to the values referred to in the *Constitution*.²² These values include the supremacy of the *Constitution*, the rule of law, legality, accountability and openness. The preamble of the *Promotion of Administrative Justice Act*²³ also embraces accountability, openness and transparency as constitutional values to be promoted by all organs of state to give effect to the constitutional right to just administrative action.²⁴ The outcome of the research questions will determine whether or not the relevant Treasury Regulations that prescribe the criteria for state cover and current trends with waiver of claims against officials ensure and promote accountability as a constitutional value and obligation.

1.4 RESEARCH METHODOLOGY

To answer the research questions posed, keeping in mind the main aim of the study, a qualitative research methodology is the most suitable approach to be followed. A qualitative method of research may rely on the use of primary and secondary documentary sources with the focus of analysing, evaluating and applying information obtained from sources accessed.²⁵ A qualitative approach allows for analysing existing documentation to be used for research purposes that may assist with clarifying or explaining the deeper meaning of its content.²⁶ A textual analysis of documentation is part of the qualitative and interpretivist tradition as it involves an interpretation of the meaning that documentation might have.²⁷ Documentation may also include official documents like statistical, financial and annual reports created by large organisations.²⁸ Similar documentation applicable to organs of state and the focus of

²² 1996:sec. 1.

²³ 3/2000.

²⁴ 1996:sec. 33.

²⁵ Morris 2006:121; Given 2006:378-380 and 382-384.

²⁶ De Vos *et al* 2011:377.

²⁷ De Vos *et al* 2011:381.

²⁸ De Vos *et al* 2011:379.

this study is used for purposes of this study. A secondary analysis of existing data provides an opportunity for a researcher to view it from a different perspective as the researcher had no direct control over or involvement with creating such data.²⁹

1.5 RESEARCH DESIGN

The approach that will be followed to obtain information and data to answer the primary and secondary research questions will now be discussed.

1.5.1 Meaning and constitutional features of accountability

The *Constitution*,³⁰ case law, legislation, textbooks, journals and internet sources will be utilised to determine the meaning and constitutional features of accountability as a constitutional value and obligation, and it involves the first secondary research question. Accountability must direct the exercising of public powers through just administrative action and, in particular, decisions in terms of legislation that must comply with the requirements of “reasonableness” and “rationality.”³¹ As accountability contributes to the realisation of just administrative action, these requirements will be investigated and applied to decisions regarding state cover and waiver of claims against officials. Such decisions must be made with accountability in mind.

It is expected from organs of state, public institutions and public officials to act according to the rule of law and to respect the founding values of accountability as entrenched in the *Constitution*.³² The impact of section 195(1) of the *Constitution* that governs the conduct of public administration at all spheres of government from an accountability perspective will be explored with reference to the *Public Administration Management Act*³³ and legislation involving public funds. Other legal instruments, such as codes of conduct applicable to public officials³⁴ and the relevance of official

²⁹ De Vos *et al* 2011:383.

³⁰ 1996.

³¹ 3/2000: secs. 6(2) (e)(vi), (f)(ii) and (h). Based on own experience, these requirements for just administrative action, pose the greatest challenge with liability determinations, hence the reason for reducing the focus for purposes of the study.

³² 1996:sec. 1. See Curry & De Waal 2013:10, 14-17.

³³ 11/2014. This Act also aims at promoting the Constitutional values prescribed for public administration referred to in section 195(1) of the *Constitution*.

³⁴ Public Service Regulations 2016:Chapter 2, Part 1 Code of Conduct.

publications³⁵ aiming at upholding accountable conduct by public officials, will also be considered.

1.5.2 Textual analysis of criteria for state cover

The second secondary research question focuses on a critical textual analysis of the relevant Treasury Regulations supported by empowering legislation that provides for a statutory right of recourse against officials liable for civil claims instituted against the state and compensation payments involved. It involves a critical analysis of the criteria applicable to state cover and decisions whether or not state cover should be afforded to officials liable for civil claims against the state.³⁶ It includes decisions to waive claims against officials who enjoy state cover for expenditure relating to compensation payments.³⁷ The *Constitution*³⁸ defines national legislation to include subordinate legislation made in terms of an Act of Parliament that is administered by the national government. Subordinate legislation, according to the *Constitution*, also includes regulations that must be available for perusal by the public.³⁹ As part of the legal framework applicable to state cover, the analysis of the criteria for state cover will be guided by the *PFMA*⁴⁰ as the empowering legislation mandated by the *Constitution*⁴¹ that provides for the enactment of Treasury Regulations. It is therefore important to consider the context of the Treasury Regulations regarding the empowering legislation throughout the interpretation process even if the words of the text of the regulations under consideration are unambiguous.⁴²

Furthermore, the intention of the legislature as expressed in the language, scope and purpose of enactments and a move toward determining substantive issues rather than a strictly legalistic approach with interpretation is preferred as confirmed in *African*

³⁵ Department of Public Service and Administration 2003:Chapter 6 Ethics and Conduct; Department of Public Service and Administration 2013:5-6. (It involves a Service Charter negotiated with eight (8) Trade Unions where the State as employer and employees committed themselves to behaviour in line with accountability and other principles).

³⁶ National Treasury 2005:reg. 12.2.1.

³⁷ National Treasury 2005:reg. 12.7.3.

³⁸ 1996:sec. 239(a).

³⁹ 1996:secs. 101(3) and 140(3).

⁴⁰ 1/1999:sec. 76. Compare this with the *Municipal Financial Management Act*, 53/2003:secs. 168(1)(m) and 176 as far as liability of functionaries exercising powers and functions in terms of this Act is concerned. It appears that different criteria apply to the exercise of a right of recourse by municipalities.

⁴¹ 1996:sec. 216.

⁴² Bato Star Fishing case 2004 (4) SA 490 (CC):par. 90.

Christian Democratic Party v Electoral Commission and Others.⁴³ The court also confirmed that the interpretation of legislative provisions needs to be understood with its purpose in mind, including the legal framework that applies to such provisions, which framework is guided by constitutional rights and values applicable to such provisions.⁴⁴ Hence, subordinate legislation, such as Treasury Regulations 2005 regarding state cover and waiver of claims against officials, will be interpreted subject to the principles and founding values entrenched in the *Constitution* involving the rule of law, legality, accountability, openness and responsiveness.⁴⁵ The analysis will also be informed by case law applicable to the interpretation of legislation, including the relevant legislation and rules applicable to the interpretation of statutes⁴⁶ that include sub-ordinate legislation.

The textual analysis of the criteria for state cover will be preceded by a historical overview regarding the development of the criteria applicable to state cover for comparison purposes. This approach is referred to by Botha⁴⁷ as the “historical dimension” of interpretation of legislation. The purposive approach of interpretation referred to, keeping in mind the legal framework concerned and historical dimension of interpretation referred to by Botha, will guide the textual analysis of the Treasury Regulations applicable to state cover and waiver of claims against officials.

Since an official first need to be “liable in law” before the criteria for state cover applies, the analysis will be linked to a brief discussion of certain legal principles involving a two-stage approach applicable to a liability determination. It involves vicarious liability, the requirements for a legal remedy for damages caused by officials such as a delict and procedures followed to institute legal proceedings against the state and relevance thereof on recourse claims. These principles are being dealt with as focus areas within the said context only insofar it relates to the research topic and is not investigated in depth.

⁴³ 2006 (3) SA 305 (CC):par.25.

⁴⁴ 2006 (3) SA 305 (CC):par.34.

⁴⁵ 1996:sec. 1.

⁴⁶ *Interpretation Act*, 33/1957.

⁴⁷ Botha 2012:111-156. The author proposes a methodology of interpretation of statutes involving the application of five interrelated dimensions. It involves the language-, holistic (contextual and structural)-, value-laden (teleological)-, and comparative dimension.

1.5.3 Waiver of claims

A critical assessment of existing data and information compiled and disclosed by organs of state, through reporting and submission of AFSs⁴⁸ that is regarded as the cornerstone of accountability, will be conducted to determine current trends, including the monetary value thereof, about claims waived against officials. The analysis aims at answering the third secondary research question. The scope of this study insofar it relates to determining trends with waiver of claims against officials will be limited to include only one national department (Department of Police).⁴⁹ Compared to other national departments, the department selected is the only department that is fully compliant with disclosures involving waivers of claims against officials. Without proper disclosure of data involving waiver of claims by national departments against officials involved, a comparison of trends with waiver of claims between national departments is not possible. The data regarding waiver of claims is obtained from information referred to as “Contingent liabilities” (i.e., pending civil claims as at year-end) disclosed as notes attached to the AFS by the organ of the state concerned. The concept of contingent liabilities and legal obligation of disclosure by organs of state will be investigated. The data obtained is compared with decisions made to waive claims against officials who enjoy state cover or to recover expenditure with reference to the nature of claims involved to provide context to the data involved. It assists with assessing the outcome of applying the criteria for state cover and waiver of claims to hold officials liable and accountable for expenditure relating to compensation payments.

1.5.4 Sufficiency of criteria for state cover to secure accountability

The study's outcome insofar it relates to the first three secondary research questions will inform the approach followed with the fourth secondary research question. The use of similar sources throughout the dissertation will determine the sufficiency of the criteria for state cover to ensure and promote accountability as a constitutional value. The criteria applied to determine the validity of sub-ordinate legislation, such as regulations, will be investigated first and applied to the Treasury Regulations

⁴⁸ The assessment will cover four financial years for comparison purposes, namely 2015-2016, 2016-2017, 2017-2018 and 2018-2019.

⁴⁹ The selected department attends to large numbers of new and pending civil claims that needs to be administered and finalised.

concerned. The sufficiency of the criteria for state cover offered to public officials to secure accountability as a constitutional obligation will then be determined. Possible gaps in the criteria for state cover that may pose a threat to secure accountability will be discussed simultaneously with such determination.

The outcome of the research methodology to answer the primary and secondary research questions is finally dealt with by attending to conclusions and recommendations.

1.6 STRUCTURE OF THE DISSERTATION (CHAPTER OUTLINE)

Chapter 1

Introduction

The background, the motivation for the research topic, the main and secondary research questions, the research methodology and the chapter outline are discussed.

Chapter 2

Accountability

The meaning and different constitutional features of accountability with reference to legislation court judgments, including legal instruments such as codes of ethics and codes of conduct to ensure and promote accountability, are investigated. The importance and meaning of accountability that contributes to the realisation of just administrative action is determined within the context of administrative action.⁵⁰ It includes decisions emphasising reasonableness and rationality as requirements for exercising public power by functionaries when exercising public powers in terms of legislation. These requirements are applied to decisions involving state cover and waivers of claims against officials.⁵¹

⁵⁰ In terms of section 1(a) of the *Promotion of Administrative Justice Act, 3/2000*, "Administrative action" also includes any decision taken by an organ of state when exercising a power in terms of the *Constitution* or exercising a public power or performing a public function in terms of any legislation.

⁵¹ National Treasury 2005:reg. 12.2.1 read with reg. 12.7.3.

Chapter 3

Criteria for state cover

A textual and critical analysis of Treasury Regulations 12.2.1 read with Treasury Regulation 12.7.3 regarding the criteria for state cover and conditions for the waiver of claims against officials will be conducted. The textual analysis is preceded by a historical overview of the Treasury Instructions that prescribed the criteria for state cover in operation just before the commencement of the first version of the new Treasury Regulations on 1 June 2000⁵² issued in terms of the *PFMA*.⁵³ It is compared with the current criteria applicable to state cover as amended since the first publication of the Treasury Regulations concerned. The analysis of the current Treasury Regulations will be conducted by applying the constitutional imperatives and values such as accountability that should guide the interpretation of the Regulations concerned. Case law and relevant legislation and rules applicable to the interpretation of statutes that include sub-ordinate legislation, such as Treasury Regulations, will also be considered. The concept of vicarious liability, the basic elements of delict and requirements for the institution of legal proceedings against organs of state will be discussed briefly to illustrate how the said concept, elements and requirements directly impact determinations about the forfeiture or not of state cover by public officials. Various challenges involving inconsistency with the interpretation of the criteria for state cover will be identified.

Chapter 4

Waiver of claims

A critical analysis and interpretation of AFSs that are included in the annual reports of the Department of Police will be conducted to determine trends with waiver of claims against officials. The requirements for transparency and disclosure of information in accordance with Generally Recognised Accounting Practices (GRAP) and uniform norms and standards will be discussed within the said context. The importance thereof is emphasised when one needs to obtain information from financial statements published by organs of state about the recoverability of expenditure relating to compensation payments and decisions made about waiver of claims. The scope involving a critical analysis of AFSs is limited to include the AFSs of only one national

⁵² National Treasury 2005:reg. 23.2.1.

⁵³ 1/1999:sec. 76(1).

department. As waiver of claims is directly linked with disclosure by organs of state of 'Contingent liabilities,' an analysis of such liabilities is conducted to determine expected future trends with waiver of claims. The concepts of accountability and transparency within the said context are inseparable.

Chapter 5

State cover and accountability

The sufficiency of the criteria for state cover offered to public officials, in terms of Treasury Regulation 12.2.1 read with Treasury Regulation 12.7.3, to secure accountability will be determined. Such determination is made with reference to the outcome of the research conducted in the previous chapters within the context of administrative action and, in particular, decision-making involving waiver of claims against officials. An investigation of the criteria applied to determine the validity of subordinate or delegated legislation such as regulations will be conducted first. The criteria will be applied to the Treasury Regulations applicable to state cover. A determination about the sufficiency of the criteria for state cover offered to public officials to secure accountability as a constitutional obligation will follow. The identification of possible gaps in the criteria for state cover that may pose a threat to secure accountability will be discussed simultaneously with such determination.

Chapter 6

Conclusion and recommendations

Conclusions supported by findings based on the outcome of all preceding chapters will be relied upon to respond to the secondary and primary research questions involved. Recommendations are made based on the outcome of the research conducted and a need for conducting continuous research involving various topics relating to this study.

CHAPTER 2

ACCOUNTABILITY

2.1 INTRODUCTION

This chapter aims to determine the intended meaning and constitutional features of accountability as a constitutional value and obligation applicable to all spheres of government within the context of administrative action.⁵⁴ Accountability must encourage the exercising of public powers through just administrative action and, in particular, decisions in terms of legislation that must comply with the requirements of “reasonableness” and “rationality.” As accountability contributes to the realisation of just administrative action, these requirements will be investigated and applied to decisions regarding the forfeiture or not of state cover by officials liable for civil claims against the state and waiver of claims against officials.⁵⁵ Such decisions must be made with accountability in mind. It is expected from public office-bearers, organs of state, public institutions and public officials to act in accordance with the rule of law and to respect the founding value and obligation of accountability as entrenched in the *Constitution of the Republic of South Africa*⁵⁶ (*Constitution*). A discussion concerning reasonableness and rationality applicable to decisions as a requirement for just administrative action will be attended to once various constitutional features involving accountability are explored. It will be followed by a discussion of remedies available to secure, legal instruments to uphold, and appropriate relief to enforce accountability and consequently just administrative action. The discussion will briefly indicate the relevance of public administration to be governed by constitutional values and principles, such as accountability, with reference to section 195(1) of the *Constitution*, the *Public Administration Management Act*,⁵⁷ (*PAMA*) legislation involving public funds, a code of conduct applicable to public officials⁵⁸ and official publications.⁵⁹ The

⁵⁴ In terms of section 1(a) of the *Promotion of Administrative Justice Act*, 3/2000, “Administrative action” also includes any decision taken by an organ of state when exercising a power in terms of the *Constitution* or exercising a public power or performing a public function in terms of any legislation.

⁵⁵ National Treasury 2005:reg. 12.2.1 read with reg. 12.7.3.

⁵⁶ 1996:sec. 1. See Curry & De Waal 2013:10, 14-17.

⁵⁷ 11/2014. This Act also aims at promoting the Constitutional values prescribed for public administration referred to in section 195(1) of the *Constitution*.

⁵⁸ Department of Public Service and Administration 2016:Chapter 2, Part 1.

⁵⁹ Department of Public Service Coordinating Bargaining Council 2013:5-6.

outcome of the determination and discussions concerning the focus areas mentioned will serve as a guide for and applied to the remaining chapters.

2.2 MEANING OF ACCOUNTABILITY

Neither the *Constitution*⁶⁰ nor the *Public Finance Management Act*⁶¹ (*PFMA*) defines “accountability” or “accountable”, although these words are used repeatedly in both the *Constitution* and the *PFMA* concerned. Hence, the ordinary or grammatical meaning of these words should not be ignored and need to be determined with the context and purpose of the provision and legislation in mind, unless the ordinary meaning may result in absurdity or is incompatible with the provision concerned.⁶² Any exercise to determine the context concerned must have regard to the scope, purpose and background of the legislation involved.⁶³ Courts use authoritative dictionaries to determine the ordinary meaning of words used in legislation.⁶⁴ The ordinary meaning of “accountability” and “accountable” will be considered with related concepts such as “responsibility” and “responsible”, including “liability” and “liable”. It will contribute to a better understanding of the meaning of accountability from a constitutional perspective. Although dictionaries may be consulted as a permissible and helpful tool to determine the meaning of words, one needs to remain cautious about the fact that dictionaries remain a guideline as words must be interpreted within the context used.⁶⁵ An attempt will be made to follow this approach throughout this dissertation.

2.2.1 Ordinary meaning of accountability

Okpaluba⁶⁶ concluded, with reference to similar reasoning by the Constitutional Court in *Johannesburg Municipality v Gauteng Development Tribunal*,⁶⁷ that no indication according to the *Constitution* exists that “accountability” should have a different meaning than its ordinary meaning or that the drafters of the *Constitution* were

⁶⁰ 1996.

⁶¹ 1/1999.

⁶² *President of the Republic of South Africa v Democratic Alliance* 2020 (1) SA 428 (CC):par. 59.

⁶³ *Bertie van Zyl v Minister for Safety and Security* 2010 (2) SA 181 (CC):par. 21.

⁶⁴ *Body Corporate of Marine Sands v Extra Dimensions* 121 2020 (2) SA 61 (SCA):par. 19.

⁶⁵ *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka* 1980 (2) SA 191 (T) at 196E-F; Also see *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726I-727A.

⁶⁶ 2018:6.

⁶⁷ 2010 (6) SA 182 (CC):par. 57.

unaware of such meaning. However, this observation is subject to recognition of the context and purpose of the legislation and provisions that contain this word. By focusing on the ordinary meaning of accountability only, the intention of this word may not be so “crystal clear”, as suggested by Okpaluba.⁶⁸ When considering various constitutional features applicable to accountability as a constitutional value and obligation, this will be embarked upon. An examination of the ordinary meaning of “accountability” remains extremely important in support of a contextual and purposive approach when interpreting the legislation that aims to promote and secure accountability regarding the exercising of public powers and decision-making.

According to the *Oxford Dictionary and Thesaurus*,⁶⁹ the word “accountability” as a noun refers to “the state of being accountable”, and “accountable” is described as “expected to explain your actions or decisions.” Synonyms for both “accountability” and “accountable” are provided to include words such as “responsibility”, “liability”, “answerability”, and “to blame.” The *Collins English Dictionary*⁷⁰ explains “accountable” to mean “responsible to someone or for some action” and “able to be explained.” Furthermore, “to blame” a person means that “someone is responsible for something bad.”⁷¹

It is evident according to the plain meaning of “accountability” that it requires an explanation from a person for his or her actions and decisions. It implies being responsible to someone for providing answers regarding one’s actions and decisions. Consequently, such a person may be blamed for things that went wrong. From sources quoted by Sefali,⁷² accountability involves observing rules, regulations, orders and instructions by public officials. Their level of accountability is determined by the extent to which officials comply with their legal duties and responsibilities. An official needs to exercise due diligence, and decisions must be consistent with performance expectations. Price⁷³ also indicates that “accountability” is frequently mentioned but seldom explained. He confirms the ordinary meaning of accountability by indicating

⁶⁸ 2018:6.

⁶⁹ Oxford Dictionary & Thesaurus 2009:8; Also see Okpaluba 2018:6, who refers to the grammatical meaning of accountability according to *Thesaurus* and *Black’s Law Dictionary* that involves concepts such as, “answerability”, “responsibility”, “liability”, “culpability” and “subject to pay”.

⁷⁰ Collins English Dictionary 2004:10.

⁷¹ Oxford Dictionary & Thesaurus 2009:88.

⁷² 2010:23-25.

⁷³ Price 2015:315.

that accountability involves an explanation and justification of one's decisions and actions and for holding persons responsible for their actions.⁷⁴ Price⁷⁵ proceeds to refer to different perspectives of "responsibilities" within the context of state liability and accountability and opt for "liability-responsibility" that involves the bearing of consequences for one's wrongful conduct.

To obtain a broader picture of what the plain meaning of "accountability" involves, it may be necessary to distinguish between "accountability" and the related concepts of "responsibility" and "liability".

2.2.2 Accountability and related concepts

A careful examination of the ordinary meaning of "responsibility" and "liability" as concepts that directly relate to "accountability" reveals that these words consist of distinctive features and view the state of "being accountable" from different perspectives. Once the ordinary meaning of these words is determined, the connection between accountability and the related concepts will be considered.

The noun "responsibility" means "the state of being responsible; the opportunity to act independently; a thing that you are required to do as part of a job, role, or obligation."⁷⁶ The word "responsible" as an adjective also means "obliged to do something or look after someone; being the cause of something and so able to be blamed or credited for it; able to be trusted; involving important duties or decisions; (responsible to) having to report to a senior person" and synonyms also include words such as "... responsible for the mistake, accountable, answerable, to blame, guilty, culpable, blameworthy, at fault, in the wrong."⁷⁷

The word "liability" according to the *Oxford Dictionary and Thesaurus*⁷⁸ means "the state of being liable; an amount of money that a person or company owes." The meaning of "liable" is referred to as "responsible by law; (liable to) able to be punished by law for something; (liable to do) likely to do or to be effected by" and synonyms include words such as "liable for negligence; responsible, accountable, answerable,

⁷⁴ Price 2015:315.

⁷⁵ Price 2015:315.

⁷⁶ Oxford Dictionary &Thesaurus 2009:790.

⁷⁷ Oxford Dictionary &Thesaurus 2009:790-791.

⁷⁸ Oxford Dictionary &Thesaurus 2009:535.

chargeable, blameworthy, at fault, culpable, guilty.”⁷⁹ It also includes words such as “legally obliged.”⁸⁰

2.2.3 Connection between different concepts

An examination of the plain grammatical meaning of accountability, responsibility and liability reveals unique, distinctive features if compared and applied in the following preferred order.

2.2.3.1 Responsibility

The concept of being responsible is linked with assigned duties and functions applicable to a job with clear roles and responsibilities and something one is obliged to do. These functionalities include decision-making powers in terms of legislation that are diverse in nature. It is based on a mutual relationship of trust that a person will perform his or her assigned duties and functions with due diligence in mind. Such a person may have to report to a person overseeing the fulfilment of all duties, functions, roles, responsibilities and obligations involved.

2.2.3.2 Accountability

The requirement for being accountable compels a person entrusted with assigned duties, functions, roles and responsibilities to explain or provide answers for his or her actions and decisions and fulfilment of obligations if required or demanded to do so. A performance assessment may be conducted to hold a person accountable for his or her actions and decisions made. Such actions or decisions may also be the subject matter of an investigation if a person involved is blamed or responsible for something that went wrong that requires an explanation.

2.2.3.3 Liability

Unlike the plain meaning of responsibility and accountability, liability is associated with a legal term⁸¹ in terms of which a person may be “chargeable” for or accused of neglect or wrongdoing. Such a person can be held legally liable for his or her actions and decisions that may justify the institution of disciplinary, criminal and civil proceedings as a means to enforce accountability. Synonyms provided for “liable” such as

⁷⁹ Oxford Dictionary & Thesaurus 2009:535.

⁸⁰ Collins English Dictionary 2004:921.

⁸¹ Okpaluba 2018:7.

“negligence, blameworthy, at fault; culpable, guilty” are also associated with legal terms. Although similar words are provided as synonyms for being “responsible”, it may be indicative of the fact that a failure to comply with or neglect one’s assigned duties, functions, roles and obligations may result in being held accountable and legally liable for one’s responsibilities.

The ordinary meaning of “accountability”, “responsibility”, and “liability” confirms the interrelatedness between these concepts and the importance to distinguish between the different features that it entails. With this in mind, the meaning and different features of accountability from a constitutional perspective require attention.

2.3 DIFFERENT CONSTITUTIONAL FEATURES OF ACCOUNTABILITY

It is well-known that if light enters a triangular prism, the light divides into different colours and passes through the prism at different angles. As the combined colours exit the prism, it matches the colours of a rainbow. Using a prism as a metaphor that represents accountability as a concept may assist with exploring the meaning of accountability from a constitutional perspective. The light that enters the prism represents a reflection on accountability as a constitutional obligation. The separation of the light into various colours represent the different features of accountability. The angle at which each colour passes through the prism represents the context of each feature. As the different colours exit the prism, an opportunity arises to observe and appreciate the meaning, combined features and context of accountability as a whole. The different features and context of accountability from a constitutional perspective will now be explored.

2.3.1 Legal nature of accountability

Accountability as a constitutional value imposes a duty on the state that requires an explanation from the state for its laws, actions and decisions.⁸² The importance of the required explanation is emphasised in *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and Others*⁸³ regarding the limitation of rights entrenched in the *Constitution* by organs of state or any person who need to justify any limitation

⁸² Currie & De Waal 2017:17.

⁸³ 2005 (2) SA 539 (CC):par. 75.

involved. Such justification upholds accountability as a constitutional value that requires an explanation of why a limitation is regarded as reasonable and defensible.⁸⁴

The Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*⁸⁵ elaborated on the nature of constitutional values, confirming that such values are intended to be strong, explicit, clear and part of a new democratic order. The court continues to emphasise that constitutional values are not meant as mere decorations for certain constitutional provisions but as something inseparable from the spirit of the Constitution; and

The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in an integral fashion to provide the protections promised by the Constitution.⁸⁶

It is evident that constitutional values are not meant to be viewed as morally accepted virtues only but as obligations that must be upheld.

Agaba,⁸⁷ with reference to various sources, remarked that accountability does not involve vague ambitions of governance. Accountability requires that public power and related responsibilities be exercised in a transparent and answerable manner by allowing communities access to information to determine how those assigned with public powers and responsibilities implemented their duties. Accountability must be enforceable and subject to oversight and review that can address shortcomings. The availability of effective structures to support adequate remedies to those whose rights were violated by functionaries assigned with public power and responsibilities is regarded as a standard feature of accountability.⁸⁸ This feature of accountability as a constitutional obligation certainly applies to officials assigned with powers and decisions involving the forfeiture or not of state cover and waiver of claims against officials.

⁸⁴ 2005 (2) SA 539 (CC);par. 75.

⁸⁵ 2008 (2) SA 24 (CC);par. 149.

⁸⁶ 2008 (2) SA 24 (CC);par. 149.

⁸⁷ Agaba 2018:129.

⁸⁸ Agaba 2018:130.

2.3.2 Accountability: Interpretation of legislation

The Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*⁸⁹ (*Bato Star Fishing case*) confirms that the interpretation of any legislation should start with the *Constitution*. The *Constitution* compels all involved with interpreting legislation to promote the spirit, purport and objectives of the Bill of Rights.⁹⁰ Such interpretation, where possible, should preferably advance a value protected in the Bill of Rights only if the legislation is receptive to such an interpretation.⁹¹ Accountability as one of the founding values of the *Constitution* contributes to the realisation of the right to just administration action that also requires public officials assigned with delegated powers to make decisions that are reasonable and rational. Extra-textual factors and circumstances, therefore, direct the interpretation process applicable to legislation, even before the legislative text is considered. The Constitutional Court in *Harksen v President of the RSA and Others*⁹² provided further direction in support of a textual analysis of the legislation by confirming that-

[The] Constitution is the supreme law of the land. It is unnecessary for legislation expressly to incorporate terms of the Constitution. All legislation must be read subject thereto.

Botha⁹³ correctly concludes that constitutional provisions, values, or principles are part of the implied contents of statutes. Legislation that provides for the exercising of public power and administrative action must comply with constitutional principles and values, such as the rule of law, legality, accountability, openness and responsiveness,⁹⁴ even though these principles and values may not directly be referred to in the legislation concerned. Fundamental rights such as equality, human dignity, access to information, just administrative action and access to courts are fundamental rights entrenched in the *Constitution*⁹⁵ that also have a direct bearing on the interpretation of legislation. It

⁸⁹ 2004 (4) SA 490 (CC):par. 72.

⁹⁰ 1996:sec. 39 (2).

⁹¹ *Bato Star Fishing case* 2004 (4) SA 490 (CC):par. 72.

⁹² 2000 (5) BCLR 478 (CC):par. 18.

⁹³ Botha 2012:145.

⁹⁴ 1996:sec. 1.

⁹⁵ 1996:secs. 9, 10, 32, 33 and 34 respectively.

is therefore essential that these constitutional imperatives should inform the interpretation of the Treasury Regulations applicable to state cover.

2.3.3 Accountability: a prerequisite for public office bearer's actions

The relevance of this feature of accountability to the focus of the study and how accountability as a constitutional obligation applies to public office-bearers in all spheres of government will be explained. The *Constitution*⁹⁶, according to the preamble, is adopted by “the people of South Africa” through their elected representatives to fulfil the aspirations of the electorate for an open and united society that embraces democratic values such as participation in free and fair elections, human rights and social justice. The Constitutional Court in *United Democratic Movement v Speaker of the National Assembly and Others*⁹⁷ (*UDM case*) remarked that these aspirations aim to move away from the past characterised by a divided, excluded and neglected society toward transformation, unity and inclusion. South Africa as a democratic state is founded on constitutional values such as adult suffrage, and general elections serve as a tool to ensure accountability and to hold elected public office-bearers accountable for the constitutionally inspired aspirations of the electorate.⁹⁸ The *Remuneration of Public Office Bearers Act*⁹⁹ defines “office-bearer” to include a member of the National Assembly (NA), a delegate to the National Council of Provinces (NCOP), the provincial legislature, a member of an Executive Council and a member of a Municipal Council.

The requirement for being accountable therefore involves public office-bearers in all spheres of government at national, provincial and local levels responsible for legislative and executive functions. They need to explain how they fulfil their constitutional obligations and functions and account for exceeding or abusing their powers, including poor performance.¹⁰⁰

⁹⁶ 1996. For a brief overview of the adoption and certification of the *Constitution* see Currie & De Waal 2013:6-7.

⁹⁷ 2017 (5) SA 300 (CC):par. 31.

⁹⁸ 1996:sec. 1; *UDM case* 2017 (5) SA 300 (CC):par. 31.

⁹⁹ 20/1998:sec. 1(viii).

¹⁰⁰ *UDM case* 2017 (5) SA 300 (CC):par. 8.

2.3.3.1 Office bearers at national level

The authority to consider and adopt legislation at national government level is vested in Parliament.¹⁰¹ Parliament consists of the NA and the NCOP.¹⁰² The NCOP consists of a single delegation of equal delegates from each province nominated by the provincial legislatures¹⁰³ to represent and attend to the interests of provinces at national government level. Each provincial delegation is led by the Premier.¹⁰⁴ The interest of each province is promoted through participation in the legislative processes, and the NCOP serve as a consultative forum for considering matters that affect provinces.¹⁰⁵

An obligation to be accountable for exercising public power and fulfilling their functions begins with members of the NA as representatives of the electorate. These elected members must swear or affirm their willingness to obey the *Constitution* and be faithful to the Republic of South Africa.¹⁰⁶ The NA represent the people of South Africa to provide for government by the people in accordance with the *Constitution* by electing a President, adopting legislation and holding the executive accountable.¹⁰⁷ Once sworn in or affirmed as members of the NA, the process to elect from its members the Speaker of the NA and the President of the Republic of South Africa continues.¹⁰⁸

The executive authority vested in the President as the Head of the Cabinet consists of the Deputy President and Ministers selected by the President from among the members of the NA, including no more than two Ministers selected from outside the NA.¹⁰⁹ All members of the Cabinet are individually and collectively accountable to Parliament for the execution of their powers and functions assigned to them by the President.¹¹⁰ The responsibility of the Cabinet to explain their actions is referred to by the Constitutional Court as “executive accountability.”¹¹¹ The executive authority is

¹⁰¹ 1996:sec. 43 (a).

¹⁰² 1996:sec. 42(1).

¹⁰³ 1996:sec. 60(1).

¹⁰⁴ 1996:sec. 60(3).

¹⁰⁵ 1996:sec. 42(4).

¹⁰⁶ 1996:sec. 48. It should be read with Schedule 2 of the *Constitution* that consists of the precise wording of the oath or affirmation.

¹⁰⁷ 1996:sec. 42(3).

¹⁰⁸ 1996:secs. 48(1) and 86(1).

¹⁰⁹ 1996:secs. 85(1) and 91(3).

¹¹⁰ 1996:sec. 92(1) and (2).

¹¹¹ *UDM case 2017 (5) SA 300 (CC)*:par. 8.

responsible for matters such as the formulation of policy and implementation of legislation adopted by Parliament, including subordinate legislation such as the Treasury Regulations, national policy and coordination of functions assigned to organs of state.¹¹² The implementation of policy and legislation involves national departments and organs of state as part of the public administration. It is critically important that the executive utilise control mechanisms to ensure appropriate policies and implementation of legislation.¹¹³ Should trends about waiver of claims as disclosed in the AFSs of departments reveal that accountability may be compromised, it should attract the attention of the executive to intervene. The executive may consider issuing policy directives to ensure just administrative action that complies with the requirements of reasonableness and rationality. Such a course of action may contribute to holding decision-makers and accounting officers of departments accountable by requiring explanations for trends observed with waivers of claims against officials concerned.

Regulations implemented by the executive authority may also be subject to scrutiny by the judiciary. A regulation issued in terms of the *South African Schools Act*¹¹⁴ has been declared constitutionally invalid in *Equal Education and Another v Minister of Basic Education and Others*¹¹⁵ as it limited the unqualified right to basic education by subjecting it to the availability of resources and cooperation of those responsible for infrastructure. The regulation violated the principle of accountability, allowing the responsible Minister an indemnity for not providing sufficient infrastructure for public schools.¹¹⁶ Any regulation that violates accountability as a constitutional obligation, including Treasury Regulations, may be subject to judicial review.

2.3.3.2 Office bearers at provincial level

Elected members of provincial legislatures are accountable to the electorate to fulfil their obligations and legislative functions as assigned to them in terms of the Constitution.¹¹⁷ The authority to consider and adopt legislation at provincial

¹¹² 1996:sec. 85(2)(a)-(c); Also see Maree 2020:32.

¹¹³ Maree 2020:32.

¹¹⁴ 84/1996.

¹¹⁵ 2019 (1) SA 421 (ECB):paras. 61 and 208.

¹¹⁶ 2019 (1) SA 421 (ECB):par. 194.

¹¹⁷ 1996:sec. 104(1).

government level is vested in the provincial legislature.¹¹⁸ A similar oath or affirmation applicable to members of the NA that needs to be administered before performing their functions applies to members of the provincial legislature.¹¹⁹ After an election and during its first sitting, a provincial legislature must elect from its members a speaker and Premier for the province.¹²⁰

The executive authority of a province is vested in the Premier, assisted by members of the provincial legislature appointed from among its members by the Premier.¹²¹ Such authority is exercised in the province in cooperation with the appointed members of the Executive Council responsible for, among other functions, the implementation of provincial legislation and policies, including the coordination of functions performed by the provincial administration and departments concerned.¹²² Similar to the Cabinet at national level, members of the Executive Council are individually and collectively accountable to the provincial legislature for exercising public powers and functions assigned to them by the Premier concerned.¹²³ The same remarks about the formulation of policy, the implementation of legislation and utilisation of control mechanisms by the executive at national level to ensure proper application of policies and implementation of legislation concerning provincial departments as part of the public administration, equally applies to the executive at provincial level.¹²⁴ The *PFMA* and Treasury Regulations issued in terms thereof also apply to provincial departments, including compliance with disclosures in the AFSs pertaining to particulars of civil claims and waiver of claims against officials liable for civil claims instituted against provincial departments.¹²⁵ Consolidated AFSs in respect of all provincial departments within a particular province must be prepared and dealt with by the provincial treasuries concerned.¹²⁶

¹¹⁸ 1996:sec. 43(b).

¹¹⁹ 1996:sec. 107.

¹²⁰ 1996:secs 111(1) and 128(1).

¹²¹ 1996:secs 125(1) and 132(1).

¹²² 1996:secs. 125(2)(a), (d)-(e).

¹²³ 1996:secs. 133(1) and (2).

¹²⁴ 1996:secs.125(2)(a) and (d).

¹²⁵ Also see 1/1999:secs. 1 and 3(1)(a) that defines a department to include national and provincial departments and confirms that the Act also applies to provincial departments, respectively.

¹²⁶ 1/1999:sec. 19(1)(a).

2.3.3.3 Office bearers at local level

The legislative and executive authority at local government level is vested in elected municipal councils who are accountable to local communities for services rendered to communities aiming at sustainability, social and economic development, a safe and healthy environment and community participation in local government-related matters.¹²⁷ The *Constitution*¹²⁸ provides for national and provincial legislation in terms of which Municipalities should be governed. Once a municipal council is elected as prescribed in terms of the *Local Government: Municipal Structures Act*,¹²⁹ municipal office bearers such as the speaker and an executive mayor must be elected at the first meeting of the municipal council.¹³⁰ Municipal councils are solely responsible and accountable for, among other things, all decisions applicable to the exercising of powers, performing of functions, the adoption of by-laws and approval of budgets.¹³¹

Each municipality may opt for different types of municipal executive systems or a combination thereof depending on the category of a municipality involved, which is determined by aspects such as population density, infrastructure, and economic activities.¹³² In the event of a municipal council that established an executive committee, such committee is accountable to the municipal council for all decisions made and for monitoring the management and performance of the municipality's administration in line with policy directions of the municipal council.¹³³ The *Local Government: Municipal Finance Management Act (MFMA)*¹³⁴ that applies to local government consists of similar arrangements and provisions than the *PFMA*, applicable to the responsibilities of an accounting officer, which is the municipal manager of a municipality.¹³⁵ The *MFMA* provides for Treasury Regulations and guidelines applicable to local government that include matters relating to settlements

¹²⁷ 1996:secs. 151(2) and 152(1).

¹²⁸ 1996:secs. 151(3), 155(2) and (3),

¹²⁹ 117/1998:sec. 22(1); Also see 1996:sec. 157(2).

¹³⁰ 117/1998:Schedule 3, sec. 36(1) and (2); Also see the *Local Government: Municipal Electoral Act*, 27/2000 that provides for the election of councillors.

¹³¹ 117/1998:secs. 160(1)(a) and 161(2)(a)-(b).

¹³² 117/1998: secs. 2-3, 8-10; 1996:sec. 155(1). Municipalities, according to the *Constitution* function as either a Category A, B or C municipality.

¹³³ 117/1998:secs. 44(3)(d) and (4).

¹³⁴ 56/2003:secs. 61-75.

¹³⁵ 56/2003:sec. 60(1).

of civil claims against a municipality.¹³⁶ Municipalities are compelled to disclose in their AFSs information about contingent liabilities (pending civil claims) and the recovery and writing-off of material losses.¹³⁷ Municipal councils should also fulfil their oversight roles through control mechanisms to ensure that decision-makers assigned with liability determinations are being held accountable for the outcome of decisions made. Unlike officials to whom the *PFMA* apply, municipalities, political office-bearers, officials, and other functionaries referred to in the *MFMA* enjoy statutory immunity and may not be held liable in respect of losses or damages resulting from the exercise of power or performance of a function in terms of the *MFMA* if done in good faith.¹³⁸ However, any loss or damage suffered by a municipality is recoverable from the said political office-bearer or functionaries concerned due to “deliberate or negligent unlawful actions” while exercising their power or performing their functions.¹³⁹ When comparing the criteria for state cover provided for in the Treasury Regulations applicable to national and provincial departments,¹⁴⁰ it differs from the *MFMA* that allows for initiating recovery procedures due to deliberate and “negligent” unlawful actions. As “negligent” actions are not qualified, it should be interpreted to mean ordinary negligence. This observation regarding “negligent actions” as a criterion to exercise a right of recourse against public officials for damages suffered will be embarked upon in chapter 3.

2.3.4 Accountability: public officials and reporting

The Constitutional Court,¹⁴¹ with reference to constitutional values of accountability, responsiveness and openness, confirmed that all public officials involved with the exercising of public power and performance of public functions are bound to uphold these values. The requirement for being accountable also applies to all accounting officers¹⁴² of state departments, trading entities, and constitutional institutions referred to in the *Constitution*.¹⁴³ In *M&G Ltd and Others v 2010 FIFA World Cup Organising*

¹³⁶ 56/2003:sec. 168(1)(m).

¹³⁷ 56/2003:secs.125(2)(c) and (2)(d)(iii).

¹³⁸ 56/2003:sec. 176(1).

¹³⁹ 56/2003:sec. 176(2).

¹⁴⁰ National Treasury 2005:reg.12.2.1.

¹⁴¹ *Sidumo case* 2008 (2) SA 24 (CC):par.232.

¹⁴² 1/1999:sec. 40(1)(d).

¹⁴³ 1996:sec. 181(1). It involves institutions such as the Public Protector, the South African Human Rights Commission, the Commission for Gender Equality and the Auditor-General.

*Committee South Africa Ltd and Another*¹⁴⁴ (*FIFA case*) the court ordered the Committee that disbursed public funds to allow access to certain records under their control to the applicants in terms of the *Promotion of Access to Information Act (PAIA)*.¹⁴⁵ Withholding such records needed by the applicants to disclose possible corruption is inconsistent with the principles of accountability and transparency. It also constitutes an infringement on the applicants' constitutional right to access information. The court regarded the respondents as a "public body" in terms of the definition of the *PAIA*¹⁴⁶ as the activities of the respondent is funded by state funds.¹⁴⁷

The reporting responsibilities of accounting officers to disclose information serve as a cornerstone for accountability and contribute to ensuring that organs of state, the government and elected representatives are held accountable for public resources entrusted to them in an open and transparent way.¹⁴⁸ Accounting officers must submit their annual reports, audited financial statements and the Auditor-General's report to the relevant treasury and executive authority responsible for the department, trading entity and constitutional institution concerned.¹⁴⁹ The annual report and financial statements must represent a fair account of the business, performance and financial status of the institutions involved.¹⁵⁰ Similar reporting responsibilities apply to accounting authorities of public entities.¹⁵¹ These reporting responsibilities also apply to disclosure by organs of state regarding contingent liabilities and waiver of claims against officials.¹⁵²

It is the responsibility of the executive authority to table the annual report, financial statements and report of the Auditor-General of the department or public entity in the NA or provincial legislature involved.¹⁵³ Unless members of the NA familiarise themselves with the disclosure notes attached to AFSs involving contingent liabilities and the recoverability of compensation payments, including waiver of claims against

¹⁴⁴ 2011 (5) SA 163 (GSJ):paras.414-417.

¹⁴⁵ 2/2000.

¹⁴⁶ 2/2000:sec. 1 (b)(ii) applies to the definition of a "public body".

¹⁴⁷ *FIFA case* 2011 (5) SA 163 (GSJ):paras.240-241.

¹⁴⁸ National Treasury 2018:11.

¹⁴⁹ 1/1999:sec. 40(1)(d)(i)-(iii).

¹⁵⁰ 1/1999:sec. 40(3).

¹⁵¹ 1/1999:sec. 55(1)(d) and 55(2)(a).

¹⁵² National Treasury 2018:5,120-121. Also see National Treasury 2019c:163-164.

¹⁵³ 1/1999:sec. 65(1)(a).

officials, trends with waiver of claims may not attract the attention it deserves. The outcome of any findings of a disciplinary board regarding financial misconduct against an accounting officer or accounting authority, including sanctions imposed, must be tabled as well.¹⁵⁴

2.3.5 Accountability: Checks and balances

Mechanisms to monitor the exercise of public powers and performance of functions by public office-bearers, accounting officers, accounting authorities and organs of state, which powers and functions are mandated by the *Constitution* and legislation, must be established by the NA and the provincial legislature.¹⁵⁵ Such mechanisms aim to ensure that national and provincial executive organs of state are accountable to the NA and provincial legislature, respectively.¹⁵⁶ Oversight mechanisms must also be maintained with regard to executive authorities, implementation of legislation and organs of state at national and provincial levels.¹⁵⁷ These accountability and oversight mechanisms provided for in the *Constitution* serves as checks and balances to promote and ensure accountability requires a brief discussion.

2.3.5.1 Oversight role of legislatures

To enhance accountability and give effect to its legislative powers and oversight roles, the *Constitution* allows for both the NA and provincial legislatures, including its committees, to gather any required evidence and information. This is achieved by:

- Ordering any person to appear before it and provide evidence or produce any required documentation. An oath or affirmation must be administered before the tendering of required evidence.¹⁵⁸
- Requiring from any person or institution to report to it.¹⁵⁹
- Compelling any person or institution in terms of legislation or its rules and orders to present evidence like documenttion and reports required.¹⁶⁰

¹⁵⁴ 1/1999:sec. 65(1)(b).

¹⁵⁵ 1996:secs.55(2) and 114(2).

¹⁵⁶ 1996:secs.55(2)(a) and 114(2)(a).

¹⁵⁷ 1996:secs.55(2)(b) and 114(2)(b).

¹⁵⁸ 1996:secs.56(a) and 115(a).

¹⁵⁹ 1996:secs.56(b) and 115(b). The mandate of the provincial legislatures is limited to provincial institutions only.

¹⁶⁰ 1996:secs.56(c) and 115(c).

- Receiving information through petitions, representations or submissions from any person or institution.¹⁶¹

A similar mandate is provided by the *Constitution* to the NCOP and any of its committees to attend to the interests of provinces and municipalities at national government level.¹⁶² The NA, the NCOP and provincial legislatures may provide for its proceedings, procedures, rules and orders and, among other arrangements, for the powers and functioning of its committees.¹⁶³ These oversight roles of the legislatures provide for the appearance of any person before the NA and provincial legislatures and its committees to provide oral or documentary evidence that may have a bearing on draft legislation under consideration or the proper implementation of any original or delegated legislation such as the *PFMA* or Treasury Regulations respectively. Evidence in this regard may be required based on research conducted by a parliamentary committee among organs of state about inconsistency in the application of Treasury Regulations applicable to state cover and waiver of claims against officials.

2.3.5.2 Oversight role of executive authority

The oversight role of the NA, NCOP and provincial legislatures, including its committees, to provide for checks and balances is supported and strengthened by its rules. Given the similarity of these rules¹⁶⁴ adopted by legislatures in the different spheres of government, only some rules applicable to the oversight role of the NA¹⁶⁵ (to be referred to as “Rules of NA”) insofar it relates to the executive authority, will be emphasised. The requirement for being accountable regarding the exercise of public powers, the performance of public functions and compliance with constitutional obligations by all organs of state is monitored by the NA and its committees¹⁶⁶ through:

¹⁶¹ 1996:secs.56(d) and 115(d).

¹⁶² 1996:secs. 69(a)-(d).

¹⁶³ 1996:secs.57, 70 and 116.

¹⁶⁴ See Parliament of the Republic of South Africa. 2016. *Rules of the National Assembly*. 9th ed. Cape Town; National Council of Provinces. 2008. *Rules of the National Council of Provinces*. 9th ed. Cape Town; Gauteng Legislature. 2013. *Standing Rules*. Version 5 – Revision 3. Johannesburg: Gauteng Provincial Legislature.

¹⁶⁵ Parliament of the Republic of South Africa. 2016. *Rules of the National Assembly*. 9th ed. Cape Town.

¹⁶⁶ *UDM case 2017 (5) SA 300 (CC):par.40.*

- Oral or written questions by members of the NA that require answers from the Ministers as members of the Cabinet responsible for overseeing the effective functioning of national departments.¹⁶⁷
- Requiring prior notice from a member of the NA in respect of oral questions to be asked to ensure the attendance of the Minister concerned during question and answer sessions to respond to such questions.¹⁶⁸
- Monitoring by the Speaker of the NA of questions in respect of which written replies remain unanswered and the scheduling of such questions by the Speaker for an oral reply by the Minister concerned.¹⁶⁹
- Cabinet Ministers summoned to appear in person before a Portfolio Committee or an *ad hoc* Committee of Parliament.¹⁷⁰
- Response from the State President to questions of national and international importance posed by members of the NA, especially following the President's State of Nation Address.¹⁷¹
- Response from the Minister of Finance to questions following the Budget Speech.¹⁷²

Ample provision is made for oral and written questions by any member of the NA on the waiver of claims against officials that can be submitted to the relevant minister of each department. Questions should be submitted concerning the extent of the claims waived by the department, and reasons should be requested, based on disclosures in AFSs, for the high rate of waivers involved. Even questions concerning the non-disclosure in AFSs of the recoverability of compensation payments made and waiver of claims should be regarded as necessary. It is clear that the relevant minister cannot avoid replying to questions submitted and may even be summoned to appear in person before a committee of Parliament. The NA must oversee the exercise of executive powers and hold all members of the executive accountable who are in breach of their constitutional and legislative obligations.¹⁷³ Apart from checks and

¹⁶⁷ Rules of NA 2016:Rules 134(5)(a), 137(1), 138(1) and 145(1).

¹⁶⁸ Rules of NA 2016:Rules 134(2) and 138(4).

¹⁶⁹ Rules of NA 2016:Rule 146(1).

¹⁷⁰ Rules of NA 2016:Rule 167(a).

¹⁷¹ Rules of NA 2016:Rules 20, 138(6) and 140(1)(a)-(b).

¹⁷² Rules of NA 2016:Rule 138(1).

¹⁷³ 1996:secs.42(3) and 55(2)(a) and (b).

balances that oversee the exercise of powers and functions of the national executive authority, similar monitoring mechanisms also apply to accounting officers of departments, trading entities and constitutional institutions.¹⁷⁴

2.3.5.3 Oversight involving accounting officers

In pursuing the purpose and objectives of their respective departments, entities and institutions, accounting officers need to account for all resources within their sphere of responsibility. Accounting officers must have and maintain effective and efficient financial management systems, exercise budgetary control and comply with reporting responsibilities by submitting annual reports and audited financial statements to the relevant Treasury and the member of the executive authority concerned.¹⁷⁵ To give effect to the requirement of being held accountable, it may be required from an accounting officer to:

- Appear in person before a Portfolio Committee or *ad hoc* Committee of Parliament involving any matter disclosed in the annual reports, such as contingent liabilities and questionable trends regarding waiver of claims against officials or due to qualified financial statements tabled by the responsible Minister in the NA.¹⁷⁶ Any over or understatement of contingent liabilities as disclosed by a department in the AFSs may result in a qualification of the AFSs by the Auditor-General. An accounting officer of such a department may then be ordered to appear in person before the Standing Committee on Public Funds (SCOPA) to explain such statements.
- Inform the National Treasury or Provincial Treasury, depending on whether or not a national or provincial department is involved, the Minister responsible for a department or constitutional institution and the Auditor-General about criminal charges initiated against any person due to financial misconduct.¹⁷⁷ The relevant Treasury may intervene by instructing an institution to lay criminal charges involving financial misconduct against any person should the accounting officer concerned fail to proceed with the appropriate action.¹⁷⁸ The

¹⁷⁴ 1/1999:sec. 41.

¹⁷⁵ 1/1999:secs.38(1), 39(1) and 40(1)(d).

¹⁷⁶ Rules of NA 2016: Rule 167(a); Also see 1/1999:sec. 65(1)(a).

¹⁷⁷ National Treasury 2005:reg.4.2.1.

¹⁷⁸ National Treasury 2005:reg.4.2.2.

outcome of any disciplinary steps and criminal proceedings, including particulars of officials involved and sanctions imposed, must be reported annually by accounting officers of departments to the executive authority, the relevant Treasury, Department of Public Services and Administration and the Public Service Commission.¹⁷⁹ Accounting officers of constitutional institutions must submit a similar annual report to Parliament also to ensure that matters involving financial misconduct receive the attention it deserves.¹⁸⁰

- Explain and respond in person to allegations concerning improper conduct or the exceeding or abuse of public powers, which allegations are the subject matter of investigation, findings and recommendations by the Public Protector.¹⁸¹
- Appear in person and testify before a Commission of Inquiry that is appointed by the President of South Africa to investigate any matter of public concern.¹⁸² The appointment of a Commission of Inquiry and the Rules of the Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector, including organs of state, serves as an example.¹⁸³

An official commits financial misconduct if that official wilfully or negligently fails to exercise assigned delegated powers or duties.¹⁸⁴ This may occur when such an official, without any justification, fails to conduct a liability determination about the forfeiture or not of state cover by officials involved. Such failure may lead to unresolved liability determinations and may deprive the state of possible claims against officials should such claims become prescribed. It may also involve neglect of assigned duties to conduct proper liability determinations causing officials to enjoy instead of forfeiting state cover, thus depriving the state of exercising a right of recourse against officials concerned. All these failures can be expressed in monetary terms as far as possible losses of income for the state are concerned that needs to be accounted for.

¹⁷⁹ National Treasury 2005:reg.4.3.3 and reg.4.3.4.

¹⁸⁰ National Treasury 2005:reg.4.3.3.

¹⁸¹ *Public Protector Act*, 23/1994:sec. 6(4)-(5).

¹⁸² 1996:sec. 84(2)(f); Also see 8/1947:secs.1(1) and 3(1).

¹⁸³ Parliament of the Republic of South Africa 2018:15.

¹⁸⁴ 1/1999:sec. 81(2).

2.3.6 Accountability: Compliance with empowering provisions

Administrative law sets boundaries for the exercise of public powers through various control mechanisms but also enables organs of state and public officials to exercise assigned powers in terms of the *Constitution*, legislation, regulations and other less official sources developed by organs of state internally, such as predetermined standards, guidelines, practice notes and manuals.¹⁸⁵ Apart from judicial control of administrative decisions retrospectively through review proceedings, internal control measures such as empowering provisions aim to assist organs of state while decisions need to be made.¹⁸⁶ Unless the exercise of public power and performance of public functions are authorised by law, it will be regarded as unlawful.¹⁸⁷ It is, therefore, essential that the content and scope of empowering provisions are clear enough to be understood and applied by those assigned with public powers to remain within the boundaries of such provisions.¹⁸⁸ To enhance certainty, empowering provisions should also include definitions where appropriate, provide guidance concerning the exercise of discretionary powers and be clear on the purposes why such powers are assigned.¹⁸⁹ Since all legislation must comply with the normative framework of the *Constitution*, the importance of administrative law that should guide the formulation of empowering provisions must not be underestimated.¹⁹⁰ These requirements for empowering provisions such as the Treasury Regulations concerning the forfeiture or not of state cover and waiver of claims against officials are essential to ensure consistent application by all organs of state to which these regulations apply.

Decisions by organs of state and public officials who are responsible for exercising public powers may also be subject to compliance with mandatory conditions included in empowering provisions.¹⁹¹ Organs of state and public officials may be held accountable to ensure compliance with mandatory conditions and their decisions are reviewable and measurable against compliance or not with such conditions. In a matter that involves public procurement of services to provide for payment of social

¹⁸⁵ Maree 2020:67 and 255; Hoexter 2012:32.

¹⁸⁶ Quinot 2020:256.

¹⁸⁷ Hoexter 2012:255.

¹⁸⁸ Quinot 2020:258.

¹⁸⁹ Quinot 2020:259-260.

¹⁹⁰ Quinot 2020:257.

¹⁹¹ Quinot 2020:256.

grants to citizens, the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*,¹⁹² had to decide whether or not a successful bidder should have been disqualified from a bidding process due to an irregularity based on non-compliance with a request for proposal. A mandatory condition required bidders who decided to submit a request for proposal in respect of more than one province to submit separate bids for each province accompanied by the required documentation. The successful bidder failed to comply with the mandatory condition by submitting a single request for proposal with one set of documentation in respect of all the provinces involved. As non-compliance with the mandatory condition did not defeat the purpose of submitting separate bids, namely to determine the suitability of the successful bidder to provide the required service to all provinces, nor caused such non-compliance to be material in nature as required in terms of the *Promotion of Administrative Justice Act (PAJA)*,¹⁹³ the court regarded the irregularity as immaterial leaving no ground of review in terms of the *PAJA*. The criteria for state cover indicates the conditions to be met for officials to enjoy or forfeit state cover. Once an official, assigned with delegated powers to conduct a liability determination, exceeds such power by considering criteria for state cover that may not be relevant to a particular cause of action, such determination may be irregular and subject to review. An irregularity may occur if the criterion for state cover involving non-compliance or ignorance of standing instructions is applied to damages arising from the use of a state vehicle. At the same time, the Treasury Regulations expressly indicated that the mentioned criterion is excluded.¹⁹⁴

In the event of non-compliance with empowering provisions and when normal checks and balances to uphold accountability prove to be ineffective, more stringent accountability mechanisms provided for in the Constitution and empowering legislation must be applied to secure and enforce accountability as a constitutional obligation.

¹⁹² 2014(1) SA 604 (CC):par.62.

¹⁹³ 3/2000:sec. 6(2)(b).

¹⁹⁴ National Treasury 2005:reg.12.2.1(g).

2.4 SECURING ACCOUNTABILITY AND PUBLIC OFFICE-BEARERS

Although this feature of accountability may not have a direct bearing on the focus of the study, it is regarded as essential to briefly discuss the importance of securing accountability as a constitutional obligation in the event of non-compliance by public office-bearers with their constitutional obligations.¹⁹⁵ Non-compliance with or a disregard of constitutional obligations assigned to public office-bearers at national, provincial and local government levels, including unacceptable behaviour by such office-bearers, may have serious consequences resulting in a disqualification to remain in public office. Therefore, it may justify steps to secure accountability or intervene in provincial administration and local government.

2.4.1 Remedies available to secure accountability

Effective and more stringent mechanisms exist to secure accountability and ensure consequences for those public office-bearers in breach of their constitutional obligations. Such mechanisms have the effect of continuously reminding public office-bearers of remedial steps available should normal checks and balances to uphold accountability failed to achieve the desired results.¹⁹⁶

2.4.1.1 Removal of President from office

The *Constitution*¹⁹⁷ provides for the removal of the President from office supported by a two-thirds majority vote of members of the NA. Such removal is based on conduct that is in breach of the *Constitution* or law and misconduct of a serious nature or an inability to perform presidential functions. Once removed from office, the President may not receive any benefits nor serve in any other public office.¹⁹⁸ Similar arrangements and consequences apply in the event of a two-thirds majority vote by the provincial legislature to remove a Premier from office for the same reasons.¹⁹⁹

2.4.1.2 Motion of no confidence in Cabinet or the President

A majority vote is required for members of the NA to pass a motion of no confidence in the Cabinet, and if such a motion succeeds, the President must rearrange a

¹⁹⁵ The discussion serves as an illustration about the most drastic measures that may be considered in respect of office-bearers to secure accountability.

¹⁹⁶ *UDM case 2017 (5) SA 300 (CC)*:par. 43.

¹⁹⁷ 1996:sec. 89(1).

¹⁹⁸ 1996:sec. 89(2).

¹⁹⁹ 1996:secs.130(3) and (4).

Cabinet.²⁰⁰ Should a majority vote to pass a motion of no confidence in the President succeeds, the President and remaining members of the Cabinet and Deputy Ministers must resign.²⁰¹ The ever reminding presence of a possibility of such motions should, according to *Mazibuko v Sisulu*,²⁰² serve to keep the President and members of the Cabinet accountable for their actions. Unlike a motion of no confidence in the Cabinet that does not involve the President, a motion of no confidence in the latter involves all members of the Cabinet, including Deputy Ministers.²⁰³ The same consequences apply to a motion of no confidence in a Premier or members of the Executive Council of a Province. The former motion results in the rearrangement of an Executive Council by the Premier concerned. Accepting the latter motion leads to the resignation of both the Premier and remaining members of the Executive Council.²⁰⁴ A motion of no confidence in those involved with executive functions serves as a consequence-management tool supporting effective governance to determine the suitability of those who govern.²⁰⁵

2.4.1.3 Removal of public office-bearers by municipal councils

The *Local Government: Municipal Structures Act*²⁰⁶ provides for a municipal council to remove by resolution an executive or deputy executive mayor from office. A municipal council may also pass a resolution to remove any number of or all the members of the executive committee from office.²⁰⁷ In the event of all members being removed from office, the municipal council must proceed with an election of a major and members to serve on the executive committee.²⁰⁸

2.4.2 Intervention in provincial and local government

Failure by a province to fulfil its executive obligations in terms of the *Constitution*²⁰⁹ and legislation may lead to intervention by the national executive resulting in a directive issued to the provincial executive concerning steps to be followed to meet its

²⁰⁰ 1996:sec. 102(1).

²⁰¹ 1996:sec. 102(2).

²⁰² 2013 (6) SA 249 (CC):par.43.

²⁰³ UDM 2017 (5) SA 300 (CC):par.45.

²⁰⁴ 1996:sec. 141(1) and (2).

²⁰⁵ UDM 2017 (5) SA 300 (CC):par.47.

²⁰⁶ 117/1998:sec. 58.

²⁰⁷ 117/1998:sec. 53(1).

²⁰⁸ 117/1998:sec. 53(2).

²⁰⁹ 1996:sec. 125(2).

obligations.²¹⁰ Such intervention allows the national executive to take responsibility for the executive responsibilities of the province concerned. It is subject to approval and review by the NCOP, who may submit recommendations to the national executive for the duration of the intervention.²¹¹

The Constitution²¹² also allows for intervention by the provincial executive if a municipality is unable to meet or consistently in breach of its constitutional obligations. The provincial executive may assume responsibility for the executive obligations of the municipality and issue a directive to the Municipal Council involved requiring the Council to meet its obligations.²¹³ Such intervention is subject to approval by the Cabinet member responsible for overseeing the functions of local governments and the NCOP. The latter may review the intervention and submit recommendations to the provincial executive concerned.²¹⁴

The *Constitution* intends to secure accountability by recognising that extreme circumstances may justify extreme corrective measures and therefore allows a provincial executive to exercise discretion to dissolve the Municipal Council and to appoint an administrator as an interim measure until a new Municipal Council has been elected.²¹⁵ However, if a municipality, due to a financial crisis, remains in breach of its obligations and can no longer provide basic services, the provincial executive concerned is obliged to introduce a recovery plan, appoint an administrator until a new Municipal Council is elected, approve a temporary budget and dissolve the Municipal Council.²¹⁶ If a provincial executive cannot or fails to intervene, the national executive must exercise these powers.²¹⁷ In *Unemployed Peoples Movement v Premier, Province of the Eastern Cape and Others*²¹⁸ (*UPM case*), the court ordered the dissolution of a Municipal Council in terms of the *Constitution*²¹⁹ as the Municipal

²¹⁰ 1996:sec. 100(1)(a).

²¹¹ 1996:secs.100(1)(b), 100(2)(a) and (b).

²¹² 1996:secs.139(1)(a) and 139(5)(b). Depending on the nature of intervention a decision to dissolve a Municipal Council in terms of these sections of the *Constitution* is discretionary or mandatory in nature.

²¹³ 1996:sec. 139(1)(b).

²¹⁴ 1996:sec. 139(2).

²¹⁵ 1996:secs.139(1)(c)and 139(5)(b).

²¹⁶ 1996:sec. 139(5). Such intervention that is mandatory in nature must be read with section 139 and 140 of the *Local Government: Municipal Finance Management Act, 56/2003*.

²¹⁷ 1996:sec. 139(7).

²¹⁸ 2020 (3) SA 562 (ECG):par.97.

²¹⁹ 1996:secs.139(5).

Council failed to ensure the provision of services to its community in a sustainable manner. The priority to meet the basic needs of the community has been neglected, and the requirement of an accountable local government was not met. Although the *Constitution* empowers the provincial executive to intervene by dissolving the Municipal Council, which failed to provide basic services to a community, the provincial and Municipal Council neglected their responsibilities since 2015 to implement a recovery plan developed for the Municipality.²²⁰ Ultimately, it left the applicant with no option but to approach a court for appropriate relief that was granted to serve the best interest of the local community.

2.5 INSTRUMENTS UPHOLDING ACCOUNTABILITY

2.5.1 National legislation

The *Constitution* as the supreme law imposes various obligations that must be fulfilled, and any law or conduct inconsistent with the *Constitution* is regarded as invalid.²²¹ Throughout the *Constitution*, provision is made for national legislation to be established to give effect to a variety of constitutional obligations. Such obligations relate to matters involving the bill of rights,²²² constitutional institutions,²²³ government structures,²²⁴ public administration,²²⁵ revenue, budget and expenditure control,²²⁶ ethical conduct²²⁷ and the exercise of public powers and functions in all spheres of government with accountability, openness and transparency in mind.²²⁸ The *Constitution* provides for the establishment of a National Treasury to ensure transparency and expenditure control in all spheres of government through, amongst

²²⁰ *UPM* case 2020 (3) SA 562 (ECG):par.92.

²²¹ 1996:sec.2.

²²² 1996:secs.3(3), 6(5), 9(4), 23(5), 32(2) and 33(3).

²²³ 1996:secs.181(5), 182(1) Public Protector, 184(2) South African Human Rights Commission, 185(4) Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, 187(2) Commission for Gender Equality, 188(3) Auditor-General and 190(2) Electoral Commission.

²²⁴ 1996:sec. 47(1)(a)(ii) Members of National Assembly, 61((2)(a)(i) delegation of provinces to serve on the NCOP, 106(1)(a)(ii) members of provincial legislature, and 158(1)(a) members of Municipal Councils.

²²⁵ 1996:sec.195(1).

²²⁶ 1996:secs.214(1)(a) and 215(2)(a).

²²⁷ 1996:sec.96(1) Code of ethics for members of the Cabinet and Deputy Ministers, and 136(1) Code of ethics for members of Executive Councils.

²²⁸ 1996:secs.57(1)(b), 70(1)(b), 92(2), 166(1)(b), 133(2), 151(1)(a), 215(1) and 216(1).

other measures, compliance with generally recognised accounting practices and uniform treasury norms and standards.²²⁹ The legislature is therefore compelled to enact national legislation ensuring that positive steps are being taken to give effect to all constitutional obligations, including values and principles entrenched in the *Constitution* such as accountability, openness and transparency.²³⁰ It will now be illustrated how certain legislation regards these values and principles as obligations that must be met.

Both the *PFMA*²³¹ and the *MFMA*²³² involve national legislation aiming to secure transparency, accountability and clear roles and responsibilities regarding effective financial management practices that apply to revenue, expenditure, assets and liabilities. Whereas the *PFMA*²³³ and regulations issued in terms thereof apply to all national and provincial departments, public entities, constitutional institutions and provincial legislatures, the *MFMA*²³⁴ applies to all municipalities municipal entities, including national and provincial organs of state insofar it relates to their involvement with the financial affairs of municipalities. All accounting officers to which both the *PFMA* and *MFMA* apply are obliged to submit their annual reports, accompanied by audited financial statements, including disclosure notes and the report of the Auditor-General to, among others, the National Treasury, and as far as Municipalities are concerned, to the provincial Treasury concerned.²³⁵ Such disclosure notes also apply to pending civil claims and the recoverability of compensation payments made, which should include information about the monetary value of claims waived against officials. All accounting officers must account for and disclose all material losses, irregular, fruitless and wasteful, including unauthorised expenditure.²³⁶ Accounting officers who intentionally or negligently failed to comply with their legislative responsibilities and public officials who failed to exercise powers and duties assigned to them commit an act of financial misconduct and expose themselves to disciplinary action.²³⁷

²²⁹ 1996:sec.216(1)(a)-(c).

²³⁰ Maree 2020:33

²³¹ 1/1999:sec.2.

²³² 56/2003:sec.2.

²³³ 1/1999:secs.1 and 3(1).

²³⁴ 56/2003:sec.3(1).

²³⁵ 1/1999:secs.40(1)(d); 56/2003:secs.121(4) and 127(5)(b).

²³⁶ 1/1999:secs.40(3)(b); 56/2003:sec.125(2)(d).

²³⁷ 1/1999:secs.81(1) and (2), 84; 56/2003:sec.171(1),(2) and (3)..

The *Public Administration Management Act*²³⁸ (*PAMA*) gives effect to the basic constitutional values and principles that apply to public administration in all spheres of government. In *Kate v MEC for the Department of Welfare, Eastern Cape*,²³⁹ the court referred to section 195(1)(f) of the *Constitution* when granting relief to the applicant for payment of a social grant which payment was in arrears and thereby securing accountability in the public administration of such grants. The court explicitly remarked that it would be almost inconceivable that a public State functionary exercising public power cannot be held individually accountable for his or her public duties given the following constitutional principles, referred to by the court with reference to the relevant sections of the *Constitution*:²⁴⁰

- The supremacy of the *Constitution* and the rule of law;²⁴¹
- The invalidity of any conduct inconsistent with the *Constitution*;²⁴²
- The Bill of Rights that binds all instruments of State;²⁴³
- Public administration that must be accountable;²⁴⁴
- The judicial authority of the courts to apply the *Constitution* and the law;²⁴⁵
- The binding effect of an order or decision issued by a court on all persons to whom and all organs of State (which include individual functionaries) to which it applies.²⁴⁶

All organs of state must foster and maintain professional ethics, and public administration must be conducted in a transparent and accountable manner also by providing accurate and accessible information without delay.²⁴⁷ The *PAMA* also refers to the requirement of monitoring, oversight, capacity and functionality audits, reporting and corrective mechanisms to ensure compliance with the basic values and principles applicable to public administration through the establishment of both the Public

²³⁸ 11/2014:sec.3(a) read with 1996:sec.195(1).

²³⁹ 2005 (1) SA 141 (SE):paras.19 and 33.

²⁴⁰ 1996.

²⁴¹ 1996:sec.1(c).

²⁴² 1996:sec.2.

²⁴³ 1996:sec.8(1).

²⁴⁴ 1996:sec.195(1)(f).

²⁴⁵ 1996:secs.165(1) and (2).

²⁴⁶ 1996:sec.165(5).

²⁴⁷ 11/2014:secs.4(a),(f) and (g).

Administration Ethics, Integrity and Disciplinary Technical Assistance Unit²⁴⁸ and the Office of Standards and Compliance.²⁴⁹

2.5.2 Constitutional institutions

The *Constitution*²⁵⁰ provides for the establishment of state institutions accountable to the NA to strengthen constitutional democracy to ensure that those who are elected to govern remain accountable to the governed for exercising public power and decisions made. The office of the Public Protector²⁵¹ and the Auditor-General²⁵² are examples of and represent state institutions that give effect to accountable government involving all public office-bearers, organs of state, public entities and public officials in all spheres of government. National legislation gives effect to the establishment of both offices as contemplated by the *Constitution* to fulfil its constitutional obligations.²⁵³

2.5.2.1 Public Protector

The *Constitution* empowers the Public Protector to investigate, draft a report and take remedial action regarding any improper conduct in state affairs involving all spheres of government.²⁵⁴ The *Constitution* provides additional powers to be exercised by the Public Protector as prescribed by national legislation.²⁵⁵ Additional investigative powers are provided for by the *Public Protector Act*²⁵⁶ that relates to any allegation concerning maladministration in connection with state affairs, the abuse of power or power exercised unjustifiably, dishonest action, unlawful enrichment, or the performance of a public function that is regarded as prejudicial to someone else.

Given the investigative powers of the Public Protector also on own initiative, an investigation may include matters involving maladministration in the handling of civil

²⁴⁸ 11/2014:secs.15(1) and (4).

²⁴⁹ 11/2014:secs.17(1) and (4).

²⁵⁰ 1996:secs.181(1) and (5).

²⁵¹ 1996:sec.182(1).

²⁵² 1996:sec.188(1).

²⁵³ See the *Public Protector Act, 23/1994* and the *Public Audit Act, 25/2004*.

²⁵⁴ 1996:sec.182(1). This very broad investigative power assigned to the Public Protector by the Constitution is referred to in the preamble of the national legislation concerned and intends to ensure that “any improper conduct” in state affairs may be the subject matter of investigation.

²⁵⁵ 1996:sec.182(2).

²⁵⁶ 23/1994:secs.6(4)(a) and (5). It includes investigations involving public entities and institutions where the state is the majority or controlling shareholder.

claims administered by a department as revealed in reports of the Auditor-General, Portfolio Committees of Parliament or press reports. Investigations may even include conduct leading to large numbers of civil claims instituted against a department or decisions about the extent of waiver of claims against officials as disclosed in the AFSs of a department that may not be justifiable. Once an investigation is conducted, the Public Protector may resolve a dispute or address any act or omission through non-litigation processes such as mediation and negotiation.²⁵⁷ The Public Protector may disclose the findings and recommendations for remedial action to any person and authority implicated during the investigation or to the NA if intervention by the NA is required.²⁵⁸

The Constitutional Court in *Economic Freedom Fighters v Speaker, National Assembly and Others*,²⁵⁹ (*EFF case*) confirmed the binding effect of a determination made by the Public Protector for remedial action that compels the President to partially refund the state for costs involved to upgrade his private residence with non-security features, thereby unduly enriching himself and his family members. The President disregarded the determination made by the Public Protector, which is contrary to the President's constitutional obligation to uphold and defend the Constitution and to protect the "independence, impartiality, dignity and effectiveness" of the Public Protector.²⁶⁰ The court confirmed that ignorance of or a disregard for such determination is also contrary to the rule of law unless such determination is set aside by a court of law.²⁶¹ The Public Protector correctly opted to submit the report with findings and recommendations to the NA as it requires the urgent attention of the NA due to the involvement of the President.²⁶² The NA wrongfully assumed judicial authority by setting aside the report of the Public Prosecutor and thereby neglecting their role of overseeing executive action and holding the President accountable.²⁶³ The same principles to uphold the *Constitution* and assist the Public Prosecutor's office to give effect to the remedial

²⁵⁷ 23/1994:sec.6(4)(b).

²⁵⁸ 23/1994:secs.6(4)(c)(ii), 8(1), 8(2)(b)(iii) and 8(3).

²⁵⁹ 2016 (3) SA 580 (CC):par.73.

²⁶⁰ 2016 (3) SA 580 (CC):par.83. Also see 1996:secs.83(b) and 181(3).

²⁶¹ 2016 (3) SA 580 (CC):paras.74-75.

²⁶² 23/1994:sec.8(2)(b)(iii).

²⁶³ *EFF case* 2016 (3) SA 580 (CC):paras.94 and 104. Also see 1996:secs.42(3) and 55(2)(a) and (b).

action against the President as proposed in the report concerned also applies to the NA.²⁶⁴

Justifiable remedial action recommended by the Public Protector may not be ignored. However, findings and recommendations by the Public Protector are not beyond contestation and may be subject to judicial scrutiny.²⁶⁵ Accountability as a constitutional obligation must direct the actions of all those involved with the exercise of public power and the performance of public functions.²⁶⁶ Even those functionaries appointed to head constitutional institutions, such as the Public Protector, should be able to explain and provide answers for decisions made if required to do so.

2.5.2.2 Auditor-General

The *Public Audit Act*²⁶⁷ provides for all constitutionally recognised powers and functions of the Auditor-General. The Auditor-General is assigned with functions to conduct an audit and submit a report on all accounts, financial statements and the management of allocated funds in respect of all national and provincial departments, administrations, municipalities, institutions, accounting entities and any institution funded from public funds or any institution that may receive money to pursue a public purpose.²⁶⁸ Such a report may include findings relating to the outcome of an audit conducted and recommendations in respect of remedial action following an investigation confirming shortcomings or anything of concern disclosed in the AFSs of organs of state, including the existence of material irregularities.²⁶⁹ Matters of concern may relate to:

- Discrepancies discovered during audits conducted regarding civil claims against the state reported as contingent liabilities.
- Explanations required about how compensations payments were accounted for in terms of write-offs, waiver of claims or recovery of expenditure involved.

²⁶⁴ 2016 (3) SA 580 (CC):par.104.

²⁶⁵ See *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC).

²⁶⁶ 1996:sec.195(1).

²⁶⁷ 25/2004:secs.2, 4(1) and (2).

²⁶⁸ 1996:secs.188(1) and (2).

²⁶⁹ 25/2004:secs.5(1A), 5(1B), 5A and 20(2).

- Non-compliance with Treasury Regulations regarding payments of civil claims once claims are settled or upon receipt of a final court order resulting in payment of interest that could have been avoided.²⁷⁰

Irregularities include non-compliance with legislation, civil claims against officials unduly waived, fraud and theft resulting in a material financial loss for the state, including misuse or loss of state resources.²⁷¹ Depending on the nature of findings of the Auditor-General involved, it may result in qualifying AFSs of a department. Such qualification may cause an accounting officer and officials of a department concerned to appear before the SCOPA to account for all matters raised in the report of the Auditor-General. The SCOPA normally requires an accounting officer to provide feedback of steps taken to address shortcomings and deficiencies discovered by the Auditor-General, and the outcome of remedial steps taken by an accounting officer will be monitored by the SCOPA until all issues are adequately addressed.

The Auditor-General may follow up on recommended remedial action concerning material irregularities by issuing a directive to an accounting officer or accounting authority to determine the financial loss suffered and to recover any amount due from the responsible person concerned.²⁷² Any failure to comply with the directive of the Auditor-General may result in a certificate of debt being issued by the latter and served on the responsible accounting officer or accounting authority for payment of the debt concerned.²⁷³ A copy of the certificate of debt must be submitted to the executive authority for the collection of the debt due from the accounting officer or accounting authority concerned subject to the outcome of written or oral representations lodged.²⁷⁴ The certificate of debt issued by the Auditor-General involves any debt in respect of which the accounting officer failed to recover from an official responsible for the debt concerned. It implies that the accounting officer's failure to initiate recovery procedures is not supported by any reasons why recovery procedures against such an official should not be proceeded with. An accounting officer may not deprive the

²⁷⁰ National Treasury 2005:reg.8.2.3.

²⁷¹ 25/2004:sec.1(1).

²⁷² 25/2004:secs.5A(1) and (3).

²⁷³ 25/2004:sec.5B(1).

²⁷⁴ 25/2004:secs.5B(2), (4) and (5).

state of recovering a debt that is legally due and which is economically recoverable from the debtor concerned.²⁷⁵

The effectiveness of these remedies available to the Auditor-General concerning material irregularities to strengthen accountability mechanisms still needs to be determined. These remedies were introduced recently by the *Public Audit Amendment Act*.²⁷⁶ Procedures to investigate material irregularities is implemented by the Auditor-General during the 2019/2020 financial year, and cases identified in respect of these irregularities are disclosed in the Integrated Annual Report of the Auditor-General.²⁷⁷ A total of thirty-nine cases of material irregularity involving R4 billion, of which R1 billion represents an estimated amount, are disclosed.²⁷⁸ Appropriate steps are being taken by accounting officers and authorities in thirty-six cases to account for financial losses involved, while the outcome of investigations of the remaining three incidents is unknown as of year-end.²⁷⁹ These investigations involve late payments of compensation following final court judgments and irregularities involving the procurement of goods and services.²⁸⁰

2.5.3 Ethics and codes of conduct

Public administration, according to the *Constitution*, must be characterised, among other basic values and principles, by high standards of ethics, accountability and transparency.²⁸¹ The Public Service Commission is accountable to the NA, which is mandated by the *Constitution* to promote these basic values applicable to all public servants.²⁸² In essence, ethics is about values and rules that distinguish between acceptable and unacceptable behaviour.²⁸³ Expectations about ethical behaviour are promoted and regulated through codes of ethics and conduct.

²⁷⁵ Treasury Regulations 2005:reg.11.4.1.

²⁷⁶ 5/2018:sec.4. This Act came into effect on 1 April 2019.

²⁷⁷ Auditor-General of South Africa 2019:67.

²⁷⁸ Auditor-General of South Africa 2019:67.

²⁷⁹ Auditor-General of South Africa 2019:68.

²⁸⁰ Auditor-General of South Africa 2019:67-69.

²⁸¹ 1996:secs.195(1)(a),(f) and (g).

²⁸² 1996:secs.196(4)(a) and (5).

²⁸³ Theletsane 2014:365.

2.5.3.1 Codes of Ethics

National legislation, according to the Constitution, must prescribe a code of ethics for members of the Cabinet, Deputy Ministers and members of the Executive Council of a province.²⁸⁴ The *Executive Members' Ethics Act*²⁸⁵ compel these members to comply with ethical standards and rules prescribed by the President and published by proclamation only after consultation with the Parliament. The standards and rules aim to " promote open, democratic and accountable government."²⁸⁶ These aims should remind members of the Cabinet and members of the executive of their responsibility to oversee compliance by the national and provincial departments of their constitutional and legislative obligations. Such compliance may be monitored through effective control mechanisms and meaningful standardised reports to be submitted by accounting officers, especially insofar they relate to just administrative action in pursuance of accountable behaviour. Such overseeing role should also focus on the behaviour of officials leading to successfully instituted civil claims against the state and should ensure that officials are being held accountable for unlawful conduct. The code of ethics must require such members to act in good faith and the interest of the state, in compliance with obligations imposed by law and must prohibit situations where a conflict of interest, self-enrichment or compromising of integrity or credibility of office may arise.²⁸⁷ The Public Protector may investigate any complaint lodged regarding a breach of the code of ethics.²⁸⁸

Ethical standards and rules, according to the said Act, are determined by the President after consultation with Parliament, meaning that the final decision regarding such standards and rules remains with the President.²⁸⁹ The *Executive Members' Ethics Act* defines "Cabinet member" to include the President.²⁹⁰ Although the President is mandated by the said Act to dictate ethical standards and rules that also apply to him or herself, sufficient checks and balances exist to achieve the aims of acceptable standards and rules. These ethical standards and rules are included in a Ministerial

²⁸⁴ 1996:secs.96(1) and 136(1).

²⁸⁵ 82/1998:sec.2(1).

²⁸⁶ 82/1998:sec.2(1).

²⁸⁷ 82/1998:secs.2(2)(a) and (b).

²⁸⁸ 82/1998:sec.3. Such investigation may be conducted with all the powers provided for in ss 7 and 8 of the Public Protector Act, 23/1994.

²⁸⁹ *Constitution of the Republic of South Africa* 1993:sec.233(4).

²⁹⁰ 82/1998:sec.1.

Handbook applicable to a member of the Cabinet and Executive Council, including a Presiding Officer in Parliament and Provincial Legislature.²⁹¹ These members must act in good faith, honestly and with integrity in the best interest of good governance and perform their powers with due diligence in mind.²⁹² Situations should also be avoided where a conflict of interest may arise, and the receiving of gifts relating to the performance of duties and financial interest must be declared.²⁹³ The members and Presiding officers are obliged to render the support required that will enable the office of the Public Protector to fulfil all its functions assigned in terms of the Constitution and empowering legislation.²⁹⁴

2.5.3.2 Codes of conduct

Instruments such as codes of conduct, Batho Pele principles,²⁹⁵ and tools to measure performance²⁹⁶ apply to organs of state and public officials. Such instruments and tools aim to promote and uphold conduct that complies with accountability requirements.

The code of conduct for public servants includes in the regulations for public servants²⁹⁷ addresses matters such as compliance with constitutional obligations and legislation, showing respect for human rights, pursuing sound work ethics, reporting irregularities, fraud and corruption, being accountable for the use of state resources for official purposes only, and promoting accountable and transparent administration. The Public Service Commission published a guide consisting of various examples of how the same principles referred to in the code of conduct should be applied in practice.²⁹⁸ According to this guide, an official commits misconduct if he fails to familiarise himself with or abide by all legislative statutory or other instructions that apply to his conduct and official duties.²⁹⁹ Should an official be assigned with

²⁹¹ Public Service and Administration 2007:5.

²⁹² Public Service and Administration 2007:7-8.

²⁹³ Public Service and Administration 2007:9-15.

²⁹⁴ Public Service and Administration 2007:15. Also see 1996:sec.182; 23/1994:secs.6-8.

²⁹⁵ *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for human rights as amicus curiae)* 2010 (4) SA 327 (CC):par.62.

²⁹⁶ Department of Planning, Monitoring and Evaluation 2019:1. Four key performance areas of organs of state are assessed in terms of performance namely, Strategic Management, Governance and Accountability, Human Resource Management and Financial Management.

²⁹⁷ Department of Public Service and Administration 2016:regulations 11-15.

²⁹⁸ Public Service Commission 2002:9-55.

²⁹⁹ Public Service Commission 2002:12.

delegated power to conduct liability determinations involving decisions about the forfeiture or not of state cover, he needs to familiarise himself with the legal framework applicable to and conditions that apply to the exercise of such powers. Failure to do that may lead to many decisions that are contrary to the conditions that apply to the criteria for state cover. Such conduct may constitute misconduct and should be dealt with as such. The guide also provides an example about the use of a state vehicle by an official in a “negligent” or reckless way, causing the state to suffer damages and the use of a state vehicle for private instead of official purposes only.³⁰⁰ Irrespective of the outcome of a liability determination regarding state cover that involves the use of state vehicles, disciplinary steps may still be justified in respect of conduct that constitutes misconduct as provided for in the code of conduct applicable to public servants.

The National Treasury developed a code of conduct for supply chain management practitioners who need to be accountable for their decisions and actions to members of the public and to encourage openness also by providing reasons for decisions made. The code of conduct also involves compliance with legislation applicable to the procurement of goods and services by bid evaluation and bid adjudication committees.³⁰¹ Non-compliance with preferential procurement legislation by such committees may lead to the institution of legal proceedings against the state and eventually avoidable state expenditure that needs to be accounted for. Conduct contrary to the code of conduct may also lead to the initiation of disciplinary steps against the officials involved. All these measures have accountable behaviour in mind. Various organs of state developed codes of conduct in support of transparent and accountable behaviour, which are aligned with the purpose and constitutional obligations of such state organs in mind.³⁰²

Behaviour by public officials contrary to the norm as prescribed in a code of conduct may constitute misconduct followed by the institution of disciplinary action against officials involved. Sanctions that may include dismissals can be imposed.³⁰³ It is possible that even before the finalisation of a civil claim instituted against the state

³⁰⁰ Public Service Commission 2002:43-44.

³⁰¹ National Treasury 2003:2-3.

³⁰² Such as a code of conduct for police officials. See Department of Police w.d. *Code of conduct*.

³⁰³ Proc 103/1994:sec.17(2)(d).

emanating from an official's conduct who committed an intentional wrong, that such official is charged and found guilty for committing misconduct and facing dismissal as the most serious sanction that can be applied from a labour law perspective. The possibility of such official forfeiting state cover and being held liable for state expenditure relating to compensation payments made is almost certain. However, the re-employment of former public servants that were dismissed due to misconduct is prohibited only for certain periods that vary between one and five years from the date of dismissal, depending on the nature of the misconduct involved.³⁰⁴ The majority of the thirty-one possible offences listed in the code of conduct that resulted in dismissals that include an offence for not being honest and accountable regarding public funds and state property, will not prevent a former official to be re-employed after the expiry of only one year since the date of dismissal.³⁰⁵ It is questionable how the possibility of being re-employed after twelve months since the date of dismissal will promote accountability as a constitutional obligation. The re-employment of officials that were dismissed due to fraud and theft, unfair discrimination, financial misconduct and conviction of a crime involving a sentence of fewer than two years imprisonment without the option of a fine is possible within five, four and three years from the date of dismissal respectively.³⁰⁶ Although this does not relate directly to the focus of this study, these arrangements for re-employment by the state may compromise accountability as a foundational constitutional value.

In *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for human rights as amicus curiae)*,³⁰⁷ the court referred to "Batho pele" as a principle that applies to accountable public administration and public officials who need to treat all people with dignity and respect and remarked as follows:

Batho pele means 'People First' in Sotho and requires that public administration should serve the best interests of the public by enabling the achievement of individual rights encompassed in the provisions of the *Constitution*. In practice, this requires that the administration work towards achieving high standards of professional ethics and responsiveness to the needs of people ... and the utilisation of resources in an efficient and effective manner, in order to create an accountable, transparent and development-oriented public administration.

³⁰⁴ Department of Public Service and Administration 2016:regulations 11-14 and 61.

³⁰⁵ Department of Public Service and Administration 2016:reg.61.

³⁰⁶ Department of Public Service and Administration 2016:reg.61.

³⁰⁷2010 (4) SA 327 (CC):par.62 and fn 57 of court judgment.

Unless adherence to codes of conduct, “Batho pele” principles and performance of public officials are monitored closely, accountability regarding the exercise of public power and decisions may be jeopardised. To this end, the involvement of internal auditors, the Auditor-General, the SCOPA, the NA, provincial legislatures, the press, social agents such as Corruption Watch and whistleblowers should not be underestimated.

2.5.4 Official publications

According to the King IV Report,³⁰⁸ accountability within a corporate governance context involves the obligation of answering for the execution of one’s responsibilities, including delegated responsibilities. The report emphasises that accountability is discharged by Governing Bodies (e.g., Board of Directors, state-owned entities and a municipal council) responsible for the governance and performance of organisations through:

- Exercising accountability truthfully for decisions, processes and outcomes that are easily discernible and available for comparing it with ethical standards;³⁰⁹
- Reporting and disclosure (transparency) of organisational performance;³¹⁰ and
- Audited financial statements that are interconnected and interrelated with activities involving the use of resources and capital, such as financial and human capital.³¹¹

As highlighted by the King IV Report, these principles of corporate governance apply to decisions by public officials assigned with public powers involving administrative action, the reporting responsibilities of accounting officers, and disclosure of information in the AFSs of state departments and state-owned enterprises.³¹² The Public Service Coordinating Bargaining Council,³¹³ which represents the state as an employer and public servants, adopted a resolution that prescribed similar principles

³⁰⁸Institute of Directors in Southern Africa 2016:9 and 43.

³⁰⁹Institute of Directors in Southern Africa 2016:118.

³¹⁰Institute of Directors in Southern Africa 2016:21; Also see Ijeoma and Sambumbu 2013:286-291. The authors convincingly argued that political-, legal and judicial-, administrative- and societal measures (involving an overseeing role by NGOs to monitor public accountability) may have a positive effect on improving management of public funds, enhancing service delivery, and promoting good governance.

³¹¹Institute of Directors in Southern Africa 2016:5,10,12.

³¹²National Treasury 2012:4.

³¹³Public Service Coordinating Bargaining Council 2013:2, 5-7.

for behaviour to the principles included in the code of conduct for public servants. The resolution involves a Service Charter negotiated with eight (8) trade unions where the State as employer and employees committed themselves to behave according to principles applicable to accountability.

2.6 ENFORCING ACCOUNTABILITY

Without the availability of mechanisms to enforce responsible behaviour by public office-bearers and officials in all spheres of government, no consequences will follow for public office-bearers and officials in breach of constitutional obligations and values. A sanction involving a vote of no confidence that Parliament may impose on the President and the Cabinet is regarded by the Constitutional Court as the most effective tool to enforce accountability and consequences in the event of a failure by these office-bearers to fulfil their constitutional obligations.³¹⁴

The right to appropriate relief to enforce and ensure the protection of the *Constitution* is discussed in *Fose v Minister of Safety and Security*,³¹⁵ and appropriate relief is summarised as follows:

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

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*,³¹⁶ the court confirms that reliance on accountability as a constitutional value may not always justify a claim for compensation against the state, nor does it compel a court to accept that a private-law duty exists that bind the state to offer compensation. Although it may appear that the principles governing public administration such as responsiveness, accountability and transparency may only impose duties without giving rise to justiciable rights,³¹⁷ courts continuously urge and compel administrators

³¹⁴UDM case 2017 (5) SA 300 (CC):paras.43 and 82.

³¹⁵ 1997 (3) SA 786 (CC):par.19.

³¹⁶ 2015 (1) SA 1 (CC):par.45.

³¹⁷ Hoexter 2012:19.

to adhere to these principles.³¹⁸ Courts in numerous judgements have ruled in favour of applicants concerning constitutional imperatives that require accountable behaviour by invalidating public power exercised and decisions made by organs of state.

The following court judgments illustrate the importance of the judiciary to enforce accountability by requiring public functionaries assigned with the exercising of public power to explain their decisions and actions. The approach followed by courts to invalidate administrative action taken characterised by irrational decisions and non-compliance with legislation and policies may also apply to decisions involving state cover that may be subject to review proceedings initiated by officials affected by such decisions. Despite the lack of reported court judgment involving the review of decisions concerning state cover or the waiver of claims by the state against officials, the same principles will be applied by courts to enforce accountability when considering compliance or not with just administrative action.

The Constitutional Court fashioned a new remedy in *Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal and Others*³¹⁹ when considering a reduction in subsidies by the Provincial Department of Education (KZN) for the 2009/2010 financial year to independent schools due to budget constraints. A notice of the reduction in subsidies was communicated to the independent schools at a stage when the due date for payment of the initially promised subsidies had passed. The applicant, who acted as an association for independent schools, did not rely on administrative action and the *PAJA* for a remedy but considered the initial notice of the Provincial Department to pay the subsidies concerned as a promise enforceable in law, also because of the right of learners to basic education.³²⁰ However, the court ordered the Provincial Department to pay the promised subsidies based on principles applicable to administrative action, namely, reliance, accountability and rationality. In contrast, none of these principles was relied upon or argued by any parties concerned.³²¹ The court found that the independent schools' payment of subsidies was

³¹⁸ See *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* (2006) 27 ILJ 2127 (LC); par.47. *Unemployed Peoples Movement v Premier, Province of the Eastern Cape and Others* (553/2019) [2020] ZAECGHC 1 (14 January 2020).

³¹⁹ 2013 (4) SA 262 (CC):paras.4 and 45.

³²⁰ 2013 (4) SA 262 (CC):paras.9 and 29.

³²¹ 2013 (4) SA 262 (CC):paras.63-65. Also see Murcott, M. *A future for the doctrine of substantive legitimate expectation? The implications of Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal*. *Potchefstroom Electronic Journal* 18 (1):3133-3158 for a

relied upon and could not be reduced after it became legally due. Accountability and responsiveness demanded that the Department announce a reduction in subsidies timeously before the independent schools became entitled to payment. The decision to reduce the promised subsidies after the expiration date affected those entitled to it, which is not justified from a rational perspective.

In *Allpay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*,³²² the court referred to the objective of *the Public Finance Management Act*,³²³ namely to secure accountability and sound management of public funds. The court declared an award of a tender to Cash Paymaster (the third respondent) to provide services for payment of social grants over five years for all nine provinces as constitutionally invalid. The award of the tender by the respondent, who is a public entity to which the said Act applies, consisted of serious irregularities due to non-compliance with public procurement legislation and policies.

The Supreme Court of Appeal echoed this understanding of accountability to be displayed by public officials, including officials of local authorities and members of government at all spheres of government who are accountable for their decisions. They need to perform their duties lawfully and without negligence. Where they failed to exercise due care in circumstances where they owed a legal duty to public members to act responsibly without causing loss or harm, they may be held liable for damages caused.³²⁴ The obligation imposed on public officials to be accountable is illustrated by punitive cost orders granted and confirmed by the Constitutional Court involving a member of the executive and the Public Protector to pay a portion of the litigation costs in their personal capacity due to, also among other reasons, misleading the court and facts not fully disclosed during the litigation.³²⁵

comprehensive discussion of the judgement and reasons why the Court granted relief to the applicant outside the scope of *PAJA*.

³²² 2014 (1) SA 604 (CC):paras.36 and 97.

³²³ 1/1999:sec.2.

³²⁴ *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA (1)3 SCA:paras.57 – 59.

³²⁵ See *Black Sash Trust v Minister of Social Development and Others (Freedom under Law NPC Intervening)* 2018 (12) BCLR 1472 (CC):par.6; *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC):paras.219, 234-237.

In *Freedom Under Law v National Director of Public Prosecutions and Others*,³²⁶ the court reviewed and set aside decisions by the Public Prosecutor not to proceed with criminal charges against a senior public official. The court also reviewed and set aside decisions by the organ of state to withdraw disciplinary proceedings against the official, including a decision to re-instate the official in his post. The court remarked that the matter involves public interest, is of national importance, and raises accountability issues.

The obligation of organs of state and public officials to be accountable for the execution of public powers and performance of public functions following decision-making necessitates further consideration.

2.7 ACCOUNTABILITY AND ADMINISTRATIVE ACTION

The right just to administrative action that is lawful, reasonable and procedurally fair is entrenched in the *Constitution*.³²⁷ The *PAJA*³²⁸ gives effect to this right and defines “administrative action” also to include a decision made by an organ of state concerning the exercise of public power or performance of a public function, authorised by the *Constitution* or any legislation, that may negatively impact someone’s constitutional rights. The focus of administrative law, in essence, involves decisions made by those assigned with public powers.³²⁹ As part of the executive, public administration is responsible for the implementation of legislation, while the executive is responsible for developing and initiating policies and legislation.³³⁰ Organs of state as part of public administration must apply and give effect to such policies, and legislation and the *PAJA* apply only to administrative action as defined,³³¹ including administrative decisions.³³² Decisions by organs of state concerning a determination whether or not

³²⁶ 2014 (1) SA 254 (GNP):paras.1 and 241. Also see fn 83 of the court judgment.

³²⁷ 1996:sec.33.

³²⁸ 3/2000:sec.1(a).

³²⁹ Quinot and Maree 2020:82.

³³⁰ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000(1) SA 1 (CC):paras.133, 138,139 and 142.

³³¹ Quinot and Maree 2020:75

³³² See 3/2000:sec.1(v) as far as the definition of “decision” is concerned; *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA):par.24.

an official forfeited state cover and whether or not claims against officials must be waived also constitute administrative action as defined.³³³

Organs of state and public officials are accountable for exercising assigned public powers, ensuring that their decisions comply with constitutional obligations, and empowering provisions provided in the legislation. Decisions by organs of state, based on evidence obtained from an investigation being conducted that involve a determination of culpability that may adversely affect the rights of a person constitute administrative action and is subject to the provisions of the PAJA.³³⁴ Just administrative action must also adhere to the requirements of reasonableness insofar as it relates to decisions made in terms of legislation.³³⁵ Accountability, as indicated, requires public functionaries and organs of state to explain or provide answers for their decisions if such decisions are challenged. Even more so, if the outcome or impact of decisions aimed at holding public officials accountable for their actions may not promote accountability as a constitutional obligation. Unless such decisions comply with the requirements of reasonableness and rationality, they may be subject to judicial review to compel public functionaries concerned to explain their decisions.³³⁶ The requirements for reasonableness and rationality that also applies to decisions regarding state cover and waiver of claims by the state against officials will now be discussed within the said context.

2.7.1 Requirements for reasonableness

Rationality is regarded as the minimum requirement for exercising public power by the executive and other functionaries.³³⁷ However, the PAJA, as indicated, applies to decisions concerning the forfeiture or not of state cover and waiver of claims against officials. According to the *PAJA*,³³⁸ a decision will be regarded as unreasonable if no reasonable person could have arrived at such a decision. An initial argument that such

³³³ National Treasury 2005:reg.12.2.1 read with reg.12.7.3. Also see 3/2000: s 1(v) in terms of which a decision includes the making of a determination.

³³⁴ *Viking Pony Africa Pumps (Pty) Ltd t/a Tricon Africa v Hidro-Tech Systems(Pty) Ltd and Another* 2011 (1) SA 327 (CC):par.38.

³³⁵ 3/2000:secs.6(2)(e)(vi), 6(2)(f) and (h); Quinot and Cachalia 2020:132. The identification by the authors of the sub-sections of s 6 of *PAJA* that relate to reasonableness as a ground of review for administrative action is supported.

³³⁶ 3/2000:sec.6.

³³⁷ *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC):par.90.

³³⁸ 3/2000:sec.6(2)(h).

a reasonableness test is too strict is supported. It may require one to rely on other grounds of review already provided for in the *PAJA* applicable to abuse of discretion, such as decisions taken arbitrarily or capriciously.³³⁹ Kidd³⁴⁰ referred to Hoexter's opinion that the section referred to in the *PAJA* about unreasonableness should be interpreted purposively to refer to simple and not gross unreasonableness. The Constitutional Court supports this interpretation in the *Bato Star Fishing case*³⁴¹ with reference to section 33 of the *Constitution* that requires just administrative action to be "reasonable", meaning that a decision may be subject to review if –

... it is one that a reasonable decision-maker could not reach.

In *Foodcorp Pty (Ltd) v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management*,³⁴² the Supreme Court of Appeal, with reference to *PAJA*, applied the simple test of reasonableness to a decision made by the respondent. The respondent deviated from past practices when applying a complex formula in allocating commercial fishing rights expressed as a percentage of the total allowable catch approved for the particular season. The outcome of the decision caused an unexpected percentage reduction in the allocation of fishing rights to the applicant, while two other companies benefited from a substantial increase in the allocation of such rights. Unlike the applicant, neither of the two companies had canning facilities to process much fish involved.³⁴³ As the respondent could not explain the apparent anomalies with applying the formula used, the court ruled that the outcome of the decision was irrational and consequently unreasonable.³⁴⁴ The court suggested that a reasonable decision-maker would have considered whether applying the formula and facts bear reasonable and justifiable results.³⁴⁵ The court set aside the decision and referred the matter back to the respondent to re-determine the allocations made.³⁴⁶ This case illustrates the importance of public functionaries that should be able to explain their decisions when

³³⁹ Kidd 2020a:204. Also see 3/2000:sec.6(2)(e)(vi).

³⁴⁰ 2020a:204

³⁴¹ 2004 (4) SA 490 (CC):par.44.

³⁴² 2006 (2) SA 191 (SCA):par.12.

³⁴³ 2006 (2) SA 191 (SCA):paras.14 and 15.

³⁴⁴ 2006 (2) SA 191 (SCA):par.18.

³⁴⁵ 2006 (2) SA 191 (SCA):par.19.

³⁴⁶ 2006 (2) SA 191 (SCA):par.21.

required to do so, and the caution displayed by the court not to replace the respondent's decision with its own.

2.7.1.1 Factors relevant to reasonableness

In the *Bato Star Fishing* case, the Constitutional Court listed some factors³⁴⁷ that may be taken into account with reviews based on reasonableness. These factors are considered crucially important, especially with regard to determinations concerning the liability of officials for state expenditure following the successful institution of civil claims against organs of state for compensation.

2.7.1.1.1 Nature of the decision

It is more likely that decisions of a legal nature involving the application of legal rules may become a matter of judicial review compared to policy-based decisions.³⁴⁸ Determinations by public functionaries whether or not officials are liable in law for their actions or should enjoy state cover rendered in terms of Treasury Regulations constitute decisions of a legal nature and are therefore exposed to review proceedings.³⁴⁹

2.7.1.1.2 Identity and expertise of the decision-maker

Decisions by public functionaries regarded as experts in their field of experience due to their daily exposure to specific subject matters that requires their attention will be treated with respect by courts which may not have sufficient experience concerning the subject matters involved.³⁵⁰ Decisions concerning a determination involving the rendering or not of state cover to public officials are mostly delegated by accounting officers in terms of the *PFMA*³⁵¹ to legal officials employed by organs of state. Depending on the extent of civil claims instituted against organs of state, such officials may acquire expertise through exposure to such decisions daily. However, as these decisions are of a legal nature, the identity and expertise of these functionaries may not be a factor for consideration by courts during review proceedings.

³⁴⁷ 2004(4) SA 490 (CC):par.45.

³⁴⁸ *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 20D-21C.

³⁴⁹ National Treasury 2005:reg.2

³⁵⁰ *Bato Star Fishing* case 2004(4) SA 490 (CC):par.48.

³⁵¹ 1/1999:sec.44.

2.7.1.1.3 Factors relevant to the decision

Respect displayed by courts for decisions made by public functionaries during review proceedings is not dependent on the number of factors that have been taken into account by such functionaries, nor the complexity of such decisions. However, it will alert the courts to approach such decisions with more caution. Where such decisions are considered by functionaries with certain expertise concerning the subject matter, courts will not support unreasonable decisions only due to its complexity and the expertise of decision-makers.³⁵² Although determinations about the liability of public officials for civil claims against the state may involve various factors for consideration and complexities, such determinations are not beyond contestation and judicial interference.

2.7.1.1.4 Reasons given for the decision

Unless the reasons provided for decisions made are supported by adequate evidence and sufficient reasoning, it may be challenged because such decisions are unreasonable or irrational.³⁵³ This factor also applies to determinations whether or not officials forfeited state cover regarding civil claims instituted against the state. Decisions that officials enjoy state cover leave no discretion on whether claims against such officials should be waived as such waivers become compulsory.³⁵⁴ A question concerning why a particular claim by the state against an official is waived may be answered with reference to why state cover is not forfeited by the official concerned.

2.7.1.1.5 Impact of the decision on those affected

When courts consider the impact of decisions on those affected by it and have regard to the merits of such decisions, it is not concerned with the correctness of the decisions, but whether or not the outcome and process followed to arrive at such decisions is justified and reasonable.³⁵⁵ Determinations concerning the liability of officials referred to may pass judicial scrutiny as far as this factor is concerned but may still be reviewable in terms of alternative grounds of review provided for in *PAJA*.³⁵⁶

³⁵² *Bato Star Fishing case* 2004(4) SA 490 (CC):par.48.

³⁵³ *Kidd* 2020a:201 and 224.

³⁵⁴ *National Treasury* 2005:reg.12.7.3.

³⁵⁵ *Bato Star Fishing case* 2004(4) SA 490 (CC): par.54. Also see *Carephone (Pty) Ltd v Marcus NO and Others* 1993 (3) SA 304 (LAC):par.37.

³⁵⁶ 3/2000:sec.6.

2.7.1.2 Judicial assessment of unreasonable decisions

Unless decisions made by public functionaries comply with the requirement of reasonableness, it may be subject to judicial review provided for in the *PAJA*.³⁵⁷ The following court judgements also serve as examples of how courts apply the requirement of reasonableness to the facts presented during review proceedings.

In *Rakgase and Another v Minister of Rural Development and Land Reform and Another*,³⁵⁸ a decision of the Deputy Director-General: Land and Tenure Reform (DDG) not to sell a farm to the applicant was challenged based on evidence that an application of the applicant to purchase the farm was approved during 2003 by the provincial grant committee of the National Department of Agriculture. Seven years later, the DDG decided to approve a lease agreement for an initial 30 years. The DDG did not at the time of the decision offer any reasons for the decision made, nor could the DDG submit any reasons why his decision should not be regarded as absurd based on convincing evidence provided in the applicant's affidavit. The applicant convincingly argued that he had already leased the farm for 27 years and was proved to be a successful farmer. Approval for leasing the farm for another 30 years while the applicant is 77 years of age appears absurd and irrational.³⁵⁹ Attempts by the respondent to explain that the decision was made in terms of certain approved policies and strategies failed when it transpired that such policies and strategies did not exist or were incorrectly applied to the facts when the decision by the DDG was made.³⁶⁰ The court finally regarded the decision of the DDG as unreasonable with reference to what constitutes unreasonableness as confirmed in the *Bato Star Fishing case*, as discussed and described in the *PAJA*.³⁶¹ For the same reasons, the court also found the decision to be arbitrary and irrational since the DDG let an opportunity pass by to contribute to the constitutional imperative in land reform.³⁶²

The court in *Head, Western Cape Education Department and Others v Governing Body, Point High School and Others*³⁶³ (*Point High School case*) dismissed an appeal

³⁵⁷ 3/2000:secs.6(2)(e)(vi) and 6(2)(h).

³⁵⁸ 2020 (1) SA 605 (GP):par.1.

³⁵⁹ 2020 (1) SA 605 (GP):paras.5.2.3 and 5.2.4.

³⁶⁰ 2020 (1) SA 605 (GP):paras.5.2.5 and 5.2.8.

³⁶¹ 2020 (1) SA 605 (GP):par.5.2.10; Also see 3/2000:sec.6(2)(h).

³⁶² 2020 (1) SA 605 (GP):paras.5.3.1 and 5.3.4.

³⁶³ 2008 (5) SA 18 (SCA):par.1.

lodged by the Head of Department (HOD) against an order of the High Court setting aside appointments made by the HOD of a principal and deputy principal at a public high school. Such appointments differed from the candidates recommended by the Governing Body of the school concerned. The court, also with reference to *Batho Star* set aside the decision of the HOD based on unreasonableness as described in *PAJA* based on the facts that the HOD:

- Disregarded the recommendations of the Governing Body believing that employment equity legislation broadened his scope to further employment equity without the need to provide reasons for his decision, which is contrary to the requirements of the PAJA³⁶⁴;
- Failed to balance the need for employment equity against the disparity in the suitability of the candidates recommended for appointment and the candidates appointed by the HOD³⁶⁵; and
- Omitted to find a reasonable balance between opposing interests by ignoring the Governing Body's interest, whose recommendation intended to improve the ability of the teaching staff.³⁶⁶

The importance of thoroughly considering an application for a community broadcasting licence to ensure compliance with reasonableness as a requirement for decisions made is illustrated in *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another*.³⁶⁷ The appellant reacted to an invitation published in the Government Gazette to submit an application for a community broadcasting licence in terms of an interim community radio-frequency plan that divides all the provinces into numbered licence areas. A distinction is made between the licence area where the transmitters are located from where broadcasts will be conducted and areas targeting a specified geographical community for broadcasting purposes that may overlap with other licencing areas. The application complied with all the conditions prescribed for a community broadcasting licence and identified both the licence area and target areas concerned.³⁶⁸ The majority of the community

³⁶⁴ 2008 (5) SA 18 (SCA):par.13.

³⁶⁵ 2008 (5) SA 18 (SCA):par.13.

³⁶⁶ 2008 (5) SA 18 (SCA):par.14.

³⁶⁷ 2008 (2) SA 164 (SCA).

³⁶⁸ 2008 (2) SA 164 (SCA):paras.4 and 5.

targeted for broadcasting purposes, regarded as the main source of income for the appellant, resides outside the broadcasting licencing area. However, the respondent misdirected itself by attending only to the area where the broadcasts would be made, thereby excluding the majority of the population in the target areas as recipients of the broadcasting services concerned.

Consequently, the respondent refused to approve the application based on reasons not applicable to the licencing area and application concerned.³⁶⁹ The appellants correctly argued that the respondent, in essence, failed to consider the application and the effect of the decision, if unchallenged, would lead to the closing down of Radio Pretoria. The court supported the applicant's argument, set aside the respondent's decision based on unreasonableness and irrationality, and returned the application for reconsideration.³⁷⁰

2.7.2 Requirements for rationality

Before implementing *PAJA*, the court in *Carephone (Pty) Ltd v Marcus NO and Others*³⁷¹ formulated rationality as a test for decisions by organs of state and public functionaries. Such decisions will be regarded as rational if, objectively viewed, a rational basis exists to justify a connection between the information before the decision-maker and the conclusion arrived at. An objective, rational decision should enable a reasonable person, after considering all the circumstances, to confirm the justification for the connection as rational, irrespective of whether or not the decision-maker regards the decision as rational.³⁷² This formulation of rationality that applies to decisions made is of critical importance to administrative action involving decisions about whether officials who are liable for civil claims against the state should enjoy or forfeit state cover. Such decisions may result in either the exercise of a statutory right of recourse against officials who forfeited state cover or the waiver of claims against officials who enjoyed state cover.³⁷³ Unless these decisions adhere to the principles applicable to and requirements for rationality, they may be invalidated by courts of law through review proceedings.

³⁶⁹ 2008 (2) SA 164 (SCA):paras.13-15 and 20.

³⁷⁰ 2008 (2) SA 164 (SCA):paras.20 and 24(2)(a).

³⁷¹ 1999 (3) SA 304 (LAC):par.37.

³⁷² Kidd 2020a:205.

³⁷³ National Treasury 2005:reg.12.2.1, reg.12.2.3 and reg.12.7.3.

In *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa*,³⁷⁴ the SCA confirmed this test for rationality with reference to the *PAJA*. After consideration of previous judgments, the court confirmed the relatedness but also the difference between “reasonableness” and “rationality” based on an invitation by the respondent’s counsel that the court should accept a test for a decision which is described as “utterly irrational”, namely a decision which no authority reasonably could have made.³⁷⁵ The court confirmed that an “utterly irrational” decision corresponds with an unreasonable decision described in the *PAJA*. It does not apply to the basic test for an irrational decision, the characteristics of which are dealt with separately in the *PAJA*.³⁷⁶

The relatedness between “reasonable” and “rational” decisions is confirmed by Hoexter,³⁷⁷ who refer to “rationality” as the first element of “reasonable” administrative action. In *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry*,³⁷⁸ the court remarked that when a decision is viewed in terms of both reasonableness and rationality, the result may be similar as it is unlikely that a decision based on adequate reasoning, will be regarded as unreasonable by a reasonable person. However, Hoexter argued that reasonableness and rationality should still be dealt with as separate grounds of review, not only due to the recognition of both these grounds by the *PAJA* but also because reasonableness involves more than mere rationality. The Supreme Court of Appeal³⁷⁹ confirmed that a decision might be regarded as unreasonable for reasons other than it being irrational.

2.7.2.1 Factors relevant to rationality

Decisions are regarded as irrational if such decisions are not rationally connected with any one of the factors listed in the *PAJA*.³⁸⁰ These factors are critical for decisions whether or not public officials forfeited state cover in terms of the criteria provided for in the Treasury Regulations concerned that will be dealt with in the next chapter. The

³⁷⁴ 2004 (3) SA 346 (SCA):par.21.

³⁷⁵ 2004 (3) SA 346 (SCA):par.21.

³⁷⁶ 2004 (3) SA 346 (SCA):par.21. Also see 3/2000:secs.6(2)(f)(ii) and 6(2)(h).

³⁷⁷ Hoexter 2012:340. Also see Hoexter 2012:343 for a discussion of the second element that involves proportionality.

³⁷⁸ 2010 (5) SA 457 (SCA):par.60. The Court confirmed that the opposite will also be true.

³⁷⁹ *Point High School case* 2008 (5) SA 18 (SCA):par.16.

³⁸⁰ 3/2000:sec.6(2)(f)(ii)(aa)-(dd).

factors concerned require a brief discussion within the context of such decisions. It will be followed by examples of judicial assessment of these factors by courts to determine the rationality of public functionaries' decisions.

2.7.2.1.1 Purpose for which decision was taken

A decision is regarded as rational if a rational connection exists between the decision and the purpose it serves.³⁸¹ The purpose may be derived from the legislation involved and the reason for a decision provided by the decision-maker involved. In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*,³⁸² the Constitutional Court, confirmed that unless decisions of public functionaries are rationally connected to the purpose it should serve, it may be clouded with arbitrariness.

The purpose of decisions regarding state cover is to determine whether or not a right of recourse should be exercised against public officials who are liable in law for expenditure relating to civil claims instituted against the state for compensation. A right of recourse must be exercised once a determination has been made that such officials acted contrary to the predetermined criteria for state cover rendered in terms of the Treasury Regulations concerned.³⁸³ Reasons for such decisions will rely on the particular criterion for state cover that have not been complied with. However, any decision that relies exclusively on the criteria for state cover for purposes of determining whether or not, for example, an official committed misconduct that justifies disciplinary steps to be initiated, will be regarded as irrational as such decision will not serve the purpose for which the decision should have been taken in terms of the Treasury Regulations concerned. Unlike Treasury Regulations, decisions about what constitutes misconduct and disciplinary procedures to be instituted are dealt with by prescripts prescribed by a legal framework applicable to labour law.

2.7.2.1.2 Purpose of the empowering provision

A rational connection should also exist between a decision and the purpose of the empowering provision concerned.³⁸⁴ If not, it may indicate a decision made for an

³⁸¹ 3/2000:sec.6(2)(f)(ii)(aa).

³⁸² 2000 (2) SA 674 (CC):paras.85 and 86.

³⁸³ National Treasury 2015:reg.12.2.1.

³⁸⁴ 3/2000:sec.6(2)(f)(ii)(bb).

ulterior or hidden purpose.³⁸⁵ Such a decision will defeat the purpose of the empowering provision. A decision made with a hidden purpose that an official did not forfeit state cover would not serve the purpose of the empowering provision in terms of which such decision has been made if, subsequently, it transpired that the official concerned forfeit state cover. Such a decision may be subject to internal review proceedings based on evidence that the decision-maker, for example, attempted to hide the real reason for the decision to gain some benefit in return from the official affected by the decision concerned.

2.7.2.1.3 Information before the administrator for consideration

A decision will be regarded as rational if it is rationally connected to the information that the decision-maker has considered.³⁸⁶ The required information includes both the evidence and facts before the decision-maker for consideration and findings based on such evidence. A decision that an official did not forfeit state cover must be supported by evidence that such an official did not act contrary to the norms set for public officials according to the criteria prescribed for state cover. The opposite also applies. A decision that an official forfeited state cover in terms of any one or even more than one criterion for state cover must be supported by the evidence concerned in respect of each criterion concerned.

2.7.2.1.4 Reasons for decision offered by decision-maker

Unless a decision is rationally connected to the reasons provided for such a decision, it may not be regarded as rational.³⁸⁷ The reasons for a decision must be supported by the former factors applicable to a rational decision. The court in *Commissioner, South African Police Service and Others v Maimela and Another*³⁸⁸ confirmed that a decision-maker must justify a decision by providing “intelligible and informative” reasons for that. Such reasons may meet the standard of adequacy.³⁸⁹ It also applies to reasons submitted why an official liable for a civil claim against the state forfeited state cover. Adequate reasons need to be provided to officials affected by such decisions. It is unlikely that officials will challenge decisions confirming that they did

³⁸⁵ Kidd 2020a:206.

³⁸⁶ 3/2000:sec.6(2)(f)(ii)(cc).

³⁸⁷ 3/2000:sec.6(2)(f)(ii)(dd).

³⁸⁸ 2003 (5) SA 480 (T) at 486.

³⁸⁹ Kidd 2020b:241.

not forfeit state cover. However, requests by accounting officers, the executive, the SCOPA and the Auditor-General to be provided with reasons why officials concerning certain causes of action and trends with settlements and court judgements in favour of plaintiffs did not forfeit state cover may be justified for the following reasons:³⁹⁰

- The need to hold public functionaries accountable for their decisions;
- To ensure that the purpose for which decisions should be made is not defeated;
- The responsibility to oversee compliance with empowering provisions; and
- To monitor the proper exercise of delegated powers through checks and balances.

2.7.2.2 Judicial assessment of irrational decisions

Courts on numerous occasions provided relief to litigants adversely affected by irrational decisions. The following cases serve as an example of how courts assess compliance by public functionaries with the factors applicable to rational decisions referred to in the *PAJA*. The following factors considered by the court judgments that also apply to decisions involving state cover and waiver of claims against officials are of importance, namely:

- A proper application of one's mind when considering facts available;
- An independent evaluation of facts by the decision-maker and not sole reliance on recommendations made;
- A rational connection between a decision and information available for consideration;
- The consideration of relevant facts that has a bearing on the decision to be made;
- Reliance on information in support of a decision made; and
- A rational connection should exist between the decision and purpose the power was conferred.

The importance of ensuring that a decision is rationally connected to the information that requires careful consideration by a public functionary is highlighted by the court in *Residents, Industry House v Minister of Police and Others*³⁹¹ (*Residents, Industry*

³⁹⁰ This observation will be explored in chapter 4 dealing with waiver of claims.

³⁹¹ 2021 (2) SA 220 (GJ).

House case). The court considered thirteen decisions made by Provincial Commissioners. They approved particular areas to be cordoned off based on applications submitted by police stations in terms of the *South African Police Service Act*³⁹² aiming to restore public order or ensure the safety of members of the public in the area concerned. The decisions were activated by applications submitted by station commanders of various police stations over several months, and some applications involved the same areas where similar operations were conducted. The empowering legislation mentioned provides for warrantless searches in the areas concerned. None of the applications consists of motivation in support of operations needed to restore public order and safety in the communities involved.³⁹³ The court discovered a template-based application form for the applications submitted for consideration consisting of the same crime statistics, involving different timeframes that were repetitively replicated in the applications concerned.³⁹⁴ The decision-makers did not apply their minds before authorising the operations and accepted recommendations by legal officials without conducting an independent evaluation of the facts provided in support of the applications offered.³⁹⁵ The recommendations were identical in all the applications concerned.³⁹⁶ The court concluded that no rational connection existed between the decisions authorising the operations and the information provided for consideration as required by the *PAJA*.³⁹⁷

It is submitted that the court could also rely on the irrational decisions because no rational connection exists between the decisions made and the purpose of the empowering provision concerned.³⁹⁸ This observation is made based on the finding of the court that the recommendation made by legal officials in support of the applications incorrectly indicated that authorisation may be granted for purposes of “controlling the illegal movement of people and goods across borders.”³⁹⁹ As indicated by the court, such purpose applies to a different section of the *South African Police Service Act*⁴⁰⁰

³⁹² 68/1995:sec.13(7)(a).

³⁹³ *Residents, Industry House case* 2021 (2) SA 220 (GJ):par.92.

³⁹⁴ 2021 (2) SA 220 (GJ):paras.87 and 94.

³⁹⁵ 2021 (2) SA 220 (GJ):par.97.

³⁹⁶ 2021 (2) SA 220 (GJ):par.94.

³⁹⁷ 3/2000:sec.6(2)(f)(ii)(cc); Also see *Residents, Industry House case* 2021 (2) SA 220 (GJ):par.97.

³⁹⁸ 3/2000:sec.6(2)(f)(ii)(bb).

³⁹⁹ *Residents, Industry House case* 2021 (2) SA 220 (GJ):par.94.

⁴⁰⁰ 68/1995:sec.13(6).

and not the section relied upon by the police stations in their applications concerned.⁴⁰¹ It also transpired that the empowering provision was used for ulterior purposes, namely to arrest illegal immigrants to deal with threats involving “inner-city hijacked buildings” and to survey the occupants of the buildings involved.⁴⁰²

Another matter involves an appeal initially lodged with the Financial Services Board's appeal board (the Board) by the applicants as directors of a company against a decision of the Johannesburg Stock Exchange (JSE), which decision was overruled by the appeal board based on information not considered by the JSE. The applicants approached the court to review the decision made by the Board that was considered in *Potgieter and Another v Howie and Other*.⁴⁰³ The JSE alleged that the applicants' contravened section 5.69 of the JSE's listing requirements involving the exchange of shares between companies without obtaining prior authorisation for such transactions from the shareholders concerned.⁴⁰⁴ The JSE found that the applicants acted in breach of the listing requirements and imposed a penalty of R5 million on each applicant.⁴⁰⁵ The Board substituted the decision of the JSE and found that the applicants contravened both section 5.69 and section 5.82 (that applies to a derivative contract concerning the repurchase of securities) without complying with further requirements of the JSE even though the JSE did not charge the applicants for such contraventions.⁴⁰⁶ The court examined the empowering provision in terms of which the Board acted during the initial appeal proceedings and ruled that the Board could not reconsider the matter and should exercise its right of remittal to allow the JSE to reconsider its decision.⁴⁰⁷ The variation by the Board of the JSE's decision and to replace it with a fine of R3 million for each applicant goes beyond the decision appealed against by the applicants.⁴⁰⁸ In this context and based on the observation by the court that the Board considered information not dealt with by the JSE, renders the decision by the Board reviewable based on irrationality in terms of the *PAJA*.⁴⁰⁹ The

⁴⁰¹ 68/1995:sec.13(7)..

⁴⁰² *Residents, Industry House* case 2021 (2) SA 220 (GJ):paras.68, 69 and 93.

⁴⁰³ 2014 (3) SA 336 (GP).

⁴⁰⁴ 2014 (3) SA 336 (GP):paras.13 and 14.

⁴⁰⁵ 2014 (3) SA 336 (GP):par.14.

⁴⁰⁶ 2014 (3) SA 336 (GP):par.17.

⁴⁰⁷ 2014 (3) SA 336 (GP):par.36.

⁴⁰⁸ 2014 (3) SA 336 (GP):par.34.

⁴⁰⁹ 2014 (3) SA 336 (GP):par.20.

court correctly confirmed that a rationality review is not concerned with a rational connection between the reasons given and the decisions made, but rather the information relied upon in support of the decisions made.⁴¹⁰

In *Umgeni Water v Sembcorp Siza Water (Pty) Ltd and Others and Another Appeal*,⁴¹¹ an agreement was concluded between a private water services provider (respondent) and a water board (appellant), in terms of which the respondent may purchase bulk water for a tariff determined by the appellant. A concession agreement between the appellant, respondent and Ilembe district municipality (municipality) allows the respondent to distribute water to consumers in a specific area on behalf of the municipality. The municipality elected the respondent as the water service provider to fulfil the municipality's constitutional and legislative obligations concerning water services in the area concerned. The municipality continues to render water services to consumers outside the concession area. The arrangement constitutes outsourcing municipal services to a private entity that involves the performance of public functions similar to functions performed by an organ of state.⁴¹² The appellant initially provided water in bulk to municipalities in a particular district, and a uniform tariff was applied to all water service providers. However, the appellant obtained ministerial approval to differentiate between municipalities as water service providers and the respondent as a private service provider by imposing a substantial increase in tariff on the respondent compared to the municipalities that rendered the same services to consumers of water in their respective areas. The respondent approached the court *a quo* for relief. After reviewing the decision made to impose different tariffs, the decision, apart from other grounds of review, was set aside because no rational connection exists between the decision to differentiate between tariffs and the purpose for which such power was conferred and how the discretion was exercised. The appellant appealed, and the SCA confirmed the order of the court *a quo*. No explanation nor any justification could be provided by the appellant why different tariffs were applied for the respondent and other water service providers, including Ilembe municipality. It transpired that the appellant's decision was incorrectly motivated by the fact that the respondent rendered services as a private entity with profit in mind.⁴¹³ Such an approach resulted in

⁴¹⁰ 2014 (3) SA 336 (GP):par.20.

⁴¹¹ 2020 (2) SA 450 (SCA):paras.2 and 4.

⁴¹² 2020 (2) SA 450 (SCA):paras.7, 8 and 10.

⁴¹³ 2020 (2) SA 450 (SCA):paras.42, 48 and 50.

penalising the respondent's ability to generate profit through rendering a more effective service than the Ilembe municipality, and the empowering provision in terms of which the decision was made does not allow for such type of discrimination between the water services providers concerned.⁴¹⁴

2.8 CONCLUSION

The meaning of accountability as a constitutional obligation has been discussed and applied to the topic of this study. Without limiting its meaning, it has been determined that the meaning of "accountability" as a constitutional obligation, in essence, involves the responsibility to explain one's actions and decisions if required to do so. The level of accountability is determined by how public officials comply with the legal framework applicable to their assigned public powers, duties and responsibilities. Although the connection between responsibilities, accountability and liability can be distinguished, these concepts are inseparable.

Various constitutional features of accountability in different contexts⁴¹⁵ were discussed that apply to office-bearers involved with legislative and executive functions in all spheres of government, public officials and accounting officers, including checks and balances that exist with reference to oversight roles to hold all public functionaries accountable for their actions and decisions. Remedies available even to remove office-bearers from office who failed to fulfil their constitutional obligations illustrates the severe impact of such remedies to secure accountability. The importance of public administration must be governed according to the *Constitution*⁴¹⁶ by principles such as impartiality, responsiveness, public participation, accountability and transparency that apply to all spheres of government, organs of state, public entities and national legislation that must ensure and promote such principles, is emphasised.

Instruments upholding accountability such as national legislation (the *PFMA*, *MFMA*, *PAMA*), constitutional institutions such as the Public Protector and the Auditor-General, codes of ethics, codes of conduct and the King IV Report are discussed. The

⁴¹⁴ 2020 (2) SA 450 (SCA):par.38.

⁴¹⁵ 1996:secs.1(d); 41(1)(c); 55(2)(a); 57(1)(b); 70(1)(b); 92(2); 93(2); 114(2)(a); 116(1)(b); 133(2); 152; 181(5); 196(5); and 199(8).

⁴¹⁶ 1996:secs.195(2) and (3).

relevance of courts to enforce accountability and remedies available, including the meaning of accountability within the context of administrative action, in particular decisions that must comply with “reasonableness” and “rationality”, has been explored.

The importance of accountability as a constitutional obligation that contributes to the realisation of just administrative action and decisions that must comply with reasonableness and rationality has been determined. The observations made regarding accountability also as a constitutional obligation will be applied to all the remaining chapters.

CHAPTER 3

CRITERIA FOR STATE COVER

3.1 INTRODUCTION

In this chapter, a critical textual analysis of the current criteria for state cover⁴¹⁷ provided to public officials responsible for civil claims against the state will be conducted to determine its meaning and scope. It will be conducted with constitutional features and a purposive approach applicable to the interpretation of legislation in mind. The textual analysis will be guided by constitutional principles and values, in particular accountability, case law, including relevant legislation and rules applicable to the interpretation of statutes that include sub-ordinate legislation such as Treasury Regulations. Concepts that directly relate to state cover, such as “self-insurer”, “liability of officials”, “liable in law”, “losses and damages”, “state liability”, and “vicarious liability” are considered. Comparing the criteria for state cover applied in the past with the criteria currently prescribed is regarded as essential to ensure a broader understanding of the dynamics applicable to such criteria. Consequently, a historical overview regarding the development of the criteria applied to state cover as part of the interpretation process will precede the textual analysis of the current criteria concerned. It will also include a discussion about the rationale for affording state cover to officials and the concept of the state being a bearer of all risks involved.

3.2 CONSTITUTIONAL FEATURES APPLICABLE TO ANALYSIS

The following specific constitutional features applicable to the interpretation of statutes referred to in the previous chapter⁴¹⁸ will guide the textual analysis of the criteria applicable to state cover:

- Continuous awareness of the importance of accountability as one of the founding values of the *Constitution of the Republic of South Africa*⁴¹⁹

⁴¹⁷National Treasury 2005:reg.12.2.1 read with reg.12.7.3.

⁴¹⁸ See par 2.3.2 of chapter 2.

⁴¹⁹ 1996:sec.1(d).

(*Constitution*) that contributes to the realisation of the right to just administration action;

- A reflection on the criteria for state cover that should promote and secure accountability as a constitutional obligation;
- Considering the *Public Finance Management Act*⁴²⁰ (*PFMA*) as the empowering legislation mandated by the *Constitution*⁴²¹ that provides for the enactment of Treasury Regulations and the exercise of public power in compliance with the right to just administrative action as entrenched in the *Constitution*;⁴²² and
- The importance of considering the context of the Treasury Regulations regarding the scope and purpose of the *PFMA*⁴²³ as empowering legislation throughout the interpretation process, thereby following a purposive approach with interpretation. It involves a move toward determining substantive issues rather than a strictly legalistic approach.

According to Botha,⁴²⁴ interpretation of statutes involves the rules and principles which assist with determining the correct meaning of legislation for application in practical situations. Legislation or “statute law” is also described as written law duly adopted and published by a body or person in terms of empowering enactments such as the *Constitution* or other legislation.⁴²⁵ This is important as the rules and principles of statutory interpretation, insofar as it involves the *Interpretation Act*,⁴²⁶ apply only to legislation and the textual analysis of this study. Regarding the relevant constitutional features that apply to the interpretation of legislation and regulations, it is evident that the point of departure with such an interpretation is not the legislative text but the *Constitution* itself.⁴²⁷ This chapter will deal with these features and how the criteria for state cover strengthen or weaken accountability as a constitutional obligation.

⁴²⁰ 1/1999.

⁴²¹ 1996:sec.216.

⁴²² 1996:sec.33.

⁴²³ 1/1999:s.2.

⁴²⁴ 2012:4.

⁴²⁵ Botha 2012:15.

⁴²⁶ 33/1957.

⁴²⁷Botha 2012:101; Also see par 2.3.2 of chapter 2.

3.3 HISTORICAL OVERVIEW

Before conducting a critical analysis of the current criteria for state cover, a historical overview concerning the development of the criteria applicable to state cover is required. According to Du Plessis,⁴²⁸ such an overview can contribute to a better understanding and meaning of current legislation and regulations compared with its predecessors. An assessment regarding the development of the criteria for state cover and reviewing thereof over many decades will assist with a critical analysis of the current criteria by identifying some of the criteria that have been continued or discontinued.⁴²⁹ The historical overview will commence with the rationale for providing state cover to public officials, the concept of the state bearing its risks and the timeframe, including sources applicable to the overview concerned.

3.3.1 Rationale for state cover

It is well-known that public officials in all spheres of government at national, provincial and local levels exercise various powers in terms of the *Constitution*⁴³⁰ in fulfilling their constitutional obligations. It also involves the exercise of powers and performance of duties by officials in terms of empowering enactments included in legislation that involves decision-making and the exercise of discretion. Officials are intensely involved in basically all aspects of life and engage daily with public members. Public Services⁴³¹ consists of many different Departments and render various services. Some organs of state perform high-risk activities, such as the South African Police Services,⁴³² the South African Defence Force⁴³³ and Provincial Departments of Health responsible for overseeing public health services. The exercise of all these powers and performance of duties may harm the rights of members of the public and those to whom public services are rendered. Therefore, the exposure of public officials to various lawsuits that directly relate to the performance of their official duties is real and involves different causes of action.⁴³⁴ Due to such exposure, public officials need some

⁴²⁸ 1986:132.

⁴²⁹ Du Plessis 1986:132.

⁴³⁰ 1996:secs.40(1) and 41(1).

⁴³¹ 1996:secs.195(1) and (2) and 197(1).

⁴³² 1996 s 205(3).

⁴³³ 1996:sec.200(2).

⁴³⁴ Such as civil claims for damages and compensation emanating from the negligent driving of state vehicles, unlawful arrests and detentions, unlawful searches and seizures, shooting incidents, assaults, defamations actions, ignorance of final court orders by organs of state to initiate

form of protection against lawsuits which is provided through the offering of state cover, subject to certain conditions.⁴³⁵

Consequently, as officials through their actions may render the state liable for compensation claims, based on the principles applicable to vicarious liability, both officials and the state may be cited as co-defendants in lawsuits concerned. Without state cover being offered to officials, subject to the criteria involved, officials may have to face bankruptcy as such claims may involve millions of rand. The State Attorney attends to civil claims, irrespective of their nature, instituted against the state or public officials personally or as co-defendants with the state if such claims arise from the performance of official duties.⁴³⁶ The reasons for offering state cover to public officials also relate to the right of an official as a defendant in a lawsuit to apply for legal representation and assistance by the State Attorney.⁴³⁷ An official must provide an undertaking to refund all expenses relating to the legal proceedings, including compensation payments made. Such refund became due once the State Attorney determined that the official did not comply with the criteria applicable to state cover.⁴³⁸

The rationale for state cover to officials is linked with the dual aim of state cover, namely to render protection to officials exposed to civil claims against the state emanating from functions performed in the course and scope of their official duties and to provide organs of state with a statutory right of recourse against officials who forfeited state cover. Once the state pays compensation, a decision needs to be made whether or not officials concerned forfeit or enjoy state cover. Should officials enjoy state cover, the state as a self-insurer will bear all expenses involved, and, claims against officials must be waived.⁴³⁹ However, if state cover is forfeited, the state must exercise its right of recourse against the officials concerned.⁴⁴⁰

compensation payments in favour of successful litigants, legal proceedings due to unfair labour practices, damages suffered due to unlawful administrative action, to mention but a few.

⁴³⁵ National Treasury 2005:reg.12.2.1 read with reg.12.7.3.

⁴³⁶ Treasury 1956:3308 (1), issued in terms of the *Exchequer and Audit Act 23/ 1956*; Department of State Expenditure 1999:W3.1 and W3.5.2.

⁴³⁷ Treasury 1956:3308 (1)(b)(ii); Department of State Expenditure 1999:W3.5.2.

⁴³⁸ Treasury 1956:3308 (6); Department of State Expenditure 1999:W3.2.

⁴³⁹ National Treasury 2005:reg.12.7.3.

⁴⁴⁰ National Treasury 2005:reg.12.2.3.

3.3.2 State as a bearer of own risks

According to the current Treasury Regulations,⁴⁴¹ the state is a self-insurer and will bear its risks emanating from civil claims for compensation. It determines:

Subject to the provisions of this regulation, or any other legislation or agreement, the state will bear its own damages and accident risks and be responsible for all claims and losses of state property where these arise from state activities by an official who is liable in law and who is or was employed by an institution.

It is important to note that the bearing of risks by the state applies to an official who is or was employed by the institution. The possibility exists that a notice to institute legal proceedings against an organ of state is served at a stage when the state no longer employs the official responsible for a civil claim for compensation. However, such an official may still rely on state cover offered by the state if the official at the time of the incident was acting in the course and scope of his employment as an employee of the state.⁴⁴²

The concept of the state bearing its damages and accident risks and risks involving civil claims and losses of state property caused by officials while being involved with state activities is historically founded.⁴⁴³ Acceptance by the state of these risks subject to conditions is supported by the empowering provisions of the *PFMA*⁴⁴⁴ in respect of which the National Treasury must make regulations involving the liability for losses and damages and the waiver of claims by the state. Such waivers are subject to the condition that state cover is not forfeited by officials concerned.⁴⁴⁵ As legislation including sub-ordinate legislation and the implementation thereof reflects the outcome

⁴⁴¹National Treasury 2005:reg.12.1.1. The Treasury Regulations are issued in terms of sec 76 of Act 1/1999.

⁴⁴² National Treasury 2005:reg.12.1.1.

⁴⁴³ See Treasury 1956:3303, issued in terms of the *Exchequer and Audit Act* 23 of 1956. Treasury Instruction 3303 determined as follows, "Unless otherwise prescribed by statute, no insurance shall be effected on behalf of the state which carries its own insurance risks: provided, however, that the Treasury may authorise a departure from this instruction in exceptional circumstances where the risk of damage or loss is disproportionately great, or where goods are specially manufactured or purchased for sale to the public and the cost of insurance can readily be recovered, or where articles of exceptional value are involved." See also the Transvaal Provincial Administration Roads Department Pretoria 1975:Par 15.1 insofar it relates to Government Garage vehicles (GG vehicles) for use by state departments; Department of State Expenditure 1999:W2.1, issued in terms of the *Exchequer Act* 66/1975 that consist of similar provisions; National Treasury 2000:reg.12.1 issued in terms of Act 1/1999.

⁴⁴⁴ 1/1999:secs.76(1)(f) and (i).

⁴⁴⁵ National Treasury 2005:reg.12.1.1 read with reg.12.2.1 and reg.12.7.3.

of the adoption of policies by the executive as discussed in the previous chapter, one may conclude that the decision about the state being a bearer of its risks relates to policy considerations adopted in the past, as expressed by the treasury regulations concerned that remains valid and unchallenged. Previous Treasury Instructions also provided for accident risks to include acceptance by the state of the responsibility for claims relating to injuries and loss of life.⁴⁴⁶

Although the state acts as a bearer of its risks, provision is made for insurance cover of state vehicles, hired vehicles and moveable state property under limited conditions with the approval of the National Treasury.⁴⁴⁷ Arrangement for such insurance is subject to conducting a risk assessment, and the annual insurance premium may not be in excess of R250 000 unless approval is obtained from the National Treasury.⁴⁴⁸ However, insurance cover and expenditure involved may be uneconomical if the quantity, nature and exposure to high-risk activities of state vehicles and other moveable assets used by certain organs of state are considered.⁴⁴⁹ Before the commencement of the *PFMA*,⁴⁵⁰ various official communications confirm the principle that the state is a bearer of its risks regarding vehicle accidents in particular. According to these communications, insurance companies did not insure government-owned motor vehicles. The state carried its accident risks and accepted liability for any expenditure arising from third-party claims.⁴⁵¹ Incidental to the acceptance by the state of its accident risks, a public official may be defended by the State Attorney if such official was involved in a vehicle accident whilst driving a Government-owned vehicle and after that faced a charge for a criminal offence or a civil claim for compensation instituted by a third party concerned.⁴⁵² Furthermore, any injuries sustained by an official whilst using a Government-owned vehicle in the course and scope of official

⁴⁴⁶Department of State Expenditure 1999:W2.1 and W4.1.

⁴⁴⁷National Treasury 2005:reg.12.1.2. Also compare with National Treasury 2000:reg.12.1.2.

⁴⁴⁸National Treasury 2005:reg.12.1.2.

⁴⁴⁹Vehicles and other moveable assets used by the South African Police Service, the National Defence Force, the Department of Correctional Services and Provincial Departments of Health (that oversees state hospitals, clinics and ambulance services) serve as examples.

⁴⁵⁰ 1/1999, including Treasury Regulations concerned.

⁴⁵¹ Treasury 1935; Transvaal Provincial Administration Roads Department Pretoria 1975:Par 15.1; Department of Public Service and Administration 1990:Par 7(1); Department of State Expenditure 1999:W4.1.

⁴⁵² Transvaal Provincial Administration Roads Department Pretoria 1975:Par 15.1.1; Department of Public Service and Administration 1990:Par 7(1)(a) of Part 7, Section IV of Chapter D.IV; Department of State Expenditure 1999:W4.1.

duties, either as a driver or as a passenger, was and is still being dealt with in terms of prescripts and legislation applicable to an injury on duty.⁴⁵³

A comparison between the criteria for state cover offered to public officials in the past involving different timeframes will now follow. Such comparison is essential for conducting a critical analysis of the current criteria applicable to state cover.⁴⁵⁴

3.3.3 Timeframe and sources applicable to the historical overview

The historical overview of the criteria concerned involves the *Exchequer and Audit Act*,⁴⁵⁵ the *Exchequer Act*⁴⁵⁶ and the *PFMA*.⁴⁵⁷ These Acts represent the empowering enactments in which previous Treasury Instructions and current Treasury Regulations regarding the criteria for state cover were published and implemented. The historical overview and comparison between the different criteria for state cover and how they developed will be conducted by focusing on two timeframes.

3.3.3.1 Timeframes

The first timeframe involves the previous Treasury Instructions that applied **before** 1 June 2000. These previous Instructions thus applied even after the *PFMA*⁴⁵⁸ took effect on 1 April 1999. However, the *PFMA*⁴⁵⁹ provided for transitional arrangements and determined that all Treasury Regulations and Instructions issued in terms of the *Exchequer Act*, 1975, remain in force until repealed. These former Treasury Regulations and Instructions were finally repealed when the new Treasury Regulations were published.⁴⁶⁰

⁴⁵³ Transvaal Provincial Administration Roads Department Pretoria 1975:Par 15.1.2; Department of Public Service and Administration 1990:Par 7(1)(b) of Part 7, Section IV of Chapter D.IV ; *The Compensation for Occupational Injuries and Diseases Act*, 130/1993 serves as an example of legislation applicable to injuries sustained by officials whilst on duty.

⁴⁵⁴National Treasury 2005:reg.12.2.1 read with reg.12.7.3.

⁴⁵⁵ 23/1956, read with the Financial Regulations and the Treasury Instructions issued in terms of ss 61(1) and 61(2) of the Act, respectively. The Act, Financial Regulations and Treasury Instructions has been included in a Financial Handbook and published by the Treasury. See Treasury 1965.

⁴⁵⁶ 66/1975, read with the Financial Regulations and the Treasury Instructions issued in terms of s 38(1) and 39(1) of the Act, respectively. The title of the Act was amended during 1998 to read, "*The Exchequer Act*."

⁴⁵⁷ 1/1999 read with the Treasury Regulations issued in terms of s 76(1) of this Act.

⁴⁵⁸1/1999:sec.95.

⁴⁵⁹1/1999:sec.93.

⁴⁶⁰Treasury Regulations 2000:reg.23.1.1.

The second timeframe involves the new Treasury Regulations published in terms of the PFMA, which took effect **from** 1 June 2000.⁴⁶¹ A few important amendments to the first version of the new Treasury Regulations regarding the criteria for state cover followed within ten months of its publication on 9 April 2001.⁴⁶² Final extensive amendments to this regulation were published again during 2002 that took effect on 27 May 2002.⁴⁶³ Further amendments to the Treasury Regulations, excluding the Treasury Regulation dealing with the management of losses and claims that include the criteria for state cover and waiver of claims, were made during 2005, which took effect on 15 March 2005.⁴⁶⁴ Since then, the Treasury Regulations concerning state cover remains the same. However, draft Treasury Regulations were published on 30 May 2012 for public comment, but the proposed criteria for state cover remains the same.⁴⁶⁵ These draft regulations were not implemented. The development of the criteria for state cover since 1 June 2000 will be dealt with and compared during the textual analysis of the current Treasury Regulations applicable to state cover.⁴⁶⁶

3.3.3.2 Sources

Before 1 June 2000,⁴⁶⁷ the Exchequer and Audit Acts, the Financial Regulations and Treasury Instructions⁴⁶⁸ referred to, were included in a Financial Handbook/Manual by the National Treasury concerned and provided to all organs of state.⁴⁶⁹ Officials assigned with the responsibility had to keep the Financial Handbook/Manual updated following instructions from the National Treasury. The Treasury Instructions were not published in the Government Gazette, and that may explain why access to such instructions, to a large extent, was limited to public officials who had to apply it to their core functions. However, since 1 June 2000, when the previous Treasury Instructions has been repealed and replaced with the new Treasury Regulations, it became a

⁴⁶¹ See National Treasury 2000:reg.23.2.1 that repealed the former treasury regulations and instructions.

⁴⁶² See Treasury Regulations 2001:reg.1.3.1.

⁴⁶³ National Treasury 2002:reg.1.3.1.

⁴⁶⁴ National Treasury 2005:reg.1.3.1.

⁴⁶⁵ National Treasury 2012:draft reg.8.2.1 read with draft reg.8.7.3.

⁴⁶⁶ National Treasury 2005:reg.12.2.1 and reg.12.7.3.

⁴⁶⁷ The date when the new Treasury Regulations were been published in terms of the Public Finance Management Act, 1/1999.

⁴⁶⁸ 23/1956, read with the Financial Regulations and the Treasury Instructions issued in terms of ss 61(1) and 61(2) of the Act, respectively; Also see 66/1975, read with the Financial Regulations and the Treasury Instructions issued in terms of s 38(1) and 39(1) of the Act, respectively.

⁴⁶⁹ Treasury 1965.

matter of public interest. The enactment of Treasury Regulations is now subject to publication for public comment.⁴⁷⁰

Three separate categories of criteria existed for state cover provided for in the then Treasury Instructions involving (1) civil claims against the state and officials, (2) state cover concerning the use of mobile state implements such as state vehicles (that provides for all civil claims against the state, including claims relating to injuries and deaths and damage to private and state property); and (3) other deficiencies, losses or damage for the state caused through acts or omissions of officials, respectively.⁴⁷¹ These separate categories of criteria for state cover are identifiable when one has regard to the definition of “losses” as defined in the previous Treasury Instructions⁴⁷² to mean-

[Any] material loss or damages or prejudice to the State or a said person and, without derogating from or limiting the concept, also shortages, damages, fruitless or wasteful expenditure and compensations

This definition will be embarked upon during the analysis of the current Treasury Regulations. Some generic criteria for state cover applied to all the different categories mentioned, while other ones applied to a specific category only.⁴⁷³ However, since the commencement of the new Treasury Regulations on 1 June 2000, the separate categories of criteria for state cover have been combined, and the challenges posed by such an approach will be identified. The criteria for state cover in respect of all three categories mentioned as reflected in the Treasury Instructions as amended during 1999⁴⁷⁴ and in use just before the new Treasury Regulations took effect on 1 June 2000 will serve as a benchmark for comparison with the previous versions of the Treasury Instructions concerned.

⁴⁷⁰ 1/1999:sec.78.

⁴⁷¹Department of State Expenditure 1999:W3.1, W4.1 and W9.1. According to W1.1 (iv) mobile state implements were defined to include motor-vehicles, vessels, submarines, aircraft, any animal or other mobile objects or equipment designed or adapted to move. The same criteria for state cover as prescribed by Treasury Instruction W4.1, applied to all mobile state implements as defined. For purposes of comparing the criteria for state cover applied in the past to mobile state implements, only state vehicles will be referred to.

⁴⁷² Department of State Expenditure 1999:W1.1(v).

⁴⁷³ For example: alcohol-related criteria applied to all the different categories of criteria involved and certain criteria applies only to the use of a state vehicle.

⁴⁷⁴ Department of State Expenditure 1999:W3.2, W4.1 and W9.3. These instructions were issued in terms of s 39(1) of the *Exchequer Act*, 66/1975.

The development of the different individual criteria for state cover will be classified per subject matter to simplify the discussion for comparison purposes. The criteria for state cover regarded as generic and applicable to all categories of “losses” as defined will be identified during the discussion. For purposes of easy reference, the sources consisting of the criteria for state cover will be referred to as Treasury Instructions 1999,⁴⁷⁵ Treasury Instructions 1997,⁴⁷⁶ Treasury Instructions 1984⁴⁷⁷ and Treasury Instructions 1956.⁴⁷⁸ However, to simplify the comparison of the criteria for state cover between the different Treasury Instructions, reference to Treasury Instructions 1997 will be made only to highlight significant differences. According to these instructions, the criteria for state cover applicable to the different categories referred to apply to “said persons” as defined⁴⁷⁹ (excluding Treasury Instructions 1956 that did not consist of a similar definition). For purposes of comparing the different criteria, reference will be made to public officials only. A similar approach regarding classifying the different individual criteria per subject matter will be followed and applied to the new Treasury Regulations, including the textual analysis of the current Treasury Regulations concerned.

3.3.4 Development of criteria applicable to state cover before 1 June 2000

An overview of the development of the criteria for state cover should not overlook an important principle mandated by the Treasury Instructions that the final decision whether or not an official forfeited state cover, except for general losses and damages not exceeding R10 000,⁴⁸⁰ remained with the state attorney and not the accounting officer concerned. This has been the case even though an accounting officer remained

⁴⁷⁵ Department of State Expenditure 1999:W3.1, W4.1 and W9.1.

⁴⁷⁶ Department of State Expenditure 1997:W3.2, W4.1 and W9.3.

⁴⁷⁷ Department of Finance 1984:W3.1, W4.1 and W9.1; issued in terms of the *Exchequer Act*, 66/1975 and published for the first time on 10 August 1984. Chapter W of the Treasury Instructions was amended on 26 September 1985 to take effect retrospectively on 10 August 1984, which is on the same date when the first version of Chapter W was published. See Department of Finance 1985

⁴⁷⁸ Treasury 1956:3308(6), issued in terms of s 61(2) of the Exchequer and Audit Act, 23/1956.

⁴⁷⁹ Department of Finance 1984:W1.1(iv); Department of State Expenditure 1997: W1.1(ix); Department of State Expenditure 1999: W1.1(ix); Said person(s) include, “ ... all persons who are or were in the employ of the State and, notwithstanding the above also persons who on a full-time or part-time basis render/rendered voluntary services to the State or who hold honorary appointments or any other persons who are/were compelled by law or a court order to render services to/on behalf of the State (for purposes of T.I. W4 this includes persons who render/rendered services in terms of a contract if this instruction has been made applicable to the contractor).”

⁴⁸⁰ Department of State Expenditure 1999:W9.5; Also see Department of State Expenditure 1997:W9.5.

accountable for all expenditures relating to civil claims and losses. According to Treasury Instructions 1999, the state accepted liability for claims emanating from acts or omissions of officials instituted against the state unless the State Attorney, after consultation with the accounting officer, decided that the official concerned is liable in law for the damage concerned and acted contrary to any one of the criteria prescribed for state cover.⁴⁸¹ The words “after consultation with” in the said context imply that although the State Attorney made the final decision, consultation with the accounting officer was required before such a decision could be made. Any views expressed by the accounting officer should have been considered thoroughly by the State Attorney before a final decision about state cover could be made.⁴⁸² However, unlike Treasury Instructions 1999, it is important to note that Treasury Instructions 1997 provided for the accounting officer to decide whether state cover is forfeited after consultation with the State Attorney.⁴⁸³ This observation will be revisited during the critical analysis of the current criteria for state cover.⁴⁸⁴

The criteria concerning state cover referred to in Treasury Instructions 1999 will now be used as a benchmark for comparison with the previous versions of the Treasury Instructions. State cover is forfeited if an official, with regard to the act or omission that led to a claim against the state, is liable in law for the damage and acted in accordance with any of the criteria described and listed in Treasury Instructions 1999.⁴⁸⁵ The requirement for an official to be “liable in law” before the criteria for state cover is considered is lacking in Treasury Instructions 1984, Treasury Instructions 1997, Treasury Instructions 1956, the Transport Circular and the PSSC. However, it would be inconceivable to conclude that this requirement would be ignored during a liability determination.

⁴⁸¹ Department of State Expenditure 1999:W3.2, W4.1 and W9.3. Also see Department of Finance 1984:W3.1, W4.1 and W9.1; and Treasury 1956:3308(6), for the same principle that applied.

⁴⁸² *Interim Constitution of the Republic of South Africa 1993:sec.233(4)*.

⁴⁸³ Department of State Expenditure 1997:W3.2 and W9.3.

⁴⁸⁴ National Treasury 2005:reg.12.2.1.

⁴⁸⁵ Department of State Expenditure 1999:W3.2 (a)-(f), W4.1 (a)-(i) and W9.3 (a)-(d).

3.3.4.1 Exceeding of powers

The criterion that appeared in Treasury Instructions 1984⁴⁸⁶ and Treasury Instructions 1997⁴⁸⁷ insofar it relates to civil claims against the state provided that state cover will be forfeited if an official “*mala fide* exercised or exceeded his powers.” The Treasury Instructions 1956 referred to powers being exceeded or exercised “deliberately” or “in bad faith.” Treasury Regulations 1999 has been amended to exclude this criterion for state cover related to civil claims against the state.⁴⁸⁸ The reason for excluding behaviour that involves exceeding powers at least intentionally is questionable as the exceeding of powers could lead to civil claims against the state.

Unlike Treasury Instructions 1999, both Treasury Instructions 1984 and Treasury Instructions 1997 include the criterion applicable to powers exercised *mala fide*, not exercised or exceeded, to apply to the use of a state vehicle and losses in general.⁴⁸⁹ The Public Service Staff Code (PSSC) also refers to a similar criterion concerning state vehicles.⁴⁹⁰ However, the exceeding of powers *mala fide* may be more relevant to causes of action other than damages arising from the handling and using state vehicles.

Mala fides involves fraudulent and dishonest behaviour and may even include action taken for an ulterior purpose.⁴⁹¹ The requirement that an official may forfeit state cover only if powers are exercised or exceeded *mala fide* restricted the possibility of an official forfeiting state cover as such behaviour was quite exceptional. Such strict requirements did not promote accountable behaviour regarding officials who exceeded their powers for reasons other than ulterior motives or bad faith in mind. The importance of a decision that an official exercised or exceeded powers *mala fides*, directly related to the fact that any debt due to the state where *mala fides* is involved will bear interest at a rate provided for in terms of the Exchequer Act.⁴⁹²

⁴⁸⁶ Department of Finance 1984:W3.1 (b).

⁴⁸⁷ Department of State Expenditure 1997:W3.1 (b).

⁴⁸⁸ Department of State Expenditure 1999:W3.2 (b).

⁴⁸⁹ Department of Finance 1984:W4.1 (b) and W9.1 (b); Department of State Expenditure 1997:W4.1 (b) and W9.3 (b).

⁴⁹⁰ Department of Public Service and Administration 1990:Par 7(1).

⁴⁹¹ Hoexter 2012:310.

⁴⁹² 66/1975:sec.26(6) read with s 34(9). Also see Department of Finance 1984:X7.2; Department of State Expenditure 1999:X7.2.

3.3.4.2 Alcohol or drug-related incidents

Incidents leading to civil claims and damages awards against the state resulting from the use of intoxicating substances by officials involves behaviour that does not meet the standards set for accountable behaviour. The following criterion intends to describe such behaviour if an official-

made excessive use of liquor or drugs (for which there is sufficient proof), which may have resulted in or contributed to liability.⁴⁹³

The criterion that appeared in Treasury Instructions 1984 is identical.⁴⁹⁴ Treasury Instructions 1956 referred to the taking of liquor or drugs in “sufficient quantities” for which “adequate” proof is required, which “possibly created or contributed” to liability.⁴⁹⁵ The criterion for state cover applicable to state vehicles involving intoxicating substances determined that an official will forfeit state cover if-

[The official] handled or used mobile State implements or occupied the driver’s seat while the engine was running and-

- (i) he/she was under the influence of alcohol or any drug that has a narcotic effect;
or
- (ii) the concentration of alcohol in his/her blood was not less than prescribed legislation.⁴⁹⁶

Treasury Instruction 1984 and Treasury Instruction 1997 added the following qualification in subparagraph (ii) at the end of the sentence, namely, “which could have resulted in or contributed to liability.”⁴⁹⁷ The PSSC consists of a similar qualification but provides for behaviour that could “possibly have led or contributed to liability.”⁴⁹⁸ Instead of referring to prescribed legislation that determines the concentration of alcohol in the blood that may not be exceeded, Treasury Instruction 1984, the PSSC and the Transport Circular⁴⁹⁹ quantify the concentration levels of alcohol prescribed in legislation concerned. The Transport Circular consists of a similar criterion but

⁴⁹³ Department of State Expenditure 1999:W3.2(c).

⁴⁹⁴ Department of Finance 1984:W3.1(c).

⁴⁹⁵ Treasury 1956:3308(6)(c).

⁴⁹⁶ Department of State Expenditure 1999:W4.1(i).

⁴⁹⁷ Department of Finance 1984:W4.1(i); Department of State Expenditure 1997:W4.1(h).

⁴⁹⁸ Department of Public Service and Administration 1990:Par 7(1).

⁴⁹⁹ Transvaal Provincial Administration Roads Department Pretoria 1975:Par 15.2.1.

requires that an official be found guilty by a criminal court whilst driving a state vehicle as prescribed in sub-paragraphs (i) and (ii) referred to above.⁵⁰⁰ These requirements will again be considered when compared with the current Treasury Regulations.⁵⁰¹

Similar requirements involving intoxicating substances that applied to civil claims applied to general losses that referred to the use of “alcohol, drugs or similar agents”.⁵⁰² Treasury Instructions 1984 consists of a similar criterion but refers to the “excessive use of liquor or drugs” without referring to “other similar agents”.⁵⁰³

3.3.4.3 Action outside course and scope of employment

Officials who acted outside the course and scope of their duties may not be entitled to state cover and may be held accountable for expenditure emanating from civil claims instituted against the state and general losses involved. This requirement that supports behaviour in line with accountability principles is dealt with by Treasury Instructions 1999 in terms of which state cover will be forfeited if-

[The official] was not acting in the execution of his/her official duties or did not *bona fide* (good intention) believe that he/she was so acting.⁵⁰⁴

A similar criterion applied to the use of state vehicles and general losses.⁵⁰⁵ The previous versions of the Treasury Instructions and the PSSC relate to state vehicles, except for minor changes, consisting of a similar criterion for state cover.

3.3.4.4 Reckless or intentional actions

The Treasury Regulations 1999 determined that officials may not act “recklessly or intentionally.”⁵⁰⁶ Officials may also forfeit state cover if damage relating to state vehicles and losses as defined involve intentional actions.⁵⁰⁷ Intentional wrongs committed by officials leading to civil claims or damage for the state are contrary to behaviour that should promote just administrative action and an accountable public service.

⁵⁰⁰ Department of Finance 1984:W4.1(i); Department of State Expenditure 1997:W4.1(h); Transvaal Provincial Administration Roads Department Pretoria 1975:Par 15.2.1.

⁵⁰¹ National Treasury 2005:12.2.1 read with 12.7.3.

⁵⁰² Department of State Expenditure 1999:W9.1(c).

⁵⁰³ Department of Finance 1984:W9.1(c).

⁵⁰⁴ Department of State Expenditure 1999:W3.2(a).

⁵⁰⁵ Department of State Expenditure 1999:W4.1(a) and W9.3(a).

⁵⁰⁶ Department of State Expenditure 1999:W3.2(e).

⁵⁰⁷ Department of State Expenditure 1999:W4.1(b) and W9.3(b).

However, apart from civil claims against the state, none of the previous Treasury Instructions, including the Transport Circular or PSSC, consisted of a similar criterion concerning the use of state vehicles or losses in general. Instead, these Treasury Instructions and PSSC, except for the Transport Circular concerned, only included a criterion for state cover that applied to the *mala fide* exercise or exceeding of powers as explained already during the discussion of the criterion applicable to the exceeding of powers. It is, therefore, notable that Treasury Instruction 1999 introduced the prohibition of “reckless or intentional” action as a criterion for state cover for the first time to apply to civil claims against the state, the use of state vehicles and losses in general. The inclusion of this criterion that applied to the handling of state vehicles certainly contributed substantially to promoting accountable behaviour.

3.3.4.5 Admissions

Any admission of liability by an official involved with activities that may lead to the institution of civil claims for compensation against the state without obtaining advice from the state attorney may be harmful to the state as far as the outcome of such claims concerning liability is concerned. Such admission may justifiably cause an official to forfeit state cover and be held accountable for the avoidable expenditure involved once such claims have to be settled. State cover will be forfeited if-

[The official], without prior consultation with the State Attorney, made an admission that was detrimental to the state’s case.⁵⁰⁸

The criterion that appeared in Treasury Instructions 1984 and Treasury Instructions 1956 is similar, although it refers to “an admission of guilt”.⁵⁰⁹ Although an admission should be avoided by officials responsible for civil claims against the state, it is evident that an admission, depending on the facts of a particular case, may not be detrimental to the state, especially if the outcome of a claim against the state would not be different, despite such admission.

The previous versions of the Treasury Instructions provided a similar criterion for state cover involving civil claims and the use of state vehicles. It includes the PSSC and the Transport Circular that provided similar criteria applicable to state vehicles. This criterion did not apply to losses in general for convincing reasons. Any admission of

⁵⁰⁸ Department of State Expenditure 1999:W3.2(d).

⁵⁰⁹ Department of Finance 1984:W3.1(d); Treasury 1965:3308(6)(d).

liability to any third party by an official regarding losses of or damage caused to state property through such an official's actions would have no legal effect on a possible claim by the state against the official concerned.

3.3.4.6 Non-compliance with or ignoring standing instructions

Non-compliance with or ignorance of standing instruction may lead to civil claims against the state. Officials who show disrespect for standing instruction leading to civil claims should not be entitled to state cover, and this criterion intends to promote accountable behaviour. State cover will thus be forfeited if-

[An official] failed to comply with or ignored standing instructions of which he/she was aware or could reasonably have been expected to be aware.⁵¹⁰

The criterion that appeared in Treasury Instructions 1984 and Treasury Instructions 1997 is identical. This criterion did not apply to the use of state vehicles, and this remark will be embarked upon during the analysis of the current criteria for state cover. A similar criterion did apply to losses in general.⁵¹¹

The criterion does not appear in Treasury Instructions 1953. Unlike the more recent instructions, Treasury Instructions 1953 determines that state cover concerning civil claims will be forfeited if an official acted in any manner similar to the criteria described in Treasury Instructions 1953.⁵¹² Treasury Instruction 1984 provides a similar criterion for state cover regarding losses in general.⁵¹³ It appears to provide a "catch-all" provision to provide for similar action by officials that may lead to the forfeiture of state cover.

3.3.4.7 Additional criteria applicable to state vehicles

The following criteria that will be discussed are unique to the use or handling of state vehicles. Similar criteria for state cover is prescribed and published in the PSSC⁵¹⁴ and the Transport Circular.⁵¹⁵ The origin of state cover provided to officials involved with motor vehicle accidents causing damage to state vehicles can be linked to

⁵¹⁰ Department of State Expenditure 1999:W3.2(f).

⁵¹¹ Department of State Expenditure 1999:W9.3(d).

⁵¹² Treasury 1965:3308(6)(f).

⁵¹³ Department of Finance 1984:W9.1(e).

⁵¹⁴ Department of Public Service and Administration 1990:Par 7(1)(b) of Part 7, Section IV of ChapterD.IV.

⁵¹⁵ Transvaal Provincial Administration Roads Department Pretoria 1975:Par 15.2.1.

Treasury Instructions 1956,⁵¹⁶ which refers to Treasury Circular 12 of 1935 regarding which state cover is afforded to such officials. Both the Treasury Instructions 1999 and Treasury Instructions 1984 confirmed the authenticity of the Transport Circular concerned by requiring state departments to comply with the Transport Circular in connection with interdepartmental claims regarding the use of Government-owned vehicles.⁵¹⁷ The previous versions of the Treasury Instructions also consist of similar criteria relating to using state vehicles. All these sources will only be referred to for comparison purposes to highlight meaningful differences. Concerning state vehicles as an indispensable and valuable asset for rendering public services, all the criteria for state cover applicable to the use of state vehicles are regarded as essential to promoting accountable behaviour.

The following criteria for state cover according to Treasury Instruction 1999 is listed and quoted individually for comparison purposes.⁵¹⁸

[The official] used the mobile State implements without authorisation for non-official purposes.⁵¹⁹

State vehicles may be used for official, as opposed to private, purposes only.

[The official], where applicable, did not possess a suitable driver's licence.⁵²⁰

The PSSC and the Transport Circular refer to an "appropriate" driver's licence.⁵²¹ It is well-known that different categories of licenses exist depending on the type of vehicle involved. The definition of mobile state implements referred to in Treasury Instructions 1999 also includes vehicles, vessels, aircraft and other moveable instruments that may require an "appropriate" licence.⁵²²

[The official] handled the mobile State implements without proper authorisation.⁵²³

⁵¹⁶ Treasury 1965:0732(4).

⁵¹⁷ See Department of State Expenditure 1999:W4.4; Department of Finance 1984:W4.3; Also see Treasury 1965:0732(4) that refers to the PSSC in a different context.

⁵¹⁸ The criteria is listed in the same sequence with the same numbering of sub-paragraphs concerned.

⁵¹⁹ Department of State Expenditure 1999:W4.1(d).

⁵²⁰ Department of State Expenditure 1999:W4.1(e).

⁵²¹ Department of Public Service and Administration 1990:Par 7(1)(b) of Part 7, Section IV of Chapter D.IV; Transvaal Provincial Administration Roads Department Pretoria 1975:Par 15.2.4.

⁵²² Department of State Expenditure 1999:W1.1(vi).

⁵²³ Department of State Expenditure 1999:W4.1(f).

The PSSC also refers to handling or using a vehicle without “having been duly authorised thereto.”⁵²⁴ The difference in the wording of the criterion concerned compared to Treasury Regulations 1999 confirmed the similarity between the different versions.

[The official] knowingly allowed persons that were not covered as envisaged in this paragraph to handle these implements.⁵²⁵

Both Treasury Instructions 1984, Treasury Instructions 1997 and the Transport Circular refer to an official who may not allow persons “not authorised to do so” to handle a state vehicle.⁵²⁶ None of the said sources refers to the word “knowingly.” The criterion does not appear in the PSSC. The meaning of the words “as envisaged in this paragraph” may have a two-fold meaning. Firstly by confirming that a person may not be covered to handle a state vehicle if any of the relevant remaining criteria for state cover may disqualify such a person from handling a state vehicle. Secondly, if a person is not a “said person” as defined⁵²⁷ and referred to in the introductory words preceding the criteria for state cover in Treasury Regulation 1999,⁵²⁸ the person may not handle a state vehicle.

[The official] deviated materially from the authorised or official journey or route without authorisation.⁵²⁹

Neither Treasury Instructions 1984 and the PSSC nor the Transport Circular refers to this criterion. The word “materially” does not appear in Treasury Instructions 1997.⁵³⁰

⁵²⁴ Department of Public Service and Administration 1990:Par 7(1)(b) of Part 7, Section IV of ChapterD.IV.

⁵²⁵ Department of State Expenditure 1999:W4.1(g).

⁵²⁶ Department of Finance 1984:W4.1(g); Department of State Expenditure 1997:W4.1(g).

⁵²⁷ State Expenditure 1999: W1.1(ix); A “said person” include, ” ... all persons who are or were in the employ of the State and, notwithstanding the above also persons who on a full-time or part-time basis render/rendered voluntary services to the State or who hold honorary appointments or any other persons who are/were compelled by law or a court order to render services to/on behalf of the State (for purposes of T.I. W4 this includes persons who render/rendered services in terms of a contract if this instruction has been made applicable to the contractor).”

⁵²⁸ Department of State Expenditure 1999:W4.1. The introductory words refer to, “The state bears its own accident risks..., arising from the handling or use of mobile State implements by a said person: ...”

⁵²⁹ Department of State Expenditure 1999.W4.1(h).

⁵³⁰ Department of State Expenditure 1997:W4.1(h).

3.3.4.8 Liability of superior or supervisor

Suppose a liability determination reveals that an official concerned is not liable in law or did not forfeit state cover insofar it relates to general losses. In that case, it is notable that an investigation by the accounting officer is required to determine the liability for a loss or damage for the state of a superior or supervisor concerned.⁵³¹ This indeed promotes accountable behaviour. This observation will be dealt with in chapter 5.

3.4 DEVELOPMENT AND ANALYSIS OF CRITERIA SINCE 1 JUNE 2000

Being mindful that a simple text-based approach to the interpretation of legislation will not do justice nor serve the purpose and values of the *Constitution*, the constitutional features referred to, and a purposive approach will direct the analysis of the Treasury Regulations applicable to state cover.⁵³² The analysis will be conducted as follows-

- The current Treasury Regulations, insofar it relates to the criteria for state cover, will be subject to critical textual analysis, and it will simultaneously serve as a benchmark for purposes of comparison with the amended versions of the new Treasury Regulations, and previous Treasury Instruction that applied before 1 June 2000 only insofar it relates to significant differences.
- The amended versions of the Treasury Regulations will be referred to as Treasury Regulations 2000⁵³³ and Treasury Regulations 2001.⁵³⁴
- Treasury Regulations 2002 will be excluded as criteria for state cover in this regulation are identical with the current Treasury Regulations.
- Due to the extent of the similarities with Treasury Regulations 2000, reference to Treasury Regulations 2001 will be made only to highlight a single significant difference.
- The same classification of the different individual criteria for state cover per subject matter as applied to the criteria in use before 1 June 2000 will be utilised to analyse the current criteria for state cover.

⁵³¹ Department of State Expenditure 1999.W9.4.

⁵³² National Treasury 2005:reg.12.2.1 and reg.12.7.3.

⁵³³ National Treasury 2000:reg.12.2.1 and reg.12.7.3.

⁵³⁴ National Treasury 2001:reg.12.2.1 and reg.12.7.3.

3.4.1 Purpose and scope of empowering legislation

The *PFMA*⁵³⁵ aims to secure transparency, accountability, and the proper management of public funds. The *PFMA* also aims to achieve the efficient and effective management of what is expressed through an acronym known as REAL, meaning the revenue, expenditure, assets and liabilities of public institutions.⁵³⁶ The word “secure” in the *PFMA* within the said context is significant. Securing transparency, accountability, and sound financial management does not imply upholding these objectives as mere virtues or values but as something that must be achieved. These objectives are fully aligned with the constitutional values of transparency and accountability applicable to sound public administration.⁵³⁷ The Constitutional court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁵³⁸ (*Sidumo*) elaborated on the importance of constitutional values. Such values are intended to be strong, explicit and clear and designed for a new democratic order. Constitutional values and the spirit of the *Constitution* are inseparable. The Constitutional Court continued to remark as follows:⁵³⁹

The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protection promised by the Constitution

Treasury Regulations 2005 should also give effect to the purpose and aims of the *PFMA* and the *Constitution*, especially in relation to accountability. However, neither the *PFMA* nor the *Constitution* defines “accountability”. Okpaluba⁵⁴⁰ remarks that the grammatical meaning of accountability involves concepts such as “answerability,” “responsibility,” “liability,” “culpability,” and “subject to pay.” Concepts such as “responsible to someone or for some action” and “able to be explained” can also be associated with the meaning of accountability.⁵⁴¹ For purposes of interpreting Treasury Regulations 2005, one can conclude that the duty attached to accountability compels the executive and organs of state to explain its laws, including decisions and actions

⁵³⁵ 1/1999:sec.2.

⁵³⁶ 1/1999:sec.2.

⁵³⁷ 1996:secs.1(d) and 195(1)(f) and (g).

⁵³⁸ 2008 (2) SA 24 (CC):par.149.

⁵³⁹ *Sidumo* 2008 (2) SA 24 (CC):par.149.

⁵⁴⁰ Okpaluba 2018:6. The meaning of accountability as a Constitutional value will be explored in Chapter 4 of this dissertation.

⁵⁴¹ Collins English Dictionary 2004:10.

based upon the application or execution of such laws.⁵⁴² It applies to every sphere of government, organs of state and public enterprises.⁵⁴³

The sound management of what the *PFMA* intends to achieve is assigned to the accounting officer as head of a department, the chief executive officer of a constitutional institution and the executive authority of a public entity.⁵⁴⁴ The *PFMA* defines “department” to include a national or provincial department.⁵⁴⁵ Provision is made in the *PFMA* for an accounting officer, chief executive officer and accounting authority to delegate any of their powers and instruct any official in their respective institutions to perform any duty assigned to them in terms of the *PFMA*.⁵⁴⁶ It includes delegation by an accounting officer of his or her power to functionaries within the department concerned to decide whether or not officials forfeited state cover. Any reference to an “accounting officer” for purposes of this study refers to a head of a national and a provincial department.

3.4.2 Purpose and scope of Treasury Regulations 2005

Unlike the *PFMA*, the Treasury Regulations issued in terms of the *PFMA* has no specific provision explaining its purpose, aim or objective. However, it is identical to that of the *PFMA*. The *PFMA* defines the words “this Act” to include all the regulations and instructions that must or may be issued by the National Treasury.⁵⁴⁷ The words “this Act” also describe the purpose or aim of the *PFMA*.⁵⁴⁸ Therefore, it is evident that the purpose of the *PFMA* about securing transparency, accountability, and proper management of public funds applies to all Treasury Regulations, including regulation 12, that deals with the management of losses and claims. The National Treasury, according to the *PFMA*,⁵⁴⁹ must provide regulations concerning matters such as

⁵⁴² Currie *et al* 2017:17.

⁵⁴³ 1996:sec.195(2). It also applies, albeit in different context, to various functionaries and institutions. See 1996: ss 41(1)(c) Intergovernmental relations; 55(2) and 57(1)(b) National Assembly; 70(1)(b) National Council of Provinces; 83(b) the President; 92(2) Members of the Cabinet; 93(2) Deputy Ministers; 114(2)(a) and 116(1)(b) Provincial Legislatures; 133(2) Members of the Executive Council; 152(1)(a) Local Government; 181(5) State Institutions such as the Public Protector and Auditor-General; 199(8) Security Services.

⁵⁴⁴ 1/1999:secs.36(1) and 49(1).

⁵⁴⁵ 1/1999:sec.1. It also includes a national or provincial government component.

⁵⁴⁶ 1/1999:secs.44 and 56.

⁵⁴⁷ 1/1999:sec.1. The *PFMA* mandates the National Treasury to issue regulations and instructions in terms of ss 69, 76, 85 and 91 of the Act.

⁵⁴⁸ 1/1999:sec.2.

⁵⁴⁹ 1/1999:secs.76(1)(b),(f),(h) and (i) respectively.

procedures to recover losses and damages; the conducting of liability determinations in respect of losses and damages and recovery procedures; the settlement of civil claims instituted by or against organs of state; and decisions to waive claims by the state. All these matters are regulated in Treasury Regulations 2005.⁵⁵⁰

3.4.3 Provisional clause preceding criteria for state cover

The introductory words preceding the criteria for state cover indicates that acceptance of liability by an institution for civil claims and payment of compensation without initiating steps to recover it from an official involved is subject to certain conditions. These conditions followed the word “*provided*” and will be referred to as “*the provisional clause*.” The preceding words and conditions, followed by the criteria for state cover, read as follows:⁵⁵¹

12.2 Claims against the state through acts or omissions [Section 76(1)(h) of the PFMA]

An institution must accept liability for any loss or damage suffered by another person, which arose from an act or omission of an official as a claim against the state and does not recover compensation from an official, provided the official shall forfeit this cover if he or she, with regard to the act or omission, is liable in law and –

- (a) intentionally exceeded his or her powers;
- (b) made use of alcohol or drugs;
- (c) did not act in the course and scope of his or her employment;
- (d) acted recklessly or intentionally;
- (e) without prior consultation with the State Attorney, made an admission that was detrimental to the state; or
- (f) failed to comply with or ignored standing instructions, of which he or she was aware of or could reasonably have been aware of, which led to the loss, damage

⁵⁵⁰ National Treasury 2005:reg.12. This regulation deals with the management of losses and claims; It includes: General provisions confirming that the state bears its damages and accident risks, including claims and losses relating to state property (reg.12.1); Claims against the state through acts or omissions (reg.12.2); Claims by the state against other persons (reg.12.3); Claims by officials against the state (reg.12.4); Losses or damages through criminal acts or omissions (reg.12.5); Losses and damages through *vis major* and other unavoidable reasons (reg.12.6); and Losses or damages committed or omitted by officials (reg.12.7). Also see National Treasury 2005:reg.11.4.1 that provides for the writing off of debt owed to the state if it would be to the advantage of the state either to settle or waive its claim.

⁵⁵¹ National Treasury 2005:reg.12.2.1.

or reason for the claim, excluding damage arising from the use of a state vehicle;
and

(g) in the case of a loss, damage or claim arising from the use of a state vehicle,
the official –

- (i) used the vehicle without authorisation;
- (ii) did not possess a valid driver's licence or other appropriate licence;
- (iii) did not use the vehicle in the interest of the state;
- (iv) allowed unauthorised persons to handle the vehicle; or
- (v) deviated materially from the official journey or route without prior authorisation.

Treasury Regulations 2005 thus confirms the principle that the state **must accept liability** and **bear all risks** for any **loss or damage** arising from civil claims instituted against the state **provided** that certain conditions are met.⁵⁵² Treasury Regulations 2001 consists of similar provisions concerning the acceptance of liability for a claim against an organ of state and the waiver of a claim against an official.⁵⁵³ However, Treasury Regulations 2000 refers to liability for claims against the state that “may” be accepted and claims against officials that “may” be waived.⁵⁵⁴ This implies that an organ of state could initiate recovery procedures against an official who enjoyed state cover. This could lead to inconsistency and a lack of uniformity in applying the criteria for state cover by organs of state. Unless the waiver of claims against officials who enjoy state cover is subject to additional conditions, the purpose of providing state cover to public officials is defeated if organs of state are allowed to continue with recovery procedures. Although the requirement for an official to be “liable in law” does not appear within the context of considering the forfeiture or not of state cover by an official in both Treasury Regulations 2000 and Treasury Regulations 2001, the said requirement applied concerning the bearing of damages, accident risks, civil claims against the state and losses involving state property.⁵⁵⁵

⁵⁵² National Treasury 2005:reg.12.2.1 read with reg.12.1.1.

⁵⁵³ National Treasury 2001:reg.12.2.1 and reg.12.7.3.

⁵⁵⁴ National Treasury 2000:reg.12.2.1 and reg.12.7.3.

⁵⁵⁵ National Treasury 2000:reg.12.1.1 and reg.12.2.1; National Treasury 2001:reg.12.1.1 and reg.12.2.1.

The provisional clause provides for **state cover** for officials **liable in law** for civil claims instituted against the state. In addition to that, Treasury Regulations 2005 also intends to create a statutory right of recourse for departments against officials who forfeited state cover. The exercise of this right is subject to conditions included in the provisional clause that requires a liability determination consisting of a two-stage approach that will be dealt with.

The principle of the state being a self-insurer and bearing all its risks, including the rationale behind state cover and what it involves, were discussed. The remaining concepts, as emphasised and used in the introductory sentence preceding the criteria for state cover, including the concept “statutory right of recourse”, require clarification.

3.4.3.1 Acceptance of liability for civil claims

Acceptance by the state of liability for civil claims for any loss or damage arising from state activities and conduct of officials directly relates to the principles of vicarious liability.⁵⁵⁶ Public officials (employees) acting in the course and scope of their official duties, may render organs of state (employer) vicariously liable for such claims. *The State Liability Act*⁵⁵⁷ refers to this important principle. Unlike direct liability, which involves liability imposed upon one who has committed a delict, vicarious liability involves one person's liability for a delict committed by another because of the relationship between the defendant (employer) and the wrongdoer (employee).⁵⁵⁸ Both Neethling, Potgieter and Visser,⁵⁵⁹ including Van der Walt and Midgley,⁵⁶⁰ refer

⁵⁵⁶ See *F v Minister of Safety and Security and Others* 2012 (1) SA 536 (CC); paras.40-41 about the meaning of vicarious liability and test to be applied to determine that; the watershed case of *Feldman v Mall* 1945 AD 733; *Minister of Police v Rabie* 1986 (1) SA 117 (A) and *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) that confirmed the standard test to be applied to determine vicarious liability, deserve to be mentioned as examples of judgments that set a precedent for similar cases to be considered by the courts prior to and even after the new constitutional dispensation; the Constitutional Court's judgment in *Carmichele v the Minister of Safety and Security and Another* 2001 (4) SA 938 (CC); 2002 (1) SACR 79 (CC); 2001 (10) BCLR 995 is regarded as the watershed case that revisited the conservative approach toward common law principles applicable to the law of delict and state liability. These cases also involve difficulties where wrongdoings take place outside the course and scope of employment referred to as the “deviation cases”.

⁵⁵⁷ 20/1957. Section 1 of the Act determines that “any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.”

⁵⁵⁸ Boonzaier 2013:330.

⁵⁵⁹ Neethling, Potgieter and Visser 2015:389.

⁵⁶⁰ Van der Walt and Midgley 2016:51.

to vicarious liability as a form of strict liability where one person is liable for a delict caused by someone else. In this regard, the Constitutional Court in *K v Minister of Safety and Security*⁵⁶¹ remarked as follows:

The general principle of vicarious liability holds an employer responsible for the wrongs committed by an employee during the course of employment. The Courts have held that as long as the employee is acting 'within the course and scope of his or her duty' or is 'engaged with the affairs of his master' that the employer will be liable.

The Court continues to consider constitutional obligations and normative principles to determine whether or not an employer is vicariously liable for a wrong committed by an employee outside the course and scope of his employment also referred to as the "deviation cases."⁵⁶² This approach differs substantially from previous Court decisions and was applied in *F v Minister of Safety and Security and Others*.⁵⁶³ These decisions will be considered and applied to one of the criteria for state cover that has a direct bearing on the general principle of vicarious liability.⁵⁶⁴

Based on the principles of vicarious liability, any legally valid defence that an employee may raise against a claim for damages is available to an employer as a joint wrongdoer.⁵⁶⁵ However, the opposite may apply where the absence of such a defence may compel an employer to concede the merits to negotiate a settlement. A legally valid defence may also include raising a special plea based on prescribed claims.⁵⁶⁶ Non-compliance with procedures applicable to claims against organs of state as prescribed in terms of the *Institution of Legal Proceedings against certain Organs of State Act*⁵⁶⁷ may also result in special pleas being raised. This Act requires prior notice, indicating a clear intention to institute legal proceedings for compensation, to be

⁵⁶¹ 2005 (6) SA 419 (CC);par.24. Also see par.21 of the judgement for a discussion of the principles applicable to vicarious liability such as providing claimants with a remedy and to ensure that employers prevent their employees to cause harm to members of the community. This case also involves complex issues where conduct constitutes intentional wrongs.

⁵⁶² 2005 (6) SA 419 (CC);par.44.

⁵⁶³ 2012 (1) SA 536 (CC);par.76.

⁵⁶⁴ National Treasury 2005:reg.12.2.1(c).

⁵⁶⁵ Neethling *et al* 2015:393.

⁵⁶⁶ 68/1969:sec.11. Organs of state, especially officials involved with the day-to-day administration of civil claims must be mindful of prescription periods applicable to debt (s 11); when prescription starts to run (s 12); when prescription is regarded as interrupted (ss 14 and 15); when prescription is considered as delayed (s 13); and the importance of raising prescription as a defence.

⁵⁶⁷ 40/2002.

served on an organ of state within the time frame prescribed. Legal proceedings only commences once a court process is served as prescribed on the defendant(s) involved.⁵⁶⁸ It is common practice to site both the responsible minister of a department as a nominal defendant⁵⁶⁹ and an official involved as joint wrongdoers in legal proceedings. An organ of state is defined by this Act to include an official that renders the state liable for a debt, meaning that an official can also rely on compliance by a plaintiff concerning timeframes applicable to a prior notice of intended legal proceedings and service of a process of court.⁵⁷⁰ Special pleas based on a plaintiff's failure to serve such notice before the institution of legal proceedings and prescription of claims may leave a plaintiff remediless.⁵⁷¹

In *Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry(Pty) Ltd*,⁵⁷² the Constitutional Court confirmed the justification of debts that are subject to prescription, and creditors cannot apply to a court for a debt to revive again once it becomes prescribed. Failure by organs of state to raise a special plea regarding claims for compensation that prescribed becomes extremely important if organs of state consider exercising their statutory right of recourse against officials. If organs of state settle claims that have prescribed due to conducting the litigation process ineffectively, it may affect a right of recourse against officials involved. Such oversight may be detrimental to officials involved as defendants and need to be considered carefully when a liability determination is made in terms of Treasury Regulations 2005.⁵⁷³

⁵⁶⁸ 40/2002:secs.3, 4 and 5. The said sections relate to the requirements that must be adhered to with regard to a prior notice of an intention to institute legal proceedings and the service of such notice, including service of a process of court in terms of which legal proceedings commenced. (Section 5 of the said Act also refer to s 2 of the *State Liability Act*, 1957 that must be complied with as far as serving of a court process is concerned).

⁵⁶⁹ 20/1957:sec.2(1).

⁵⁷⁰ 40/2002:sec.1(1)(vii)(g). "Debt" in terms of section 1(1)(iii) of the Act also means "any debt arising from any cause of action which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any act performed under or in terms of any law; or omission to do anything which should have been done under or in terms of any law and for which an organ of state is liable for payment of damages..."

⁵⁷¹ 40/2002:sec.3(4). The section provides for a plaintiff to submit an application to a court to grant condonation for failure to serve the required notice within the timeframe prescribed, if an organ of state relies on such failure. A court may grant condonation only if the debt has not been extinguished by prescription, good cause exists for such failure and an organ of state suffered no unreasonable prejudice due to such failure.

⁵⁷² (2018) 39 ILJ 1213 (CC):paras.50-51 and 57.

⁵⁷³ National Treasury 2005:reg.12.2.1.

3.4.3.2 Loss or damage

As neither the *PFMA* nor the regulations issued in terms thereof define “loss or damage”, these words require interpretation also with the context of Treasury Regulation 12 in mind. The said Treasury Regulation applies to the management of losses and civil claims. Therefore, it is appropriate to first consider the ordinary grammatical meaning of these words before comparing it in the broader context involving delict.⁵⁷⁴

Some dictionaries describe “loss” to mean “the act or an instance of losing; the disadvantage or deprivation resulting from losing”⁵⁷⁵ or “the losing of something or someone; or a thing that is lost.”⁵⁷⁶ The word “damage” is defined to mean “injury or harm impairing the function or condition of a person or thing; loss of something desirable”⁵⁷⁷ or “physical harm that makes something less valuable or effective; harmful effects” on somebody or something.⁵⁷⁸

Neethling and Potgieter⁵⁷⁹ define damage within the context of delict as follows:

Damage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law.

The definition consists of both patrimonial and non-patrimonial loss, and the latter is referred to as injury to personality.⁵⁸⁰ Unlike patrimonial loss that can be measured objectively, such as the “repair cost” of a vehicle involved in a collision, assessing non-patrimonial loss like pain and suffering due to injuries sustained is based on equitable estimates.⁵⁸¹

Neethling and Potgieter⁵⁸² concede that the concept “damage” is not easily definable, and one should distinguish between “damage” and “damages” as the latter involves

⁵⁷⁴ *Bato Star* 2004 (4) SA 490 (CC):par.89.

⁵⁷⁵ Collins English Dictionary 2004:949.

⁵⁷⁶ Oxford Dictionary & Thesaurus 2009:550.

⁵⁷⁷ Collins English Dictionary 2004:399.

⁵⁷⁸ Oxford Dictionary & Thesaurus 2009:225.

⁵⁷⁹ 2020:256.

⁵⁸⁰ Neethling & Potgieter 2020:257. The authors also refer to different views of various legal scholars and provide convincing arguments why “damage” is viewed as a broader concept.

⁵⁸¹ Neethling & Potgieter 2020:260.

⁵⁸² 2020:256 and 280. Also see Potgieter, Steynberg & Floyd 2012:20-21 who also distinguish between the meaning of “damage” and “damages”.

compensation for damage suffered by a claimant. The ordinary meaning of the word “damages” is described to mean “money paid to compensate for a loss or injury.”⁵⁸³

The concept of “damage or loss” are used but seldom defined. The Treasury Regulations are no exception in this regard. However, before the commencement of Treasury Regulations 2000, the previous Treasury Instructions⁵⁸⁴ defined “losses” to mean

[Any] material loss or damages or prejudice to the State or a said person and, without derogating from or limiting the concept, also shortages, damages, fruitless or wasteful expenditure and compensations

The current Treasury Regulations are less prescriptive than the previous Treasury Instructions. Certain organs of state continue to rely on the repealed Treasury Instructions that are consistent with the Treasury Regulations to manage losses and civil claims. This approach assisted accounting officers who must have and maintain systems to manage all their responsibilities in terms of the *PFMA*.⁵⁸⁵ The said and other definitions, including previous prescriptions within the context of losses and civil claims, remain important as certain organs of state still rely on it as a guideline to define “losses.” Apart from the few examples of losses, the definition qualifies a loss or damage as “material” and therefore not trivial.⁵⁸⁶ Losses also involve any prejudice to the state or a said person as defined in Treasury Instruction 1999.⁵⁸⁷ The latter may submit a claim for consideration by the state if such a person suffered a loss or damage whilst performing official duties.⁵⁸⁸

The *PFMA* also refers to “material” losses due to criminal conduct and requires accounting officers to include particulars of such losses in their annual reports and

⁵⁸³ Oxford Dictionary & Thesaurus 2009:225.

⁵⁸⁴ Department of State Expenditure 1999:W1.1(v); Also see Botha 2015:106. Mindful of the complexities surrounding the management and accounting of public funds and context of *the Act* and Treasury Regulations, the author of this dissertation developed a definition of “losses” to mean, “Any prejudice, with a monetary value, to the state that may arise from any delict or contractual liability or any other liability or damage-causing event resulting in the loss or reduction in the value of state assets, or creating or increasing a financial obligation for the state which loss must be accounted for in terms of the applicable legislation.”

⁵⁸⁵ 1/1999:Chapter 5.

⁵⁸⁶ See *Arendse v Badroodien* 1971 (2) SA 16 (C) at 17F-18G. After accepting the ordinary meaning of “material damage”, the court applied it to mean damage which is “appreciable, important and of some consequence.”

⁵⁸⁷ Department of State Expenditure 1999:W1.1(ix).

⁵⁸⁸ National Treasury 2005:reg.12.4.

audited financial statements.⁵⁸⁹ As the monetary value of “material” losses is uncertain and in the absence of any guidelines from the National Treasury of what it involves, it appears that the policy of each department dictates what should be regarded as material losses for reporting purposes. Such policies are subject to audit by the Auditor-General to ensure that checks and balances exist to prevent an understatement of losses. The reference to any “material loss or damage” does not exclude the responsibility of an accounting officer to account for all losses suffered by the state. The accumulated effect of minor losses may also be harmful to the state. However, individual incidents involving minor losses may not be economical to recover and may justify decisions to proceed with write-offs in terms of departmental policies involved.⁵⁹⁰

3.4.3.3 Liability determination: A two-stage approach

The word “provided” referred to in the provisional clause of Treasury Regulation 2005 intends to state as a condition something that must be met.⁵⁹¹ An institution⁵⁹² must accept liability for civil claims against the state as a result of an act or omission by an official and will not recover any compensation from an official involved, subject to certain conditions. A decision whether or not an official forfeits this cover involves a liability determination that consists of a two-stage approach.

Firstly, a decision is required whether or not an official is liable in law concerning the said act or omission. At first, it seems odd to think that such a decision is required once the state pays a compensation claim. In the vast majority of matters and based on own experience, this question is answered with reference to why the state could not deny liability for a claim involved or had to concede the merits resulting in a settlement out of court in favour of the plaintiff. A court judgment and ruling against the state will also indicate why an official is liable in law for a claim for compensation. Based on the principles of vicarious liability as discussed and unless the official involved can offer a valid defence to enable an organ of state to deny liability for a claim, it is unlikely that an organ of state will be able to defend a claim successfully.

⁵⁸⁹ 1/1999:secs.40(3)(b)(i) and 55(2)(b)(i).

⁵⁹⁰ National Treasury 2005:reg.11.4.

⁵⁹¹ Collins English Dictionary 2004:1305.

⁵⁹² 1/1999:sec.3(1). Institutions include state departments, public entities, constitutional institutions and provincial. Legislatures.

As the same criteria apply to state cover applicable to a loss or damage other than those arising from a claim against the state, a proper investigation to obtain all the relevant facts about a loss or damage is required before a liability determination can be made.⁵⁹³ If an official is not liable in law, no need exists to move to the second stage of the liability determination. Consequently, the state will bear the risk in such cases, and all expenditure must be accounted for against state funds. Once it is determined that an official is liable in law for an act or omission giving rise to the claim against the state, it activates the next stage of the approach. The word “and” that directly follows the words “liable in law” in the introductory sentence referred to indicates that something else apart from being liable in law is required before one can conclude that an official forfeits state cover.

Secondly, and only if decided that an official is liable in law, a decision is required to determine whether an official acted as described in sub-paragraphs (a) to (g) of Treasury Regulation 12.2.1 applicable to the facts under consideration. Any failure by a functionary assigned with liability determinations to thoroughly apply his or her mind in this regard may deprive an organ of state to exercise a right of recourse against an official concerned. If an official acted as described in any of the criteria involved and therefore forfeits state cover, steps to recover all expenditure involved from the official must be initiated.⁵⁹⁴ The criteria for state cover provide for different causes of action, meaning that certain criteria may not apply to a specific incident. The Treasury Regulations combined different categories of criteria for state cover that existed before the commencement of Treasury Regulation 2000. This observation will be pursued during the analysis of each criterion for state cover.

Compared to the previous Treasury Instructions and other directives applicable to state cover as discussed as part of a historical overview, the Treasury Regulations laid at rest the question of who should finally decide whether or not an official forfeited state cover. Only if in doubt, an accounting officer must consult with the State Attorney regarding questions of law concerning the application of the provisions involving state cover.⁵⁹⁵ In practice, all claims against the state that become litigious will be referred

⁵⁹³ See National Treasury 2005:reg.12.7.1. It relates to “Losses or damages through acts committed or omitted by officials.”

⁵⁹⁴ National Treasury 2005:reg.12.2.3.

⁵⁹⁵ National Treasury 2005:reg.12.2.2. Similar arrangements is provided for in the Treasury Regulations since 1 June 2000 when the first Treasury Regulations took effect.

to the State Attorney for further handling in terms of the *State Attorney Amendment Act*.⁵⁹⁶ All settlements of claims are subject to approval by the accounting officer.⁵⁹⁷ Once a claim is settled and paid due to an out of court settlement or final court order, it becomes common practice for the State Attorney to provide an opinion concerning the forfeiture or not of state cover. However, the final decision remains with the accounting officer or the delegated functionary.⁵⁹⁸

Decisions about liability determinations involve administrative action defined in the *Promotion of Administrative Justice Act (PAJA)*.⁵⁹⁹ All decisions involving the forfeiture or not of state cover by officials should therefore comply with the requirements for just administrative action and, in particular, reasonableness and rationality as discussed in the previous chapter.⁶⁰⁰ Furthermore, before any decision involving a liability determination, an opportunity must be created by an organ of state for an official involved to be heard by allowing the official to submit reasons why he or she is not liable in law and/or did not act as described in terms of any of the relevant subparagraphs of Treasury Regulation 12.2.1. Such opportunity relates to procedural fairness as expressed in the maxim *audi alteram partem*.⁶⁰¹ In *Janse van Rensburg and Another v Minister of Trade and Industry and Another*,⁶⁰² the Constitutional Court confirms the importance of procedural fairness. It allows the administrative functionary to obtain all the relevant facts and maintain an open mind before making a decision. If an opportunity to be heard is created after a decision has been made, the purpose of procedural fairness is defeated. It will then have the effect that an official should use the opportunity to indicate why the decision is wrong, leaving the administrative functionary with a closed mind and in a position to defend his or her decision.

⁵⁹⁶ 13/2014:sec.3.

⁵⁹⁷ National Treasury 2005:reg.12.2.4.

⁵⁹⁸ 1/1999:sec.44. This provision allows an accounting officer to delegate powers assigned to him or her in terms of the Act. Decisions concerning the settlement or defending of a civil claim is normally delegated to legal officials within a Department.

⁵⁹⁹ 3/2002:sec.1. Also see Constitution 1996:sec.33. Administrative action must be lawful, reasonable, procedurally fair and reasons for decisions must be provided in writing to those whose rights are affected by decisions made.

⁶⁰⁰ See pars 2.7.1 and 2.7.2 of chapter 2.

⁶⁰¹ Hoexter 2012:363. Also see 3/2002 s 3 concerning detailed requirements for procedural fairness in this regard.

⁶⁰² 2001 (1) SA 29 (CC):par.24.

Unlike the repealed Exchequer Act⁶⁰³ that provided for an official to approach the accounting officer, or the Minister responsible for the Department concerned, or a court of law for relief concerning the outcome of a liability determination, neither the *PFMA* nor the Treasury Regulations provide for similar procedures. However, current legislation makes provision for a remedy to approach a court of law to revise state cover decisions.⁶⁰⁴ As with the day-to-day administration and management of losses and civil claims, accounting officers may consider policies relating to internal remedies available for officials to lodge representations concerning liability determinations.

3.4.3.4 Statutory right of recourse

the two-stage approach discussed, it is clear that Treasury Regulations 2005 intend to provide organs of state as employers with a statutory right of recourse against officials who rendered the state liable for civil claims and other damage-causing events. Such a right of recourse is subject to the conditions prescribed in Treasury Regulations 2005. Officials assigned with the responsibility of liability determinations should also embrace the aim of the *PFMA* to secure accountability. The common law also provides a right of recourse available to employers who are vicariously liable for wrongs committed by employees.⁶⁰⁵

3.4.3.5 Liable in law

The *Institution of Legal Proceedings against certain Organs of State Act*⁶⁰⁶ refers to debt as any cause of action that may render an organ of state liable for damages relating to a delict, contract, or any other liability arising from an act performed or omission to perform something as prescribed in terms of any law. Civil claims instituted against the state for compensation based on a delict involves three recognised actions available to claimants to exercise a remedy for wrongs committed by officials during the execution of their duties. These actions are referred to as (1) an action for patrimonial damage (the *actio Legis Aquiliae*), (2) an action for injury to personality (the *actio iniuriarum*) and (3) an action for pain and suffering due to bodily injuries, bodily disfigurement, emotional shock, loss of life expectancy and amenities

⁶⁰³ 66/1975:secs.34(5),(6) and (7).

⁶⁰⁴ 3/2000:sec.6.

⁶⁰⁵ Neethling, Potgieter & Visser 2015:393. Also see *Botes v Van Deventer* 1966 (3) SA 182 (A) at 205G-251A.

⁶⁰⁶ 40/2002:sec.1(1)(iii).

of life and health.⁶⁰⁷ A delict involves a wrongful culpable act that causes harm to another, thus involving five elements, namely an act, wrongfulness, fault, causation and damage.⁶⁰⁸ Fault, involving either intentional or negligent behaviour, applies to both an action for patrimonial damage and action for pain and suffering. Except for strict liability that does not require fault, all these elements must be satisfied to render the wrongdoer liable in law for a delict. An *iniuria* involves wrongful and intentional (not negligent) harm to a person's physical integrity, good name and dignity.

Unless all the elements of a delict are satisfied, keeping in mind principles applicable to strict liability and variation for certain actions regarding a fault that applies, no delict or liability is involved. Although the concepts of a delict and breach of contract are not materially different it should not be viewed as identical.⁶⁰⁹ The form of wrongful conduct applicable to breach of contract and remedies available differs substantially compared with a delict.⁶¹⁰ As part of the law of contract, breach of contract occurs if any of the contractual parties do not comply with the terms of the contract as agreed upon or fail to comply with an obligation to perform. The remedy for breach of contract is primarily aimed at enforcing contractual obligations and a claim for damages, unlike a delict, is secondary in nature.⁶¹¹ A decision to determine whether or not an official is liable in law for an act or omission regarding compensation payments needs to be mindful of all the requirements that must be met concerning the different actions and remedies available. In addition to determining that an official is liable in law, each criterion for state cover applicable to the facts under consideration must be considered individually to determine whether or not an official is entitled to state cover.

3.4.4 Consideration of criteria for state cover

The second stage of a liability determination involves careful consideration of each criterion listed in Treasury Regulation 2005. Each criterion needs to be interpreted with the requirement of being liable in law in mind. The criteria for state cover will be listed and analysed to determine its meaning, scope and application within the context of the legal framework discussed above. The criteria are considered within the context

⁶⁰⁷ Neethling & Potgieter 2020:9, 13 and 16; Van der Walt & Midgley 216:1 and 77.

⁶⁰⁸ Neethling & Potgieter 2020:4; Boule, Harris & Hoexter 1989: 182-187; Burns *et al* 2006: 430-435.

⁶⁰⁹ Neethling & Potgieter 2020:6-7.

⁶¹⁰ Neethling & Potgieter 2020:7.

⁶¹¹ Neethling & Potgieter 2015:7; Van der Walt & Midgley 2016:5.

of Treasury Regulation 2005 that relates to an act or omission of an official causing a loss or damage resulting in a claim for compensation against the state. From each criterion for state cover, one can derive the nature of unacceptable behaviour, describing conduct contrary to the norm set for public officials. To keep the context in mind, each criterion must be read together with the introductory words and provisional clause preceding the criteria for state cover as discussed.

3.4.4.1 Exceeding of powers

The first criterion involves an official who-

[]Intentionally exceeded his or her powers.⁶¹²

This criterion does not appear in both Treasury Regulations 2000 and 2001. The first criterion of state cover listed in these regulations involve liability by the state for a claim regarding a loss or damage that may be accepted provided that the loss, damage or reason of a claim was caused by an act or omission of an official. This requirement is now included in the provisional clause preceding the criteria for state cover that relate to causation, as discussed, which is one of the elements of a delict and a requirement for being “liable in law.”⁶¹³ The previous Treasury Instructions linked the exceeding of powers with behaviour motivated by *mala fide* or bad faith.

The current criterion involves exercising powers assigned to an official who exceeded those powers and did so intentionally. The nature of public powers and public functions assigned to officials in legislation is vast and diverse. Legislation such as the *Criminal Procedure Act*,⁶¹⁴ for example, empowers police officials to conduct seizures and searches, perform arrests and use reasonable force when necessary to effect an arrest to overcome any resistance by a person suspected of committing a crime. These powers are subject to conditions to ensure lawful administrative action. Organs of state, including officials assigned with the procurement of goods and services, are involved with various decisions in terms of preferential procurement legislation that may adversely affect the rights of suppliers and bidders who partake in the procurement process. If procurement procedures and principles concerning invitations

⁶¹² National Treasury 2005:reg.12.2.1(a).

⁶¹³ Neethling & Potgieter 2020:215; Van der Walt & Midgley 2016:274 and 275.

⁶¹⁴ 51/1977:secs.20, 23, 24,38, 40 and 49.

to submit bids, the evaluation of bids received and adjudication of such bids in terms of such legislation are ignored or not complied with, or officials acted beyond the scope of assigned powers to adjudicate bids, the bid process and procedures followed may be irregular or invalid.⁶¹⁵

Decisions made by officials assigned with such powers and functions that adversely affect any person's rights constitute administrative action.⁶¹⁶ Administrative action is subject to judicial review by a court or a tribunal that may, in exceptional cases, consider an award for compensation to the person adversely affected by such action.⁶¹⁷ The observation by Hoexter that it may be more beneficial for a complainant to consider action based on contract or delict to recover the financial loss suffered rather than to proceed with judicial review proceedings in terms of *PAJA* is supported.⁶¹⁸ The *PAJA* is designed to set aside unlawful administrative action and only provides compensation orders in exceptional cases. The particular criterion for state cover concerned involves the exceeding of powers causing claims for compensation instituted against an organ of state.

The exercise of any public power or function by officials will be unlawful and therefore without lawful authority unless it is duly authorised by law and in compliance with the empowering legislation.⁶¹⁹ These important principles, including the common-law principle of *ultra vires*, which also relate to the legality requirement, are confirmed by the Constitutional Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*.⁶²⁰ Although officials may be duly authorised to exercise public powers, such powers are exceeded if they go beyond the powers assigned to officials or constitute a contravention of the powers concerned.⁶²¹ Legislation that empowers certain functionaries with powers that impact severely on the rights of others, such as police officers as referred to, also provides

⁶¹⁵ 1996:sec.217(1). Procurement of goods and services, according to the *Constitution*, must be fair, equitable, transparent, competitive and cost-effective. Also known as the five pillars of public procurement; See 1/1999:secs.76(4)(c) and 38(1)(a)(iii) that also echoed these principles; Other legislation, such as the *Preferential Procurement Policy Framework Act, 5/2000* and *Preferential Procurement Regulations, 2017* issued in terms thereof and the *Broad-Based Black Economic Empowerment Act, 53/2003* also apply.

⁶¹⁶ See 3/2002: s 3 for a more comprehensive definition of "administrative action."

⁶¹⁷ 3/2002:secs.6(1) and 8(1)(c)(ii)(b).

⁶¹⁸ Hoexter 2012:520 and 570.

⁶¹⁹ Hoexter 2012:255.

⁶²⁰ 1999 (1) SA 374 (CC):paras.58-59.

⁶²¹ Hoexter 2012:258.

the conditions in terms of which such powers need to be exercised. The exceeding of powers within the said context is also reviewable in terms of the *PAJA*.⁶²²

A decision by delegated functionaries to determine whether or not the exceeding of powers is relevant involves careful consideration of the facts involved, the empowering legislation in terms of which powers were exercised, any powers delegated to an official by the accounting officer in terms of the *PFMA* and conditions that applied in terms of such delegations.⁶²³ An accounting officer may, in writing, delegate any power or instruction delegated to him or her in terms of the *PFMA* to an official within the department. Such delegation or instruction is subject to any limitation and condition imposed by the relevant treasury and accounting officer. It may be delegated to a specific official or holder of a specified post.⁶²⁴ Apart from the delegation in writing, these limitations and conditions may include reference to regulations, instructions, practice notes, standing operational procedures and policy documentation that must be complied with. In general, delegations may involve making decisions on behalf of the accounting officer and granting approval for expenditures not exceeding certain amounts. These aspects and conditions need to be carefully considered during a liability determination to confirm whether or not powers are indeed exceeded.

An official will forfeit state cover if powers are exceeded intentionally. Fault in the form of intent (*dolus*) and not negligence (*culpa*) is required. Intent is defined as follows⁶²⁵

An accountable person acts intentionally if his will is directed at a result which he causes while conscious of the wrongfulness of his conduct.

Before considering whether or not a person acted with intent, it is essential to determine whether or not he can be held accountable for his actions, thus having the mental ability to appreciate the difference between right and wrong and act according to such differentiation.⁶²⁶ The law acknowledges that certain factors such as youth, mental diseases or illness, being under the influence of intoxicating liquor or drugs, and provocation may impact the requirement for being accountable.⁶²⁷ Furthermore,

⁶²² 3/2002:secs.6(2)(a)(i) and 6(2)(f)(i).

⁶²³ 1/1999:sec.44.

⁶²⁴ 1/1999:secs.44(2)(a) and (c).

⁶²⁵ Neethling and Potgieter 2020:159; Van der Walt and Midgley 2016:227.

⁶²⁶ Neethling and Potgieter 2020:157; Van der Walt and Midgley 2016:226.

⁶²⁷ Neethling and Potgieter 2020:158-159; Van der Walt and Midgley 2016:227.

a person acting with intent must be conscious of his wrongful conduct knowing that the conduct is contrary to the law and will infringe on the rights of others.⁶²⁸

It is questionable why the criterion for state cover limits the exceeding of powers to intentional behaviour only. The exceeding of powers intentionally or negligently produces an identical outcome, namely to act beyond the scope of one's authority or in contravention of powers assigned in terms of empowering legislation or delegated powers. This observation will be embarked upon in Chapter 5 as a possible gap in the criterion concerned.

3.4.4.2 Alcohol or drug-related incidents

The second criterion applies to an official who-

[M]ade use of alcohol or drugs.⁶²⁹

The previous versions of the new Treasury Regulations consist of a similar criterion. Unlike previous Treasury Instructions relating to a similar criterion as discussed, the current criterion applicable to the use of alcohol or drugs is unqualified as no qualification regarding the use, effect, or consequences of alcohol or drugs are provided. The previous Treasury Instructions required the excessive use or use in sufficient quantities of alcohol or drugs for which sufficient or adequate proof is required which may have resulted, created or contributed to liability. The state could be liable for a claim based on the merits of a particular case for reasons that may not directly relate to an official who used alcohol or drugs. A possibility, therefore, could arise that the use of alcohol or drugs did not result, create or contribute to liability for the state, especially if the maxim *de minimis non curat lex* applies regarding the quantity of alcohol or drugs used.

The previous Treasury Instructions and the PSSC that apply to the use of a state vehicle whilst under the influence of alcohol or drugs with a narcotic effect also required that such use should have resulted in or contributed to liability. These instructions intend to establish a causal link between the liability of an official for the damages concerned and the driving of a state vehicle by an official as prescribed. This requirement could be added *ex abundanti cautela* to ensure that an official needs to

⁶²⁸ Neethling and Potgieter 2020:162.

⁶²⁹ National Treasury 2005:reg.12.2.1(b).

be “liable in law” for the damages concerned. For an official to be liable in law based on a delict, all requirements of a delict of which causation is one should be met. The possibility exists that an official drove a vehicle whilst under the influence of alcohol as prescribed but did not cause or contribute to the cause of the accident involved.⁶³⁰ These previous prescripts referred to the legislation concerning the prohibition of driving a vehicle whilst the percentage of alcohol in blood exceeds prescribed limits. A guilty verdict by a court for driving a vehicle under such circumstances was required by the Transport Circular concerned. Without a verdict of guilt, state cover was not forfeited in terms of this criterion. However, such a requirement was not applicable in the Treasury Instructions, and the PSSC referred to. Therefore, an official may still forfeit state cover even if he/she is found not guilty, as sufficient evidence may still exist to prove on a balance of probabilities that an official was under the influence of liquor or drugs with a narcotic effect that resulted in or contributed to liability.

3.4.4.3 Action outside course and scope of employment

The third criterion for state cover involves an official who-

[D]id not act in the course and scope of his or her employment.⁶³¹

A similar criterion was prescribed by the previous Treasury Instructions, including Treasury Regulations 2000, but Treasury Regulations 2001, in addition, required that an official may not act recklessly, willfully or maliciously.⁶³² This criterion relates to the basic principles applicable to vicarious liability that renders an employer liable for the wrongs committed by an employee when acting in the course and scope of his employment to further the business or interest of his master.⁶³³ An employer will be vicariously liable for such wrongs if committed while an employer-employee relationship exists, when a delict by the employer is committed and if the employer acted in the course and scope of his employment.⁶³⁴ The latter requirement refers to this criterion for state cover and the standard test to determine whether or not an employee acted in the course and scope of his employment, which the court confirms

⁶³⁰ For example when a driver of a private vehicle collided with the rear of a non-moving state vehicle at an intersection controlled by traffic lights while the driver of the state vehicle waited for the traffic light to turn in his or her favour.

⁶³¹ National Treasury 2005:reg.12.2.1(c).

⁶³² National Treasury 2001:reg.12.2.1(c).

⁶³³ Van der Walt and Midgley 2016:53.

⁶³⁴ Neethling & Potgieter 2020:445-447.

in *Minister of Police v Rabie*.⁶³⁵ Firstly the court determined whether the employee intended to act solely for his own interest and purpose or for that of his master by considering the employee's intentions, which involves a subjective test. Secondly, if the employee acted outside the scope of his employment, the employer may still be liable if a sufficiently close link between the employee's actions for his ends and the purpose and business of his master exists, which involves an objective test.

When an employee commits wrongs while acting outside the scope of his employment, also referred to as the “deviation cases”, it requires careful consideration whether or not it will render the employer vicariously liable. An official who acts outside the course and scope of his duties or committed an intentional wrong⁶³⁶ may also render the state liable. In such a case, the outcome of the first enquiry of the standard test will not render an employer liable, especially if an intentional wrong to further personal interests is committed. These cases and subject matters concerning vicarious liability attracted the attention of various writers.⁶³⁷ Rulings of the Constitutional Court in this regard requires consideration.

The Constitutional Court in *K v Minister of Safety and Security*⁶³⁸ ruled that the Minister of Safety and Security is vicariously liable for wrongs committed by three uniformed police officers who, whilst on duty, raped the plaintiff after offering her a lift home. The court confirmed and developed the second enquiry of the standard test to involve both questions of fact and law with due observance to normative considerations to ensure that it conforms to constitutional norms and values.⁶³⁹ The court confirms a close connection between the police officer's conduct and business of the South African Police Service as their employer, based on the constitutional obligations of the state to protect the public; the trust of the public in the police to fulfil their obligations to protect vulnerable women and children; and the conduct of the police officers who

⁶³⁵ 1986 (1) SA 117 (A) at 134 C-E; Also see *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 832 C-D and 833 (G-H) that confirmed the standard test to be applied to determine vicarious liability.

⁶³⁶ *Minister of Safety and Security v Booysen* (35/2016) 2016 ZASCA 201 (9 December 2016); *Minister of Safety and Security v Morudu* (1084/13) 2015 ZASCA 91 (29 May 2015); *Booyesen v Minister of Safety and Security* 2018 (6) SA 1 (CC).

⁶³⁷ See for example: Boonzaier 2013:330-368; Fagan 2018:18-54; Price 2015:313-335; Roederer. 2005:575-606; Scott 2013:348-361; Scott 2019:150-167 and Wessels 2018:868-882.

⁶³⁸ 2005 (6) SA 419 (CC):par 57; Also see Van der Walt & Midgley 2016:55 for a discussion of this and similar cases.

⁶³⁹ 2005 (6) SA 419 (CC):paras.22-23 and 32.

committed rape and omitted to render the plaintiff the protection that she deserves while they were on duty.⁶⁴⁰

The Constitutional Court applied similar principles in *F v Minister of Safety and Security and Others*⁶⁴¹ (*F case*) in a matter that involves a police officer dressed in uniform and on standby duties who was driving an unmarked police vehicle after visiting a nightclub where the plaintiff accepted a lift offered. On the way to her home, the police officer created an opportunity to assault and rape her.⁶⁴² Similar to the previous case and after applying the outcome of the first enquiry of the standard test, the court found that the police officer did act and pursue his interest when committing the crimes, thus not rendering the Minister of Police vicariously liable.⁶⁴³ The court continued to determine whether a connection existed between the wrong committed by the policeman and his employment to render his employer liable. The court also applied the normative principles concerning the state's constitutional obligations to protect women and children and the trust that members of the public may have in police officers appointed by the state to protect them. A breach of such trust may establish a link between a police officer and his employment and the delict committed.⁶⁴⁴ The court confirmed further connections between the employment and the wrong committed by the police officer. He was issued with a police vehicle that enabled him to commit the rape whilst on standby duties. The plaintiff also concluded that she was in the company of a police officer when she saw case dockets and a police radio as she entered the police vehicle.⁶⁴⁵

In a more recent judgment, the court in *Stallion Security (Pty) Ltd v Van Staden*⁶⁴⁶ (*Stallion Security case*) affirmed the finding of the court *a quo*, namely that a legal duty may originate from a contract of employment and not necessarily from the *Constitution* to determine whether a sufficiently close link exists between the business of the master and the conduct of the employee to render the master vicariously liable. The court also accepted risk-creation not for policy consideration purposes only but also

⁶⁴⁰ 2005 (6) SA 419 (CC):paras.51-53.

⁶⁴¹ 2012 (1) SA 536 (CC):paras.1 and 9.

⁶⁴² 2012 (1) SA 536 (CC):par.14.

⁶⁴³ 2012 (1) SA 536 (CC):par.51.

⁶⁴⁴ 2012 (1) SA 536 (CC):paras.57 and 64.

⁶⁴⁵ 2012 (1) SA 536 (CC):par.81.

⁶⁴⁶ 2020 (1) SA 64 (SCA):par.13.

as a factor to be considered and applied when determining whether or not such a sufficiently close link exists.⁶⁴⁷

These cases confirmed that the second enquiry of the standard test for vicarious liability as applied in deviation cases only, namely whether an employee acted within the course and scope of employment, no longer applies. The Constitutional Court⁶⁴⁸ confirmed that the focus is now whether-

[The] connection between the conduct of the policemen and their employment was sufficiently close to render the respondent [employer] liable.

The said focus is followed where it is clear, according to the first enquiry of the standard test, that the employee concerned did not further the purpose or business of his master and therefore not rendering his master vicariously liable.⁶⁴⁹ The standard test to determine whether or not an official acted within the course and scope of his employment still applies where no deviation from official duties occurs. In most matters, the standard test will not pose major difficulties to apply where an employee acted solely or partially to further the purpose and business of his master.⁶⁵⁰ In practice, this inquiry is conducted by organs of state after receiving a notice from a claimant of an intention to institute legal proceedings against the state and after obtaining the evidence to consider the merits of a particular claim for compensation. Once confirmed that no deviation of duties occurred, no special plea will be filed to dispute issues concerning vicarious liability. The claim will be defended based on the merits of a particular claim or settled in the absence of a legally valid defence. It is thus unlikely that an organ of state will continue with a compensation payment without accepting that it is vicariously liable. Therefore, a determination about state cover involving this criterion is answered long before a claim for compensation is paid.

Concerning all deviation cases where the first enquiry of the standard test is not met, meaning that an official acted solely in pursuance of his interests and did not further the purpose and business of his master, the possibility that an official will forfeit his or her cover in terms of this criterion, is almost certain. Functionaries assigned with the

⁶⁴⁷ *Stallion Security case 2020 (1) SA 64 (SCA):paras.27 and 32.*

⁶⁴⁸ *F case 2012 (1) SA 536 (CC):par.76.*

⁶⁴⁹ *2012 (1) SA 536 (CC):par.51.*

⁶⁵⁰ *Stallion Security case 2020 1 SA 64 SCA:par.15.*

powers to conduct liability determinations must be fully conversant with the principles applicable to vicarious liability to display due diligence when applying their minds.

3.4.4.4 Reckless or intentional actions

The fourth criterion for state cover involves an official who-

[A]cted recklessly or intentionally.⁶⁵¹

Treasury Regulations 2000 does not provide for a similar criterion. However, Treasury Regulation 2001 combined this criterion with the former criterion. The previous Treasury Instructions included a similar criterion applicable to civil claims against the state only. Similar to the criterion for state cover that involves the intentional exceeding of one's powers as discussed above, this criterion also refers to an official who acted intentionally. However, a clear distinction should be made between conduct described as "recklessly" and "intentionally" to ensure consistency with decision-making when applying this criterion applicable to state cover. The remarks made about the meaning of intentional conduct during the discussion involving the intentional exceeding of one's power also applies to this criterion and will not be repeated.

According to the *Oxford Dictionary and Thesaurus*,⁶⁵² the ordinary or grammatical meaning of the word "reckless" is described as conduct, "without thought or care for the results of an action". Synonyms for this word are provided to include words such as "rash, careless, thoughtless, heedless, precipitate, impetuous, impulsive, irresponsible, foolhardy." The *Collins English Dictionary*⁶⁵³ describe "reckless" conduct as "having or showing no regard for danger or consequences." The word "recklessly" and "recklessness" as an adverb and noun respectively, has a corresponding meaning.

In *S v Van Zyl (Van Zyl case)*,⁶⁵⁴ the court, within the context of reckless driving, considered similar words describing the meaning of "reckless" regarding its grammatical meaning. The court distinguishes between the more restricted and ordinary meaning of reckless driving. The former, subjectively viewed, involves a driver who foresees, or is conscious of danger or possible danger that he might create

⁶⁵¹ National Treasury 2005:reg.12.2.1(d).

⁶⁵² Oxford Dictionary & Thesaurus 2009:768.

⁶⁵³ Collins English Dictionary 2004:1355.

⁶⁵⁴ 1969 (1) SA 553 (A) at 558 A-D; Also see Neethling & Potgieter 2020:168 who referred to the same court judgment in their discussion to distinguish between ordinary and gross negligence.

through his way of driving and recklessly accepts and continues to drive in such a manner bringing about such consequences. Such a way of driving even exceeds the borders of gross negligence in its most serious form and constitutes *dolus eventualis*.⁶⁵⁵ If such driving and foreseeable danger resulted in someone else's death, the driver might be found guilty of murder instead of culpable homicide.⁶⁵⁶ The court also explained that if a driver foresees the possibility of danger but unreasonably reckons that he can avoid that or that the danger may not bear any consequences, his action may constitute negligence or gross negligence depending on the circumstances of each particular case.⁶⁵⁷

Neethling and Potgieter⁶⁵⁸ cautioned against using the word “reckless” within this context as recklessness may refer to a serious degree of negligence, such as “gross negligence”, which may lead to confusion between these concepts. Whereas *dolus eventualis* involves someone who subjectively foresees the consequences of his action and nevertheless proceeds with his actions, negligence is involved when someone, objectively viewed, reasonably foresees the consequences of his actions and fails to take reasonable steps to guard against that.⁶⁵⁹

The court continues to consider the ordinary meaning of “recklessly” that may include action characterised by being indifferent, careless, inconsiderate or inattentive, of which consciousness about possible consequences is not a requirement.⁶⁶⁰ The ordinary meaning of “recklessly”, regarding the restricted meaning thereof, may be interpreted to include reckless conduct that also covers gross negligence in respect of which conscious negligence, without indifference about the consequences of one’s behaviour, may or may not be a component.⁶⁶¹ The court remarked that the ordinary meaning of “recklessly” should not be restricted to include conscious negligence accompanied by an indifference concerning the consequences of one’s conduct, which involves *dolus eventualis*. Thus, depending on the evidence involved, reckless

⁶⁵⁵ 1969 (1) SA 553 (A) at 557A-C; Also see Neethling & Potgieter 2020:161.

⁶⁵⁶ 1969 (1) SA 553 (A) at 557B-C.

⁶⁵⁷ 1969 (1) SA 553 (A) at 557C-D.

⁶⁵⁸ 2020:161.

⁶⁵⁹ Neethling & Potgieter 2020:166.

⁶⁶⁰ *Van Zyl* case 1969 (1) SA 553 (A) at 558D-F.

⁶⁶¹ *Van Zyl* case 1969 (1) SA 553 (A) at 559 D-G.

conduct that amounts to conscious negligence may either involve “gross negligence” or *dolus eventualis*, depending on whether or not such indifference is evident.

Uncertainty may exist whether or not the word “recklessly” concerning this criterion should be interpreted to include an action that involves *dolus eventualis* and gross negligence because of possible confusion regarding the use of well-established legal concepts referred to. However, as intentional action consists of three well-known forms of which *dolus eventualis* is but one, reference to reckless action that consists of *dolus eventualis*, as discussed, is covered by the criterion for state cover concerned regarding an official who acted “intentionally.” Furthermore, as the word “recklessly” is not defined in the Treasury Regulations to have a restricted or particular meaning, the ordinary meaning of the word that includes gross negligence should apply.

Ordinary “negligence” is not added to “recklessly or intentionally” as an additional criterion for state cover. However, it is relevant to determine whether or not an official is “liable in law”. To avoid any possible confusion, it may be viable to apply this criterion for state cover to add “gross negligence” as unacceptable conduct that may result in the forfeiture of state cover. This observation will be discussed in Chapter 5.

3.4.4.5 Admissions

The fifth criterion for state cover involves an official who-

[W]ithout prior consultation with the State Attorney, made an admission that was detrimental to the state.⁶⁶²

It appears that the said criterion is generic in nature and apply to all losses and damages suffered by or claims against the state irrespective of the cause of action. Both Treasury Regulations 2000 and Treasury Regulation 2001 refer to the same criterion but limit its scope to apply only with regard to a loss, damage or a claim relating to the use of a state vehicle.⁶⁶³ The current Treasury Regulations intends to rectify this deficiency by adding this criterion as part of the criteria for state cover that applies to all losses and claims, irrespective of the cause of such losses and claims.⁶⁶⁴ The previous Treasury Instructions included a similar criterion applicable to civil claims

⁶⁶² National Treasury 2005:reg.12.2.1(e).

⁶⁶³ National Treasury 2000:reg.12.2.1(e)(vi); National Treasury 2001:reg.12.2.1(e)(vi).

⁶⁶⁴ See National Treasury 2002:reg.12.2.1(g) where this criterion is removed and now precedes the criteria for state cover applicable to the use of a state vehicle.

and the use of state vehicles only. It has been argued that the exclusion of this criterion by the former Treasury Instructions not to apply to general losses is legally sound.

This criterion involves an admission of liability by an official liable for a loss or damage suffered by another person who instituted a claim for compensation against the state. An admission of liability made by an official to the detriment of the state without involving the state attorney first may have serious implications for the state from a litigation and financial point of view. Although admissions of this nature are remote, it may happen at the scene where an incident, leading to a civil claim against the state, occurred or at any stage while legal proceedings instituted against the state are still pending. This criterion requires careful consideration and involves three requirements that must be met before confirmation that an official indeed forfeit state cover.

Firstly, it should be clear that the official concerned did not consult with the State Attorney before making any admission of liability to someone who will certainly rely upon such admission in support of a claim against the state. The need for prior consultation with the State Attorney is obvious. An official may not be aware that a valid defence may exist to defend a claim for compensation. Prior consultation may allow the State Attorney to confirm and assess the merits based on the official's version of events. Once legal proceedings commence,⁶⁶⁵ the State Attorney will act on behalf of the organ of state concerned, and an official may not withhold from the State Attorney any information about an admission made. This criterion may create an impression that an admission of liability may only be possible after an official consulted with the State Attorney. However, it is quite unlikely that an official will be advised to proceed with making such admission when the State Attorney already attends to the litigation on behalf of the state.

Secondly, the official made an admission of liability. Unlike informal admissions made out of court and which may assist a plaintiff to submit evidence in support of his claim, formal admissions are normally made in court when evidence is conceded,⁶⁶⁶ during exchanging of pleadings,⁶⁶⁷ or when admissions are made during cross-

⁶⁶⁵ 40/2002:sec.5. Legal proceedings commence once a process of court is served on the defendant(s) concerned.

⁶⁶⁶ *Satekge and SA Broadcasting Corporation Ltd* (2013) 34 ILJ 1335 (CCMA):par.35-38.

⁶⁶⁷ *South African Broadcasting Corporation v Pollecut* 1996 (1) SA 546 (A) at 554A-B.

examination.⁶⁶⁸ As any formal admission of liability will be dealt with by the State Attorney as part of the litigation process, in consultation with the organ of state concerned and after assessing all the evidence available, this criterion for state cover focuses on informal admissions. An admission of liability made by an official to a claimant or his legal representative, orally or in writing, may be used as evidence in support of the claim. It is regarded as immaterial if an official is unaware that an admission may be harmful to him.⁶⁶⁹ An admission made by the official is also of importance if included in a statement relating to an investigation of a criminal offence that has a bearing on the same incident. Such a statement may be subject to disclosure during the litigation process when the parties involved in the lawsuit exchange discovery affidavits to prepare for adjudication of the claim by the court concerned.

In *Zungu NO v Minister of Safety and Security*,⁶⁷⁰ the defendant denied that a police officer assaulted the plaintiff's minor son by shooting him. It transpired that the police officer made a statement under oath to another police officer confirming that he did fire shots at the plaintiff's son. The defendant disputed the statement's admissibility based on a lack of privity or identity of interest between the police officer involved and the defendant. The court allowed the statement as admissible evidence as the admission relates to an obligation that applies to the defendant and police officer involved. As such, the statement by an employee to a fellow employee is regarded as a statement made to the master himself.⁶⁷¹ The court also referred to unequivocal admissions made during cross-examination when counsel for the defendant confronted the plaintiff with facts that correspond with the police officer's initial statement under oath, which admissions serve as evidence against the defendant

⁶⁶⁸ *Zungu NO v Minister of Safety and Security* 2003 (4) SA 87 (D) at 93A-D. One should also distinguish between an express, tacit and spontaneous admission, including admissions derived from a person's conduct.

⁶⁶⁹ *Satekge and SA Broadcasting Corporation Ltd* (2013) 34 ILJ 1335 (CCMA):par.39.

⁶⁷⁰ 2003 (4) SA 87 (D) at 94C-J; Also see *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA):par.21 where uncertainty about the admissibility of admissions made by a third party, that involves vicarious admissions, is clarified by the court with reference to s 3(1)(c) of Law of Evidence Amendment Act 45 of 1988 that relates to hearsay evidence. The court found that s 3 of the said Act altered the common law rules applicable to hearsay evidence as far as admissibility is concerned and the rule concerning vicarious admissions is "supplemented by notions of relevance, weight and the interests of justice"; Also see Monteiro 2002:270-277 for a discussion of this judgement.

⁶⁷¹ 2003 (4) SA 87 (D) at 94H-J.

without any further proof needed.⁶⁷² The weight attached to such admissions is measured by a court only after all the evidence of the defendant is presented to the court.

Thirdly, the official made an admission that is detrimental to the state. The ordinary grammatical meaning of detrimental also includes “harmful” or “injurious.”⁶⁷³ Unless an admission of liability by an official is harmful or prejudicial to the state, an official may not forfeit state cover in terms of this criterion. As this criterion relate to compensation payments made by the state recoverable from an official, the harm or prejudicial effect of an admission, apart from other consequences, must also be indicated in monetary terms. This is possible by comparing the actual payment for compensation due to an admission of liability with an expected outcome in the absence of such admission. It is, therefore, possible that an admission of liability would not affect whatsoever the outcome of a compensation payment as it may be evident that the state, despite an admission made, would have no choice but to concede the merits.⁶⁷⁴ However, an admission of liability by an official can prevent the state from negotiating a more favourable settlement in the best interest of the state where the merits in a particular matter indicate that a plaintiff contributed to the cause of action concerned. In such matters, an apportionment of damages in terms of the *Apportionment of Damages Act*⁶⁷⁵ normally applies.

⁶⁷² 2003 (4) SA 87 (D) at 93A-D.

⁶⁷³ Collins English Dictionary 2004:432.

⁶⁷⁴ For example, where an official did not keep a proper lookout while driving a state vehicle and collided with a properly parked vehicle. Prior to the collision the official answered his cellphone that distracted his attention resulting in his failure to keep a proper lookout. It should be evident that the owner of the parked vehicle did not contribute to the cause of the collision and should succeed with his claim in full for damages suffered.

⁶⁷⁵ 34/1956:sec.1(a). For example, a collision occurred at an intersection controlled by 4-way stop signs. Both the driver of the state vehicle and private vehicle entered the intersection without reducing speed to stop at the traffic sign. The driver of the state vehicle made an admission that he was in a hurry, that his view was obscured by vehicles parked on both sides of the road and that he did not notice the private vehicle before it entered the intersection. Such admission could be detrimental to the state resulting in a settlement less favourable for the state, as evidence could exist proving that the driver of the private vehicle also contributed to the cause of the collision.

3.4.4.6 Non-compliance with or ignorance of standing instructions

The sixth criterion involves an official who-

[F]ailed to comply with or ignored standing instructions, of which he or she was aware of or could reasonably have been aware of, which led to the loss, damage or reason for the claim, excluding damage arising from the use of a state vehicle.⁶⁷⁶

Unlike Treasury Instructions 1956, all previous Treasury Instructions and former versions of the Treasury Regulations consist of a similar criterion. This criterion involves failure to comply with or ignorance of standing instructions which lead to a loss, damage or reason for a claim instituted against the state. However, like all previous versions of the Treasury Regulations and Treasury Instructions, this criterion is explicitly excluded from damage arising from the handling or use of a state vehicle. The reason for such exclusion will be dealt with during the discussion of the unique criteria for state cover applicable state vehicles.⁶⁷⁷

This criterion provides various scenarios concerning non-compliance or ignorance of standing instructions that require consideration. The word “standing” in relation to “instructions” refers to something that remains in force or use or the duration that something continues or exist.⁶⁷⁸ “Instructions” involve an order, teaching or education, or a piece of information on how something should be done.⁶⁷⁹ Viewed together, standing instructions refers to instructions that are not temporarily in nature. Standing instructions should not be equated with the commonly known sources of law referred to as legislation, the common law, indigenous law and case law.⁶⁸⁰ It is common practice for all organs of state to issue comprehensive standing instructions that cover all employees' core functions for compliance within their area of responsibility. It also includes instructions issued by the National Treasury in pursuance of the object referred to in the *PFMA* for compliance by all institutions to which the *PFMA* applies.⁶⁸¹

⁶⁷⁶ National Treasury 2005:reg.12.2.1(f).

⁶⁷⁷ National Treasury 2005:reg.12.2.1(g).

⁶⁷⁸ Oxford Dictionary & Thesaurus 2009:906.

⁶⁷⁹ Oxford Dictionary & Thesaurus 2009:486. The source also refers to synonyms that include words such as, instructions order, a directive, mandate, instructions directions, a handbook, manual or guide.

⁶⁸⁰ Botha 2012:3-4.

⁶⁸¹ 1/1999:secs.2-3, 76.

In *Kotze v Minister of Safety and Security*,⁶⁸² the court considered the lawfulness of police officers' conduct who shot the plaintiffs with reference to the *Criminal Procedure Act*⁶⁸³ and standing orders issued by the South African Police Service. As quoted extensively by the court, the standing orders provide instructions to police officers about the use of force, including lethal force, to perform an arrest. Apart from other findings, the court confirms that before the use of force, the police officers failed to make it clear to the plaintiffs that an attempt to arrest them was being made, causing their conduct to be wrongful.⁶⁸⁴ The said requirement is also dealt with in the standing order concerned. The importance of standing instructions within the said context is evident as it may serve as evidence of whether such instructions were complied with.

An official may forfeit cover in terms of this criterion if he failed or ignored to comply with standing instructions while being aware of such instructions. Unlike failure⁶⁸⁵ to comply with standing instruction, which may also include a failure to comply fully with instructions, ignorance involves a deliberate disregard of an instruction.⁶⁸⁶ In *Goldschagg v Minister van Polisie*⁶⁸⁷ the court considered the meaning of "failure" in different contexts, including failure following knowledge of particular facts.

The criterion also provides for non-compliance or ignorance of standing instructions of which an official "could reasonably have been aware of." This expected awareness may be determined objectively by having regard to all the circumstances involved and determining what a reasonable person would do to familiarise himself with instructions that apply to the intended action. In *S v De Blom*⁶⁸⁸ the court confirms, with reference to a presumption regarding statutory offences, that the legislature does not intend to punish an unlawful act without fault involved. Therefore, the slogan "ignorance of the law is no excuse" should not be approached from a strict liability perspective. However, the court also accepted the principle that one can reasonably expect a person to update himself with statutory requirements that apply if involved with a

⁶⁸² 2012 (1) SACR 396 (GSJ);paras.11-16, 26, 126.

⁶⁸³ 51/1977:sec.49(2).

⁶⁸⁴ 2012 (1) SACR 396 (GSJ);par.138.

⁶⁸⁵ See Oxford Dictionary &Thesaurus 2009:335. The word "fail" also means "be[ing] unable to meet the standards set; or not do something that you should have done."

⁶⁸⁶ Oxford Dictionary &Thesaurus 2009:459.

⁶⁸⁷ 1979 (3) SA 1284 (T) at 1298F. Such failure may also constitute misconduct in terms of a code of conduct if described in such terms.

⁶⁸⁸ 1977 (3) SA 513 (A):532B.

specific area of law.⁶⁸⁹ These principles, as confirmed by the court to the facts involved, are also applied by the Constitutional court in *Democratic Alliance v African National Congress and Another*.⁶⁹⁰ The same principles can be applied to standing instructions applicable to officials responsible for public functions and duties assigned to them.

Causation is required between a failure to comply with or ignore standing instructions and a loss, damage or a claim that arises from that. In the absence of causation, state cover cannot be forfeited in terms of this criterion. Unlike the criterion that involves the use of alcohol or drugs, this criterion is qualified with reference to causation. It is critically important for functionaries responsible for liability determinations to ensure that all standing instructions bearing on the loss, damage, or claim are provided. Even failure by officials to effect payment within 30 days following a settlement or a final court order may result in a writ of execution obtained by a plaintiff.⁶⁹¹ Such failure may lead to the payment of unnecessary interest and legal costs that may be recoverable from the officials responsible for non-compliance with standing instructions. Any deviation from or ignorance of standing instructions that may lead to the loss, damage or claim deserves careful consideration when applying this criterion for state cover to the evidence available.

3.4.4.7 Additional criteria applicable to state vehicles

All the criteria, as discussed, excluding the criterion involving failure to comply with or ignorance of standing instructions, also applies to the use of a state vehicle.⁶⁹² A possible reason for excluding the said criterion may relate to the fact that organs of state have comprehensive instructions concerning the use of state vehicles.⁶⁹³ It sensitises officials while driving a state vehicle about maintaining safe distances, avoiding speeding, keeping a proper lookout, obeying traffic signs, properly parking a vehicle, adjusting speed due to rainy, dusty or other conditions, to mention but a few examples. Should the criterion for state cover regarding non-compliance with or ignorance of standing instructions applied to the use of a state vehicle, non-

⁶⁸⁹ 1977 (3) SA 513 (A):531H - 532B.

⁶⁹⁰ 2015 (2) SA 232 (CC):par.130. Also see fn 130 of the judgement for sources acknowledged by the court.

⁶⁹¹ National Treasury 2005:reg.8.2.3.

⁶⁹² National Treasury 2005:reg.12.2.1(f).

⁶⁹³ See South African Police Service 2011:35.

compliance with instructions of a department regarding the use of a state vehicle according to the examples provided may leave officials basically without any cover. Owners of private vehicles may arrange for comprehensive insurance cover to indemnify themselves against risks of this nature. One may conclude that drivers of state vehicles should not be in a less favourable situation compared to drivers of private vehicles insofar it relates to comprehensive insurance cover available to them. Hence a reason why the state may be prepared to bear similar risks provided that all other conditions of state cover are met.

The word “or” following subparagraph (e) of the criteria for state cover as listed during the discussion above about the provisional clause preceding the criteria for state cover, indicates that each criterion for state cover applies in the alternative, meaning that if an official acted as described in accordance with any one of the criteria as listed, state cover is forfeited.⁶⁹⁴ However, an official can forfeit state cover in terms of more than one criterion concerned. Sub-paragraph (f) of the criterion regarding failure to comply or ignorance of standing instructions that excludes the use of a state vehicle is followed by the word “and” that indicates a continuation of additional criteria applicable to the use of a state vehicle. In *R v Standard Tea and Coffee Co and Another*,⁶⁹⁵ the court considers the use of the words “or/and” with reference to legislation and a rule that requires that legislation should not be interpreted, where possible, in a way that renders a clause, sentence or word to become redundant, void or insignificant.⁶⁹⁶

The previous versions of the new Treasury Regulations and previous Treasury Instructions consist of similar criteria applicable to using a state vehicle. An analysis of the following unique criteria for state cover applicable to the use of state vehicles will now be conducted. According to the words preceding the criteria for state cover as discussed, an official shall forfeit this cover if he or she, with regard to the act or omission, is liable in law and-

⁶⁹⁴ See par 3.4.3 above; Also see *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 517B-C regarding the meaning of the word “or” that applies in the context referred to.

⁶⁹⁵ 1951 (4) SA 412 (A).

⁶⁹⁶ 1951 (4) SA 412 (A) at 416E-G.

in the case of a loss, damage or claim arising from the use of a state vehicle, the official-

used the vehicle without authorisation.⁶⁹⁷

Treasury Regulations 2000 consists of a similar criterion but requires that a vehicle be used with authorisation “for official purposes” only. However, the current Treasury Regulations exclude this condition based probably on the fact that another criterion that will be discussed explicitly prohibit the use of a vehicle for reasons other than in the state's interest. As the authorisation method is not qualified, it may involve written or oral authorisation. Depending on standing instructions or policies of organs of state, standing authorisation is provided in writing and is valid until it expires or is withdrawn. In the event of a dispute whether or not an official obtained the required authorisation, an official will bear the onus to submit evidence in support of such authorisation.

did not possess a valid driver's licence or other appropriate licence.⁶⁹⁸

A “valid” driver's licence may also refer to a “legally acceptable”⁶⁹⁹ licence that has not expired yet and is issued by a driver's licence authority. Previous Treasury Instructions refer to a “suitable” driver's licence. It is well-known that an appropriate licence depends on the type of vehicle involved as different vehicles require different licenses. There is no clear indication that a “drivers licence” by implication includes a learner's licence. The *National Road Traffic Act*⁷⁰⁰ distinguishes between a learner's and a driving licence. Unlike the previous Treasury Instructions that defines state mobile implements to include vehicles, vessels, submarines, aircraft and other implements for which a suitable licence is required, the current criterion only applies to the use of a state vehicle.

did not use the vehicle in the interest of the state.⁷⁰¹

⁶⁹⁷ National Treasury 2005:reg.12.2.1(g)(i).

⁶⁹⁸ National Treasury 2005:reg.12.2.1(g)(ii).

⁶⁹⁹ Collins English Dictionary 2004:1795.

⁷⁰⁰ 93/1996:secs.13(a) and (b).

⁷⁰¹ National Treasury 2005:reg.12.2.1(g)(iii).

This criterion supports the principle that a state vehicle may be used for official purposes only.⁷⁰² It implies that an official must use a state vehicle to perform official functions of the state and not to pursue own personal interest. The latter is determinable by considering subjective and objective factors, similar to the approach followed to determine vicarious liability as discussed. The use of a state vehicle “in, or in the interest of, the performance of the functions of the State” is also considered in *MEC for Public Works, Eastern Cape v Faltein*.⁷⁰³ The court had to consider whether or not an indemnity clause in the Public Service Act⁷⁰⁴ indemnifies the state from a claim for compensation relating to injuries sustained by an employee in a collision between a state vehicle (bus) and another vehicle. Together with other employees, the employee was transported on the bus to attend a funeral of a deceased employee. Evidence confirmed that policies of the state provided for such transport. The court interprets the conveyance of passengers “in the performance of the functions of the state” and “in the interest of the performance of the functions of the state” as mutually exclusive exceptions.⁷⁰⁵ As the passengers were conveyed in accordance with the latter exception, which is a wider concept than the former, the court dismissed the appeal lodged, thus leaving the injured employee with a remedy against the state for injuries sustained. The use of a vehicle in the interest of the state is served when such use can be connected with the performance of state activities or functions.

allowed unauthorised persons to handle the vehicle.⁷⁰⁶

Unlike the previous Treasury Instructions that defined “said persons” to whom the criteria for state cover applicable to state vehicles apply that assisted with determining which persons apart from officials are authorised to handle a state vehicle, the current Treasury Instructions do not consist of a similar or any definitions whatsoever. In *S v Judge*⁷⁰⁷, the court confirmed that the word “allow” involves both knowledge and consent with reference to previous court rulings. An official may not consent to the handling of a vehicle by unauthorised persons, be it a fellow employee or non-

⁷⁰² It corresponds with previous Treasury Instructions and Treasury Regulations. See Department of State Expenditure 1999: Treasury Instruction W4.1(d); National Treasury 2000:reg.12.2.1(e)(i).

⁷⁰³ 2006 (5) SA 532 (SCA).

⁷⁰⁴ Proc 103/1994:sec.40.

⁷⁰⁵ 2006 (5) SA 532 (SCA) par.18.

⁷⁰⁶ National Treasury 2005:reg.12.2.1(g)(iv).

⁷⁰⁷ 1967 (3) SA 172 (C) at 173H.

employee. The ordinary meaning of the word “handle” may include the control, operating and use of a vehicle.⁷⁰⁸ The state may also consider exercising a right of recourse against the person who handled the state vehicle and who is liable in law for the damage concerned. If such a person is a non-official such right may be exercised in terms of common law principles.

deviated materially from the official journey or route without prior authorisation.⁷⁰⁹

Apart from the Treasury Instructions 1984, PSSC and the Transport Circular, the remaining Treasury Instructions and Treasury Regulations consisted of similar criterion. The word “materially” did not appear in Treasury Instructions 1997. This could cause uncertainty and inconsistency about the extent of prohibited deviations, hence the amendment of the criterion concerned with the publication of Treasury Instruction 1999.

An official journey or route involves the act of travelling from one place to another on a route for a particular distance or time,⁷¹⁰ which journey is officially recognised as a preferable route to travel. A deviation from the route implies discontinuation of the journey on the initial route and proceeding with travelling in a different direction. An official will forfeit cover if the deviation is material and not authorised. A deviation may be regarded as material if such deviation is significant or considerable.⁷¹¹ Possible factors for determining non-compliance with this criterion for state cover may involve the extent of the deviation, the reason for such deviation, the distance travelled and time involved to return to the initial official route and the reason for not obtaining prior authorisation for the deviation concerned.

The maxim *de minimis non curat lex* also applies concerning deviations that are not material. Prior authorisation orally or in writing is required. A material deviation from a route beyond the control of an official may be necessary during a journey due to, for example, the closure of roads. While proceeding with the journey on an alternative route as indicated by the public road authorities, such deviation may still be regarded as an officially recognised route in respect of which oral authorisation for such

⁷⁰⁸ Collins English Dictionary 2004:712.

⁷⁰⁹ National Treasury 2005:reg.12.2.1(g)(v).

⁷¹⁰ Collins English Dictionary 2004:855.

⁷¹¹ Collins English Dictionary 2004:997.

deviation may not be required. Policies of organs of state normally dictate what procedure need to be followed to obtain prior authorisation where material deviations of an official journey or route may occur.

3.5 OUTCOME OF LIABILITY DETERMINATION

Once a decision confirms that an official is liable in law for damages arising from a claim against the state during the first stage of a liability determination, a claim against an official exist for all expenditure relating to compensation payments and expenditure involved. If state cover is not available to public officials, recovery procedures may proceed based on the common law right of recourse available to employers. However, as state cover is provided, a claim against an official must be waived if a decision during the second stage of a liability determination reveals that an official did not act as described in terms of any of the criteria listed for state cover.⁷¹² Such an official will enjoy state cover, and the state will bear the risk for all expenditures involved.

The Treasury Regulations regarding waiver of claims against officials read as follows:

A claim against an official must be waived if the conditions in paragraphs 12.2.1(a) to (g) are not applicable.⁷¹³

The word “must” leaves no room for any discretion to continue with recovery procedures.⁷¹⁴ If such an interpretation were possible, the principle that the state bears its damage and accident risks, including the provision of state cover, would be meaningless.⁷¹⁵

If an official did act as prescribed in terms of any one of the criteria applicable to state cover, steps to recover all expenses relating to compensation payments made by the

⁷¹² National Treasury 2005:reg.12.2.1(a)-(g).

⁷¹³ National Treasury 2005:reg.12.7.3.

⁷¹⁴ Botha 2012:178.

⁷¹⁵ National Treasury 2005:reg.12.1.1 read with reg.12.2.1.

state must be initiated against the official concerned.⁷¹⁶ The recoverable amount may include expenditure such as compensation payments made, including interest legally due⁷¹⁷ and legal costs of the plaintiff and the organ of state involved.

All the current criteria for state cover intend to promote accountable behaviour. However, the sufficiency of the criteria to secure accountability in line with the purpose of the *PFMA* will be explored in chapter 5. The trends with waiver of claims against officials liable for civil claims against the state will be discussed in the next Chapter.

3.6 CONCLUSION

A critical analysis of the current criteria for state cover offered to public officials, keeping in mind important constitutional features and a purposive approach applicable to the interpretation of subordinate legislation, is conducted and preceded by a historical overview concerning the development of criteria for state cover. The overview includes considering the rationale for offering state cover to public officials liable for civil claims against the state. It is regarded as essential given the variety of powers exercised and functions performed by public officials in the course and scope of their official duties that may harm the rights of members of the public.

Officials' exposure to possible civil claims against the state for wrongful action is real. The state as a bearer of its risks and acceptance of liability for losses, damages and civil claims subject to certain conditions is explained and confirmed. Acceptance by the state of such risks is historically founded and based on policy and other considerations. The historical overview involves different sources to investigate the development of criteria for state cover in use before the implementation of the Treasury Regulations published in terms of the *PFMA* on 1 June 2000. The similarities and differences of these criteria were compared with the new Treasury Regulations published since 1 June 2000. An in-depth and critical analysis of the current Treasury Regulations compared with previous criteria for state cover is conducted.

⁷¹⁶ National Treasury 2005:reg.12.2.3.

⁷¹⁷ 55/1975:secs.1, 2 and 2A.

It is important for officials assigned with liability determinations to consider the purpose and scope of both the empowering legislation and the current Treasury Regulations to secure accountability, including the meaning of the introductory words and provisional clause preceding the criteria for state cover. It is clear according to the introductory words and provisional clause that a two-stage approach is required to determine whether or not an official should be entitled to state cover. The investigation confirms that it involves a determination of whether or not an official is “liable in law” for action leading to a civil claim and, if so, whether or not an official acted as described by any one of the relevant criteria for state cover that prohibits certain actions. Understanding the meaning of each criterion is critically important for officials assigned with the powers involving decisions about the forfeiture or not of state cover. The similarities with previous criteria for state cover, especially insofar as it relates to the use of state vehicles and some criteria applicable to civil claims, are evident.

The outcome of a liability determination involves either a waiver of claims against officials who enjoyed state cover or the initiation of recovery procedures should officials forfeit state cover. It is concluded that each criterion for state cover intends to promote accountable behaviour.

CHAPTER 4

WAIVER OF CLAIMS

4.1 INTRODUCTION

This chapter focuses on the third secondary research question to determine what current trends reveal about the waiver of claims by organs of state against officials who enjoy state cover. Determining such trends requires a critical analysis and interpretation of the Annual Financial Statements (AFSs) prescribed for organs of state that includes disclosure notes attached to the AFSs. Such disclosure notes provide particulars of “contingent liabilities” that involve all claims against an organ of state that are still pending as of 31 March, namely the last day of each financial year. It includes the recoverability of compensation payments made and claims waived against officials involved. An analysis of such liabilities will be conducted to determine expected future trends with waiver of claims against officials and impact on securing accountability. The *Constitution of the Republic of South Africa*⁷¹⁸ (*Constitution*) provides for national, provincial and municipal budgetary processes to promote transparency and accountability. An analysis of disclosure notes about contingent liabilities and waiver of claims solely depends on all departments to be transparent and accountable. The importance of disclosure, transparency and accountability within this context is inseparable. Waiver of claims is directly linked with disclosure by organs of state of their contingent liabilities. The scope involving a critical analysis of the disclosure notes in AFSs is limited to include the AFSs of the South African Police Service (SAPS) only. The reason for selecting this department is the magnitude of civil claims instituted against the department. Compared to other national and provincial departments, the SAPS is more compliant with disclosures involving waivers of claims against officials. This observation will be dealt with during the discussion involving disclosures.

⁷¹⁸ 1996:sec.215(1).

4.2 WAIVER OF CLAIMS PERSPECTIVES

It is important to distinguish between waiver of claims by organs of state against officials who are liable for civil claims against the state and who enjoy state cover⁷¹⁹ and waiver of claims by the state against persons other than public officials, liable for losses or damage suffered by the state.⁷²⁰ The former involves the key focus of this chapter, and the latter relates to waiver of claims by the state in a different context. The National Treasury issued Treasury Regulations in terms of the *Public Finance Management Act*⁷²¹ (PFMA), and it includes the following Treasury Regulations that have a direct bearing on decisions involving waiver of claims by the state-

- The settlement of claims against⁷²² or by⁷²³ the state.
- Liability for losses and damages.⁷²⁴
- The waiver of claims by the state.⁷²⁵

The National Treasury may also provide guidelines and issue instructions regarding any matter prescribed for departments or institutions.⁷²⁶

4.2.1 Waiver of claims against officials

Organs of state must waive claims against officials liable for civil claims against the state, losses or damages suffered by the state if such officials do not forfeit state cover.⁷²⁷ Waiver of claims within the said context is compulsory, causing the state to bear all damage and accident risks involved, including risks relating to civil claims against the state, as discussed in the previous chapter.⁷²⁸ Waiver of claims against officials who enjoy state cover is considered once claims against the state are finalised based on compensation being paid following a settlement or final court order favouring plaintiffs involved. Waiver of claims against officials who enjoy state cover in respect

⁷¹⁹ National Treasury 2005:reg.12.2.1 read with reg.12.7.3.

⁷²⁰ National Treasury 2005:reg.12.3 read with reg.11.4.1(b)(iii).

⁷²¹ 1999:sec.76(1).

⁷²² National Treasury 2005:reg.12.2; 1/1999:sec.76(1)(h)

⁷²³ National Treasury 2005:reg.12.3; 1/1999:sec.76(1)(h).

⁷²⁴ National Treasury 2005:reg.12.1.1 and reg.12.7; 1/1999:secs.76(1)(b) and (f) read with 76(4)(a).

⁷²⁵ National Treasury 2005:reg.11.4.1(b)(iii) and reg.12.7.3; 1/1999:sec.76(1)(i).

⁷²⁶ 1/1999:secs.76(2) and (4).

⁷²⁷ National Treasury 2005:reg.12.7.3.

⁷²⁸ National Treasury 2005:reg.12.1.1.

of other losses or damages suffered by the state is considered after conducting liability investigations.⁷²⁹

4.2.2 Waiver of claims against non-officials

Although waiver of claims by the state involving persons other than public officials is not the focus of this study, it is regarded as important to provide information in brief about waiver of claims by the state in a different context. Such waiver of claims is considered once investigations regarding the merits of such claims are conducted. However, debt owed to the state based on claims by the state against other persons may be written off if, apart from other reasons, it is to the advantage of the state to either negotiate a settlement or to waive its claim.⁷³⁰ Such decisions are discretionary depending on the merits of each case. As the writing off of debt within the said context is considered based mainly on financial reasons, considerations to settle claims by the state or waive such claims will be informed and guided by such reasons in mind. It may be to the benefit of the state to accept an offer by a defendant to pay the debt partially if the possibility to recover a debt in full is remote due to risks associated with litigation. It may also benefit the state to waive a claim against a defendant even though the merits favour the state to recover the debt in full. Such a waiver may be to the benefit of the state if the estimated costs associated with litigation to proceed with a claim against a defendant by far exceeds the debt involved.

An organ of state may also consider proceeding with legal proceedings in a Magistrate court and partially waive or abandon a claim amount in terms of the Magistrates' Courts Act⁷³¹ in order not to exceed the jurisdiction of the court concerned. This approach may be to the advantage of the state to save costs, especially if the amount of the claim to be waived or abandoned marginally exceeds the jurisdiction of the court. Once an offer by a debtor is accepted to partially pay a debt due to the state based on

⁷²⁹ National Treasury 2005:reg.12.7.3.

⁷³⁰ National Treasury 2005:reg.11.4.1(b)(iii).

⁷³¹ 32/1944:sec.38. This option will only be considered if the defendant refuses to consent to the jurisdiction of the court. Also see 32/1944:sec.45.

either a settlement or a waiver of a claim, the organ of state involved will proceed to write off the remainder of the debt in terms of the Treasury Regulation concerned.⁷³²

4.3 PRINCIPLES APPLICABLE TO ANNUAL FINANCIAL STATEMENTS

Compliance by departments to disclose contingent liabilities and waiver of claims against officials, the requirements for such disclosure and an analysis of disclosure notes concerning claims waived can only be assessed with due observance of important principles applicable to disclosures in AFSs. These principles will illustrate the importance of transparency and accountability and how they relate to compliance with disclosure responsibilities, the requirements for disclosure and the intended analysis concerning waiver of claims against officials.

4.3.1 Expectations for AFSs

It is expected that AFSs submitted by departments represent a true and fair account of how revenue, expenditure, assets, and liabilities are accounted for. It should consist of all required disclosures for use by various users for evaluation and decision-making purposes. Financial statements also need to reflect the outcome of stewardship, accountability and the effective and efficient use of resources entrusted to departments. It serves as a means to measure departments' financial performance in terms of compliance with their constitutional and other legislative obligations. All these expectations are described in detail by the Office of the Accountant-General in the National Treasury through uniform standards known as the *Modified Cash Standard for National and Provincial Departments*.⁷³³ The said standards emphasise the importance of financial reporting regarding accountability in the following terms:⁷³⁴

Accountability is the cornerstone of financial reporting in government. Accountability is based on the belief that the citizens have a “right to know”, a right to receive openly declared facts that may lead to public debate by the citizens and their elected

⁷³² National Treasury 2005:reg.11.4.1(b)(iii). However, any write off of a claim partially abandoned, is subject to the outcome of a court ruling to uphold the remainder of the claim in part only. See 32/1944:sec.38(2).

⁷³³ National Treasury 2018:10.

⁷³⁴ National Treasury 2018:11.

representatives. Financial reporting plays a major role in fulfilling government's duty to be publicly accountable in a democratic society.

Public debate by the electorate and their representatives about the outcome of financial reporting and disclosure of information depends on compliance by state organs with their constitutional obligations involving transparency and accountability.

4.3.2 Qualitative characteristics of presenting information in AFSs

The standards prescribed for AFSs confirmed the constitutional feature of accountability that applies to all organs of state and their responsibilities of financial reporting, as discussed in chapter 2.⁷³⁵ The purpose of the said standards applicable to financial reporting and inclusion of information in the AFSs by organs of state must adhere to the following qualitative characteristics of fair presentation:

- **Understandability:** It should be possible for users of such information and someone with a fair knowledge about government, its activities and accounting to understand most of the information provided.⁷³⁶
- **Relevance:** Information is relevant if it is suitable for decision-making about past, present and future events that impact on the financial performance of a department as reflected in the AFSs. A comparison between previous AFSs of a department regarding trends with waiver of claims may assist with decision-making and intervention initiatives to investigate questionable trends with such waivers during a current financial year that may impact on the outcome of waivers of claims in future. Relevance also depends on the nature and materiality of information provided. It will be regarded as material if any information that is omitted, incorrect or not disclosed, irrespective of whether it is ascribed to fraud or error, may affect decisions based on information available.⁷³⁷
- **Reliability:** Information is regarded as reliable if such information is experienced by users, not as absolutely accurate but as trustworthy, and

⁷³⁵ See par 2.3.4 of chapter 2.

⁷³⁶ National Treasury 2018:12.

⁷³⁷ National Treasury 2018:12.

presented in a neutral and unbiased way without material errors, emphasising substance rather than form.⁷³⁸

- **Comparability:** Information should be suitable for users for determining trends and financial performance of a department and to compare information provided with similar and different entities.⁷³⁹

Disclosure notes concerning contingent liabilities and waiver of claims against officials must be measured against and comply with the prescribed standards applicable to financial reporting.

The AFSs aim to address the needs and requirements of various users such as parliament, national and provincial treasuries, the public, taxpayers, public servants employed by a department, donors, statisticians and scholars of various disciplines, suppliers and creditors, other governments and the media. Accounting standards that apply to AFSs are provided with these principles in mind.⁷⁴⁰

4.4 DISCLOSURE REQUIREMENTS

The *Constitution*⁷⁴¹ provides for establishing a National Treasury through national legislation that must prescribe measures to ensure transparency, expenditure control at all spheres of government, Generally Recognised Accounting Practices (GRAP), uniform classifications of expenditure and uniform norms and standards. The *PFMA*⁷⁴² gave birth to the establishment of the National Treasury to give effect to the constitutional provision concerned. The object of the *PFMA*,⁷⁴³ as discussed in the previous chapter, is to secure transparency, accountability and sound management of expenditure. It implies a clear intention not only about the importance of transparency, accountability and sound financial management of public funds, but something that must be fostered and complied with by the institutions concerned. The ordinary meaning of “secure” involves an expectation that something is “not likely to fail.”⁷⁴⁴ To achieve transparency and accountability objectives, the National Treasury continues

⁷³⁸ National Treasury 2018:13.

⁷³⁹ National Treasury 2018:13.

⁷⁴⁰ National Treasury 2018:11.

⁷⁴¹ 1996:sec.216(1).

⁷⁴² 1/1999:sec.5.

⁷⁴³ 1/1999:sec.2.

⁷⁴⁴ Collins English Dictionary 2004:1472.

to provide updated guidelines to all organs of state concerned about disclosure of contingent liabilities and the recoverability of compensation payments made, also known as “liabilities recoverable.” It involves disclosing how compensations payments and related expenditures are accounted for, including write-offs, waiver of claims against officials who enjoyed state cover and exemptions as an act of grace.⁷⁴⁵ The guidelines necessitate discussion before attending to an analysis of trends with waiver of claims against officials.

4.4.1 Guidelines for disclosing contingent liabilities

An accounting officer of a department in respect of which the *PFMA*⁷⁴⁶ applies must submit their AFSs in accordance with GRAP to the Auditor-General, the relevant Treasury and the executive authority of the department concerned.⁷⁴⁷ Instructions about the inclusion of compulsory notes to the AFS about contingent liabilities and information about the recoverability of compensation payments made are provided by the National Treasury.⁷⁴⁸ Such instructions include reference to the -

- *Accounting Manual for Departments: Provisions and Contingents*⁷⁴⁹ that explain what contingent liabilities involve and how the monetary value of pending civil claims should be calculated for disclosure purposes.
- *Modified Cash Standard for National and Provincial Departments*⁷⁵⁰ explaining the principles applicable to matters such as the recognition, reporting, disclosure and presenting of information concerning revenue, expenditure, assets and liabilities (including contingent liabilities) in die AFSs of departments in accordance with predetermined standards.
- *Specimen Annual Financial Statements for National and Provincial Departments*⁷⁵¹ that consist of detailed specifications on how disclosure notes

⁷⁴⁵ Treasury Regulations 2005:reg.11.4.1, reg.12.7.3 and reg.22.1.

⁷⁴⁶ 1/1999:sec.3.

⁷⁴⁷ 1/1999:secs.40(1)(a)-(c). National departments must submit their AFSs to the National Treasury and provincial departments must involve the provincial treasury concerned.

⁷⁴⁸ National Treasury 2019a:par 3.

⁷⁴⁹ National Treasury 2019b:18-19.

⁷⁵⁰ National Treasury 2018:5,120-121.

⁷⁵¹ National Treasury 2019c:163-164.

regarding contingent liabilities and recoverability of compensation payments should be presented in the AFSs.

Disclosure is about depicting and capturing secondary information in the notes to the AFSs in accordance with set standards. In contrast, presentation involves the layout and place of primary information displayed in the AFSs.⁷⁵² Without including such information and disclosure notes in the AFSs, the National Treasury will not be able to prepare consolidated financial statements for each financial year in respect of departments, public entities, and constitutional institutions to which the *Public Finance Management Act*⁷⁵³ applies. The meaning of contingent liabilities how they should be calculated and presented through disclosure notes attached to the AFSs of departments requires clarification.

4.4.1.1 Contingent liabilities explained

Contingent liabilities involve all possible liabilities for departments that remain unresolved at year-end. It consists of possible financial obligations for departments arising from past events (such as delict), which obligations depend on the occurrence or non-occurrence of future and uncertain events (settlements or not of compensation claims) beyond the departments' control concerned.⁷⁵⁴ Various uncertainties exist involving contingent liabilities, of which the following serves as an example⁷⁵⁵ -

- When the figures (closing balance of all pending accumulated claims) are published in the financial statements, the exact amount of possible compensation payments and when they will become due in the future is unknown.
- It is uncertain whether or not amounts claimed will be amended (reduced or increased) once letters of demand and summonses are served or even after summonses were served.

⁷⁵² National Treasury 2018:5 and 65.

⁷⁵³ 1/1999:sec.8.

⁷⁵⁴ National Treasury 2019a:8.

⁷⁵⁵ National Treasury 2019a:17-18.

- Uncertainty exists as to which claims will be adjudicated in a court of law or whether or not claims will be settled out of court.
- In matters that a court of law will adjudicate, it is uncertain in whose favour a possible judgment will be granted, keeping in mind that judgments may be subject to an appeal, the outcome of which is uncertain as well.
- Until such uncertainties cease to exist or claims are finalised for reasons other than settlements or court judgments (for example, claims that were abandoned, withdrawn, prescribed or due to counter claims that a department successfully instituted), such pending claims will remain contingent liabilities to be disclosed as such in the AFSs of departments.

Contingent liabilities, therefore, consist of all pending civil claims against the state as on the last day of each financial year as disclosed in the AFSs of departments, which claims are subject to various uncertainties as far as the outcome of such claims is concerned. Different methodologies exist to determine an estimate of contingent liabilities.

4.4.1.2 Determination of contingent liabilities

The preferable method to determine contingent liabilities involves estimating the “most likely” amount that may be awarded by a court or estimated settlement amounts.⁷⁵⁶ Such estimates may be conducted by a legally qualified person such as the state attorney or a legal official employed by a department regarding each claim involved.⁷⁵⁷ Estimates may also be based on historical data available about the average of compensation payments made for different causes of action for the past predetermined financial years.⁷⁵⁸ The ratio between the number of claims per cause of action received in respect of which compensation payments were made and the number of claims that were successfully defended, withdrawn, abandoned or finalised for reasons other than conceding the merits in favour of a plaintiff also requires careful consideration to determine such estimates.

⁷⁵⁶ National Treasury 2019b:17.

⁷⁵⁷ National Treasury 2019b:17.

⁷⁵⁸ National Treasury 2019b:17-18.

Depending on the number of new claims received annually by a department and accumulated pending claims that need to be administered, it may involve an extremely labour intensive exercise to peruse individual files to disclose estimates about contingent liabilities according to the preferred method of estimation. Unless a department that needs to administer very large numbers of civil claims has effective computerised systems to keep and update records of all pending claims on a sustainable basis until finalisation of such claims, disclosure on contingent liabilities based on such estimates will either be understated or overstated.

Questionable estimates may lead to a qualification of AFS's by the Auditor-General, as discussed in chapter 2.⁷⁵⁹ Such qualifications involve various departments at national and provincial levels.⁷⁶⁰ However, if a department has effective systems and reliable data available, such estimates may be conducted programmatically without perusing individual files. All variables that may have an impact on the "most likely" amount disclosed as contingent liabilities in the AFS must be taken into account to comply with the requirement of reliability applicable to AFS's as discussed.

Although not preferable, departments may also opt to determine the monetary value of contingent liabilities for disclosure purposes based on amounts claimed according to letters of demand received.⁷⁶¹ Such methodology will always result in an overstatement of contingent liabilities as claim amounts are normally inflated. Depending on the nature of a claim, a huge difference may exist between a claim and a settlement amount.⁷⁶²

Some departments opt to base their estimate of contingent liabilities on claim amounts as reflected in summonses only.⁷⁶³ This methodology may also involve an overstatement of contingent liabilities due to inflated claim amounts. Unless claim

⁷⁵⁹ See par 2.5.2.2 of chapter 2.

⁷⁶⁰ See for example Department of Justice and Constitutional Development 2019:60 and 169;

⁷⁶¹ National Treasury 2019b:17. Also see Department of Defence 2019:327 and 373. The department opted to base estimates about contingent liabilities on amounts claimed as disclosed both in letters of demand and summonses.

⁷⁶² Compare a claim for damages caused to a vehicle due to a motor vehicle accident which claim is supported by a quotation for repair costs involved that may match a settlement amount if an apportionment of damages does not apply. However, a claim amount involving an unliquidated claim for injuries suffered due to a shooting incident may be inflated if compared, eventually, with a reduced settlement amount legally due to a claimant concerned.

⁷⁶³ Department of Justice and Constitutional Development 2019:229 and 261.

amounts based on letters of demand are also included in estimates conducted, an understatement of contingent liabilities may occur. The approach followed with disclosure of estimates by including claim amounts reflected in summonses only may create the impression that claims for compensation will only be attended to and disclosed once civil claims become litigious. It may also be based on unjustified policy decisions that all claims received, irrespective its merits, must be defended, leading to unnecessary and wasteful expenditure following awards made by courts in favour of plaintiffs concerned. Such a strategy may have in mind to discourage claimants to proceed with legal proceedings due to financial constraints. Some claimants who may have legally valid claims against departments may not be able to afford costs associated with litigation and cannot compete with resources and access to legal services available to departments. This approach may deprive such claimants of possible remedies for compensation to which they are legally entitled. Accountability demands that the state as a party to litigation should not use questionable delaying and unethical tactics to deny plaintiffs' remedies regarding undefendable claims.

4.4.1.3 Presentation of contingent liabilities in AFSs

Guidelines are provided to departments on how to present disclosure notes to the AFSs related to contingent liabilities. The following table illustrates how departments should present disclosure notes about contingent liabilities in their AFSs according to standards set as indicated in the *Specimen Annual Financial Statements for National and Provincial Departments*⁷⁶⁴ prescribed by the National Treasury. It provides for the following presentation or layout of information to be disclosed in a table format-

⁷⁶⁴ National Treasury 2019c:163.

Table 4.1: Prescribed outlay for statement of contingent liabilities

ANNEXURE 3B

STATEMENT OF CONTINGENT LIABILITIES AS OF 31 MARCH 20ZZ

Nature of liability	Opening Balance 1 April 20YY R'000	Liabilities incurred during the year R'000	Liabilities paid/cancelled/reduced during the year R'000	Liabilities recoverable (Provide details hereunder) R'000	Closing Balance 31 March 20ZZ R'000
Claims against the department					
Environmental liability					
TOTAL					

The table serves as a minimum standard of presentation. A department may consider adjustments to the table's layout to provide for specific needs and circumstances unique to a particular department.⁷⁶⁵ Although the table and layout may appear self-explanatory, the following explanation of the information is provided in the same sequence as required in the table above.

- Nature of liability: Claims may be categorised to distinguish between different categories of or types of claims such as claims arising from vehicle accidents breach of contract, to mention but a few examples. Based on the methodology used to determine contingent liabilities as discussed, the monetary value of these claims must be reflected in the remaining columns next to each category or type of claim involved.
- Opening balance: It represents contingent liabilities as on the first day (1 April) of a financial year. Unless certain adjustments are required to the previous year's closing balance, it will be similar to the opening balance of the following year.

⁷⁶⁵ See 1/1999:sec.79. This section allows a department to deviate from a treasury regulation or instruction, including any condition imposed by the *PFMA* subject to approval by the National Treasury and on condition that such a department notifies the Auditor-General in writing of such intended deviation.

- Liabilities incurred during the year: The total amount of new liabilities incurred during the financial year need to be disclosed and added to the opening balance for purposes of, eventually, determining the closing balance.
- Liabilities paid, cancelled or reduced during the financial year. It reveals information about the finalisation of pending claims during the financial year. It involves all claims paid during the financial year and cancellations of claims due to duplicate claims registered. The reduction of claims relates to claims finalised for reasons other than payments. The difference between original amounts claimed and amounts paid should be considered to reduce the liabilities concerned. The reduction of claims for reasons other than payments involves successfully defended, withdrawn, abandoned, prescribed, or litigious claims that became dormant due to plaintiffs that did not initiate steps to pursue their claim. These liabilities need to be deducted from the accumulated total amount of claims involved to reduce the closing balance.
- Liabilities recoverable: The monetary value of liabilities that are recoverable and referred to as “liabilities recoverable” must be disclosed. Any amount disclosed in this column do not affect the closing balance of contingent liabilities as it relates to the disclosure of a department how compensation payments were accounted for. This table continues with a separate table indicated as “Annexure 3B (continued)” to reflect “liabilities recoverable” as prescribed.⁷⁶⁶ The latter table and what it involves will be discussed.
- Closing balance: The closing balance represents all contingent liabilities as of year-end (31 March) pending and awaiting finalisation.

This information and disclosure about claims finalised, particularly claims paid, directly impact the disclosure of liabilities recoverable that also involve information about waiver of claims against officials liable for compensation payments arising from civil claims against the state.

4.4.2 Guidelines for disclosing liabilities recoverable

Instructions about including compulsory notes to the AFS about the recoverability of compensation payments made arising from civil claims against organs of state are

⁷⁶⁶ National Treasury 2019c:164.

prescribed by the National Treasury.⁷⁶⁷ The National Treasury also provides specifications on how disclosure notes about the recoverability of compensation payments⁷⁶⁸ should be presented in the AFSs. Unless the recoverability of compensation payments is disclosed in the AFSs of departments, it would not be possible to determine how compensation payments are accounted for by the departments concerned.

4.4.2.1 Recoverability of compensation payments

Departments must account for all compensation payments in terms of the relevant Treasury Regulations.⁷⁶⁹ Apart from templates provided to departments on how to present “liabilities recoverable” through disclosure notes attached to AFSs,⁷⁷⁰ more precise guidelines about the content of such disclosure notes are lacking. This may contribute to a lack of consistency and uncertainty about disclosure requirements.

Once a compensation payment arising from a civil claim against the state is made, a liability determination is required to confirm whether or not an official liable for such claim enjoys state cover or not. The outcome of such a determination may result in activating recovery procedures against the official who forfeited state cover,⁷⁷¹ or it may involve a waiver of a claim against an official who enjoys state cover.⁷⁷² Unlike waiver of claims where certainty exist that recovery procedures will not follow, the success of recovery procedures will remain uncertain until the amount of the debt legally due is determined and undisputed and therefore becomes a liquidated debt.⁷⁷³ Particulars about waiver of claims are included in the disclosure notes concerned once a liability determination is made. The same principle applies when a decision is made that an official forfeited state cover irrespective of the outcome of recovery steps initiated. Such a decision is disclosed as a claim by the state, the final outcome of which may not yet be known as at year-end. The rationale behind such an approach is disclosing what is possibly recoverable and not what has been recovered. This

⁷⁶⁷ National Treasury 2019a:par 3.

⁷⁶⁸ National Treasury 2019c:164.

⁷⁶⁹ National Treasury 2005:reg.11.4.1, reg.12.2.3, reg.12.7.3 and reg.22.1.

⁷⁷⁰ National Treasury 2019c:164.

⁷⁷¹ National Treasury 2005:reg.12.2.3.

⁷⁷² National Treasury 2005:reg.12.7.3.

⁷⁷³ Oxford Dictionary &Thesaurus 2009:542; Collins English Dictionary 2004:934.

observation will be pursued while analysing trends with waiver of claims against officials.

4.4.2.2 Presentation of liabilities recoverable in AFSs

Guidelines are also provided to departments on how to present disclosure notes to the AFSs insofar it relates to the recoverability of compensation payments. The following table illustrates how departments should present disclosure notes about “Liabilities recoverable” in their AFSs according to standards prescribed as indicated in the *Specimen Annual Financial Statements for National and Provincial Departments*⁷⁷⁴ prescribed by the National Treasury. It provides the following layout and information to be disclosed in a table format.

Table 4.2: Prescribed outlay for statement of liabilities recoverable

ANNEXURE 3B (continued)

Nature of liabilities recoverable	Opening Balance 1 April 20YY R'000	Details of Liability and Recoverability	Movement during year R'000	Closing Balance 31 March 20ZZ R'000
Civil claims against the Department				
TOTAL				

The table also serves as a minimum standard of presentation. A department may consider adjustments to the table's layout to provide for specific needs and circumstances unique to a particular department.⁷⁷⁵ The following explanation is provided in the same sequence as required in the table above.

- Nature of liabilities recoverable: An indication of the nature of liabilities is required, for example, “Civil claims against the department” in respect of which compensation payments were made.

⁷⁷⁴ National Treasury 2019c:164.

⁷⁷⁵ See 1/1999:sec.79.

- Opening balance: The amount disclosed represents the total accumulative compensation amount paid regarding civil claims against the department concerned during previous financial years that still need to be accounted for in terms of the relevant Treasury Regulations. As payments are made until the last day of a financial year, it may not be possible to finalise a liability determination in the same year applicable to payments as at year-end. Adjustments to the opening balance are possible due to, for example, duplicate payments or incorrect allocations of payments made during the previous year. Such deficiencies and amounts must be disclosed in a separate column next to the opening balance that should be added to or deducted from the opening balance depending on the rectifications made.
- Details of liability and recoverability: The outcome of decisions made regarding the recoverability of compensation payment made during the financial year is disclosed. It includes write-offs, claims by the state registered, claims waived against officials, or exemptions as an act of grace. All amounts disclosed in this table are deducted from the opening balance as it will have a reducing effect on the closing balance.
- Movement during the year: The amount disclosed represents the amount paid as compensation during the financial year. Decisions regarding the recoverability of these payments that could be finalised during the financial year are also included in the previous column.
- Closing balance: The closing balance reflects accumulative compensation payments made during the previous and reporting financial year that still awaits liability determinations as at year-end.

The obligation of departments to comply with accounting standards applicable to disclosure notes attached to AFSs should not be underestimated. Without disclosing how compensation payments relating to civil claims against the state are accounted for, the objectives of the *Public Finance Management Act*⁷⁷⁶ to secure transparency and accountability may be endangered. A critical analysis of the AFSs insofar it relates to the disclosure notes attached to the AFSs of the SAPS will reveal to what extent the department is compliant with disclosure standards applicable to contingent liabilities

⁷⁷⁶ 1/1999:sec.2.

and waiver of claims against officials. The impact of trends regarding waiver of claims against officials to secure accountability will then be determined.

4.5 ANALYSIS OF DISCLOSURE NOTES PRESENTED BY SAPS

Since the 2016/2017 financial year, the department disclosed contingent liabilities based on the best estimate of average claims paid, or referred to in the guidelines by the National Treasury, as the “most likely” settlement amounts as explained in the discussion about the determination of contingent liabilities.⁷⁷⁷ Disclosures for previous years were based on amounts claimed for compensation as reflected in letters of demand and figures disclosed during the 2015/2016 financial year about contingent liabilities as at year-end is therefore not comparable with disclosures based on the new methodology followed for determining contingent liabilities since the 2016/2017 financial year.⁷⁷⁸ Therefore, an analysis of contingent liabilities will be conducted to include disclosure notes for three financial years from 2016/2017 until 2018/2019.⁷⁷⁹ However, these disclosure notes will be compared with those for 2015/2016 to assess compliance with disclosure standards regarding contingent liabilities.⁷⁸⁰ The focus will then shift to the disclosure of “liabilities recoverable” during 2015/2016 until 2018/2019 that include waiver of claims against officials relating to compensation payments made regarding civil claims against the state.⁷⁸¹ As the new methodology followed with disclosures concerning contingent liabilities, do not affect disclosures about “liabilities recoverable”, a comparison concerning waivers of claims will involve four financial years from 2015/2016 until 2018/2019.

⁷⁷⁷ National Treasury 2019b:17.

⁷⁷⁸ South African Police Service 2016:365.

⁷⁷⁹ South African Police Service 2017:409; South African Police Service 2018:385; South African Police Service 2019:426

⁷⁸⁰ South African Police Service 2016:365.

⁷⁸¹ South African Police Service 2016:366; South African Police Service 2017:409; South African Police Service 2018:385; South African Police Service 2019:426

4.5.1 Disclosure notes on contingent liabilities

The following table illustrates how the department reports contingent liabilities from 2016/2017 until 2018/2019.⁷⁸² The second column is added to distinguish between contingent liabilities disclosed for the different financial years. A financial year commences on the 1st day of April and ends on the 31 March of each year. The words underneath the table appear in all disclosure notes applicable to contingent liabilities.

Table 4.3: Statement of contingent liabilities for 2016/17 until 2018/19

ANNEXURE 5

STATEMENT OF CONTINGENT LIABILITIES AS OF 31 MARCH

Nature of liabilities	Financial year	Opening balance	Closing balance
		1 April	31 March
		R'000	R'000
Claims against the department	2016/2017	4 469 031	5 152 092
	2017/2018	5 152 092	6 509 609
	2018/2019	6 273 274	6 790 335

Claims against the Department is calculated based on the best estimate of average claims paid.

The disclosure of contingent liabilities in the annual report for each financial year concerned consists of only two total figures, namely an opening and closing balance of estimates made. Similar to trends observed during previous years, an annual increase of contingent liabilities is evident. Since 1 April 2017, when a new methodology about estimates was introduced by the department until 31 March 2019, an increase of contingent liabilities of 51,49% or R 2,3 billion occurred. Viewed from a different perspective, it is important to realise that the figures disclosed in the closing balance represent the amount that would most likely be payable if all claims could be finalised as of 31 March of the financial year. Put differently, this amount equals

⁷⁸² South African Police Service 2017:409; South African Police Service 2018:385; South African Police Service 2019:42.

expected compensation amounts based on pending civil claims as of 31 March 2019 only and illustrates the amount that will involve liability determinations. This observation is supported by the department's note that the estimation of contingent liabilities is based "on the best estimate of average claims paid." Therefore if for illustration purposes only, all contingent liabilities as disclosed could be finalised as of 31 March 2019, an estimated amount of R 6,7 billion would be payable based on historical data and methodology used to conduct such estimate.

4.5.1.1 Compliance with disclosure standards

Compared to the required standards applicable to disclosure of contingent liabilities, it is unclear according to the information provided by SAPS in the disclosure notes concerning contingent liabilities:

- How the amounts disclosed are arrived at concerning the variables taken into account to conduct the estimates involved.⁷⁸³
- What new liabilities were incurred during the financial years concerned.
- What liabilities were paid, and what liabilities were reduced or cancelled during the financial years involved.
- Why the closing balance of contingent liabilities for 2017/2018 and the opening balance for 2018/2019 differs, keeping in mind the methodology used to conduct the estimates involved.
- What the closing balances represent in terms of the type of pending claims involved with an indication of estimates applicable to such claims. The disclosure of a single figure in the opening and closing balance only lacks context and meaningful information.
- How the estimates as disclosed can contribute to inform decision-making by users without any context provided.
- How it would be possible to compare contingent liabilities as disclosed with that of other organs of state concerned.⁷⁸⁴

⁷⁸³ An enquiry directed to the department about the methodology used to determine an estimate for contingent liabilities as disclosed, was met with a response that the document, consisting of detailed information, is classified as "Confidential."

⁷⁸⁴ See par 4.3.2 above regarding the qualitative characteristics of presentation of AFSs insofar it relates to comparability.

The estimates concerning contingent liabilities provided in the table above, as explained, are not comparable with the information provided regarding contingent liabilities for the previous financial years due to different methodologies used to disclose contingent liabilities. Although the current disclosure notes on contingent liabilities in use by the SAPS for the past financial years differs substantially from previous disclosure notes, it is evident that the National Treasury approved a deviation of the disclosure standards as prescribed.⁷⁸⁵ Even though the disclosure notes lack context, the department remains accountable to answer questions posed by members of Parliament once the AFSs are published.⁷⁸⁶ Since this study also focuses on waiver of claims during the 2015/2016 financial year that relate to the disclosure notes on contingent liabilities for the same year, it is regarded as important to compare the said contingent liabilities with the disclosure standards as prescribed.

4.5.1.2 Compliance of previous disclosure notes with standards

Compliance with disclosure standards regarding contingent liabilities according to the AFS of 2015/2016 is comparable with the disclosure notes applicable to contingent liabilities. The following image represents the statement of contingent liabilities as disclosed in the AFSs of the SAPS as of year-end on 31 March 2016.⁷⁸⁷

⁷⁸⁵ 1/1999:sec.79.

⁷⁸⁶ See pars 2.3.5.2 and 2.3.5.3 in chapter 2 regarding the oversight roles of the national executive and parliamentary committees that involves accounting officers.

⁷⁸⁷ South African Police Service 2016:365.

Table 4.4: Statement of contingent liabilities for 2015/16

ANNEXURE 5

STATEMENT OF CONTINGENT LIABILITIES AS OF 31 MARCH 2016

Nature of Liability	Opening Balance 2015/04/01	Current year adjustments to prior year balances	Liabilities incurred during the year	Claims settled during the year			Closing Balance 2016/03/31
				Original claim Amounts	Amounts paid	Amounts Cancelled /Reduced	
	R'000	R'000	R'000	R'000	R'000	R'000	R'000
Claims against the Department							
Arrest / Detention	15,959,839	1,005,315	9,726,825	5,219,757	174,976	5,044,781	21,472,222
Assault	914,307	28,711	229,836	228,024	10,542	217,482	944,830
Collisions	183,138	24,321	63,419	76,366	16,358	60,008	194,512
Defamation/ Crimen injuria	727,398	60,381	489,698	130,116	3,153	126,963	1,147,361
Labour/ Administrative matters	110,186	{5,980}	6,670	17,738	507	17,231	93,138
Loss/Damage private property	85,651	1,486	14,168	34,250	1,152	33,098	70,055
Negligence	493,099	{12,407}	413,380	88,183	1,031	87,152	805,889
Not yet classified	657,396	37,926	978,175	81,763	0	81,763	1,591,734
Police actions-comp general & or special dam	5,557,541	14,405	1,475,882	1,013,310	13,512	999,798	6,034,518
Search and Seizures	831,132	6,087	82,655	204,726	2,890	201,836	715,148
Shooting incidents	1,396,034	181,889	1,191,655	595,156	66,858	528,298	2,174,422
Total	26,918,721	1,342,134	14,672,363	7,689,389	290,979	7,398,410	35,243,829

Note: Amounts on this schedule reflects the actual amounts paid and actual amounts claimed (NOT ESTIMATED SETTLED AMOUNTS) in respect of all pending civil claims against the state, which may or may not be settled in future. Claim amounts are subject to change due to matters becoming litigious of nature, revision of claim amounts by claimants or subsequent actuarial or medical assessments of damages suffered.

The following summary of information disclosed during the 2015/2016 financial year concerning contingent liabilities based on claim amounts (not estimated settled amounts) is provided:

- All the figures disclosed in table format are linked to different categories of claims listed in the first column of the table described as “Nature of liabilities.”

The categories of claims, among others, involve unlawful arrests and detentions, assault, collisions, defamation/ crimen injuria, shooting incidents, search and seizures and police actions other than the categories listed.

- An opening balance and adjustments to prior year balances are provided, leaving an opening balance of R28,2 billion.
- New liabilities (new claims received) incurred during the financial year of R14,6 billion are disclosed.
- Claims settled/ finalised during the financial year is disclosed in three separate columns to provide further context, starting with original claim amounts of R7,6 billion, of which an amount of R290,9 million was “settled and paid” during the financial year and claim amounts of approximately R7,3 billion that were cancelled/reduced. A due process has been followed regarding each claim before finalising settlements, followed by payments (i.e. settlements by the department or payments due to court judgments). According to the figures provided in this column, it is clear that a huge difference exists between original claim amounts and amounts paid. Compared to the new liabilities incurred and claims settled or finalised, it is evident that unless more claims can be finalised annually than new claims received, huge backlogs with the finalisation of pending claims will occur.
- A closing balance of R35,2 billion regarding claims that are still pending as of year-end is provided. It represents an increase in contingent liabilities compared to the opening balance of 24,7%.

Compared to the disclosure standards and how contingent liabilities need to be presented, it is evident that the disclosure notes for the 2015/2016 financial year are compliant with the standards applicable to disclosure notes. An analysis of liabilities recoverable that includes information about waiver of claims against officials will now be analysed.

4.5.2 Disclosure notes on liabilities recoverable

The following table illustrates how “liabilities recoverable” is disclosed in the AFSs of the department in respect of accumulated compensation payments during the 2015/2016 financial year.⁷⁸⁸

Table 4.5: Statement of recoverability of payments for 2015/16

STATEMENT OF THE RECOVERABILITY OF ACCUMULATED PAYMENTS MADE AS OF 31 MARCH 2016

Nature of recoverability	Opening Balance 2015/04/01	Current year adjustments to prior year balances	Movement during the year			
			Detail of finalised transactions	Amount finalised	New transactions Amount	Closing Balance 2016/03/31
				R'000		
	R'000	R'000		R'000	R'000	R'000
Claims against the Department	156,427	1,739	Written off (TR11.4 &12)	365	335,486	47,152
			State funds	7,110		
			Claim by the Department	13,908		
			Waiver of claims (TR 12.7.3)	424,393		
			Merits of loss cannot be determined	724		
Total	156,427	1,739		446,500	335,486	47,152

The department adjusted the layout as prescribed by the National Treasury to have a clearer picture of the accounting of compensation payments during the financial year concerned.⁷⁸⁹ The amount disclosed in the second column of the table (R156,4 million) represents the total accumulative compensation amount paid in respect of civil claims against the department concerned during the previous financial years that still need to be accounted for in terms of the relevant Treasury Regulations as on the first day of the financial year concerned, namely 1 April 2015. The third column of the table reflects adjustments to R1,7 million that were made during the financial year to prior year balances. It may involve adjustments to amounts captured incorrectly or

⁷⁸⁸ South African Police Service 2016:36.

⁷⁸⁹ See par 4.4.2.2 above.

cancelled transactions that need to be added to the opening balance of accumulated payments that still need to be accounted for.

The amounts reflected in columns 4 and 5 of the table represent the total value of compensation payments (R446,5 million) accounted for in terms of the relevant Treasury Regulations during the 2015/2016 financial year. The total amount of R446,5 million includes compensation payments reflected in the opening balance, adjustments made to the opening balance and a large amount of compensation payments made during the same financial year (R335,4 million) as reflected in column 6 of the table. According to column 5 of the table, compensation payments to the value of R424,3 million (95,04%) compared to the total amount of R446,5 million accounted for were waived against officials liable in law for such claims who enjoyed state cover. The last column reflects the closing balance of accumulative compensation payments made (R47,1 million) that still needs to be accounted for at year-end, namely 31 March 2016.

Compared to the disclosure standards prescribed, one can conclude that the department complies with such standards. Unlike the layout prescribed for disclosing detailed information about the recoverability of liabilities,⁷⁹⁰ the department also discloses the amount of claims paid during the financial year in column 6 of the table. Without such disclosure, which impacts the closing balance of accumulated payments that await liability determinations, the layout as prescribed lacks completeness and context.

The same outlay of the disclosure notes as the one discussed and explained for the 2015/2016 financial year will now be used to determine and summarise the trends with waivers of claims against officials.

4.5.3 Trends with waiver of claims

An analysis of trends with the waiver of claims against officials will be conducted and compared with disclosure notes involving four financial years from 2015/2016 until 2018/2019.⁷⁹¹ The information is obtained from the disclosure notes regarding

⁷⁹⁰ National Treasury 2019c:164.

⁷⁹¹ South African Police Service 2016:366; South African Police Service 2017:409; South African Police Service 2018:385; South African Police Service 2019:426.

statements of the recoverability of accumulated payments as at the year-end of each financial year concerned. Some information on how accumulated payments were accounted for is combined for simplicity purposes without affecting total figures displayed and to ensure visibility of trends with waiver of claims against officials.

Apart from the opening balance and adjustments to prior year balances combined, the outlay of the disclosure notes used by SAPS, as indicated in Table 4.5 above, will be used to determine trends with the waiver of claims against officials. The combination will have the effect that the opening balance will not match the closing balance of a previous year provided in the table below. However, such adjustments are disclosed in the published disclosure notes of the AFSs in a separate column next to the pre-adjusted opening balance as indicated above⁷⁹² that matches the closing balance of the previous year. The figures indicated in brackets in the column “Amount finalised” are added to provide more context. It involves the number of payments made relating to compensation amounts disclosed in respect of which liability determinations have been made. The number of payments is obtained from records kept and provided by the SAPS.

⁷⁹² See par 4.5.2 above.

Table 4.6: Statement of recoverability of payments for 2015/16 until 2018/19

Financial year	Opening balance 1 April	Movement during the year			Closing balance 31 March
		Finalised transactions	Amount finalised	New transactions amounts	
	R'000		R'000	R'000	R'000
2015/2016	158 166	Claims by department	13 908 (73)	335 486	47 152
		Waiver of claims (TR12.7.3)	424 393 (6 580)		
		Other transactions	8 199 (104)		
Total	158 166		446 500	335 486	47 152
2016/2017	49 849	Claims by department	5 478 (50)	369 066	42 090
		Waiver of claims (TR12.7.3)	370 695 (5 729)		
		Other transactions	652 (14)		
Total	49 849		376 825	369 066	42 090
2017/2018	46 045	Claims by department	1 956 (36)	392 924	95 574
		Waiver of claims (TR12.7.3)	337 320 (4 720)		
		Other transactions	4 119 (13)		
Total	46 045		343 395	392 924	95 574
2018/2019	99 184	Claims by department	4 957 (28)	519 379	83 313
		Waiver of claims (TR12.7.3)	527 988 (5 887)		
		Other transactions	2 305 (21)		
Total	99 184		535 250	519 379	83 313

Note: Certain errors were made by the department concerning figures in the disclosure notes for 2018/2019.⁷⁹³ However, the figures provided in the table above regarding waiver of claims and claims by the department are rectified.

⁷⁹³ See Table 1.1 and fn 12 in chapter 1.

The figures involving waiver of claims against officials compared to claims registered against officials who forfeited state cover is evident. A summary and analysis of these figures are required to determine trends with waiver of claims against officials liable for compensation payments.

4.5.3.1 Summary of trends with waiver of claims

The following table summarises trends with waiver of claims against officials concerning accumulated compensation payments made as disclosed by the department in the disclosure notes provided. The figures and percentages in brackets are provided for comparison purposes and relate to claims registered by the department against officials who forfeited state cover.

Table 4.7: Summary of waiver of claims against officials

WAIVER OF CLAIMS AGAINST OFFICIALS			
(Figures in brackets relate to claims by the state)			
Financial year	Accrued value of claims paid and considered in terms of TR12.2.1	Value of claims waived in terms of TR 12.7.3	Percentage of the value of claims waived compared to the accrued value of claims considered
2015/2016	R 446,500,000.00	R 424,393,000.00 (R 13 908 000.00)	95,04% (3,11%)
2016/2017	R 376,825,000.00	R 370,695,000.00 (R 5 478 000.00)	98,37% (1,45%)
2017/2018	R 343,395,000.00	R 337,320,000.00 (R 1 956 000.00)	98,23% (0,57%)
2018/2019	R 535,250,00,00.00	R 527,988,000.00 (R 4 957 000.00)	98,64% (0,93%)

A large percentage of compensation payments made by the department is not recoverable from officials liable for claims against the department due to the outcome of liability determinations, namely that such claims must be waived against officials

concerned.⁷⁹⁴ The figures disclosed in respect of claims by the department relate to decisions that the amounts concerned are recoverable. The outcome of steps to initiate recovery procedures may not be known as at year-end. The success of recovery steps also depends on the outcome of applications submitted by officials for debt due to be written off fully or partially for financial reasons.⁷⁹⁵ Officials may also successfully lodge duly motivated representations in terms of internal policies based on a disagreement with liability determinations about forfeiture of state cover.

A different perspective about the extent of future waiver of claims becomes apparent when one has regard to the closing balance of R6,7 billion regarding contingent liabilities based on the best estimate of average claims paid as discussed for the 2018/2019 financial year.⁷⁹⁶ If for purposes of illustration only, it would be possible to finalise all those pending claims at once and apply the percentage claims waived by the department for the same financial year, namely 93% an estimated total amount of R63,1 million may become recoverable, subject to the variables applicable to the outcome of recovery steps initiated.

4.5.3.2 Nature of claims involved with waiver of claims

The total amounts disclosed concerning compensation payments made (“New transactions amounts”) during the same financial years as reflected in Table 4.6 above⁷⁹⁷ will now be linked to the number of payments made and the nature of claims relating to such payments. It will provide more context with the nature of claims in respect of which waiver of claims against officials by the department is or still should be considered.⁷⁹⁸ The information is obtained from records kept and as provided by the SAPS. The trend with waiver of claims against officials liable for civil claims against the department applies to all types of claims involved. The total amount paid for each financial year as indicated in the table is rounded off to an amount as reflected in the disclosure notes above. The following table may assist in providing more context with waiver of claims against officials:

⁷⁹⁴ National Treasury 2005:reg.12.7.3.

⁷⁹⁵ National Treasury 2005:reg.11.4.1.

⁷⁹⁶ See Table 4.3 at par 4.5.1 above.

⁷⁹⁷ See par 4.5.3 above..

⁷⁹⁸ Department of Police 2016:s.p.; Department of Police 2017:s.p.; Department of Police 2018:s.p.; Department of Police 2019:s.p.

Table 4.8: Compensation payments and nature of claims involved

Financial year	Claim categories	Number of payments	Total amount paid
2015/2016 ⁷⁹⁹	Arrest/Detention	4 341	203 834 505.38
	Assault	142	18 386 315.94
	Collisions	539	17 548 064.80
	Police actions	127	14 586,861.87
	Shooting incidents	119	71 789,973.04
	Other	237	9 339 895.58
	TOTAL	5 505	335 485 616.61
2016/2017 ⁸⁰⁰	Arrest/Detention	4 403	222 677 783.76
	Assault	143	12 379 103.98
	Collisions	589	19 898 400.46
	Police actions	154	14 499 274.82
	Shooting incidents	131	72 671 205.21
	Other	225	26 940 378.76
	TOTAL	5 645	369 066 146.99
2017/2018 ⁸⁰¹	Arrest/Detention	4 432	239 658 729.21
	Assault	110	7 666 210.78
	Collisions	398	14 337 138.42
	Police actions	143	32 205 015.98
	Shooting incidents	121	68 667 985.78
	Other	259	30 388 644.35
	TOTAL	5 463	392 923 724.52
2018/2019 ⁸⁰²	Arrest/Detention	4673	356 205 508.36
	Assault	119	10 416 646.56
	Collisions	427	13 899 871.94
	Police actions	152	20 238 361.96
	Shooting incidents	100	102 708 744.17
	Other	234	15 910 228.08
	TOTAL	5 695	519 379 361.07

⁷⁹⁹ Department of Police 2016:s.p.

⁸⁰⁰ Department of Police 2017:s.p.

⁸⁰¹ Department of Police 2018:s.p.

⁸⁰² Department of Police 2019:s.p.

The following observations from the information depicted in the table above can be made:

- Compensation payments regarding claims for unlawful arrests and detentions represent an average of 80% of all payments made during the financial years concerned. According to the annual reports of the South African Police Service, a total of 1 556 794 **arrests** were made for all crimes, during 2018/2019,⁸⁰³ compared to 1 610 782, in 2017/2018.⁸⁰⁴ If the number of arrests is compared with the annual payments made for unlawful arrests and detention, such claims may be insignificant. However, most claims received by the department relate to claims for unlawful arrests and detentions. The closing balance for unlawful arrests and detention claims disclosed as contingent liabilities in the AFS for 2015/2016 based on amounts claimed (not estimated settlement amounts) is R21,4 billion. This amount represents 61% of all pending claims at year-end compared with the closing balance of R35,2 billion.⁸⁰⁵ As so many arrests are made as part of the department's core functions to prevent and combat crime, police officers conducting arrests ought to be well-versed in the application in practice of the legal requirements applicable to lawful arrests with or without warrants of arrest and detention of suspects involved.
- Although fewer payments are made regarding shooting incidents than other claims for compensation, the total amount paid in respect of such claims exceeds amounts paid for all other types of claims, except claims involving unlawful arrest and detentions. The damage suffered by claimants due to shooting incidents is excessive compared to other types of claims.
- Claims relating to collisions compared to other types of claims attract attention in terms of the number of annual payments for compensation made.
- The majority of liability determinations and decisions to waive claims against officials involve compensation payments regarding unlawful arrests, detentions and collisions.

⁸⁰³ South African Police Service 2019:114.

⁸⁰⁴ South African Police Service 2018:13.

⁸⁰⁵ South African Police Service 2016:365.

The implications of the analysis conducted on the focus of this study emphasise the importance of due diligence to be exercised with decisions concerning state cover and waiver of claims against officials who enjoyed state cover. Such decisions constitute administrative action and, therefore, decisions that must comply with the requirements of reasonableness and rationality. Waiver of claims to the extent as disclosed in the AFSs concerned may impact the intended purpose of the *PFMA* to secure accountability.⁸⁰⁶

4.6 IMPACT OF CLAIMS WAIVED ON SECURING ACCOUNTABILITY

According to the summary of trends with waiver of claims against officials involving four financial years, an average of 97,5 % of the total value of accumulated compensation payments made was waived due to officials who enjoyed state cover.⁸⁰⁷ Unless officials assigned with delegated power exercise due diligence when conducting liability determinations, officials liable in law for civil claims against the state may not be held accountable for their decisions and actions. Factors that need to be considered to reduce the impact of waivers of claims against officials due to possible questionable decisions made concerning state cover requires consideration.

4.6.1 Accountability of public functionaries for their decisions

Decisions to determine whether or not officials enjoyed or forfeited state cover, including waiver of claims against officials who enjoyed state cover, must comply with just administrative action that requires reasons for decisions made.⁸⁰⁸ Unless decisions are supported by adequate evidence and adequate reasoning, decisions about state cover may not be justified. Officials involved with liability determinations need to be held accountable for their decisions. An analysis of trends with waiver of claims confirmed that the majority of claims in respect of which claims against officials are waived relate to unlawful arrest and detentions.⁸⁰⁹ Clear standing instructions published by SAPS and referred to by the court in *Kotze v Minister of Safety and*

⁸⁰⁶ 1/1999:sec.2.

⁸⁰⁷ See par 4.5.3.1 above.

⁸⁰⁸ See par 2.7.2.1.4 of chapter 2.

⁸⁰⁹ See par 4.5.3.2 above.

*Security*⁸¹⁰ exist that involve requirements to be met to ensure lawful arrests and detentions. Non-compliance with these instructions leading to civil claims against the state that could not be defended successfully requires a thorough consideration of the merits when a liability determination concerning the forfeiture or not of state cover needs to be made. During the 2018/2019 financial year, the ratio between court judgments against the SAPS and settlements in favour of plaintiffs was 84:16 in favour of court judgments, representing 4,775 and 920 payments, respectively, meaning that the majority of claims paid related to claims adjudicated by a court of law and judgment in favour of plaintiffs.⁸¹¹ The trends with waiver of claims revealed that 5,695 payments were made during the 2018/2019 financial year, of which 4,673 (82%) of the payments related to claims for unlawful arrests and detention.⁸¹² One can derive from this that most claims paid for unlawful arrests and detentions were adjudicated by a court of law confirming that such arrests and detentions were unlawful. Given these observations and the large number of payments made due to unlawful arrests and detentions confirmed by courts of law and possible non-compliance with standing instructions relating to such arrests and detentions, trends with waiver of claims against officials may compromise accountability as a constitutional obligation.

4.6.2 Avoid defeating the purpose of enabling legislation

Officials involved with liability determinations who do not thoroughly apply their minds to the criteria for state cover may defeat the purpose of the *PFMA*⁸¹³ and the Treasury Regulations that aims to secure accountability regarding expenditure and liabilities. Such officials would also act contrary to accountability as a constitutional obligation and the values and principles prescribed for an accountable public administration.⁸¹⁴

4.6.3 Responsibility to comply with empowering provisions

The previous chapter emphasised the importance of officials involved with liability determinations to familiarise themselves with all the dynamics involved with the interpretation of delegated legislation such as the Treasury Regulations and, in

⁸¹⁰ 2012 (1) SACR 396 (GSJ):paras.11-16, 26, 126.

⁸¹¹ Department of Police 2019:s.p.

⁸¹² See table 4.8 at par 4.5.3.2 above.

⁸¹³ 1/1999:sec.2.

⁸¹⁴ 1996:secs.1(d) and 195(1)(f) and (g).

particular, the criteria for state cover.⁸¹⁵ Careful consideration of all the information available is required before a final decision concerning state cover is made. An assessment of the reasons for findings by a court that ruled in favour of and awarded damages to a plaintiff, including reasons for settlements outside of court, should be the point of departure to assess the facts in all liability determinations. These facts may indicate some of the criteria for state cover that may not have been complied with that requires careful consideration and application.

4.6.4 Monitoring exercise of delegated powers

Regarding the extent of waivers of claims against officials and the outcome of decisions made about state cover offered to public officials liable for civil claims against the state, any attempt to monitor such decisions from an accountability perspective is justified. Accountability demands officials assigned with public powers and duties to explain their actions and decisions if required to do so. Accounting officers remain accountable for the powers and duties delegated in terms of the *PFMA*.⁸¹⁶ Without checks and balances and control mechanisms to determine whether or not due diligence has been exercised regarding decisions about state cover and waiver of claims, the purpose of the *PFMA* to secure accountability may not be met.⁸¹⁷

4.7 NON-DISCLOSURE BY OTHER DEPARTMENTS

Unless departments disclose how compensation payments were accounted for in terms of the relevant Treasury Regulations⁸¹⁸ by following standards prescribed for disclosure of “liabilities recoverable,”⁸¹⁹ a comparison between departments concerning such disclosure notes is impossible. Non-disclosure of such information

⁸¹⁵ National Treasury 2005:reg.12.2.1. Also see par 3.4.3.3 in chapter 3 regarding the two-stage approach to be followed with a liability determination.

⁸¹⁶ 1/1999:sec.44. This section provides for various conditions attached to delegated powers and duties.

⁸¹⁷ See par 2.3.5 of chapter 2 regarding the importance of checks and balances from an accountability perspective

⁸¹⁸ National Treasury 2005:reg.11.4.1 (reasons for write-offs); reg.12.7.3 (waiver of claims against officials); reg.12.2.3 (recovery of an amount paid in respect of a loss, damage or a claim); reg.22.1 (exemptions as an act of grace).

⁸¹⁹ National Treasury 2019c:164.

does not meet the requirement of " comparability " which is a qualitative characteristic of fair presentation.⁸²⁰

Some examples of departments that are not compliant will be discussed, followed by possible reasons for non-disclosures. The discussion will focus on the Gauteng Department of Health, which must attend to many compensation claims.

4.7.1 Extent of non-disclosure

An overview of many national and provincial departments revealed that none of these departments is compliant with disclosing information about how compensation payments were accounted for in terms of the *PFMA* and Treasury Regulations concerned. Detail about "liabilities recoverable" are not provided as prescribed.⁸²¹

The Auditor-General qualified the AFSs of the Department of Justice and Constitutional Development during 2018/2019 insofar it relates to disclosure of contingent liabilities.⁸²² The department disclosed R 543,4 million of claims paid/ cancelled or reduced during the financial year concerned; no information about "liabilities recoverable" is disclosed.⁸²³

Non-disclosure of "liabilities recoverable" by departments poses a threat to accountability regarded as the cornerstone of financial reporting.⁸²⁴ Furthermore, non-disclosure constitutes a material breach by departments of their duty to be publicly accountable and transparent in a democratic society as it deprives citizens and all those who have a direct interest by such disclosures of their belief of having a "right to know."⁸²⁵ Non-disclosure by departments within the said context deserves serious intervention.⁸²⁶

⁸²⁰ See par. 4.3.2 above.

⁸²¹ National Treasury 2019c:164.

⁸²² Department of Justice and Constitutional Development 2019:60 and 169.

⁸²³ Department of Justice and Constitutional Development 2019:270.

⁸²⁴ See par 4.3.1 above.

⁸²⁵ National Treasury 2018:11.

⁸²⁶ Also see the following annual reports as examples of non-compliance by departments with standards applicable to disclosing "liabilities recoverable": Department of Defence 2019:373; Department of Correctional Services 2019:230; Department of Transport 2019:365; Department of Education Free State Province 2017:319-320.

4.7.2 Possible reasons for non-disclosure

After a thorough perusal of the AFSs of many national and provincial departments as published since 2015/2016, no particulars concerning the recoverability of compensation payments as prescribed by the National Treasury could be found. Similar trends with non-disclosure of “liabilities recoverable” were discovered during the perusal of the AFSs submitted by all the provincial Departments of Health for the past four financial years. The reasons for non-disclosure will be limited to the Gauteng Department of Health only.⁸²⁷

Detail about “liabilities recoverable” is required according to the disclosure standards prescribed as discussed. The layout prescribed for the presentation of liabilities recoverable in table format following the table applicable to disclosure of contingent liabilities requires disclosure of the information concerned.⁸²⁸ Clear evidence exists of compensation payments made for the past four financial years regarding medical negligence claims, including other claims instituted against the Gauteng Department of Health.⁸²⁹ Disclosure about the outcome of liability determinations concerning the recoverability of such payments and how expenditure is accounted for is required in terms of the disclosure standards. Such standards apply to all national and provincial departments, including institutions to which the *PFMA* applies.⁸³⁰

It is unlikely that no liability determinations regarding the recoverability of compensation payments are conducted by the department concerned. Particulars of such determinations may be available on case files. However, unless such determinations are well recorded and kept updated on computerised systems, disclosing such information may not be possible.

The following information provided by the department in their annual reports concerning medical negligence claims serve as possible explanations for the observations made:

⁸²⁷ Gauteng Department of Health 2016:269; Gauteng Department of Health 2017:292; Gauteng Department of Health 2018:275; Gauteng Department of Health 2019:275.

⁸²⁸ National Treasury 2019c:163-164. The following departments serve as an example:

⁸²⁹ Gauteng Department of Health 2016:269; Gauteng Department of Health 2017:292; Gauteng Department of Health 2018:275; Gauteng Department of Health 2019:275.

⁸³⁰ 1/1999:s3.

- Medical negligence claims pose severe challenges to the financial situation of the department. Such claims leave the department with no choice but to settle claims at excessive-high amounts due to the unavailability of clinical data due to insufficient record-management systems. Unlawful access to records in possession of third parties also exposes insufficient control measures.⁸³¹
- Due to an intervention by the Standing Committee on Public Accounts (SCOPA) of Parliament, the department started to link the management of lawsuits with the performance contract of the relevant managers. The Legal Services Division of the Department would start identifying employees guilty of “avoidable negligence”.⁸³²
- Another response by the department to the SCOPA indicates that a litigation strategy is in the process of development, aiming to improve the management of claims involved. The establishment of a medico-litigation centre that serves as a data management centre will assist to coordinate mediation as an alternative dispute resolution mechanism to limit costs associated with litigation and assist with litigation management in general.⁸³³
- A litigation system will provide support with tracking of claims, monitoring disciplinary steps initiated against employees, and providing information about claims by the department to recover costs involved due to employee negligence.⁸³⁴

The contemplated strategies of the department reveal that a lack of proper systems to provide for recordkeeping of claims instituted against the department, the managing of litigation and the conducting of proper liability determinations could contribute to non-disclosure of “liabilities recoverable.”

⁸³¹ Gauteng Department of Health 2017:11.

⁸³² Gauteng Department of Health 2018:103.

⁸³³ Gauteng Department of Health 2019:108.

⁸³⁴ Gauteng Department of Health 2019:108.

4.8 CONCLUSION

Waiver of claims against officials liable in law for civil claims against the state reflects the outcome of liability determinations and decisions made, namely that officials involved did not forfeit state cover according to the criteria prescribed for such cover rendered in terms of the Treasury Regulations.⁸³⁵ The outcome of these decisions and how compensation payments are being accounted for need to be disclosed in the form of notes attached to the AFSs of departments according to standards prescribed by the National Treasury. The National Treasury provides guidelines regarding standards applicable to these disclosure notes, the layout and presentation of such notes in the AFSs concerned.

Departments need to disclose all pending civil claims (contingent liabilities) as at year-end of each financial year that is directly linked to disclosure notes indicating how departments accounted for expenditures relating to compensation payments made, referred to as “Liabilities recoverable.” Based on these disclosure notes, an analysis has been conducted to determine the trends with waiver of claims against officials concerned by limiting the analysis of such trends to the information as disclosed by the SAPS in their AFSs involving four financial years from 2015/2016 until 2018/2019. The analysis revealed that an average of 97,5% of the total value of accumulated compensation payments made was waived during the financial years concerned due to officials who enjoyed state cover.⁸³⁶

Factors for consideration to reduce the impact of waivers of claims against officials due to possible questionable decisions made concerning state cover and how it may threaten accountability as a constitutional obligation has been discussed.⁸³⁷ The extent of national and provincial departments involved that do not comply with standards applicable to disclosure notes involving “liabilities recoverable” is a cause of concern that requires intervention. The constitutional feature of accountability involving the importance of considering and applying “checks and balances” to monitor the exercise of public power and functions assigned to public officials also applies to

⁸³⁵ National Treasury 2005:reg.12.7.3 read with reg.12.7.3.

⁸³⁶ See par 4.5.3.1 above.

⁸³⁷ See pars 4.6.1-4.6.4 above.

waiver of claims against officials liable in law for civil claims against the state.⁸³⁸ The sufficiency of the criteria for state cover, keeping in mind the trend with waivers of claims against officials and compliance with accountability as a constitutional obligation, will be investigated in the next chapter.

⁸³⁸ See par 2.3.5 of chapter 2.

CHAPTER 5

STATE COVER AND ACCOUNTABILITY

5.1 INTRODUCTION

This chapter aims to determine whether or not the current criteria for state cover are sufficient to ensure and promote accountability as a constitutional obligation with reference to the outcome of the research conducted in the previous chapters. These chapters focused on the meaning of accountability from a constitutional perspective within the context of administrative action, a critical analysis of the criteria for state cover and trends with waiver of claims against officials liable for civil claims against the state. An investigation needs to be conducted first to determine whether the Treasury Regulations⁸³⁹ comply with common law criteria applied to assess the validity of subordinate or delegated legislation. The criteria for validity will be applied to the Treasury Regulations applicable to state cover. A determination about the sufficiency of the criteria for state cover offered to public officials to secure accountability as a constitutional obligation will follow. The identification of possible gaps in the criteria for state cover that may pose a threat to secure accountability will be discussed simultaneously with such determination.

5.2 VALIDITY OF DELEGATED LEGISLATION

It is regarded as important for purposes of this chapter to distinguish between the general criteria to determine the validity of delegated legislation such as regulations issued in terms of national legislation *vis-a-vis* a determination about the sufficiency of the criteria for state cover provided for in the Treasury Regulations to secure accountability as a constitutional obligation. Delegated legislation, such as the Treasury Regulations applicable to state cover, may meet the general requirements for validity. However, it may still lack sufficiency to hold officials accountable for expenditure relating to civil claims instituted against the state.

⁸³⁹ National Treasury 2005:reg.12.

5.2.1 Common law criteria for the validity of delegated legislation

In a discussion about the hierarchy of legislation, Du Plessis⁸⁴⁰ confirms that legislation promulgated by any legislature in the different spheres of government inconsistent with the *Constitution* will be regarded as invalid. It equally applies to delegated legislation, such as regulations created, authorised and promulgated in terms of the empowering enactments of the original legislation.⁸⁴¹ Whereas the latter legislation provides for legislative matters in broader terms, the former legislation regulates matters in more detail without necessarily, posing a threat to flexibility in its application. This also applies to the first set of Treasury Regulations issued in terms of the *PFMA*, which, according to a media statement of the National Treasury, replaced ‘*volumes of old treasury instructions*’ applicable to the previous dispensation. It assigned more responsibilities to heads of departments to manage and account for losses and allowed for more flexibility to fulfil their responsibilities.⁸⁴²

Delegated legislation compared to original legislation is regarded as subordinate legislation.⁸⁴³ In *S v Mhlungu*⁸⁴⁴ the court created a general rule confirming that if civil or criminal matters before a court can be adjudicated without considering constitutional issues, such an approach should be followed. This implies that the validity of delegated legislation should be adjudicated by applying common law principles first. If such legislation does not pass any common law requirements for validity, the matter may be resolved without considering constitutional issues.⁸⁴⁵ However, if delegated legislation complies with the common law requirements for validity, it should be subjected to constitutional scrutiny. Unlike an investigation into the validity of original legislation that always involves constitutional issues, such issues only apply to delegated legislation depending on the application and outcome of common law principles concerning its validity.⁸⁴⁶

⁸⁴⁰ 2000:196.

⁸⁴¹ Du Plessis 2000:198 and 200.

⁸⁴² National Treasury s.a.:s.p.

⁸⁴³ Du Plessis 2000:198.

⁸⁴⁴ 1995 (7) BCLR 793 (CC):par.59.

⁸⁴⁵ Du Plessis 2000:202.

⁸⁴⁶ Du Plessis 2000:213.

The following common-law principles applicable to determine the validity of delegated legislation will be investigated:

- The competency of the body delegating authority to legislate
- Conflict with the original legislation
- Compliance with legislative procedures
- Vagueness
- *Intra vires* principle
- Unreasonable, unfair and discriminatory legislation
- Sub-delegation of delegated powers

To determine the validity of delegated legislation, these common-law principles, such as the current Treasury Regulations, will be applied to the criteria for state cover and waiver of claims against officials.

5.2.1.1 Competency of body delegating authority to legislate

The competency of the body delegating the power to legislate to a delegated legislature must be beyond contestation. The *Constitution*⁸⁴⁷ confirms the legislative authority and competency of parliament, provincial legislatures and municipal councils at national, provincial and local spheres, respectively, and their legislation is regarded as original. The *Constitution* remains the source of these legislative powers, and legislative powers may be delegated and granted in terms of the original legislation.⁸⁴⁸ The *Public Finance Management Act*⁸⁴⁹ (*PFMA*), as original legislation, authorises the National Treasury to make regulations involving various matters, such as the –

- Liability for losses and damages and procedures for recovery;
- The settlement of claims by or against the state; and
- The waiver of claims by the state.

These matters are regulated in terms of the Treasury Regulations concerned.⁸⁵⁰

⁸⁴⁷ 1996:sec.43; Also see Du Plessis 2000:203.

⁸⁴⁸ Du Plessis 2000:204.

⁸⁴⁹ 1/1999:sec.76(1)(f), (h) and (i).

⁸⁵⁰ National Treasury 2005:reg.11.4 and reg.12.

5.2.1.2 Conflict with the original legislation

Another important common law principle dictates that no conflict may exist between delegated and original legislation. The former is regarded as subordinate legislation that derives its existence, purpose and scope from the empowering provisions of the original legislation concerned.⁸⁵¹ A direct link exists between state cover offered to public officials liable for civil claims against the state and decisions whether or not claims against officials for expenditure relating to such claims must be waived. A right of recourse and recovery procedures must be exercised against officials who forfeited state cover, and claims against officials must be waived if officials enjoyed state cover.⁸⁵² Waiver of claims against officials is subject to confirmation that none of the conditions referred to in the Treasury Regulations that involve the criteria for state cover is applicable. Waiver of claims thus implies that the state as a self-insurer will bear the risk for all expenditure involved.⁸⁵³ The National Treasury gives effect to the subject matters provided for in the *PFMA* as regulated in the Treasury Regulations concerned.

The *PFMA*⁸⁵⁴ determines that any draft legislation intending to amend the *PFMA* or provides for subordinate legislation in conflict with the *PFMA* may be tabled in Parliament by the Minister of Finance only, or only after consultation with the Minister as far as the content of the draft legislation is concerned. Although it may be quite exceptional, Parliament, therefore, can eventually adopt draft legislation aiming at amending the *PFMA* or providing for subordinate legislation that may be in conflict with the *PFMA*. Such a scenario is not foreseeable with subject matters such as the rendering of state cover to officials subject to prescribed conditions, the right of recourse by organs of state against officials who forfeited state cover, and waivers of claims by the state. The National Treasury regulates these matters, and the current Treasury Regulations apply across all spheres of government to enhance consistency and avoid preferential practices.

⁸⁵¹ Du Plessis 2000:211.

⁸⁵² National Treasury 2005:reg.12.2.1, reg.12.2.3 and reg.12.7.3.

⁸⁵³ National Treasury 2005:reg.12.1.1.

⁸⁵⁴ 1/1999:sec.4.

5.2.1.3 Compliance with legislative procedures

Procedures prescribed regarding the enactment of legislation in all spheres of government, obtaining public comments, tabling and consideration of legislation by the relevant legislatures, and final adoption and publication of legislation relate to compliance with legislative procedures.⁸⁵⁵ Non-compliance with this common-law principle may result in legislation and subordinate legislation being declared invalid. Unlike with Acts of Parliament, provincial Acts and municipal by-laws, no provision is expressly made by the *Constitution* for the publication and commencement of delegated legislation. Still, it requires that such legislation be accessible to the public.⁸⁵⁶ However, the *Interpretation Act*⁸⁵⁷ provides for the publication and commencement of delegated legislation.

According to the *PFMA*,⁸⁵⁸ draft regulations must be published in the national Government Gazette for public comment before enacting the regulations concerned. This requirement has been met concerning the current Treasury Regulations.⁸⁵⁹

5.2.1.4 Vagueness

The validity of delegated legislation may be subject to review in terms of another common law requirement based on vagueness and uncertainty.⁸⁶⁰ In *R v Pretoria Timber Co (Pty) Ltd and Another*,⁸⁶¹ the then Appellate Division confirmed that what is required involves reasonable instead of perfect clarity. Once delegated legislation is interpreted without bias, a court must determine whether or not an act that is required or prohibited can be ascertained with reasonable certainty by those bound by it. If affirmative, the legislation will be good, and if not, it will not pass the requirements for validity.⁸⁶² The courts still apply these common law requirements for clarity and certainty about delegated legislation, albeit in a different context, including the

⁸⁵⁵ 1996:secs.73-79, 119-121, 156(2), 160(4) and (6).

⁸⁵⁶ 1996:secs.81, 123, 162 and 101(3).

⁸⁵⁷ 33/1957:secs.13 and 16.

⁸⁵⁸ 1/1999:sec.78.

⁸⁵⁹ National Treasury 2004. Draft Treasury Regulations.

⁸⁶⁰ Kidd 2020a:219. Also see Hoexter 2012:332 and Botha 2012:68.

⁸⁶¹ 1950 (3) SA 163 (A) at 176G-H.

⁸⁶² *R v Jopp and Another* 1949 (4) SA 11 (N) at 13-14.

Constitutional Court.⁸⁶³ Chaskalson CJ, with reference to previous jurisprudence, confirmed that although vagueness is not explicitly mentioned in *PAJA* as a ground for review, it is founded in the rule of law that is regarded as a foundational value of the Constitution. However, *PAJA*⁸⁶⁴ also provides a “catch-all provision” for reviewing administrative action that is otherwise “unconstitutional or unlawful”, of which vagueness serves as an example.

In addition to the common law requirements to assess delegated legislation for vagueness and certainty, the court in *MEC for Public Works, Roads and Transport, Free State and Another v Morning Star Minibus Hiring Services (Pty) Ltd and Others*⁸⁶⁵ (*MEC for Public Works case*) confirmed important principles that require consideration before a decision concerning invalidity is made. The following principles are of importance:

- Once a court interpreted a regulation in terms of the normal rules that apply to the interpretation, it should be determined whether a reasonable man would be able to ascertain with reasonable certainty the act which is required or forbidden;⁸⁶⁶
- The mischief the regulation intends to address, the importance thereof and the reasonable application thereof in numerous cases are important factors that require consideration;⁸⁶⁷
- The former principle also relates to whether a decision concerning the enactment of the regulations is rationally related to the purpose for which the power was provided. *In casu* the MEC published regulations to close certain taxi ranks to prevent violence in the transport industry which regulations were sanctioned by the empowering provisions that provide for such special measures to be implemented;⁸⁶⁸ and

⁸⁶³ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC): par.108. Also see *Minister of Health and Another NO v New Clicks South Africa and Others (Treatment Action Campaign and Another as amici curiae)* 2006 (2) SA 311 (CC): par.246; and Kidd 2020a:219.

⁸⁶⁴ 3/2000:sec.6(2)(i).

⁸⁶⁵ 2003 (4) SA 429 (O).

⁸⁶⁶ 2003 (4) SA 429 (O):par.12.2.

⁸⁶⁷ 2003 (4) SA 429 (O):par.12.3.

⁸⁶⁸ 2003 (4) SA 429 (O):paras.12.10 and 25. Also see Hoexter 2012:358.

- A regulation as a whole should not be declared void if only a particular word, phrase, or sentence lacks clarity. In such matters, the regulation may still pass the test for validity by separating the “bad from the good.” Although interpretation may be difficult, the meaning of the regulation in question may still be ascertainable.⁸⁶⁹

5.2.1.4.1 *Mischief rule*

When applying these common law principles applicable to vagueness and uncertainty to subordinate legislation such as the current Treasury Regulations,⁸⁷⁰ it is regarded as useful to consider the mischief rule (also known as the text-in-context approach to interpretation) that allows for using the historical context of delegated legislation to provide perspective on four questions to be asked as required by the mischief rule.⁸⁷¹ The response to the questions may assist with determining the purpose of the current criteria for state cover and compliance with the common law rule applicable to clarity and certainty.

Question 1:

What was the existing law (legal position) before the delegated legislation in question was adopted?

Three sets of criteria for state cover existed to provide for different categories of damage-causing events as provided for in the Treasury Instructions⁸⁷² that were in use before implementing the *PFMA* and Treasury Regulations concerned.⁸⁷³ The categories relate to (1) civil claims against the state and officials, (2) state cover concerning the use of state vehicles (that provides for all civil claims against the state, including claims relating to injuries and deaths and damage to private and state

⁸⁶⁹ 2003 (4) SA 429 (O):paras.12.5 and 12.9.

⁸⁷⁰ National Treasury 2005:reg.12.2.1 read with reg.12.7.3.

⁸⁷¹ Botha 2012:152.

⁸⁷² Department of State Expenditure 1999:Treasury Instruction W3.1, W4.1 and W9.1.

⁸⁷³ 1/1999. The initial Treasury Regulations were published during 2000 and amended twice and the current Treasury Regulations remained the same since then. See National Treasury 2005:reg.12.2.1 read with reg.12.7.3.

property); and (3) other deficiencies, losses or damage for the state caused through acts or omissions of officials.

Question 2: Which problem (mischief or defect) was not adequately addressed by the existing law before the new delegated legislation was adopted?

Some generic criteria for state cover overlapped with and applied to all categories of damage-causing events, while more specific criteria for state cover also applied to each category concerned. This approach leads to a duplication of criteria for state cover. The criteria for state cover were also published by other organs of state as indicated in Chapter 3 and differ to some extent compared to the criteria published in the previous Treasury Instructions. Treasury Instruction 1999,⁸⁷⁴ for example, determined that state cover will be forfeited concerning the use of a state vehicle if a vehicle is driven by an official whilst under the influence of alcohol or drugs having a narcotic effect, or if the concentration of alcohol in blood exceeds the limit prescribed by legislation. A Transport Circular published by the then Transvaal Provincial Administration Roads Department Pretoria for use by all organs of the state consists of similar criteria but added an additional requirement, namely that an official will only forfeit state cover if found guilty by a criminal court for driving a state vehicle under any of the two conditions referred to.⁸⁷⁵

Question 3: What remedy (solution) is proposed by the new legislation to solve this problem?

It may have been regarded as more viable to combine all generic and unique criteria for state cover applicable to the different categories of damage-causing events to enable the application of the criteria for state cover to any damage-causing event concerned.

⁸⁷⁴ Department of State Expenditure 1999:W4.1(i)(ii).

⁸⁷⁵ Transvaal Provincial Administration Roads Department Pretoria 1975:part 15.2.1 of Transport Circular 1 of 1975.

Question 4: What is the true reason for the proposed remedy?

To provide one set of criteria for state cover applicable to all categories of damage-causing events. The current Treasury Regulations attempted to provide for such criteria.

5.2.1.4.2 Application of mischief rule to criteria for state cover

The only uncertainty that may exist with the interpretation of the combined criteria for state cover is the heading chosen for the criteria for state cover concerned that reads “Claims against the state through acts or omissions [Section 76(1)(h) of the PFMA].”⁸⁷⁶ It may create the impression that the criteria only apply concerning civil claims against the state. The empowering provision that allows for the enacting of the Treasury Regulation concerning state cover appears in brackets in the said heading. It provides for regulations that must be made concerning “the settlement of claims by or against the state.”⁸⁷⁷ The Treasury Regulation also provides for claims by the state against persons other than officials, and state cover does not apply to these claims.⁸⁷⁸ However, if Treasury Regulation 12 is read as a whole, it is evident that criteria for state cover also apply to damage-causing events involving officials other than damage-causing events that attract civil claims against the state. The Treasury Regulation provides for the recovery of any losses and damages caused by officials if state cover is forfeited.⁸⁷⁹ If state cover is not forfeited, claims against officials involved must be waived, resulting in the state bearing its damages and accident risks involved.⁸⁸⁰

Therefore, it remains important for officials involved with decisions concerning state cover to distinguish between the criteria for state cover that applies to all damage-

⁸⁷⁶ National Treasury 2005:reg.12.2.

⁸⁷⁷ 1/1999:sec.76(1)(h).

⁸⁷⁸ National Treasury 2005:reg.12.3.

⁸⁷⁹ National Treasury 2005:reg.12.7.1 read with reg.12.7.3.

⁸⁸⁰ National Treasury 2005:reg.12.1.

causing events⁸⁸¹ and those that are unique to the different damage-causing events concerned.⁸⁸² Although the interpretation of the applicability of the criteria for state cover may be difficult, it can still be ascertained with reasonable certainty. Such difficulty does not render the Treasury Regulations applicable to state cover void due to vagueness or uncertainty.

5.2.1.5 *Intra vires principle*

Another common-law requirement for considering the validity of delegated legislation requires that such legislation be *intra vires* and thus within the scope of the legislative powers granted.⁸⁸³ Therefore, it must be authorised by and not in conflict with the provisions of the enabling Act concerned or any other original legislation.⁸⁸⁴ The Treasury Regulations applicable to state cover and waiver of claims derives their scope and authority from the empowering provisions of the *PFMA*, which are not in conflict with the purpose of the Act to secure accountability and sound management of expenditure and liabilities.⁸⁸⁵

5.2.1.6 *Unreasonable, unfair and discriminatory legislation*

Unless explicitly authorised, delegated legislation must be reasonable, fair, non-discriminatory and not retrospective according to the common-law requirements.⁸⁸⁶ Hoexter,⁸⁸⁷ with reference to *Kruse v Johnson*,⁸⁸⁸ indicates that delegated legislation would have been regarded as unreasonable if its effect bears partial, unequal, unjust or oppressive results or if it discloses bad faith or improper motives during the

⁸⁸¹ See National Treasury 2005:reg.12.2.1(a)-(e) that applies to all claims against the state including claims arising from the use of state vehicles.

⁸⁸² Also see National Treasury 2005:reg.12.2.1(g)(i)-(v) for criteria that applies in addition to the generic criteria concerning the use of state vehicles. The following remarks also apply to National Treasury 2005: reg12. For all claims against the state that does not involve the use of state vehicles regulation 12.2.1(f) applies as well. Regulation 12.2.1(a)-(d) and (f) applies to all losses and damages caused by officials that are dealt with in terms of regulation 12.7. It is unlikely that regulation 12.2.1(e) will apply to the latter category of damage-causing events as it involves an admission to the detriment of the state without prior consultation with the state attorney. Admissions by officials may be detrimental to the state if it has been made in connection with pending civil claims instituted against the state.

⁸⁸³ Du Plessis 1986:16.

⁸⁸⁴ Botha 2012:27-28 and 136.

⁸⁸⁵ 1/1999:secs.2, 76(1)(f),(h) and (i).

⁸⁸⁶ Du Plessis 1986:16

⁸⁸⁷ 2012:330.

⁸⁸⁸ [1898] 2 QB 91 at 99-100; Also see Du Plessis 2000:199 and footnote referred to.

enactment process. It is also inconceivable that Parliament would authorise delegated legislation with such results. However, Du Plessis⁸⁸⁹ correctly argued that the *Constitution* replaced these common law requirements for delegated legislation as the concepts of what amounts to unreasonableness, unfairness and discrimination are constitutionally much better developed and defined. When applying the mentioned principles to the Treasury Regulations regarding state cover and waiver of claims, it is evident that it can be regarded as reasonable, fair and non-discriminatory concerning its nature and application. Since the implementation and application of both the Treasury Instructions during the pre-constitutional dispensation and the Treasury Regulations published in terms of the *PFMA*, no reported judgement exists in terms of which the criteria for state cover and waiver of claims against officials were challenged based on non-compliance with these principles.

The requirement referred to that legislation should apply retrospectively requires consideration. Although new or amended delegated legislation may apply to events that originated before the commencement of such legislation, it may not affect or violate vested or substantive rights involved.⁸⁹⁰ However, the presumption against retroactive application of delegated legislation does not apply if the legislation deals with neutral and harmless procedural issues or if the retrospective application of the legislation on past events benefits a person to whom it applies.⁸⁹¹ It also applies to the Treasury Regulations concerning state cover and waiver of claims against officials. Should the criteria for state cover be amended to include more strict criteria for state cover, meaning that the possibility exists that more officials would forthwith forfeit state cover, such criteria may not apply to incidents that occurred before the implementation of the new criteria concerned. This is due to the requirement for delegated legislation that must be ascertainable with reasonable certainty, especially insofar it relates to acts required or prohibited by those bound by it.⁸⁹²

⁸⁸⁹ 2000:211.

⁸⁹⁰ Botha 2012:56.

⁸⁹¹ Botha 2012:61-62.

⁸⁹² See par 5.2.1.4 above.

5.2.1.7 Sub-delegation of delegated powers

Delegated legislation, according to the final common-law requirement for validity, may provide for the exercise of certain powers and the performance of specific duties exclusively by certain administrators only and unless expressly or by implication authorised to do so by the original legislation concerned, such administrator may not sub-delegate conferred powers or functions involved.⁸⁹³ The PFMA⁸⁹⁴ and Treasury Regulations assigned various responsibilities, powers and duties to accounting officers of a Department, including the management of losses and civil claims.⁸⁹⁵ An accounting officer may delegate any of the powers or instruct any official in the Department to perform any of the duties assigned or delegated to him or her in terms of the *PFMA* and Treasury Regulations.⁸⁹⁶ As it is practically impossible for an accounting officer to exercise all the powers delegated and duties assigned in respect of a Department, whose powers and duties are diverse, sub-delegation is necessary and justified. It also applies to decisions regarding the defence and settlement of civil claims instituted against a Department and decisions concerning state cover and waiver of claims against officials. Such powers and duties are normally assigned to legal officials within a Department. Some Departments provide for certain claims to be settled by legal officials without the intervention of the State Attorney also concerned to reduce the administrative burden on offices of the State Attorney across South Africa.

However, sub-delegation of powers and duties are subject to various conditions confirming, for example, that the accounting officer remains responsible for the exercise and performance of delegated powers and assigned duties.⁸⁹⁷ An accounting officer may also confirm, amend or revoke decisions taken by officials in terms of delegated powers or instructions subject to rights obtained due to decisions made.⁸⁹⁸ Unless internal control mechanisms concerning the exercise of delegated powers and

⁸⁹³ Hoexter 2012:265-266.

⁸⁹⁴ 1/1999:secs.38-43. It also, among other responsibilities, include the responsibility to recover debt due to the state, to manage the liabilities and losses of a Department concerned, to settle contractual obligations and to pay money due within the timeframe prescribed and to submit annual financial statements to the National Treasury.

⁸⁹⁵ National Treasury 2005:reg.12.

⁸⁹⁶ 1/1999:sec.44(1).

⁸⁹⁷ 1/1999:sec.44(2)(d).

⁸⁹⁸ 1/1999:sec.44(3).

assigned duties exist, monitoring qualitative decision-making and compliance with conditions imposed would not be possible. An opportunity for accounting officers to confirm, amend or revoke decisions may then only arise based on representations lodged by aggrieved officials who are adversely affected by such decisions.

When applying the common-law requirements for validity of delegated legislation to the Treasury Regulations regarding state cover and waiver of claims, it is clear that these requirements are met. However, the sufficiency of the criteria for state cover to secure accountability as a constitutional obligation needs to be determined.

5.3 SUFFICIENCY OF STATE COVER TO SECURE ACCOUNTABILITY

Although the Treasury Regulations regarding state cover and waiver of claims against officials comply with common law requirements for validity, it may still lack sufficiency to comply with accountability as a constitutional obligation. Before determining the sufficiency of the criteria for state cover, it is necessary first to consider what principles should inform the sufficiency or not of the criteria concerned, the aim for rendering state cover to officials, the criteria for state cover that set standards for expected behaviour by officials and an indication of how SAPS applies the criteria for state cover.

5.3.1 Principles to determine the sufficiency of criteria for state cover

Unlawful and wrongful behaviour leading to civil claims instituted successfully against the state and the consequences to be faced by those liable for such claims should be considered with caution. The selection and nature of the criteria applicable to state cover may have the effect that either more or fewer officials are likely to forfeit state cover following decisions concerning liability determinations. The purpose of state cover provided to officials must not be defeated by implementing criteria for state cover that render such cover meaningless. That may happen if the outcome of a proper application of the criteria reveals that it is quite exceptional for officials to forfeit state cover. With such an outcome in mind, one would expect that the criteria for state cover justify reconsideration. It may also raise questions if state cover is forfeited by most officials liable for civil claims against the state due to the nature of the criteria

concerned. It is, therefore, important that the standard set for acceptable behaviour as expressed in the criteria for state cover should be determined at a level with fairness in mind without compromising accountability as a constitutional obligation and to encourage officials to perform their assigned powers and duties without fear in terms of empowering legislation.

5.3.2 Aim of rendering state cover

The dual aim of state cover is to render protection to officials exposed to civil claims against the state emanating from functions performed in the course and scope of their official duties and to provide organs of state with a statutory right of recourse against officials who forfeited state cover. Officials perform their powers and duties in terms of empowering legislation, and it also involves compliance with constitutional obligations. These powers and public duties include decision-making and the exercise of discretion in terms of legislation that may harm the rights of public members and those to whom public services are rendered. The outcome of exercising such powers and duties in the course and scope of official duties may cause damages leading to civil claims for compensation against officials and the state. Consequently, officials cited as a co-defendant with the state in civil proceedings, based on the principles of vicarious liability, are entitled to representation by the state attorney. Some of these claims are adjudicated by courts of law, resulting in court orders either in favour of the state if such claims are successfully defended or in favour of the plaintiffs, including an award for damages suffered. Other compensation claims require negotiations to settle claims in favour of claimants outside of court to the best advantage of the state.

Without state cover being offered to officials, subject to the criteria involved, officials may have to face bankruptcy as such claims may involve millions of rand. However, once the state pays compensation, a decision needs to be made whether or not officials concerned forfeit or enjoy state cover.⁸⁹⁹ Should officials enjoy state cover, the state as a self-insurer will bear all expenses involved.⁹⁰⁰ However, if state cover is forfeited, the state must exercise its right of recourse against the officials concerned.⁹⁰¹

⁸⁹⁹ National Treasury 2005:reg.12.2.1.

⁹⁰⁰ National Treasury 2005:reg.12.7.3.

⁹⁰¹ National Treasury 2005:reg.12.2.3.

5.3.3 Criteria for state cover and standards for expected behaviour

Viewed from an accountability perspective, the criteria for state cover provides a mechanism to ensure that public officials exercise and perform their legislative and constitutional powers, duties and functions according to predetermined standards. The different criteria for state cover indicate the nature of officials' behaviour that is regarded as unacceptable. Officials who behave in a way as expressed in the prescribed criteria for state cover should not be entitled to state protection relating to civil claims for compensation instituted against the state. Consequently, non-compliance with these predetermined standards for officials' actions or omissions leading to civil claims that are successfully instituted against the state will result in officials being held liable for damages suffered by the state that needs to be accounted for. Within this context, officials need to account for their actions and accept the consequences relating to the outcome of liability determinations.

5.3.4 Application of criteria for state cover by SAPS

It may be meaningful to focus first on some remarks made by the Department of Police in their annual report about applying the criteria for state cover provided for in the current Treasury Regulations within the context of an assessment of the sufficiency or not of such criteria to secure accountability. The remarks may indicate questionable practices with the application of the Treasury Regulations concerned and trends observed with waiver of claims against officials by this Department and why the majority of officials enjoy state cover.⁹⁰² The following remarks by SAPS are important and require consideration-⁹⁰³

Once a matter is finalised in court, which could be four to five years after the incident, a decision is made whether a member forfeits state cover, in terms of Treasury Regulations.

Due to the fact that Treasury Regulations are so wide, members seldom forfeit state cover, as they have to act maliciously to forfeit state cover. If a member does forfeit state cover, the capital amount paid to a claimant is recovered from the member.

⁹⁰² See chapter 4 for trends with waiver of claims by SAPS.

⁹⁰³ South African Police Service 2020:100.

The remarks were made within the context of strategies implemented to down manage pending civil claims dealt with by the Department. A total of 49 040 claims against the Department to the value of R6 716 929 845 (R6, 7 billion), based on the best estimate of average claims paid, were still pending as of 31 March 2020.⁹⁰⁴ However, these remarks create uncertainty about current practices followed to administer claims instituted against the Department concerned and how the criteria for state cover is applied.

Firstly, one should be cautious to create the impression that a liability determination regarding state cover is made only once a matter is finalised in court. According to the same annual report, claims are also settled in terms of shortened procedures once it is determined that claims are not defensible, meaning that a court of law does not adjudicate the merits of such claims. A decision whether or not an official forfeits state cover or not should also be made once these claims are settled and paid.

Secondly, it appears from the remarks made that an argument is raised by the Department concerned that the current criteria for state cover, due to its broadness, lacks sufficiency to hold officials accountable as officials only forfeit state cover if they acted maliciously. If this argument represents a true reflection about the criteria for enjoying or forfeiting state cover, all remaining criteria would then become redundant. However, regarding the relevant criteria for state cover applicable to civil claims, one should notice that an official will forfeit state cover if he or she acted contrary to any one or more than one of the relevant criteria concerned. The previous version of the Treasury Regulations⁹⁰⁵ indeed determined that an official, apart from other criteria in terms of which state cover may also be forfeited, will forfeit cover if he or she acted “recklessly, willfully or maliciously.” (Own emphasis). The current Treasury Regulations replaced this criterion by referring to an action that may not be “recklessly or intentionally.”⁹⁰⁶ The Department’s remark is based on a misinterpretation of the current Treasury Regulations concerned. As discussed in this chapter, the criteria are all-inclusive to provide for different incidents leading to civil claims and losses. Its broadness needs to be understood within the context explained, especially when one

⁹⁰⁴ South African Police Service 2020:98.

⁹⁰⁵ National Treasury 2002:reg.12.2.1(d).

⁹⁰⁶ National Treasury 2005:reg.12.2.1(d).

applies the mischief rule to the criteria for state cover concerned. However, it certainly does not prevent the proper application of the criteria for state cover to any particular case concerned. It is unknown whether checks and balances exist to ensure the exercise of due diligence in applying the criteria concerned by those assigned with delegated powers to conduct liability determinations. Adequate evidence and adequate reasoning, supported by reasons provided for decisions made, should determine the outcome of any liability determination in line with the aim of the *PFMA* to secure accountability.

Thirdly, if an official forfeits state cover, the amount recoverable involves much more than only the capital amount paid to a claimant. It also involves, for example, the legal costs of both the legal representatives of the claimant and the SAPS. The latter will include expenses of the state attorney and fees paid to counsel. Such legal costs may involve costs relating to court cases and settlements. An undertaking that needs to be signed by officials involved with civil claims against the state who requested the state attorney to act on their behalf provides for all these costs to be considered for recovery from officials if state cover is forfeited. As the Treasury Regulations do not provide an example of such undertakings, Departments still utilise undertakings similar to the undertakings provided for in the previous Treasury Instructions.⁹⁰⁷

A question that requires a written reply was directed by a member of the National Assembly to the Minister of Justice and Constitutional Development asking whether or not the Minister intends to submit amendments to legislation, including rules or regulations, to ensure that legal costs relating to lawsuits that could not be defended successfully, be recovered from officials involved.⁹⁰⁸ The Minister responded by confirming that if legal representation by the state attorney is granted to an official, such official needs to sign an undertaking to refund all legal costs involved subject to the conditions referred to in the Treasury Regulations regarding state cover. Once the case is concluded and if it is found that the official is liable in law and forfeits state cover rendered in terms of the current Treasury Regulations, a decision regarding recovery of legal costs from an official is made. The Minister confirmed that the state must accept liability for such costs if an official enjoys state cover. The Minister also

⁹⁰⁷ Department of State Expenditure 1999:Annexure A of Chapter W.

⁹⁰⁸ Department of Justice and Constitutional Development 2012.

indicated that it might not be in the interest of justice to recover legal costs from an official as the outcome of a judgment may be based on technicality or [policy] considerations in respect of which the criteria for state cover does not apply. The Minister concluded that the current provisions as explained are sufficient, and no amendments are required.

5.3.5 Sufficiency of criteria for state cover and possible gaps involved

After considering the principles that should assist with determining the sufficiency of criteria for state cover, the dual aim for rendering state cover, and the nature of criteria for state cover setting standards of what constitutes unacceptable behaviour by officials, a determination whether or not such criteria is sufficient to secure accountability as a constitutional obligation and as intended by the PFMA,⁹⁰⁹ needs to be made. The criteria for state cover will be discussed in the same order as published in the Treasury Regulations concerned. Possible gaps that may indicate the insufficiency of the criteria from an accountability perspective will be identified as part of the discussion. It will also be assumed for purposes of this discussion only that the first stage of a liability determination referred to in Chapter 3 confirmed that an official is liable in law for a claim against the state.⁹¹⁰ Some gaps involve content and form regarding some criteria for state cover, while others involve gaps of a more technical, procedural and discretionary nature. The latter gaps require the application of one's mind thoroughly to assess adequate evidence obtained through proper investigations being conducted, to consider whether or not officials concerned comply with the criteria for state cover concerned.

5.3.5.1 Exceeding of powers

If an official intentionally exceeds his or her powers, resulting in civil compensation claims successfully instituted against the state, such an official will not be entitled to state cover.⁹¹¹ Officials may be authorised to exercise public powers in terms of empowering legislation but may not act beyond or contrary to assigned powers.⁹¹² Such action was also prohibited in common law based on the *ultra vires* doctrine,

⁹⁰⁹ 1/1999:sec.2.

⁹¹⁰ See par 3.4.3.3 of chapter 3.

⁹¹¹ National Treasury 2005:reg.12.2.1(a).

⁹¹² Hoexter 2012:258.

which action is now regarded as unlawful based on the foundational values of the *Constitution* that includes reference to the rule of law, the right to just administrative action and grounds of the review provided for in the *PAJA*.⁹¹³ This criterion for state cover is regarded as necessary to hold officials accountable for unlawful actions. It requires officials to act lawfully within the boundaries of the law and powers assigned to them in terms of legislation.

Possible gap: It is questionable why the criterion for state cover limit the exceeding of powers to intentional behaviour only. The exceeding of powers intentionally or negligently produces an identical outcome, namely to act beyond the scope of one's authority or in contravention of powers assigned in terms of empowering legislation or delegated powers. A reasonable person, viewed objectively, is capable of foreseeing a reasonable possibility that his or her conduct may cause harm to a person or property, resulting in patrimonial loss suffered. A failure by such a person to take reasonable steps to guard against conduct with such results will constitute negligence.⁹¹⁴ Reasonable steps to avoid exceeding one's power may consist of observing or obtaining advice about the scope of powers assigned before exercising such power. If an official nevertheless continues to exercise the power concerned in circumstances where doubt in respect of its scope exists, instead of guarding against unlawful action, it may be indicative of negligent conduct. An official should be held accountable for such conduct within this context. Should the criterion for state cover concerned prohibits the "exceeding of powers" without any qualification, an official within the context explained, may not enjoy state cover.

5.3.5.2 Alcohol or drug-related incidents

An official may also forfeit state cover if he or she "made use of alcohol or drugs."⁹¹⁵ As discussed in Chapter 3, this criterion was qualified by previous Treasury Instructions by referring to the excessive use of liquor or drugs, or the use thereof in sufficient quantities for which sufficient proof is required, and which must have resulted

⁹¹³ Corder 2020:16 and 25. Also see 3/2000:secs.6(2)(e)(i) and 6(2)(f)(i). These sections prohibit action in contravention of the law or not authorised by an empowering provision. Such actions are unlawful.

⁹¹⁴ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-F.

⁹¹⁵ National Treasury 2005:reg.12.2.1(b). The previous versions of the Treasury Regulations consist of a similar criterion.

in or contributed to liability.⁹¹⁶ Where the use of alcohol or drugs by an official is involved resulting in a claim for damages against the state in respect of which liability cannot be avoided, an official should forfeit state cover.

Possible gap: In the absence of any qualification attached to the use of alcohol and drugs, decisions about state cover involving this criterion may be clouded with controversy. As a case study has not been conducted to support this observation which is solely based on practical experience in the application of this criterion, such controversy remains real given the number of organs of state that are involved with liability determinations independent of one another. However, one needs to consider the criterion within the broader context of the provisional clause that precedes the criteria for state cover.⁹¹⁷ It requires that an official will forfeit state cover if he or she is liable in law for an act or omission resulting in a claim against the state and acted as described in terms of the criteria concerned. Unless a causal link exists between the use of alcohol or drugs and the damages involved, an official may not forfeit state cover in terms of the criterion concerned. The evidence available in a particular matter will determine to what extent the use of alcohol or drugs contributed to liability and whether or not an official will forfeit state cover. If such an approach is not considered when applying the criterion to the facts available, it may lead to inconsistency in applying the criterion by organs of state concerned. Such inconsistency, in general, may pose a threat to accountability that needs to be secured. Consistency concerning applying this criterion may be enhanced if similar qualifications than those referred to in the previous Treasury Instructions are considered.

5.3.5.3 Action outside course and scope of employment

An official will forfeit state cover if acting outside the course and scope of his or her employment.⁹¹⁸ This requirement for state cover is usually considered during an investigation of a civil claim following receipt of a letter of demand or once civil proceedings commence.⁹¹⁹ Once it is determined that an official acted as such, liability will be denied, and the state may escape liability for civil claims instituted by filing a

⁹¹⁶ See par 3.4.4.2 of chapter 3.

⁹¹⁷ National Treasury 2005:reg.12.2.1.

⁹¹⁸ National Treasury 2005:reg.2.2.1(c).

⁹¹⁹ 40/2002:sec.5. Civil proceedings commence once a court process, e.g. a summons, is served on a defendant concerned.

special plea based on evidence that the state cannot be held vicariously liable for an official's actions. If the court upholds such a plea, litigation may be proceeded with against an official as a defendant in his or her personal capacity. However, if it becomes evident that an official indeed acted within the course and scope of his or her employment, this criterion for state cover will be dealt with in practice long before a claim is settled or unsuccessfully defended on the merits and/or quantum of a particular claim. The majority of officials are not disqualified by this criterion from enjoying state cover. This observation is based on my own experience and the number of reported court judgments that adjudicated disputes concerning vicarious liability compared to claims finalised due to settlements or court judgments for reasons unrelated to such disputes.

Possible gaps: If the outcome of the first enquiry of the standard test for vicarious liability reveals that an official intended to act solely for his own interest and purpose, such intended action, that may include an intentional wrong committed by an official, will not render the state as an employer vicariously liable.⁹²⁰ However, such action may nevertheless render the state liable based on the outcome of the second enquiry that requires consideration in the so-called "deviation cases." The second enquiry of the standard test as developed by the Constitutional Court now also involves consideration of various factors that are normative in nature. This approach ensures that the state as employer conforms to constitutional norms, values and obligations as factors considered in support of a finding that a sufficiently close connection between the conduct of the official and their employment exists to render the state vicariously liable.⁹²¹ The main concern with applying this criterion for state cover to the deviation cases involves decision-makers that overlook the fact that once an official did not pass the first enquiry of the standard test for vicarious liability, such official will forfeit state cover if the state remains vicariously liable based on the outcome of the second enquiry. Decision-makers that are not fully conversant with the principles applicable to vicarious liability may, respectfully, not be able to apply their mind as far as this

⁹²⁰ See discussion at par 3.4.4.3 of chapter 3.

⁹²¹ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); paras.22-23 and 32. Also see par 3.4.4.3 of Chapter 3 for more court judgements from the Constitutional Court confirming this approach.

criterion for state cover is concerned, resulting in officials not being held accountable for their actions.

5.3.5.4 Reckless or intentional actions

An official who acted recklessly or intentionally may not be entitled to state cover.⁹²² This criterion is undoubtedly justified as such unacceptable conduct by officials must bear consequences to secure accountability. A critical analysis involving this criterion that has been conducted revealed that the ordinary meaning of “reckless” conduct might also include “gross negligence” with or without conscious negligence.⁹²³ Furthermore, reckless conduct that constitutes conscious negligence may involve “gross negligence” or *dolus eventualis*, depending on whether or not an indifference about the consequences of one’s conduct is evident.⁹²⁴

Possible gaps: Any obstacles that may arise when considering the facts of a particular matter applicable to this criterion for state cover to ensure that negligence of a serious nature is considered as a criterion for state cover may be avoided by adding “gross negligently” in addition to the existing criterion that involves conduct described as “recklessly” and “intentionally.”

The court in *S v Van Zyl*,⁹²⁵ with reference to *S v Mahametsa*,⁹²⁶ and within the context of driving a vehicle, referred to the behaviour of a driver known as “cutting in” or approaching a blind corner by driving on the wrong side of the road, or while approaching a hill starts to overtake a vehicle, as examples of reckless driving that amounts to gross negligence.⁹²⁷

The court in *MV Stella Tingas Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another*⁹²⁸ (*Stella Tingas*) interprets gross negligence to mean the following:

⁹²² National Treasury 2005:reg.12.2.1(d).

⁹²³ See par 3.4.4.4 of chapter 2.

⁹²⁴ Neethling & Potgieter 2020:161. The authors’ remark to guard against confusion regarding the difference between *dolus eventualis* and gross negligence is supported.

⁹²⁵ 1969 (1) SA 553 (A) at 559 D-G.

⁹²⁶ 1941 AD 83 at 86.

⁹²⁷ *S v Van Zyl* 1969 (1) SA 553 (A) at 558 E-G.

⁹²⁸ 2003 (2) SA 473 (SCA) at 481 A-B. Also see Neethling & Potgieter 2020:168 who supported the clear distinction made by the court between ordinary and gross negligence.

[T]o qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.

The court provides some examples of gross negligence regarding case law to mean, “no consideration whatever to the consequences of his acts”, “a total disregard of duty”; “nalatigheid van 'n baie ernstige aard” or “'n besondere hoë graad van nalatigheid”; “ordinary negligence of an aggravated form which falls short of wilfulness”; and “an entire failure to give consideration to the consequences of one's actions.”⁹²⁹ It is evident that the behaviour of officials, according to the examples provided, which may lead to civil claims against the state, falls by far short of standards set for conduct that should promote and embrace accountable behaviour.⁹³⁰ An inclusion of “gross negligence” as a criterion for state cover may invite the attention of officials assigned with delegated power and decisions regarding the forfeiture or not of state cover to seriously consider conduct that involves negligence of a serious and gross nature. Although such inclusion may be regarded as an extreme precautionary measure (*ex abundantia cautela*) to ensure that matters involving gross negligence as a criterion for state cover are considered with due diligence, it is regarded as justified. Due to the seriousness of conduct that constitutes gross negligence, such inclusion may improve the sufficiency of the criteria for state cover that may contribute to promoting and securing accountability.

5.3.5.5 Admissions

An official who made an admission to the detriment of the state without involving the state attorney first may forfeit state cover.⁹³¹ Such admission by an official may have serious consequences for the state as it may deprive the state attorney of an opportunity to defend a claim based on its merits or to consider the settlement of a particular claim to the best advantage of the state. An official may not be aware of

⁹²⁹ *Stella Tingas* 2003 (2) SA 473 (SCA) at 480I-481B.

⁹³⁰ This observation regarding accountability has been elaborated upon in Chapter 2.

⁹³¹ National Treasury 2005:reg.12.2.1(e).

having legally sound reasons for relying on a defence for his actions leading to a claim against the state. An admission without involving the state attorney who will act on behalf of the state and official as possible co-defendant, once a claim becomes litigious, is serious, and this criterion for state cover is regarded as a necessity to exercise a right of recourse against an official for expenditure that could have been avoided but for the admission concerned.

Possible gaps: Accounting officers of some departments delegated the power to some officials within their respective departments to deal with and settle certain civil claims against the state in terms of shortened procedures without the involvement of the state attorney.⁹³² However, should a plaintiff prefer to continue with the institution of legal proceedings, the state attorney will act on behalf of the department concerned. The criterion for state cover only requires prior consultation with the state attorney before an official considers making an admission of liability. A division within a department assigned with the responsibility to attend to civil claims against the state, without the involvement of the state attorney, may also be confronted with evidence that an official made an admission before or after service of a notice (letter of demand) on a department. Such admission, if detrimental to the state, may also impact negatively on settlement negotiations by such a division, and in particular, the official delegated with the power to settle claims to the best advantage of the state. For an official to forfeit his cover due to such admission, the criterion for state cover should provide for prior consultation not only with the state attorney but also with an official within a department assigned with delegated powers to settle civil claims on behalf of a department. It may prevent a situation where an official successfully lodges a presentation based on the gap identified and technical reasons only, as no requirement exists for prior consultation other than the state attorney who may not be involved with settlements of claims dealt with by departments internally.

5.3.5.6 Non-compliance with or ignoring standing instructions

Non-compliance with or ignorance of standing instructions by an official resulting in a loss, damage, or reason for a civil claim instituted against the state, also involves a criterion that set a standard to prevent conduct that displays disrespect for compliance

⁹³² South African Police Service 2020:99.

with standing instructions.⁹³³ The standard set for awareness by officials about standing instructions that apply to their core responsibilities and assigned duties is justified. It involves standing instructions that officials are aware of or reasonably could have been aware of.⁹³⁴ Unless this criterion is considered with utmost care in determining whether or not state cover is forfeited, it may threaten the sufficiency of the criteria to secure accountability.

Possible gaps: The reason for exercising the utmost care concerning decisions involving this criterion involves a practice followed by departments to convert their constitutional and other legislative obligations and duties into standing instructions, policy directives, official courses, manuals and standing operational procedures. This is done especially for officials to ensure and promote compliance with such obligations and duties. These standing instructions do not relate to the core functions of departments that are divergent only, but also to generic functions of departments that involve financial management, human resource management, asset management, supply chain management that include the procurement of goods and services and information technology management. Non-compliance with and ignorance of standing instructions applicable to the core and generic functions of departments also lead to unnecessary litigation resulting in avoidable expenditure in respect of which the magnitude of reported court judgments serve as evidence. The availability of these sources of information for officials assigned with decision-making concerning the forfeiture or not of state cover becomes critical and essential, without which a liability determination cannot be concluded. Therefore, it is essential that officials involved with the investigation of civil claims include in their factual reports and evidence obtained a reference to all standing instructions that may have a bearing on the cause of action applicable to a civil claim instituted against the state. Without proper investigations being conducted to assess the evidence to determine compliance with or ignorance of standing instructions that lead to claims against the state, this criterion for state cover will not receive the attention it deserves.

⁹³³ National Treasury 2005:reg.12.2.1(f).

⁹³⁴ See discussion at par 3.4.4.6 of chapter 3.

5.3.5.7 Civil claims arising from the use of state vehicles

Except for a particular criterion for state cover that do not apply to claims arising from the use of state vehicles,⁹³⁵ all remaining criteria, including criteria unique to the use of state vehicles, apply.⁹³⁶ Compared to the previous versions of the criteria regarding the use of state vehicles as applied before the commencement of the *PFMA* and Treasury Regulations concerned, the current criteria with a few minor exceptions consists of similar criteria for state cover. State vehicles are regarded as an invaluable asset without which organs of state may not perform their functions. The criteria for state cover applicable to the use of state vehicles intends to identify behaviour that is unacceptable and contrary to the principles applicable to accountability that demand respect for state resources. As such, each criterion is regarded as sufficient from an accountability perspective. Possible gaps will be discussed only concerning the criteria identified that may require more careful consideration.

Possible gaps: An official will forfeit state cover when using a state vehicle for purposes other than in the interest of the state.⁹³⁷ This criterion for state cover requires an official to use a state vehicle for official purposes only that furthers not own interests but the interest of the state.⁹³⁸ One should also determine whether an official intended to drive a state vehicle in the interest of the state viewed from a subjective and objective perspective with due regard to all surrounding circumstances. It may involve questions of fact and law. It has been concluded that the use of a vehicle in the interest of the state is served when such use can be connected with the performance of state activities or functions. Caution should be displayed to determine whether the required connection exists and whether or not the official involved acted in the course and scope of official duties.

An official will also forfeit state cover if a material deviation from the official journey or route without prior authorisation is evident.⁹³⁹ A discussion of this criterion for state cover revealed that certain factors require consideration to determine whether or not

⁹³⁵ National Treasury 2005:reg.12.2.1(f). This criterion relates to non-compliance with or ignorance of standing instructions that lead to a loss, damage or reason for a particular claim.

⁹³⁶ National Treasury 2005:reg.12.2.1(a)-(e) and (g)(i)-(v).

⁹³⁷ National Treasury 2005:reg.12.2.1(g)(iii).

⁹³⁸ See par 3.4.4.7 of chapter 3.

⁹³⁹ National Treasury 2005:reg.12.2.1(g)(v).

a deviation from the official journey or route can be regarded as material.⁹⁴⁰ The procedure to be followed to obtain prior authorisation and the compliance or not with such procedures also requires serious consideration. Standing instructions of a department must be considered during a liability determination and require consistent application. In the absence of guidelines provided to officials involved with liability determinations, inconsistency with decision-making involving this criterion may occur. This may happen, especially concerning organs of state that perform their functions regarding liability determinations nationally, within a decentralised structure. Although each case must be determined on its own merits, a lack of access to precedents concerning the outcome of decision-making in a decentralised structure may not support an approach aimed at consistency and securing accountability.

5.3.8.8 Possible gap involving superiors or supervisors

The previous Treasury Instructions,⁹⁴¹ within the context of deficiencies, losses, or damage caused through the acts or omissions of officials, determined that if an official involved is not legally liable in law for a loss or damage concerned, or did not forfeit state cover, liability needs to be determined in terms of the same criteria for state cover as far as the official's superior or supervisor is concerned. As "losses" were defined to mean any prejudice to the state that includes "compensations",⁹⁴² the Treasury Instruction also applied to liability determinations involving civil claims against the state. Even though this instruction has not been included in the current Treasury Regulations,⁹⁴³ it is expected that a liability determination should consider the possibility, based on the evidence involved, that a superior or supervisor could have contributed to a cause of action leading to a claim instituted against the state.

A superior or supervisor, for example, could have failed to implement sufficient control measures to prevent unauthorised access to keys of state vehicles or access to official firearms leading to incidents in respect of which civil claims are successfully instituted against the state. A supervisor should also be held accountable when exposing an official to line functions involving contact with members of the public, knowing that

⁹⁴⁰ See par 3.4.4.7 of chapter 3.

⁹⁴¹ Department of State Expenditure 1999:W9.4.

⁹⁴² Department of State Expenditure 1999:W1.1(v).

⁹⁴³ National Treasury 2005:reg.12.

such official is suffering from serious emotional stress, or alcohol and drug-related abuse. Unless precautionary measures are considered to avoid unlawful conduct by such an official, it may lead to possible claims against the state.

A liability determination involving the superior or supervisor, subject to compliance with the two-stage approach of such determination, may reveal that a right of recourse can be exercised against such a superior or supervisor within the context explained. The inclusion of similar instruction in the Treasury Regulations to compel decision-makers to consider the liability of superiors and supervisors in this regard may focus attention on the importance of such liability determinations in support of behaviour that complies with accountability principles. Such liability determinations should apply to any damage-causing event resulting in avoidable expenditure for the state.

5.4 CONCLUSION

This chapter highlighted the importance of first determining the validity of subordinate or delegated legislation such as the Treasury Regulations in terms of common-law criteria and applying that to the criteria for state cover and waiver of claims before a determination is made whether or not such criteria is sufficient to secure accountability as a constitutional obligation. Should the outcome of the former determination in a real adjudicative environment reveal that the Treasury Regulations concerned is invalid, the matter would be regarded as finalised. The Treasury Regulations would then not be subjected to constitutional scrutiny to determine the sufficiency of the criteria for state cover from an accountability perspective. The opposite also applies.

The common-law criteria used to determine the validity of the Treasury Regulations were applied to the criteria for state cover and waiver of claims. The common-law criteria also require delegated delegation not to be vague or uncertain concerning required or prohibited conduct. This requirement, given the historical overview of how different sets of criteria for state cover used in the past were combined to provide for one set of criteria to provide for different damage-causing events, required careful consideration. By applying the mischief rule to the Treasury Regulations concerned, it transpired that although it may be difficult to interpret, the meaning and application

thereof is still ascertainable. The Treasury Regulations are regarded as valid when compared to the common-law criteria applicable to the validity of delegated legislation.

Having regard to the principles applicable to determine the sufficiency of criteria for state cover and waiver of claims, the dual aim of rendering state cover to officials and the standards set for expected behaviour from officials as derived from such criteria, the current criteria for state cover promote accountability as a constitutional obligation. However, possible gaps regarding the criteria and their application are identified that may prevent the criteria from securing accountability from a constitutional and *PFMA* perspective. A variety of gaps in respect of the criteria for state cover are identified. Some gaps involve a need to broaden the scope of certain criteria for state cover; to qualify some criteria to enhance more clarity and consistency as far as application thereof is concerned; to exercise more care and due diligence when considering compliance or not with certain criteria; to consider the adding of words concerning certain criteria for state cover aimed at focusing attention on conduct contrary to the principles of accountable behaviour such as “gross negligence”; to provide for procedural issues involving admissions of liability, and to consider the liability of superiors and supervisors who may have contributed to conduct leading to civil claims against the state. In the next chapter, specific recommendations regarding these gaps identified will be attended to.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

This chapter aims to respond to the secondary research questions supported by findings based on the research conducted. It will guide a response to the primary research question. Recommendations will follow based on observations and conclusions made during the study that may require attention. Consideration will be given to improving the criteria for state cover, improvement of decision-making capabilities, the monitoring of liability determinations, non-disclosure in annual financial statements (AFSs) by departments about how compensation payments are accounted for and measures to enhance accountability. The need to encourage further research involving the focus and outcome of this study will also be discussed.

6.2 FINDINGS REGARDING RESEARCH QUESTIONS

The conclusions regarding the research questions will now be dealt with by first identifying each secondary research question involved, followed by a response to such question based on the findings made regarding the outcome of the research conducted that has a bearing on the research question concerned. A response to the primary research question will then follow.

6.2.1 First secondary research question

The first secondary research question relates to the research conducted in chapter 2. This chapter focuses on the ordinary meaning of accountability and its connection with closely related concepts describing responsibility and liability. Various constitutional and other perspectives on accountability relating to administrative action are investigated, which is used to direct and inform the discussions in all remaining chapters. The question to be responded to is:

What does accountability as a constitutional value mean within the context of just administrative action?

Findings: “Accountability” is not defined in any legislation referred to in this study. The ordinary meaning of accountability involves a situation of someone being held accountable and from whom an explanation may be required concerning actions taken and decisions made.⁹⁴⁴ It requires all public officials and public office-bearers in all spheres of government to explain assigned powers exercised and functions performed in fulfilling their constitutional and legislative obligations if required to do so. The level of accountability is determined by the extent to which public officials and public office-bearers comply with their assigned duties and responsibilities in accordance with the legal framework applicable to their core functions.

As one of the constitutional features of accountability, the legal nature of accountability emphasises that accountability is not meant to be a mere morally and accepted virtue or value but an obligation that must be embraced.⁹⁴⁵ The importance of accountability appears throughout the *Constitution* in different contexts that apply to all spheres of government (the parliament, executive and the judiciary), all levels of government (national, provincial and local), constitutional institutions such as the Public Protector and the Auditor-General, organs of state and public entities, accounting officers and authorities, including public officials.

Various constitutional features of accountability apply to decisions about state cover and waiver of claims against officials. These features relate to the interpretation of statutes, reporting responsibilities, checks and balances to enable the legislatures and the executive to fulfil their respective oversight roles. It includes oversight involving accounting officials and compliance with empowering provisions aiming to assist organs of state while decisions need to be made.

The concept of being held accountable supports remedies available to secure accountability when acting against public office-bearers who do not fulfil their constitutional obligations. Instruments such as legislation and constitutional institutions to uphold accountability and legal remedies to enforce accountability

⁹⁴⁴ See par 2.2.1 of chapter 2.

⁹⁴⁵ See par 2.3.1 of chapter 2.

through court proceedings aim to recognise the importance of accountable behaviour. Codes of ethics and codes of conduct set standards for accountable behaviour and remedial action to correct unacceptable conduct contrary to these codes.

Accountability within the context of the right to just administrative action contributes to the realisation of this right. Accountability directs the exercising of public powers through just administrative action and, in particular, decisions in terms of legislation that must comply with the requirements of “reasonableness” and “rationality.” Unreasonable and irrational decisions are contrary to accountable behaviour. The fundamental requirements for reasonableness and rationality, including the factors that require serious consideration, also apply to decisions regarding the forfeiture or not of state cover by officials liable for civil claims against the state and waiver of claims against officials.

6.2.2 Second secondary research question

The research conducted in chapter 3 relates to the second secondary research question. In this chapter, the research involves a historical overview of the development of criteria for state cover before and after implementing the new Treasury Regulations published in terms of the *Public Finance Management Act*⁹⁴⁶ (PFMA). It includes a critical analysis concerning the current criteria for state cover provided to public officials liable in law for claims against the state compared to the previous criteria involved, followed by a discussion summarising the outcome of a liability determination. The research question to be responded to involves the following:

What are the current criteria for state cover to determine the liability of officials for expenditure relating to civil claims against the state?

Findings: The rationale for offering state cover to public officials are linked to the dual aim of state cover, namely to render protection to officials exposed to civil claims against the state emanating from functions performed in the course and scope of their official duties and to provide organs of state with a statutory right of recourse against officials who forfeited state cover. The offering of state cover to public officials is justified given the risk of exposure to civil claims being instituted against the state while

⁹⁴⁶ 1/1999.

officials act in the course and scope of their official duties. While fulfilling their constitutional obligations and exercising the assigned powers and functions in terms of empowering legislation, officials render the state vicariously liable when acting unlawfully or infringing the constitutional rights of others. Hence the involvement of the state in litigation involving public officials.

The state is a bearer of its risks. Such risks, including the risk for compensation payments, are accepted subject to certain conditions related to the outcome of a liability determination. Such determination involves the application of the criteria for state cover once claims for compensation are settled and paid or due to a final court order that includes an award for damages in favour of the plaintiffs concerned.

The criteria for state cover applicable to all public officials liable for civil claims against the state are listed in the Treasury Regulations.⁹⁴⁷ The criteria for state cover represent the outcome of criteria that have been developed before and after the implementation of the current criteria for state cover. A critical analysis and interpretation of each criterion to determine its meaning expose certain areas of concern and caution to be exercised with the interpretation and application of some criteria for state cover concerned. The criteria for state cover only need consideration if an official in terms of the provisional clause preceding the criteria concerned is liable in law for an act or omission giving rise to a claim against the state.

The analysis and interpretation of the criteria for state cover involve a liability determination that consists of a two-stage approach that should be considered with caution.⁹⁴⁸ A purposive and contextual approach with interpretation is required with due observance of the purpose of the *PFMA*⁹⁴⁹ and Treasury Regulations to secure accountability as a constitutional obligation. It is essential to apply due diligence when considering each criterion for state cover concerned. Liability determinations involving decisions about state cover constitute administrative action, and such decisions must comply with all the requirements for such action, particularly reasonableness and rationality. Each criterion for state cover intends to promote accountable behaviour

⁹⁴⁷ National Treasury 2005:reg.12.2.1 read with reg.12.7.3.

⁹⁴⁸ See par 2.3.2 of chapter 2; Also see par 3.4.3.3 of chapter 3.

⁹⁴⁹ 1/1999:sec.2.

and, by implication, describes the nature of behaviour and conduct contrary to the norm set for public officials.

The outcome of all liability investigations may result in claims against officials for the expenditure involved that must be waived if such officials enjoyed state cover. Alternatively, steps to recover expenditure relating to compensation payments must be initiated if state cover is forfeited.

6.2.3 Third secondary research question

The third secondary research question relates to chapter 4. This chapter focuses on trends with waiver of claims by the state against officials liable in law for civil claims against the state. It involves the requirements for and an analysis of disclosure notes attached to annual financial statements (AFSs) of the South African Police Service (SAPS) regarding contingent liabilities (pending civil claims as on the last day of a financial year) and disclosure of decisions made about the recoverability of compensation payments made. Such decisions also reveal the current and expected future trends with a waiver of claims against officials concerned. The research question involves the following:

What do current trends reveal about the waiver of claims by organs of state against officials who enjoy state cover?

Findings: Compared to other departments, the SAPS is the only national department fully compliant with disclosure notes about waiver of claims against officials. Accountability is the cornerstone of financial reporting and disclosure of information in AFSs. The principles and requirements for disclosure notes that need to be attached to AFSs are prescribed by the National Treasury.⁹⁵⁰

The extent of contingent liabilities directly relates to the disclosure of claims waived against officials, and the latter cannot be considered in isolation. As the SAPS since the 2016/2017 financial year changed the methodology to determine contingent liabilities as at year-end resulting in disclosing single figures only as far as the opening and the closing balance of contingent liabilities are concerned, context is lacking about

⁹⁵⁰ See paras. 4.2-4.4 of chapter 4.

what these claims involve. Contingent liabilities now reflect an estimate of the “most likely” amount that may be awarded by a court or estimated settlement amounts. Since 1 April 2017, when the new methodology about estimates was introduced by the department until 31 March 2019, an increase of contingent liabilities of 51,49% or R2,3 billion occurred.⁹⁵¹ The closing balance of contingent liabilities as of 31 March 2019 is indicated as R6,7 billion. This amount equals expected compensation amounts based on pending civil claims as on 31 March 2019 only. It illustrates the number of compensation payments that would be the subject of liability determinations if such payments could be resolved on the same date. The determination of contingent liabilities disclosed for the 2015/2016 financial year is based on amounts claimed from the SAPS and therefore differs substantially from figures disclosed since the 2016/2017 financial year. The former disclosure notes provide more context of the monetary value of the different types of claims involved. Compared to the opening and closing balance of the disclosure notes concerned, an increase of 24,7% in respect of contingent liabilities occurred during the 2015/2015 financial year.⁹⁵²

Disclosure notes involving waiver of claims against officials regarding the four financial years from 2015/2016 until 2018/2019 remains the same and are comparable. According to the summary of trends with waiver of claims against officials involving four financial years, an average of 97,5 % of the total value of accumulated compensation payments made was waived due to officials who enjoyed state cover.⁹⁵³ The nature of claims linked to payments made during the four financial years concerned, as disclosed in the table applicable to waiver of claims,⁹⁵⁴ provides more context regarding the nature of claims in respect of which waiver of claims against officials by the department is considered during the particular financial year or still needs to be considered as at year-end of the particular financial year. On average, 80% of the claims paid during the four financial years related to unlawful arrests and detention. Apart from claims in respect of unlawful arrests and detention, claims relating to motor vehicle collisions attracted attention in terms of the number of payments compared to other types of claims involved. The majority of claims against

⁹⁵¹ See Table 4.3 at par. 4.5.1 of chapter 4.

⁹⁵² See Table 4.4 at par. 4.5.1.2 of chapter 4.

⁹⁵³ See Table 4.7 at par. 4.5.3.1 of chapter 4.

⁹⁵⁴ See Table 4.8 at par. 4.5.3.2 of chapter 4.

the SAPS in respect of which claims are waived against officials liable for claims against the state relate to claims paid in respect of unlawful arrests and detention and motor vehicle collisions.

The extent of current trends with waiver of claims against officials and impact of waiver of claims against officials liable in law for civil claims against the state may compromise the purpose of the *PFMA*⁹⁵⁵ to secure accountability. Officials assigned with liability determinations need to be held accountable for their decisions as they may defeat the purpose mentioned. Non-disclosure by departments concerning the recoverability of compensation payments may prevent an opportunity to determine trends with waiver of claims and hold to account those responsible for decisions made. The significance of these findings will be dealt with as part of the recommendations made to address some of the issues raised.

6.2.4 Fourth secondary research question

The research conducted in chapter 5 relates to the fourth secondary research question. It involves an investigation concerning the sufficiency of the current criteria for state cover to secure accountability in pursuance of the intended purpose of the *PFMA*⁹⁵⁶ and with accountability as a constitutional obligation in mind. Possible gaps concerning the criteria for state cover were identified. The investigation is preceded by a determination, as explained,⁹⁵⁷ to confirm whether or not the Treasury Regulations⁹⁵⁸ comply with the common law criteria as applied by courts to assess the validity of Treasury Regulations as subordinate legislation. The fourth secondary question read as follows:

Do the current criteria for state cover promote and secure accountability as a constitutional value?

Findings: The common law criteria as applied by courts to determine the validity of delegated legislation such as the current Treasury Regulations involves an assessment of the competency of the body delegating the authority to legislate; conflict

⁹⁵⁵ 1/1999:sec.2.

⁹⁵⁶ 1/1999:sec.2.

⁹⁵⁷ See paras. 5.2 and 5.2.1 of chapter 5.

⁹⁵⁸ National Treasury 2005:reg.12.

with original legislation; compliance with legislative procedures; vagueness; the *intra vires* principle; unreasonable, unfair and discriminatory legislation and sub-delegation of delegated powers.⁹⁵⁹ The current Treasury Regulations represent a combination of different sets of criteria that existed before implementing the regulations published in terms of the *PFMA*. It applies to claims against the state, the use of state vehicles, and other losses and damages suffered by the state. The combination of the criteria may cause inconsistency in its application due to possible vagueness. However, after applying the mischief rule (also known as the text-in-context approach to interpretation) that allows for using the historical context of delegated legislation to provide perspective on the interpretation of legislation under consideration, it is found that although the criteria for state cover may be difficult to interpret, its meaning and application can be ascertained with reasonable certainty. Such difficulty does not render the Treasury Regulations applicable to state cover void due to vagueness or uncertainty. Therefore, the Treasury Regulations comply with the common law requirements of validity.

Each criterion for state cover complies with promoting accountability as a constitutional value and obligation. However, gaps as far as the criteria for state cover are concerned were identified. Some gaps involve content and form, while others involve gaps of a more technical, procedural and discretionary nature. The latter gaps require the thorough application of one's mind to assess adequate evidence obtained through proper investigations and to consider whether officials concerned comply with the criteria for state cover. Given some gaps identified, the current Treasury Regulations may not be sufficient to secure accountability. This finding will be pursued as part of the recommendations to improve some of the criteria for state cover concerned.

6.2.5 Primary research question

The response to the primary research question is based on the outcome of the research conducted regarding each secondary research question as discussed. The primary research question involves the following:

⁹⁵⁹ See par. 5.2 of chapter 5.

Will the criteria applicable to state cover applied by organs of state pass constitutional muster from an accountability perspective?

Findings: The current criteria for state cover, by implication, identify the behaviour of public officials that are regarded as unacceptable, and if such behaviour leads to civil claims against the state, it may eventually cause officials to forfeit state cover rendered in terms of the Treasury Regulations.⁹⁶⁰ The current criteria for state cover is the product of criteria developed over decades aimed at holding officials to account who acted contrary to the set standards of behaviour as expressed in the criteria for state cover. The aim of a liability determination conducted in the past and present is similar and contributes to promoting accountable behaviour.

However, the contrast between criteria that contributes to promoting accountability and current trends with waiver of claims by the SAPS that may compromise accountability as a constitutional obligation is evident. The reasons submitted by SAPS in an annual report why most officials enjoy state cover, resulting in the majority of claims against officials being waived, clearly indicate that the criteria for state cover may not be interpreted and applied with due diligence.⁹⁶¹ It is found that the intention of the criteria for state cover to ensure accountable behaviour may be jeopardised if due diligence is not exercised in the application of such criteria during a liability determination. It may defeat the purpose of the *PFMA* to secure accountability.

The criteria applicable to state cover applied by organs of state will pass constitutional muster from an accountability perspective. However, the current criteria lack sufficiency in terms of content and form and gaps of a more technical, procedural and discretionary nature to secure accountability as intended by the *PFMA* as empowering legislation.⁹⁶² Recommendations that may contribute to secure accountability will be made.

⁹⁶⁰ National Treasury 2005:reg.12.2.1.

⁹⁶¹ South African Police Service 2020:100. Also see par. 5.3.4 of chapter 5.

⁹⁶² 1/1999.sec.2. Also see par. 5.3.4 of chapter 5.

6.3 RECOMMENDATIONS

The recommendations made are based on the outcome of the research topic and conclusions made. It relates to key issues identified during the study and, if addressed, may contribute to secure accountability as a constitutional obligation. It may, furthermore, contribute to ensuring just administrative action insofar it relates to reasonable and rational decision-making regarding liability determinations and whether or not officials involved with civil claims against the state forfeit state cover.

6.3.1 Improvement of criteria for state cover

Being mindful of the principles to determine the sufficiency of criteria for state cover and the aim for rendering state cover to public officials,⁹⁶³ the following improvements to some of the criteria for state cover listed below are recommended. The improvements are based on gaps identified and discussed.⁹⁶⁴ An official forfeits state cover if he or she is liable in law for an act or omission leading to a claim against the state and-

(1) Exceeded his or her power intentionally.⁹⁶⁵

The exceeding of powers intentionally or negligently produces an identical outcome, namely to act beyond the scope of one's authority or in contravention of powers assigned in terms of empowering legislation or delegated powers. Should the criterion for state cover prohibits the "exceeding of powers" without any qualification, an official who exceeded powers negligently within the context already explained⁹⁶⁶ may not enjoy state cover. The word "intentionally" should therefore be deleted.

(2) [M]ade use of alcohol or drugs.⁹⁶⁷

In the absence of any qualification attached to the use of alcohol and drugs, decisions about state cover involving this criterion may be clouded with controversy. Previous Treasury Instructions, for example, referred to the excessive use of liquor or drugs,

⁹⁶³ See paras. 5.3.1 and 5.3.2.

⁹⁶⁴ See par. 5.3.5 of chapter 5.

⁹⁶⁵ National Treasury 2005:reg.12.2.1(a).

⁹⁶⁶ See par. 3.4.4.1 of chapter 3; Also see par. 5.3.5.1 of chapter 5.

⁹⁶⁷ National Treasury 2005:reg.12.2.1(b).

which must have resulted in or contributed to liability. It is confirmed that “causation” is implied by the provisional clause preceding the criteria for state cover that require an official to be “liable in law” before the criteria for state cover apply. Unless a causal link exists between the use of alcohol or drugs and the damages involved, an official may not forfeit state cover in terms of the criterion concerned. The evidence available in a particular matter will determine to what extent the use of alcohol or drugs contributed to liability and whether or not an official will forfeit state cover. If such an approach is not considered when applying the criterion to the facts available, it may lead to inconsistency in applying the criterion by organs of state that may pose a threat to accountability that needs to be secured. Consistency concerning applying this criterion may be enhanced if similar qualifications than those referred to in the previous Treasury Instructions are considered.⁹⁶⁸

(3) [A]cted recklessly or intentionally.⁹⁶⁹

Based on court judgments discussed, it is concluded that the ordinary meaning of “reckless” behaviour may also include behaviour that constitutes “gross negligence.”⁹⁷⁰ Practical examples of grossly negligent behaviour gleaned from court judgments fall short by far of standards set for conduct that should promote and embrace accountable behaviour. Including “gross negligence” as a criterion for state cover may invite the attention of officials assigned with delegated power and decisions regarding the forfeiture or not of state cover to seriously consider conduct that involves negligence of a serious and gross nature. Any obstacles that may arise when considering the facts of a particular matter applicable to this criterion for state cover to ensure that negligence of a serious nature is considered as a criterion for state cover may be avoided by adding “gross negligently” in addition to the existing criterion that involves conduct described as “recklessly” and “intentionally.”

⁹⁶⁸ See par. 3.4.4.2 of chapter 3; Also see par. 5.3.5.2 of chapter 5.

⁹⁶⁹ National Treasury 2005:reg.12.2.1(d).

⁹⁷⁰ See par. 3.4.4.4 of chapter 3; Also see par. 5.3.5.4 of chapter 5.

(4) [W]ithout prior consultation with the State Attorney, made an admission detrimental to the state.⁹⁷¹

For an official to forfeit his cover due to such admission, the criterion for state cover should provide for prior consultation not only with the state attorney but also with an official within a department assigned with delegated powers to settle civil claims on behalf of a department without the involvement of the state attorney. It may prevent a situation where an official successfully lodges a presentation based on the gap identified and technical reasons only, as no requirement exists for prior consultation other than the state attorney that is not involved with settlements of claims dealt with by departments internally.

(5) Remaining criteria for state cover.⁹⁷²

The remaining criteria for state cover involve officials who acted outside the course and scope of their employment, who did not comply with or ignore standing instructions or did not comply with any of the criteria applicable to the use of a state vehicle. The gaps regarding some of these criteria are of a more technical, procedural and discretionary nature that do not require an amendment to any of the criteria concerned. Given the extent of waivers of claims against officials, the gaps identified require the application of one's mind to assess thoroughly all available evidence, obtained through proper investigations being conducted, to consider whether or not officials concerned comply with the criteria for state cover concerned.⁹⁷³ Without proper liability determinations conducted, waiver of claims against officials may not be justified, nor may accountability be secured.

6.3.2 Improving decision-making capabilities

Officials assigned with delegated powers and functions applicable to liability determinations should be fully conversant with how the criteria for state cover developed before and since the implementation of the PFMA and Treasury Regulations and applying the current criteria for state cover with utmost care and due diligence in mind. Furthermore, the need to appreciate the rationale of providing state

⁹⁷¹ National Treasury 2005:reg.12.2.1(e).

⁹⁷² National Treasury 2005:reg.12.2.1 (c),(f) and (g).

⁹⁷³ See paras. 5.3.5.3, 5.3.5.6 and 5.3.5.7 of chapter 5.

cover to public officials and the state acting as a bearer of its risks should also not be underestimated. Knowledge about these matters should not be assumed. A short course or workshops arranged by state organs for officials assigned with the powers and functions mentioned may improve decision-making capabilities regarding the forfeiture or not of state cover by officials liable for civil claims against the state. An induction course arranged for newly appointed officials that will eventually be involved with liability determinations should also not be overlooked.

6.3.3 Monitoring of liability determinations

Members of Parliament, members of the Cabinet as part of the executive, Parliamentary Committees, the Standing Committee on Public Accounts (SCOPA), Constitutional Institutions such as the Public Protector and the Auditor-General, including accounting officers, have a prominent oversight role to fulfil to monitor decisions about the recoverability of compensation payments made that include waiver of claims against officials as discussed.⁹⁷⁴ Accounting officers who delegated their powers regarding liability determinations to officials within a department must implement monitoring mechanisms to ensure compliance with conditions applying to delegated powers. Line managers overseeing the exercise of delegated powers may assist with monitoring the outcome of decisions involving liability determinations and, in particular, waiver of claims against officials concerned.

6.3.4 Non-disclosure of liabilities recoverable

A failure by organs of state to disclose in their AFSs the outcome of decisions made concerning the recoverability of compensations made relating to civil claims against the state jeopardise accountability as the cornerstone of financial reporting.⁹⁷⁵ During the study, it was discovered that, apart from the SAPS, national and provincial departments are not compliant with disclosing information about “liabilities recoverable” as prescribed by the National Treasury.⁹⁷⁶ Given possible reasons for such failure, the National Treasury needs to ensure that electronic financial systems support the business environment of officials involved with liability determinations. It

⁹⁷⁴ See paras. 2.3.3, 2.3.5 and 2.5.2 of chapter 2.

⁹⁷⁵ See discussion at par. 4.7 of chapter 4.

⁹⁷⁶ National Treasury 2019c:164.

will enable the capturing of information for disclosure purposes regarding the outcome of decisions applicable to the recoverability of compensation payments made.

6.3.5 Measures to enhance accountability

A publication consisting of practical proposals about a framework and measures to enhance public accountability, as referred to in this study, corresponds with the various constitutional features of accountability as discussed.⁹⁷⁷ What all these measures and features have in mind is the creation of public environments that are conducive to accountable behaviour. Without proper implementation of these measures, accountability as a constitutional obligation will remain a mere virtue. It requires a culture, a change in mindset and a commitment to be held accountable for exercising public powers and functions. It involves accepting responsibilities and the consequences and outcome thereof if something went wrong, which may lead to public officials being held liable for unjust administrative action.

6.4 CONTINUOUS RESEARCH

It is suggested that this study creates ample opportunities for legal scholars to explore the research topic through comparative legal studies, case studies and publications. Law scholars can contribute immensely to exploring some of the matters raised in this study and the recommendations concerned. It may attract the attention of and sensitise legal officials, employed by organs of state, who are responsible for liability determinations to practice more caution and due diligence to ensure reasonable and rational decisions concerning state cover and waiver of claims against officials. Legal advisors employed by the National Treasury may also consider assisting organs of state in this regard and ensuring compliance with disclosure of information about “liabilities recoverable” by all organs of state involved. It may even lead to an appreciation by decision-makers of their roles in ensuring that administrative action and, in particular, decisions involving state cover and waiver of claims do not compromise accountability as a constitutional obligation.

⁹⁷⁷ See paras. 2.3 and 2.5 of chapter 2.

6.5 CONCLUSION

The secondary and primary research questions are responded to supported by findings based on the research conducted. Recommendations to improve some of the criteria for state cover has been made. Some gaps regarding the remaining criteria for state cover are identified and of a more technical, procedural and discretionary nature that do not require an amendment to any one of the criteria concerned. Recommendations involve improving decision-making capabilities involving state cover and waiver of claims, monitoring liability determinations, non-disclosure of liabilities recoverable, and enhancing accountability. The need to continue with further research based on the conclusions and recommendations of the study is emphasised.

BIBLIOGRAPHY

AGABA DK

2018. Implementing legal accountability to reduce maternal mortality and morbidity in Uganda. *African Human Rights Law Journal* 18(1):123-145.

AUDITOR-GENERAL OF SOUTH AFRICA.

2019. *Integrated Annual Report 2018/2019*. Pretoria. Auditor-General.

BOONZAIER L

2013. State liability in South Africa: A more direct approach. *South African Law Journal* 130 (2):330-368.

BOTHA C

2012. *Statutory Interpretation: An introduction for students*. 5th ed. Cape Town: Juta.

BOTHA CG

2015. *Public Supply Chain Management II (PSC200) study guide*. Krugersdorp: Southern Business School.

BOULLE L, HARRIS B & HOEXTER C

1989. *Constitutional and Administrative Law: Basic Principles*. Johannesburg: Juta.

BRAND-JONKER N

2019. Miljarde rande se foutiewe eise gevind. *Beeld* 30 September: 11.

BURNS Y & BEUKES M

2006. *Administrative Law under the 1996 Constitution*. 3rd ed. Durban: Lexis Nexis.

COLLINS ENGLISH DICTIONARY

2004. 1st ed. Glasgow: HarperCollins.

CORDER H

2020. The development of administrative law in South Africa. In G Quinot (ed) 2020:1-27.

CURRIE I & DE WAAL J

2013. *The Bill of Rights Handbook*. 6th ed. Cape Town: Juta.

DEPARTMENT OF CORRECTIONAL SERVICES

2019. *Annual Report 2018-2019*. Pretoria: Department of Correctional Services. <http://www.dcs.gov.za/wp-content/uploads/2019/12/DCS-Annual-Report- web-version.pdf> (accessed on 23 April 2020).

DEPARTMENT OF DEFENCE

2019. *Annual report 2018-2019*. Pretoria: Department of Defence. <http://www.dod.mil.za/document/ReportsNav/Reports/Annual%20Reports/2019/DOD%20Annual%20Report%20for%20FY2018-19.pdf> (accessed on 27 October 2021).

DEPARTMENT OF EDUCATION, FREE STATE PROVINCE

2018. *Annual Report 2019/20 Financial year, Part E – Financial Information*. <http://www.education.fs.gov.za/wp-content/uploads/2018/11/Annual-Report-2017-2018-Part-E-Financial-Information.pdf> (accessed on 23 April 2020).

DEPARTMENT OF FINANCE

1984. *Chapter W of the Financial Manual issued in terms of section 39 of the Exchequer and Audit Act, 1975 (Act 66 of 1975)*. Treasury Circular TS1/10/1 (10 Augustus 1984). Pretoria: Treasury.

1985. *Amended Chapter W of the Financial Manual issued in terms of section 39 of the Exchequer and Audit Act, 1975 (Act 66 of 1975)*. Treasury Circular TS1/10/1(W) (26 September 1995). Pretoria: Treasury.

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT.

2012. *National Assembly, Question for written reply, Parliamentary question no 1733*. Date of question 27 July 2012.

<https://www.justice.gov.za/pqa/pqa2012/2012-1733.pdf> (accessed on 18 September 2021).

2019. *Annual Report 2018-2019*. Pretoria: Department of Justice and Constitutional Development.

https://www.gov.za/sites/default/files/gcis_document/201911/justice-annual-report-2018-19.pdf (accessed on 23 April 2020).

DEPARTMENT OF PLANNING, MONITORING AND EVALUATION

2019. *Future status of the Managing Performance Assessment Tool (MPAT)*. National Circular (18 January 2019). Pretoria: Government Printer.

DEPARTMENT OF POLICE

n.d. *Code of Conduct*. Pretoria. Department of Police. <https://www.saps.gov.za/about/about.php> (accessed on 18 February 2020).

2016. *Recoverability: Information extracted by Loss Control System*. Excel report, Request No OOIVB188 (1 April 2016). Pretoria. Department of Police.

2017. *Recoverability: Information extracted by Loss Control System*. Excel report, Request No OOIVB188 (1 April 2017). Pretoria. Department of Police.

2018. *Recoverability: Information extracted by Loss Control System*. Excel report, Request No OOIVB188 and OOIV227 (2 April 2018). Pretoria. Department of Police.

2019. *Recoverability: Information extracted by Loss Control System*. Excel report, Request No OOIVB188 (31 March 2019). Pretoria. Department of Police.

DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION

1990. *Public Service Staff Code*. A/S 1/2/5/1 (12/90): 28-30.

DEPARTMENT OF STATE EXPENDITURE

1997. Amendment of *Financial Manual*: Amendment 1 of 1997. Circular Minute SS 1/10/1 (1 September 1997). Pretoria

1999. Amendment of *Financial Manual*: Amendment 1 of 1999. Circular Minute SS 1/10/1 (Date unknown). Pretoria

DEPARTMENT OF TRANSPORT

2019. *Annual report 2018-2019*. Pretoria: Department of Transport. https://www.transport.gov.za/documents/11623/41419/DoT_AnnualReport_30_09_2019.pdf/dfb6bce5-e5f0-4f8d-85d7-2cbcdfed6efa (accessed on 28 January 2020).

DE VOS AS, STRYDOM H, FOUCHÉ CB & DELPORT CSL

2011. *Research at Grass Roots: For the social sciences and human service professions*. 4th ed. Pretoria: Van Schaik.

DU PLESSIS LM

1986. *The interpretation of statutes*. 1st ed. Cape Town: Butterworths.

2000. The status of legislation and the realisation of constitutional values in the new constitutional dispensation. *Stellenbosch Law Review* 11(2):192-214.

FAGAN A

2018. Further reflections on wrongfulness in the law of delict. *South African Law Journal* 123 (1):18-54.

FELIX J

2017. Siviele eise teen polisie styg met 175%. *Netwerk24* 19 Mei: 1.

GAUTENG DEPARTMENT OF HEALTH

2016. *Annual Report 2015-2016*. Johannesburg: Gauteng Department of Health. https://provincialgovernment.co.za/department_annual/409/2016-gauteng-health-annual-report.pdf (accessed on 31 January 2019).

2017. *Annual Report 2016-2017*. Johannesburg: Gauteng Department of Health. https://provincialgovernment.co.za/department_annual/534/2017-gauteng-health-annual-report.pdf (accessed on 31 January 2019).

2018. *Annual Report 2017-2018*. Johannesburg: Gauteng Department of Health. https://provincialgovernment.co.za/department_annual/646/2018-gauteng-health-annual-report.pdf (accessed on 31 January 2019).

2019. *Annual Report 2018-2019*. Johannesburg: Gauteng Department of Health. https://provincialgovernment.co.za/department_annual/780/2019-gauteng-health-annual-report.pdf (accessed on 28 January 2020).

GAUTENG LEGISLATURE

2013. *Standing Rules*. Version 5 – Revision 3. Johannesburg: Gauteng Provincial Legislature.

GIVEN L

2006. Qualitative research in evidence-based practice: A valuable partnership. *Library Hi Tech* 24 (3):376-386.

HENRICO R

2018. Subverting the Promotion of Administrative Justice Act in judicial review: The cause of much uncertainty in South African administrative law. Part 2. *Tydskrif vir die Suid-Afrikaanse Reg*.2:88-307.

HOEXTER C

2012. *Administrative Law in South Africa*. 2nd ed. Cape Town: Juta.

IJEOMA EOC & SAMBUMBU DK

2013. A framework for improving public accountability in South Africa. *Journal of Public Administration* 48 (2):282-298.

INSTITUTE OF DIRECTORS IN SOUTHERN AFRICA

2016. *King IV Report on Corporate Governance for South Africa 2016*. The Institute of Directors (South Africa). Sandton: IoDSA.

KIDD M

2020a. Reasonableness. In G Quinot (ed) 2020:199-225.

2020b. Reasons. In G Quinot (ed) 2020:227-254.

MAREE P

2020. Administrative authorities in legal context. In: G. Quinot (ed) 2020:29-67.

MDUMBE FK

2005. The meaning of 'organ of state' in the South African Constitution. *South African Public Law* 20:8-28.

MONTEIRO C

2002. Vicarious admissions and section 3 of the Law of Evidence Amendment Act 45 of 1988: *Makhathini v Road Accident Fund*. *South African Law Journal* 119 (2):270-277.

MORRIS A

2006. Provision of research methods teaching in UK LIS departments. *New Library World* 107:116-126.

MURCOTT M

2015. A future for the doctrine of substantive legitimate expectation? The implications of *Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal*. *Potchefstroom Electronic Journal* 18 (1):3133-3158.

NATIONAL COUNCIL OF PROVINCES.

2008. *Rules of the National Council of Provinces*. 9th ed. Cape Town. https://www.parliament.gov.za/storage/app/media/Rules/NCOP/Rules_of_NCOP9tredition.pdf (accessed on 13 October 2020).

NATIONAL TREASURY

[n.d.] *Press statement on new treasury regulations*. Pretoria. <http://www.treasury.gov.za/search.aspx?cx=018115738860957273853%3Aj5zowsrmpIi&cof=FORID%3A11&q=media%20statement%20treasury%20regulations> (accessed on 8 September 2021).

2003. *Code of Conduct for Supply Chain Management Practitioners*. Practice Note SCM 4 of 2003 (5 December). Pretoria: Government Printer

2018. *Modified Cash Standard: For National and Provincial Departments* (1 April 2018). Pretoria: National Treasury.

2019a. *Financial year-end procedures, closure and submission dates for all Public Finance Management Act (PFMA) compliant institutions*. Circular (12 February 2019). Pretoria: National Treasury.

2019b. *Accounting Manual for Departments: Provisions and Contingents*. Pretoria: National Treasury.

2019c. *Specimen Annual Financial Statements for National and Provincial Departments*. (For the year ended 31 March 2019). Pretoria. National Treasury.

2019d. *Budget review 2019*. (20 February 2019). Pretoria. National Treasury. <http://www.treasury.gov.za/documents/national%20budget/2019/review/FullBR.pdf> (accessed on 2 August 2020).

NEETHLING J & POTGIETER J

2012. The Law of Delict. *Annual Survey of South African Law* (2012): 602-671.

NEETHLING J & POTGIETER JM

2020. *Law of Delict*. 8th ed. Durban: Lexis Nexis.

NEETHLING J, POTGIETER JM & VISSER PJ

2015. *Law of Delict*. 7th ed. Durban: Lexis Nexis.

OCTOBER A

2015. Siviele eise teen polisielede kos taksbetalers R860m in 6j. *Netwerk24* 30 Julie: 1.

OKPALUBA C

2018. The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law. *South African Public Law* 33 (1):1-39.

OXFORD

2009. *Oxford Dictionary & Thesaurus*. 3rd ed. Oxford: Oxford University Press.

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

2016. *Rules of the National Assembly*. 9th ed. Cape Town. https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf (accessed on 13 October 2020).

POTGIETERJM, STEYNBERG L & FLOYD TB

2012. *Law of Damages*. 3rd ed. Cape Town: Juta.

PRICE A

2015. State liability and accountability. *Acta Juridica* 215 (1):313-335.

PUBLIC SERVICE AND ADMINISTRATION

2003. *Senior Management Service: Public Service Handbook*. Pretoria: Government Printer.

2007. *Ministerial Handbook: A Handbook for Members of the Executive and Presiding Officers*. Pretoria: Government Printer.

<https://serve.mg.co.za/content/documents/2011/04/13/Ministerial-Handbook-2007.pdf> (accessed on 13 October 2020).

PUBLIC SERVICE COORDINATING BARGAINING COUNCIL

2013. *Republic of South Africa: Service Charter*. Resolution 1 of 2013 (28 June). Pretoria.

PUBLIC SERVICE COMMISSION

2002. *Explanatory Manual for the Public Service: A practical guide to ethical dilemmas in the workplace*. 1st ed. Pretoria: Government Printer.

QUINOT G

2020. Administrative justice and drafting empowering provisions. In G Quinot (ed) 2020 255-272.

QUINOT G (ed)

2020. *Administrative Justice in South Africa: An Introduction*. 2nd ed. Cape Town: Oxford University Press.

QUINOT G & CACHALIA R

2020. Judicial regulation of administrative action. In G Quinot (ed) 2020:127-143.

QUINOT G & MAREE P

2020. Administrative action. In G Quinot (ed) 2020:69-101.

ROEDERER CJ

2005. The constitutionally inspired approach to vicarious liability in cases of intentional wrongful acts by the police: One small step in restoring the public's trust in the South African police services. *South African Journal on Human Rights* 21:575-606.

SCOTT J

2013. Vicarious liability for intentional delicts – The Constitutional factor clinches liability. *Tydskrif vir die Suid-Afrikaanse Reg*.2013(2):348-361.

2019. Intentional delicts of police officers: The majority of the Constitutional court fails to come to the table. *Tydskrif vir die Suid-Afrikaanse Reg*.2019(1):150-167.

SEFALI FT

2010. *The impact of a performance management system on accountability in the public service of Lesotho*. PhD Thesis. University of the Free State (Unpublished).

SOUTH AFRICAN POLICE SERVICE

2011. *National Instruction 4 of 2011: State vehicles*. (Published per Consolidation Notice 12 of 2012). Pretoria: Vehicle Fleet Management.

2016. *Annual Report 2015-2016*. Pretoria: South African Police Service Strategic Management (Head Office).

https://www.saps.gov.za/about/stratframework/annual_report/2015_2016/saps_annual_report_2015_2016.pdf (accessed on 31 January 2019).

2017. *Annual Report 2016-2017*. Pretoria: South African Police Service Strategic Management (Head Office).

https://www.saps.gov.za/about/stratframework/annual_report/2016_2017/part_e_2017.pdf (accessed on 31 January 2019).

2018. *Annual Report 2017-2018*. Pretoria: South African Police Service Strategic Management (Head Office).

https://www.saps.gov.za/about/stratframework/annual_report/2017_2018/saps_annual_report_2017_2018.pdf (accessed on 31 January 2019).

2019. *Annual Report 2018-2019*. Pretoria: South African Police Service Strategic Management (Head Office).

https://www.saps.gov.za/about/stratframework/annual_report/2018_2019/saps_annualreport2018_2019v2.pdf (accessed on 28 January 2020).

2020. *Annual Report 2019-2020*. Pretoria: South African Police Service Strategic Management (Head Office).

https://www.saps.gov.za/about/stratframework/annual_report/2019_2020/annual_report_2019-2020.pdf (accessed on 13 Augustus 2021).

THELETSANE KI

2014. Ethics course in Public Administration. *Journal of Public Administration*, 49(1):362-374.

TRANSVAAL PROVINCIAL ADMINISTRATION ROADS DEPARTMENT PRETORIA
1975. *Instructions to officers and employees using Governed-Owned Motor Transport*. Transport Circular No 1 of 1975 as amended. Pretoria. Norand Lithoforms.

TREASURY

1935. *Treasury Circular No 12 of 1935*. Pretoria. Treasury.

1965. *Republic of South Africa: Financial Handbook*. G.P. S.7001623-1965-66-10,000. Pretoria: Government Printer.

VAN DER WALT JC, MIDGLEY J

2016. *Principles of Delict*. 4th ed. Durban: Lexis Nexis.

WESSELS AB

2018. The role played by trust in imposing vicarious liability on the state for the intentionally committed violent crimes of police officers. *Tydskrif vir die Suid-Afrikaanse Reg*.2018(4):868-882.

LEGISLATION

Apportionment of Damages Act 34 of 1956

Broad-Based Black Economic Empowerment Act 53 of 2003

Commissions Act 8 of 1947

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Constitution of the Republic of South Africa 1996

Criminal Procedure Act 51 of 1977

Exchequer Act 66 of 1975

Exchequer and Audit Act 23 of 1956

Executive Members' Ethics Act 82 of 1998

Higher Education Act 101 of 1997

Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002

Interim Constitution of the Republic of South Africa 1993

Interpretation Act 33 of 1957

Law of Evidence Amendment Act 45 of 1988

Local Government: Municipal Electoral Act 27 of 2000

Local Government: Municipal Finance Management Act 56 of 2003

Local Government: Municipal Structures Act 117 of 1998

Magistrates' Courts Act 32 of 1944

National Road Traffic Act 93 of 1996

Preferential Procurement Policy Framework Act 5 of 2000

Prescribed Rate of Interest Act 55 of 1975

Prescription Act 69 of 1969

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

Public Administration Management Act 11 of 2014

Public Audit Act 25 of 2004

Public Finance Management Act 1 of 1999

Public Protector Act 23 of 1994

Public Service Act Proc 103 of 1994

Remuneration of Public Office Bearers Act 20 of 1998

Schools Act 84 of 1996

State Attorney Amendment Act 13 of 2014

State Liability Act 20 of 1957

CASE LAW

A

AAA Investments v Micro Finance Regulatory Council and Another 2007 (1) SA 343 (CC).

Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC).

African Christian Democratic Party v Electoral Commission and Others 2006 (3) SA 305 (CC).

Allpay Consolidated Investments Holdings and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (1) SA 604 (CC).

Arendse v Badroodien 1971 (2) SA 16 (C).

B

Barclays National Bank Ltd v Love 1975 (2) SA 514 (D).

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC).

Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others 2010 (2) SA 181 (CC).

Black Sash Trust v Minister of Social Development and Others (Freedom under Law NPC Intervening) 2018 (12) BCLR 1472 (CC).

Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd and Another 2020 (2) SA 61 (SCA).

Booyesen v Minister of Safety and Security 2018 (6) SA 1 (CC).

Botes v Van Deventer 1966 (3) SA 182 (A).

C

Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry 2010 (5) SA 457 (SCA).

Carephone (Pty) Ltd v Marcus NO and Others 1993 (3) SA 304 (LAC).

Carmichele v the Minister of Safety and Security and Another 2001 (4) SA 938 (CC).

Commissioner, South African Police Service and Others v Maimela and Another 2003 (5) SA 480 (T).

Country Cloud Trading CC v Mec, Department of Infrastructure Development 2015 (1) SA 1 (CC).

D

De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka 1980 (2) SA 191 (T).

Democratic Alliance v African National Congress and Another 2015 (2) SA 232 (CC).

E

Equal Education and Another v Minister of Basic Education and Others 2019 (1) SA 421 (ECB).

F

F v Minister of Safety and Security and Others 2012 (1) SA 536 (CC).

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC).

Feldman v Mall 1945 AD 733.

Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd (2018) 39 ILJ 1213 (CC).

Foodcorp Pty (Ltd) v Deputy Director General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management 2006 (2) SA 191 (SCA).

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

Freedom under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 (GNP).

Fundstrust (Pty) Ltd (in liquidation) v Van Deventer 1997 (1) SA 710 (A).

G

Goldschagg v Minsiter van Polisie 1979 (3) SA 1284 (T).

Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA).

H

Harksen v President of the RSA and Others 2000 (5) BCLR 478 (CC).

Head, Western Cape Education Department v Governing Body, Point High School 2008 (5) SA 18 (SCA).

J

Janse van Rensburg and Another v Minister of Trade and Industry and Another 2001 (1) SA 29 (CC).

Johannesburg Municipality v Gauteng Development Tribunal 2010 (6) SA 182 (CC).

Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A).

K

K v Minister of Safety and Security 2005 (6) SA 419 (CC).

Kate v MEC for the Department of Welfare, Eastern Cape 2005 (1) SA 141 (SE).

Kotze v Minister of Safety and Security 2012 (1) SACR 396 (GSJ).

Koyabe and Others v Minister for Home Affairs and Others (Lawyers for human rights as amicus curiae) 2010 (4) SA 327 (CC).

Kruger v Coetzee 1966 (2) SA 428 (A).

Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal and Others 2013 (4) SA 262 (CC).

M

Makhathini v Road Accident Fund 2002 (1) SA 511 (SCA).

Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC).

Mazibuko v Sisulu 2013 (6) SA 249 (CC).

MEC for Public Works, Eastern Cape v Faltein 2006 (5) SA 532 (SCA).

MEC for Public Works, Roads and Transport, Free State and Another v Morning Star Minibus Hiring Services (Pty) (Ltd) and Others 2003 (4) SA 429 (O).

M&G Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another 2011 (5) SA 163 (GSJ).

Minister of Health and Another NO v New Clicks South Africa and Others (Treatment Action Campaign and Another as amici curiae) 2006 (2) SA 311 (CC).

Minister of Law and Order v Ngobo 1992 (4) SA 822 (A).

Minister of Police v Rabie 1986 (1) SA 117 (A).

Minister of Safety and Security v Booysen (35/2016) 2016 ZASCA 201 (9 December 2016).

Minister of Safety and Security v Morudu (1084/13) 2015 ZASCA 91 (29 May 2015).

MV Stella Tingas Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another 2003 (2) SA 473 (SCA).

N

Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services 2006 (27) ILJ 2127 (LC).

P

Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC).

Potgieter and Another v Howie and Others NNO 2014 (3) SA 336 (GP).

Premier, Western Cape v Faircape Property Developers (Pty) Ltd 2003 (6) SA 13 (SCA).

President of the Republic of South Africa v Democratic Alliance and Others 2020 (1) SA 428 (CC).

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000(1) SA 1 (CC).

Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC).

R

R v Jopp and Another 1949 (4) SA 11 (N).

R v Pretoria Timber Co (Pty) Ltd and Another 1950 (3) SA 163 (A).

R v Standard Tea and Coffee Co and Another 1951 (4) SA 412 (A).

Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another 2008 (2) SA 164 (SCA).

Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 539 (CC).

Rakgase and Another v Minister of Rural Development and Land Reform and Another 2020 (1) SA 605 (GP).

Residents, Industry House v Minister of Police and Others 2021 (2) SA 220 (GJ).

S

S v De Blom 1977 (3) SA 513 (A).

S v Judge 1967 (3) SA 172 (C).

S v Mahametsa 1941 AD 83.

S v Mhlungu 1995 (7) BCLR 793 (CC).

S v Van Zyl 1969 (1) SA 553 (A).

Satekge and SA Broadcasting Corporation Ltd (2013) 34 ILJ 1335 (CCMA).

Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC).

South African Broadcasting Corporation v Pollecut 1996 (1) SA 546 (A).

Stallion Security (Pty) Ltd v Van Staden 2020 (1) SA 64 (SCA).

T

Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A).

Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA).

U

Umgeni Water v Sembcorp Siza Water (Pty) Ltd and Others and Another Appeal 2020 (2) SA 450 (SCA).

Unemployed Peoples Movement v Premier, Province of the Eastern Cape and Others 2020 (3) SA 562 (ECG).

United Democratic Movement v Speaker of the National Assembly and Others 2017 (5) SA 300 (CC).

V

Viking Pony Africa Pumps (Pty) Ltd t/a Tricon Africa v Hidro-Tech Systems(Pty) Ltd and Another 2011 (1) SA 327 (CC).

Z

Zungu NO v Minister of Safety and Security 2003 (4) SA 87 (D).

GOVERNMENT GAZETTES & REGULATIONS

DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION

2016. *Public Service Regulations, 2016*. (GN 877 of 2016). *Government Gazette*, 40167: 29 July.

NATIONAL TREASURY

2000. *Public Finance Management Act, 1999: Treasury Regulations*. (Notice R.556 of 2000). *Government Gazette*, 21249: 31 May 2000.

2001. *Public Finance Management Act, 1999: Treasury Regulations*. (Notice R.345 of 2001). Government Gazette, 22219: 9 April.
2002. *Public Finance Management Act, 1999: Treasury Regulations*. (Notice R.740 of 2002). Government Gazette, 23463: 25 May.
2004. *Draft Treasury Regulations for departments, trading entities, constitutional institutions and public entities*. (Notice R225 of 2004). Government Gazette, 25613: 28 June.
2005. *Public Finance Management Act, 1999: Amendment of Treasury Regulations*. (Notice R225 of 2005). Government Gazette, 27388: 15 March.
2012. *Public Finance Management Act, 1999: Draft National Treasury Regulations*. (Notice R.1005 of 2012). Government Gazette, 35939: 30 November. 29 July.

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

2018. *Rules governing proceedings of the Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state, 2018*. (GN 397 of 2018). Government Gazette, Vol 637 (41774): 16 July.