



Province of the
EASTERN CAPE

COOPERATIVE GOVERNANCE
& TRADITIONAL AFFAIRS

LITIGATION MANAGEMENT POLICY

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SIGN OFF

I. Head of Department

This policy on litigation management has been recommended by M Baza in my capacity as the Acting 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:	28/02/2017

II. Executive Authority

Signed:	
Designation:	MEC: Fikile Devilliers Xasa of Cooperative Governance and Traditional Affairs
Date:	06/03/2017

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.

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 framework will bind the department once it has been approved by the Executive Authority. 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.

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 order.

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

- Constitution of the Republic of South Africa of 1996
- Public Service Act , 1994 (Proclamation 101 of 1994) as amended
- Labour Relations Act, 1995 (Act No.66 of 1995) as amended
- Public Service Regulations, 2016
- 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 (Act No 4 of 2000)
- Public Finance Management Act (Act 1 of 1999 as amended) and Treasury regulations
- 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., 2005 (Act No.4 of 2005)
- Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003)
- Eastern Cape Traditional Leadership and Governance Act, 2004 (Act 4 of 2005)
- 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

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 the responsibility of the Accounting Officer, acting in consultation with the Executive Authority. In appropriate circumstances, the Accounting Officer may delegate this responsibility.

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.

8. LITIGATION PROCESS

- 8.1 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 The State Liability Act provides that summons or notice issued against the State must be served on the State Attorney. However in some instances summons or notice is served directly to the department, especially the office of the MEC because the executive authority is always cited as a nominal defendant or respondent in any action or application against the State department. In such instances, legal documents must be attended to promptly and appropriately. The official who receives the court papers must clearly indicate the date and time of receipt of service and sign on the document.
- 8.3 The court papers must upon receipt 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 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) Recommendations.

8.5 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 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.

10. LITIGATION RISK ANALYSIS

10.1 Legal Advisory Services must conduct annually an analysis of risk factors pertaining to the department's litigation. The risk analysis must assist in the tracking of litigation trends and factors that contribute to the identified trends.

10.2 The analysis should also 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.

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 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 LITIGATION AGAINST OTHER ORGANS OF STATE

12.1 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.

12.2 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.

12.3 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.

13 LITIGATION AFFECTING MUNICIPALITIES

13.1 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.

13.2 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.

13.2 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.

13.3 In order to fulfill 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.

14 LITIGATION AFFECTING TRADITIONAL LEADERSHIP INSTITUTIONS

14.1 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.

- 14.2 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.
- 14.3 The Traditional Leadership and Governance Framework Act, 2003 provides for the roles and functions of Traditional leadership institutions.
- 14.4 The Eastern Cape Traditional Leadership and Governance Act, 2005 (Act No. 4 of 2005) provides for the recognition of traditional communities; traditional councils and traditional leaders; withdrawal and removals.
- 14.5 The House of Traditional Leaders Act, 1995 (Act No. 1 of 1995) provide for the establishment of the House of Traditional Leaders.
- 14.6 The Local Government: Municipal Structures Act, 1998 provides for the procedure for the participation of Traditional Leaders in the Municipal Councils.
- 14.7 The Local Government: Municipal Systems Act, 2000 regulates the conduct of traditional leaders when participating in Municipal Council
- 14.8 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.
- 14.9 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.
- 14.10 In order to fulfill 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.

15 MONITORING OF COMPLIANCE WITH THE POLICY

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

16 COMMUNICATION

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

17 IMPLEMENTATION

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

18 REVIEW OF THE POLICY

This policy will be reviewed bi annually from the date of approval and when there are compelling developments in the legal framework regulating management of state litigation.