



Province of the
EASTERN CAPE
COOPERATIVE GOVERNANCE
& TRADITIONAL AFFAIRS

LITIGATION MANAGEMENT POLICY

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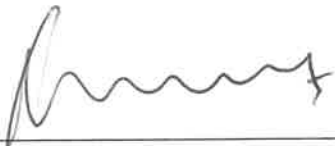
I. Head of Department

This policy on litigation management has been recommended by A Fani in my capacity as the Head of Department of Cooperative Governance and Traditional Affairs.

I am satisfied and concur with the contents of this Policy.

Signed:	
Designation:	Head of Department
Date:	06/11/2020

II. Executive Authority

Signed:	
Designation:	MEC: Xolile Nqatha of Cooperative Governance and Traditional Affairs
Date:	11/11/2020

1. PREAMBLE

The new democratic order in South Africa has ushered some basic principles of constitutional democracy such as the rule of law, transparency and accountability, separation of powers and checks and balances. Organs of State are thus obliged to observe these basic principles.

To ensure that these principles are observed, parliament introduced various pieces of legislation like the Promotion of Access to Information Act and Promotion of Administrative Justice Act.

The Constitution further provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. It must be said that this right entrenches one of the fundamental principles of our law which is expressed in the maxim *ubi ius ubi remedium* which means where there is a right there is a remedy.

It is because of this background that the State is the biggest consumer of legal services in the Republic. Consumption of legal services includes participation in litigation whether for or against the department.

In order to avoid calamitous effect of litigation, the Department of Justice and Constitutional Development has developed a framework for the management of State litigation. The framework seeks to improve management of state litigation.

The Departmental Litigation Management Policy is aligned to the Eastern Cape provincial litigation management strategy. One of the drivers of the strategy is to ensure transition from reactive litigation management into a proactive legal risk management. The strategy has four pillars, namely, the proactive legal support services, stakeholder consultation, litigation trend analysis and capacity building.

This policy is therefore intended to ensure that the department, when managing litigation, observes the constitutional values and principles as well as the provincial litigation management strategy.

2. PURPOSE

- 2.1 To ensure that any litigation that the Department is involved in is handled in an efficient manner looking at costs and value for money, which would include prompt instructions to the Office of the State Attorney; early preparation for hearings; thorough consultations with counsels on brief. The policy encourages a cooperative, results-oriented approach to litigation management.
- 2.2 To pursue alternative dispute resolution (ADR) as a mechanism to respond to litigation and minimise costs, and further foster peaceful co-existence and amicable settlement between the warring factions, in particular in traditional affairs matters.
- 2.3 To ensure that judgments for and against the Department are promptly and properly responded to, either, by noting an appeal or giving guidance in complying with the Court orders.

3. DEFINITIONS

Terms and definitions that will be used throughout the procedure that need clarification for the reader, this can also include any keywords, technical terms and abbreviations that may be used in this document. Definitions in this Policy, unless the context otherwise indicates.

Words/Terms	Definition (with examples if required)
Accounting Officer	Means an accounting officer as defined in the Public Finance Management Act, 1999 (Act No.1 of 1999)
Executive Authority	Means the member of the Executive Council responsible for the department of Cooperative Governance and Traditional Affairs

Legal Processes	Means any civil law suit or criminal prosecution instituted for or against an Organ of State
Legal Services	Means any form of legal advice, or drafting of document, or representation of any person that requires the expertise of a person trained in the practice of law
Legal Practitioner	Means an attorney or advocate
State Attorney	Means any person who is an Attorney in the office of the State Attorney created in terms of State Attorney Act, 1957 (Act No.56 of 1957)

4. APPLICATION AND SCOPE

This policy is applicable to all officials of the department and to all processes relating to the initiation, opposition or defence of any legal action or application.

5. LEGISLATIVE FRAMEWORK

All legislation applicable in the department in particular but not limited the following:

- Constitution of the Republic of South Africa ,1996
- Public Service Act, 1994 (Proclamation 101 of 1994) as amended
- Labour Relations Act, 1995 (Act No.66 of 1995) as amended
- Basic Conditions of Employment Act (Act 75 of 1997) as amended by Act 20 of 2013
- Employment Equity Act (Act 55 1998) as amended by Act 47 of 2013
- Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000)
- Promotion of Access to the Information Act, 2000 (Act No 2 of 2000)
- Promotion of Equity and Prevention of Unfair Discrimination Act, 2000 (Act No 4 of 2000)
- Protection of Personal Information Act , 2013 (Act No.4 of 2013)

- Public Finance Management Act (Act 1 of 1999 as amended)
- Intergovernmental Relations Framework Act, 2005
- State Liability Act, 1957 (Act 20 of 1957) as amended
- State Attorneys Act, 1957 (Act 56 of 1957) as amended
- Institution of legal proceedings against certain organs of State, 2002 (Act No. 40 of 2002)
- Eastern Cape Traditional Leadership and Governance Act., 2017 (Act No.1 of 2017)
- Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003)
- Traditional and Khoi – San Leadership Act, 2019 (Act 3 of 2019)
- Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998)
- Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000)
- Local Government: Municipal Finance Management Act 2003 (Act No.56 of 2003)

6. PRINCIPLES

6.1 Respect for the rule of law

The department acknowledges that as an organ of State it must obey the law and that its functionaries cannot exercise power unless authorized by law. Any decision or conduct taken by an unauthorized functionary may be declared null and void and set aside through litigation.

6.2 Accountability and Transparency

The Department acknowledges that as an organ of State, it must be accessible and that it must be able to respond to the people. The department further understands that the duty of accountability requires it to be able to explain its actions and decisions when required to do so.

It is further acknowledged that failure to observe principles of accountability and transparency may result in litigation.

6.3 Fairness

The Department is committed to observe a fair procedure when dealing with individuals and members of the public in general as imposed to it by the Constitution and legislation. It is acknowledged that decisions of the department are reviewable in Court and therefore observing a fair procedure is imperative and is also a measure to mitigate incidents of litigation.

6.4 Professionalism

The staff of the department that is entrusted to handle litigation is expected to maintain a high standard of professional ethics.

6.5 Value for money

In relation to litigation management, the principle of value for money relates to the department's commitment to the principle of rule of law thus avoiding unnecessary litigation. It also refers to ensuring that the State Attorney or a legal practitioner that is in brief carries out its mandate in a competent and timely manner.

7. ROLE PLAYERS

The role players in litigation management, for purposes of our department, are the following:

7.1 Accounting Officer

The PFMA and treasury regulations prescribe specific powers to the Accounting Officer like management of losses and claims. Consequently, it is the responsibility of the accounting officer to ensure that the department's litigation management is in accordance with this policy document.

A decision to initiate, defend or oppose any matter is thus the responsibility of the Accounting Officer, acting in consultation with the Executive Authority.

7.2 Legal Advisory Services

Management of litigation in the department is the responsibility of Legal Advisory Services. Professional staff of legal advisory services must have necessary competencies, qualifications, expertise and must have practical knowledge of litigation process and must be persons who qualify to practice as either Attorneys or Advocates.

It is imperative for the department to adequately capacitate legal advisory services to deal with complex matters as a unit that is handling litigation. A regular review of human capacity is thus essential.

The responsibility of legal advisory services in the management of litigation is outlined at clause 8 of this policy document.

7.3 Office of the State Attorney

The mandate of the State Attorney is derived from section 3 of the State Attorneys Act and is to provide to government, services rendered by Attorneys, Notaries and Conveyances.

In terms of section 2 (3)(b) of the State Liability Act the State Attorney must within 10 days of receipt of the process, provide the head of department with legal advice on the merits of the matter.

7.4. Administrators / Line functionaries

Departmental administrators or line functionaries are key in the management of litigation. They are expected, working with legal advisory services, to develop measures to avoid litigation like prompt legal compliance and effective management of letters of demand. In instances where litigation has materialised they are key in the provision of necessary information for instructions and prompt compliance with court orders.

8. LITIGATION PROCESS

8.1. PRE-LITIGATION PROCEDURE

8.1.1. Management of letters of demand

In terms of section 3 of the Institution of Legal Proceedings Against Certain Organs the State Act No. 40 of 2002, *No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-*

- (a) the creditor has given the organ of state in question notice in writing of his or*
- (b) the organ of state in question has consented in writing to the institution of that her or its intention to institute the legal proceedings in question; or legal proceedings-*
 - (i) without such notice; or*
 - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).*

(2) A notice must-

- (a) within six months from the date on which the debt became due, be served on*
- (b) briefly set out the organ of state in accordance with section 4(1); and*
 - (i) the facts giving rise to the debt; and*
 - (ii) such particulars of such debt as are within the knowledge of the creditor.*

The notice or letter of demand, is intended to afford the organs of State, an opportunity to investigate the claims against it and possible settle such claims. It is important for the department to arrest litigation at this stage.

The department must, when receiving a notice or any letter of demand, immediately refer them to Legal Advisory Services. Legal Advisory Services must facilitate prompt investigation of the claims and respond thereto. No responses to the letters of demand must be sent out without a legal input by Legal Advisory Services.

Failure to investigate and respond to the letter of demand will justify institution of disciplinary proceedings against the responsible official(s).

8.2. Litigation phase

Litigation is regulated by the rules of the relevant court and requires strict adherence to time limits in order to avoid adverse orders/judgments and punitive costs orders.

8.2.1 In terms of section 2(2)(a) of the State Liability Act No.20 of 1957, the plaintiff or applicant, as the case may be, or his or her legal representative must after

any court process instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that process on the head of the department concerned at the head office of the department.

To ensure effective management of litigation process and that legal documents are attended to promptly and appropriately, the head of department may designate Legal Advisory Services to receive court process. An official who receives court papers must clearly indicate the date and time of receipt of service and sign on the document.

8.3.1 In instances where court papers were served directly to the office of the head of department, they must promptly be referred to Legal Advisory Services directorate to ensure adherence with the rules of the court and prescribed time frames. Legal Advisory Services must immediately initiate contact with the relevant directorate in order to receive necessary information which will be used to formulate an advice to the accounting officer on whether or an application or action must be opposed or defended. In appropriate circumstances, Legal Advisory Services may hold a consultation with the relevant directorate.

8.4.1 Relevant directorates must adhere to time period as may be prescribed by Legal Advisory Services and must at all times avail themselves when information is requested. Upon receipt of requested information, Legal Advisory Services must request instructions from the accounting officer on whether or not the matter must be opposed or defended. The request of instruction must at least explain to the accounting officer the following:

- (a) The cause of action;
- (b) The relief sought against the department;
- (c) Advice on the prospects of success if the matter is defended or opposed;
- (d) Any possibilities to initiate alternative dispute resolution mechanism;
- (e) Stipulate if litigation occurred as a result of misconduct or negligence of a departmental official and make necessary recommendations on necessary remedial steps to be taken against that official.
- (e) Recommendations.

8.5.1 On receipt of instructions from the accounting officer, Legal Advisory Services will prepare formal instructions to the State Attorney. All legal processes, notices related to the matter will be handled by the State Attorney once they have been instructed in writing.

8.6.1 Legal Advisory Services will regularly liaise with the State Attorney on the matter and provide necessary updates to the department. It is also the responsibility of Legal Advisory Services to ensure that responsible officials are available for further consultations and provision of further information and documentation as may be required by the State Attorney. In appropriate circumstances, Legal Advisory Services may, together with the State Attorney as well as the representative of the relevant directorate, attend all court hearings and pre-hearing conference on the matter.

9. LITIGATION REGISTER

9.1 Legal Advisory Services must develop and maintain a register of all litigation matters in which the department is involved.

9.2 The register will include the following information:

- (a) The court where the matter was or is to be heard;
- (b) The case number;
- (c) The names of the parties;
- (d) The type of litigation;
- (e) The amount involved.

9.3 Matters that are lying dormant must be removed from the litigation register after the lapse of five-year period. Legal Advisory Services, must before the dormant matters are removed, confirm with the State Attorney about the need to have these matters removed from the register.

10. LITIGATION RISK AND TREND ANALYSIS

- 10.1 Legal Advisory Services must conduct annually an analysis of risk factors pertaining to the department's litigation. The analysis should identify potential risks, and propose measures to mitigate these risks. To ensure the credibility and authenticity of the analysis, Risk Management Unit will take the lead in the compilation of the final risk analysis document.
- 10.2 Legal Advisory Services must conduct litigation monthly trend analysis and propose mitigating measures with relevant directorates and provide a report to the Head of Department quarterly in this regard.

11. IMPLEMENTATION OF COURT ORDERS / JUDGMENTS

- 11.1 Compliance with court orders is highly regulated by legislation. Thus in terms of section 165(5) of the Constitution, an order or decision issued by a court binds all persons to whom and organ of state to which it applies. It is important to note that failure to comply with a court order may have serious implications because the judgment creditor may instruct the sheriff of the court to attach the state property.
- 11.2 The State Liability Act further provides that the State Attorney or attorney of record appearing on behalf of the department must, within seven days after a court order sounding in money against a department becomes final, in writing, inform the executive authority and accounting officer of that department and the relevant treasury of the final court order.
- 11.3 It is further provided that a final court order against a department for the payment of money must be satisfied within 30 days of the date of the order becoming final or within the time period agreed upon by the judgment creditor and the accounting officer of the department concerned.
- 11.4 Legal Advisory Services must, upon receipt of a court judgment advise the department about its implications and facilitate compliance with it unless the

department decides to appeal against it. The responsibility to comply with the Court Order rests with the Accounting Officer of the department. In instances where court judgments in respect of claims sounding in money are not satisfied within the prescribed period, the matter may, as provided by the State Liability Act, be referred to the Provincial Treasury.

- 11.5 Legal Advisory Services must keep and maintain an implementation of court orders register to track the status of implementation of court orders by the department. All court orders must be satisfied within the period prescribed in the court order and under no circumstances can the department take more than 30 days to implement a court order.
- 11.6 Failure to implement court orders within the prescribed time frames by the department must not be tolerated. Reasons for non-compliance must be investigated and remedial steps to prevent reoccurrence must be taken.
- 11.7 A decision to appeal must be taken within the prescribed timeframes of the relevant court. Legal Advisory Services will be responsible for advising the department of the deadlines that apply.

12 CLAIMS AGAINST THE DEPARTMENT THROUGH ACTS AND OMISSIONS OF THE OFFICIALS

- 12.1. In terms of regulation 12.2.1 of the Treasury regulations, *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.*
- 12.2. An official shall forfeit the cover provided by regulation 12.2.1, if he or she-
 - (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 Legal Advisory Service and /or State Attorney, made an admission that was detrimental to the department; 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 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.

13. CLAIMS BY THE DEPARTMENT AGAINST OTHER PERSONS

In term of regulation 12.3.1 *If the state suffers a loss or damage and the other person denies liability, the accounting officer must, if deemed economical, refer the matter to the State Attorney for legal action, including the recovery of the value of the loss or damage.*

The institution of a legal action for recovery of the value of the loss or damage must, in order to avoid prescription of the claim, be done promptly and not more than three years after the accounting officer became aware of the loss.

14. LITIGATION AGAINST OTHER ORGANS OF STATE

14.1. In terms of section 41(1) (h) (vi) of the Constitution all spheres of government and organs of state within each sphere must co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another. Section 40(1) of the Intergovernmental relations framework Act further states that all organs of states must make every reasonable effort to avoid intergovernmental disputes when exercising their statutory powers or

performing their statutory functions and to settle intergovernmental disputes without resorting to judicial proceedings.

- 14.2. The department consequently has a duty to avoid litigation against other organs of state and may not resort to judicial proceedings unless the IGR processes that are prescribed in the IGR Act have been exhausted.

It is worth to note that the provisions of IGR Act, do not apply to the settlement of specific Intergovernmental Disputes in respect of which other national legislation provides resolution mechanisms or procedures or to a dispute concerning an intervention in terms of section 100 or 139 of the Constitution.

- 14.3. The department may however resort to judicial proceedings without having to exhaust the provisions of the IGR Act, if the procedures contemplated by IGR Framework Act will be time consuming and that for purposes of a particular case, following the procedures will deny effective redress to the department. A further reason to allow departure from the dispute resolution mechanism prescribed by IGR Framework Act is when the lawfulness of an organ of state's conduct needs to be determined.

15. LITIGATION AFFECTING MUNICIPALITIES

- 15.1. Local Government is an autonomous sphere of government in terms of the constitution. The constitutional mandate of provincial government is to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. This mandate does not impose any obligation to the department to litigate on behalf of municipalities. The department cannot therefore litigate on behalf of municipalities as that would lead to the incurring of an unauthorized expenditure.

- 15.2. It must further be noted that the department may also not litigate on behalf of municipalities even in instances where it has intervened in terms of section 139 of the Constitution.

15.3. In instances where the department is cited as defendant or respondent in a matter affecting a municipality, it may only enter the fray if there is relief sought against the department and that it is necessary to safeguard its interests.

15.4. In order to fulfil the constitutional mandate of the department, legal advisory services must embark on a coordinated and strategic risk litigation assessment and litigation trends analysis in municipalities with a purpose of avoiding litigation, where possible.

16. LITIGATION AFFECTING TRADITIONAL LEADERSHIP INSTITUTIONS

16.1. The Constitutional mandate according to Section 211 and 212 is to provide for recognition of the institution of traditional leadership and further stipulates that national legislation may provide for the role of the institution of traditional leadership at local level on matters affecting local communities.

16.2. According to the white paper on Traditional Leadership the transformation of the institution must, among other things promote sound relationships between itself and other spheres of government, act in partnership with municipalities by creating good relationships in order to enhance service delivery.

16.3. The Traditional Leadership and Governance Framework Act, 2003 provides for the roles and functions of Traditional leadership institutions.

16.4. The Eastern Cape Traditional Leadership and Governance Act, 2017 (Act No. 1 of 2017) provides for the recognition of traditional communities; traditional councils and traditional leaders; withdrawal and removals.

16.5. The Local Government: Municipal Structures Act, 1998 provides for the procedure for the participation of Traditional Leaders in the Municipal Councils.

16.6. The Local Government: Municipal Systems Act, 2000 regulates the conduct of traditional leaders when participating in Municipal Council

- 16.7. The above mentioned legislations will guide the department on litigation management wherein traditional leadership institutions are involved. The department will not be held legally accountable for personal litigation matters of traditional leadership, subject to paragraph 16.8 hereunder.
- 16.8. In instances where the department is cited as defendant or respondent in a matter affecting a traditional leadership, it may only enter the fray if there is relief sought against the department and that it is necessary to safeguard its interests, and whether the Department is cited as a party or not and whether any relief is sought against it or not it may still enter the fray in any manner it deems fit where it has an interest or is concerned or the matter is in the public interest."
- 16.9. In order to fulfil the constitutional mandate of the department, legal advisory services must embark on a coordinated and strategic risk litigation assessment and litigation trends analysis in traditional leadership institutions with a purpose of avoiding litigation, where possible.

17. MONITORING OF COMPLIANCE WITH THE POLICY

Legal Advisory Services will monitor the extent of compliance with this policy.

18. COMMUNICATION

The Litigation Management Policy will be communicated by means of intranet, circulars and advocacy sessions to all employees of the Department

19. IMPLEMENTATION

This policy will come into effect immediately on approval by the Executive Authority

20. REVIEW OF THE POLICY

This policy will be reviewed as and when there are compelling developments in the legal framework regulating management of state litigation.