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Department:
Public Works; Roads and Transport
North West Provincial Government
Republic of South Africa

LEGAL RELATED POLICY

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POLICY TITLE : LITIGATION POLICY AND PROCEDURE MANUAL

DEPARTMENT : PUBLIC WORKS AND ROADS

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1. PREAMBLE

The Department of Public Works and Roads has a duty to maintain a comprehensive litigation management programme, the objective of which is to reduce litigation, litigation costs, negligence, acts and/ or omissions by staff employed by the Department without sacrificing case or litigation results.

PURPOSE

The purpose is to develop the following procedures to assist its legal service directorate in the management of lawsuits as well as to efficiently supervise litigation matters on our behalf by the State Attorney and Advocates appointed.

1. SCOPE OF APPLICATION:


The policy shall apply to all employees within the North-West Department of Public Works and Roads. This includes (Road Workers – Road camps) if any construction engineering, and/or Administration Staff etc.

2. LEGISLATIVE FRAMEWORK

- i. The Constitution of the Republic of South Africa, Act 1996;
- ii. Public Service Act, 1994;
- iii. Basic Service Act, 1994;
- iv. Public Finance Management Act and related Acts.

3. PROCEDURAL STEPS

The following procedural steps shall apply to all officials of the Department:

- i. Assignment of a case
 - ii. Acknowledgement of a case
 - iii. Preliminary liability report/opinion
 - iv. Draft Factual synopsis
 - v. Quantum (calculation / damages exposure)
 - vi. Request for Additional Investigation
 - vii. Discovery Plan
 - viii. Consultations
 - ix. Legal Budget
 - x. Recommendations
 - xi. Mandatory Status Reports
 - xii. Trial / Arbitration Reports
 - xiii. Final Report
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xiv. Settlement Authority

xv. Approval of Extra Ordinary Expenses

3. Receipt of a claim by the district

An official must within 2 days dispatch any claim from received

4. Assignment of a case

The Director or his delegated official will as soon as possible but not later than 3 days from the date of receipt of a claim, assign an Official to deal with the matter. The Director will issue an assignment letter to such Official together with a list of people to be copied on status reports.

The Official must together with the State Attorney determine the budget for the claim concerned.

In a case of Summons or applications, the appointed official as the case maybe within 24 hours refer the matter to the State Attorney for their necessary attention.

5. Acknowledgement of a case

The appointed Official and/or State Attorney must furnish the Director Legal Services within 24 hours of receipt of such assignment letter with an acknowledgement letter.

6. Preliminary Liability Report

The Official must within 7 days furnish the Director – Legal Services with a Preliminary Liability Report. The Report must emanate from consultations with relevant directorates regarding the merits of the case. The report may emanate from an objective analysis of the file. This may assist the Department to decide whether to settle or actively litigate the matter.

7. Draft Factual Synopsis

The Official should provide a report to the State Attorney and the Director: Legal Services with a brief synopsis of the facts giving rise to the lawsuit.

8. Damages

The official must summarise and analyse Plaintiff's injuries, damages and exposure of the Department. This report must be done within 14 days from the date of receipt of the claim.

9. Request for Additional Investigation

The Official must upon his finding that additional investigation is required to request permission from the Director for same to be conducted. Such request must be done no later than 3 days from such finding.

10. Discovery Plan

The Official must as soon as practically possible collate all documentation to support its claim for discovery purposes.

11. Legal Budget

The Official must together with the State Attorney determine the budget for the claim concerned



12. Recommendations

The Official after discussions with the Director: Legal Services must determine a strategy for successfully defending a claim or instituting a claim and provide the State Attorney with such strategy.

13. Status Reports

The Official must obtain status reports from the State Attorney every month and forward same to the Director. The report must state a "to do" list of immediately upcoming tasks.

14. Trial / Arbitration Reports

No later than 30 days before the trial date, the Official must request the Advocate or Attorney handling the matter through the State Attorney to provide a merit report. The Report must contain the following:-

- i. An assessment of the merits of the case
- ii. The verdict value assuming full liability
- lii. List of witnesses
- iv. Status of settlement negotiations, if any.

15. Final Report

A brief report should be drafted and submitted to the Director within 5 days from the date of completion of a case.

16. Settlement Authority

The legal services directorate has no authority to settle cases without the prior written authorization from the Head of Department.

17. Extra – Ordinary Expenses

The director legal services must request the express authority from the HOD & CFO regarding expert expenses and related expenses.

18. CIVIL LITIGATION MATTERS

DEFENDED AND UNDEFENDED MATTERS

(a) LETTER OF DEMAND

Upon receipt of a letter of demand from a third party, the relevant Directorate that has received it should immediately forward it to legal services directorate office (under cover of a letter) for attention and further handling. The letter should clearly give our Directorate the necessary instructions to handle same and to give advice on the relevant Directorate requesting that;

- i. The claim as set out in the demand (notice) be investigated thoroughly by that Directorate;
- ii. The said investigations should be geared towards obtaining more information as well as documentation that would assist in dealing with the matter; iii. The said information / documentation will also assist our Directorate to instruct the State Attorney to handle the claim on behalf of the Department especially if the matter warrants to be defended;



iv. The State Attorney in turn will keep the Department (through our Directorate) abreast of further developments on the matter;

v. However if the matter warrants to be settled, the Directorate will facilitate the process and see to it that a settlement has been reached between the parties without necessarily having to refer the matter to the State Attorney for assistance. The whole idea will be to avoid unnecessary litigation at all costs as this might have cost implications for the Department.

vi. A formal submission will have to be prepared by the Directorate requesting the necessary approval from the HOD, for the matter to be settled and also setting out the reasonable amount that should be considered by the HOD for settlement of the claim.

(b) SUMMONS

The civil summons in respect of both the **High Court, Magistrates' Court and Labour Court** are to be served at the office of the **State Attorney** in terms of the normal rules of Civil Procedure. After having been served with the Summons, the State Attorney shall refer same to the Legal Services Directorate for attention and further handling, also requesting the necessary instructions to deal with the matter.

The Legal Services Directorate shall refer a copy thereof to the HOD and the relevant Directorate which is directly involved in the matter with a request that an approval be granted to either defend the matter or settle same if it warrants to be settled. Should the HOD's directive be to defend the matter, the following steps will have to be taken:

i. The relevant directorate, which is directly involved in the matter, will have to compile the necessary information and/or documents that might assist in defending the matter. The aid information should entail e.g. accident reports setting out the extent of the damages to the vehicle, copy of case docket (if any), sketch plan and key to plan etc; trip authority, accident report

ii. As soon as the said information / documents have been forwarded to our Directorate, it will be perused and thereafter referred to the State Attorney under cover of a letter, instructing them to defend the matter and to file the relevant documents within the normal time frames;

iii. If the Summons has been issued in the High Court, the HOD should be approached with a submission requesting the necessary approval for the appointment of an Advocate (Counsel) who would assist in dealing with the matter for the Department. As soon as such approval has been obtained, the State Attorney will have to be instructed to appoint and brief Counsel to handle the matter.

(C) APPLICATIONS

Applications proceedings could either be instituted for or against the Department in the High Court, Labour Court, as well as the Magistrates Court. Every application should as a matter of principle be served at the office of the State Attorney as provided for in the rules of Civil Procedure. As soon as such application has been served at the office, the State Attorney shall refer a copy thereof to the Legal Services Directorate under cover of their letter, requesting the relevant instructions to either oppose or settle the matter. Upon receipt of the said application, the above-mentioned steps as set out under the headings "**Letter of Demand and Summons**" shall be followed by the Department.



(D) CONSULTATIONS

All consultations with every official of the Department with respect to any claim, which is instituted, for and against the Department shall be arranged through the Directorate which shall in turn liaise with the office of the State Attorney for that purpose. The following points should be noted:-

- i. It is the responsibility of the relevant Directorate which is directly involved in a claim of whatever nature to see to it that the officials concerned attend consultations on scheduled dates and times;
- ii. The said consultations shall be held either at the Legal Services Directorate, the State Attorney's offices, the Advocates Chambers or any Expert's offices, with the exception of the MEC and the HOD who may elect to hold such consultations in their offices;
- iii. Arrangements for such consultations shall be made timeously and it is expected that every official who has attended a consultation should produce a document signed by the State Attorney and or the Directorate that the consultation did take place and that he was in attendance on the said date.
- iv. It is the responsibility of the relevant Directorate which is directly involved in a claim of whatever nature to see to it that officials who are to travel from the various regions to attend consultations as aforesaid are provided with adequate transport facilities to enable them to be in attendance;
- v. Should an Official be unavailable for such consultations, the relevant Directorate shall take responsibility for such non-attendance, as these might hamper progress regarding the preparations for the hearing of the matter;
 - a. If a consultation is to be held with the HOD, any Chief Director, Regional Director or Director of the department, prior arrangements should be made and this would depend upon their availability. If for one or other reasons such a consultation cannot take place because of the unavailability of either official, arrangements should be made to re-schedule the date through the Legal Services Directorate and the State Attorney;
- vi. In the same vein, should the case be postponed with costs (against the Department) due to the unavailability of witnesses, the relevant Directorate will have to carry the responsibility regarding payment of legal costs.
- vii. It is expected of every Official from the Department who has been called as a witness in a matter in which the Department has been sued or is suing a third party, to be in attendance in Court when the matter is to be heard;
- viii. He / She is expected to co-operate with the Departmental Legal Team at all times when the matter is before Court until it has been finalized.

18.1 CATEGORIES OF LITIGATION CLAIMS

Litigation matters are categorized under the following sub-headings;

COLLISIONS

As soon as a claim has been received by the Department, it should be forwarded to the relevant Directorate which is directly involved in the matter for investigations, with a request that they should supply the Legal Services Directorate with the following information or documents:-

- i. Statement of the State Driver and passengers;
- 

ii. Whether a case docket has been opened, and if so, to supply the directorate with a copy thereof; iii. The status of the criminal matter (if any);

iv. A written request for legal representation by the office of the State Attorney;

v. To obtain a damages affidavit from a Panel Beater in respect of the damages sustained by the State vehicle;

vi. A duly completed accident reports form;

vii. Sketch-plan and key to plan;

viii. Three quotations from different Panel Beaters;

ix. Full particulars of the motor vehicles, which are involved in the accident;

x. Physical and postal addresses of the parties involved;

xi. Determination of liability and request for opinion on treasury cover;

xii. An official from the Directorate Motor Fleet should attend the scene of accident and supply further details (if any) of the accident.

The above-mentioned information should be compiled as a matter of extreme urgency, to enable the Directorate to instruct the State Attorney to institute a civil claim against a third party timeously. This will also be of assistance in a matter in which a third party, after filing a Notice of Intention to Defend the claim, files a Request for Further Particulars for purposes of Plea. Therefore if the above-stated information has been supplied timeously, the State Attorney would be able to supply the third party with the particulars requested and proceed with the other procedural steps in the matter. The above-mentioned information will also be required in situations where the Department is suing for damages sustained by the State vehicle against a third party. *the driver of the vehicle should not admit liability at the scene.

CLAIMS FOR DAMAGES CAUSED BY POTHOLES

As soon as a claim has been received by way of either a letter of demand or the Summons, it must be referred to the legal services Directorate under cover of a letter requesting that the matter be attended to. The relevant Directorate, which is directly involved in the matter, should in the meantime investigate the claim and compile the following information and/or documentation urgently and forward it to Legal Services Directorate;

i. Particulars regarding the name of the road where the accident took place;

ii. Reports on the condition of the road to be furnished by Traffic Officers who had been assigned to patrol that particular road on a regular basis;

iii. A detailed technical report indicating whether a particular pothole can cause damages to the vehicle concerned;

iv. A sworn statement or affidavit by a witness indicating how the accident took place;

v. A sworn statement or affidavit by the claimant is required indicating how, when, at what time, on which particular road did the accident take place;

vi. A police accident report;

vii. Sketch-plan and key to plan;



- viii. Affidavit from an Expert setting out the extent of damages sustained by the claimant's motor vehicle;
- ix. Statements from the case docket including passengers' statements;
- x. Case Number;
- xi. Physical and postal addresses of the claimant;
- xii. Three quotations from the various panel beaters;
- xiii. Report on Accident Management system relating to the accident
- xiv. Four colour photographs of the pothole where the accident took place;
- xv. (15)
- xvi. Four colour photographs of any warning road sign and / or road marks at the scene;
- xvii. Four colour photographs of any object, which is situated at or nearer the scene.

The above-mentioned information will be required to enable the Department to consider the claim and ascertain whether it is valid or not. If the investigation reveals that the claim is not valid, the Directorate through the HOD will instruct the State Attorney to defend the matter vigorously. The above-mentioned information will be necessary to avoid the Department having to settle fake claims lodged by unscrupulous third parties. Unfortunately the Department will always find itself in the defensive by reason of the fact that the Roads component is part and parcel of its responsibility. In essence there is no way in which the Department could sue third parties in this type of claims because the incidents (if any) relate directly to the Departmental responsibilities towards the maintenance of the roads. Therefore if the above-mentioned information has been furnished timeously, it would have the effect of making the claims lodged by unscrupulous claimants very difficult to prove in a court of law.

In all pothole claims, the claimant should prove that the department was negligent.

(C) CLAIMS AGAINST STATE OFFICIALS FOLLOWING LOSS OF TREASURY COVER

A Government employee can during the normal course and scope of his or her employment commit an act or omission which could attract liability by the Department. This could also arise as a result of an act or omission of a State employee who has been acting on a frolic of his own at the time of the alleged incident i.e. outside the normal course and scope of his employment. His / her conduct could attract liability especially if the said act or omission caused harm to a third party and / or the Department. When this situation arises, the following are the steps that must be followed.

- i. The Directorate Legal Services should prepare an opinion on treasury cover for the Department;
- ii. The opinion should advise about the incident, whether the state employee has lost treasury cover or not, options available to the Department;
- iii. It must set out the possible legal action to be taken against the State employee for the recovery of the loss;
- iv. It must state whether the loss should be recovered from the State employee's pocket;
- v. As soon as the HOD has granted the necessary approval, the State Attorney will have to be instructed to kick start the legal processes;



vi. The relevant Directorate should furnish the Legal Services Directorate with all the necessary documents and information in that regard;

vii. The above-mentioned steps will also have to be followed where the act or omission has resulted in damages suffered by the third party.

To give employee opportunity to respond why cover should not be waved.

When does one loose cover.

(d) OTHER CLAIMS

Other categories of claims and applications should also be dealt with in terms of the above-mentioned guidelines.

19. OPINIONS

It is the function of the Legal Services Directorate to furnish the Department with written legal opinions as and when requested in order to meet the Department's strategic objectives. Therefore it is incumbent upon all the Directorates within the Department to forward all requests for the drafting of legal opinions to that Directorate for attention and further handling. The request for legal opinion should be in writing and it must include the following:-

- i. Background information, which must be clear and concise;
- ii. Statement by the official from the relevant Directorate (if any);
- iii. The record pertaining to the matter in question;
- iv. The legal issues to be looked into and the implications thereof;
- v. Whether the services of Counsel (an Advocate) should be engaged;
- vi. Whether the services of an independent expert should be engaged;
- vii. Clear and concise instructions to Legal Services Directorate;
- viii. Personnel implications (if any);

Private matter should be disregarded / referred back

All matters dealing with police should be

ix. Any other information, which might be of assistance to the matter.

Upon receipt of the above-mentioned letter of instructions, an acknowledgement letter shall be dispatched to the Directorate, which referred the matter to us advising that the matter is receiving attention and that the legal opinion will follow soon. The above-mentioned information will assist the Legal Services Directorate to open up a file and to start dealing with the matter.

19.1 CONSULTATIONS

- i. All consultations will have to be arranged through the Legal Services Directorate;
- ii. The purpose thereof would be to discuss the matter further and to clarify certain issues prior to the actual drafting of the opinion;



iii. If a consultation involves complex issues of a technical or legal nature, an expert opinion may be sought with the necessary approval of the HOD and the relevant Chief Directorate;

iv. If Legal Services Directorate requires additional information or documentation, the relevant Directorate should compile same soon as is reasonably possible;

v. Should there be a likelihood of a litigation claim arising from such an opinion, the normal steps as set out in the preceding pages under litigation will have to be followed;

vi. All consultations will have to be attended at the offices of the Directorate Legal Services, the Advocates Chambers or an Expert's offices, with the exception of the MEC, HOD or any Chief Directorate who can elect to hold a consultation in his / her office.

vii. As soon as such an opinion has been forwarded to the HOD, the Chief Directorate or any Directorate, an acknowledgement letter must be dispatched to Legal Services Directorate advising that the opinion is in order and that they should regard the matter as having being finalized and close the file.

20. CRIMINAL MATTERS

The State Employees who appear at criminal Courts throughout the province and in other provinces as well, after having committed certain criminal offences whilst acting within the course and scope of their employment. The State employees commit many of these offences by making use of State property e.g. a State vehicle, state fire arms, assault on state property.

In other instances the State employees whilst acting on a frolic of their own use the State property e.g. a State vehicle. In these instances it needs to be determined whether such an official has lost treasury cover or not and if he/she does, then he will have to pay for the costs of his legal representation out of his pocket and the Department would not assist him / her financially. The following steps need to be noted:

i. Upon receipt of the relevant instructions from a Directorate, Legal Services shall furnish an opinion on treasury cover to the said Directorate e.g. motor fleet;

ii. Should Legal Services opine that the State employee has lost treasury cover, the employee will have to seek the services of an Attorney out of his pocket who would assist him in defending the criminal matter;

iii. Should the incident in question result in damages by the third party and the latter institutes a civil action against the Department, Legal Services through the office of the HOD will have to instruct the State Attorney to defend the civil matter if the latter warrants to be defended;

iv. Should the department become unsuccessful in that claim, it will have to pay the amount claimed to the third party plus the legal costs and thereafter recover the loss from the State employee;?

v. Therefore the normal steps as set out under litigation will have to be followed;

vi. However where the State employee was acting within the course and scope of his employment on the alleged day and time and the incident resulted in damages sustained by a third party, Legal Services shall if the matter warrants to be settled, advise the Department to settle same by offering the most reasonable amount in full and final settlement of the matter. Here also the normal procedures as set out in the preceding paragraphs shall apply. After the matter has been settled, the damages will have to be written off as irrecoverable to the State.?



vii. Where the State employee was acting within the course and scope of his employment on the date of the alleged incident and is due to appear at criminal Court, the relevant Directorate must notify Legal Services Directorate in writing?

viii. Upon receipt of the notification, the State Attorney should be instructed to handle the matter for and on behalf of that official. The letter of instructions addressed to the State Attorney should be accompanied by the relevant documents that will assist in dealing with the matter;

ix. The normal steps regarding consultations and Court attendances by the State employee and his / her witnesses shall apply;

x. The State Attorney shall keep Legal Services Directorate abreast of developments in the matter;

xi. The State Attorney has discretion to appoint a Correspondent Attorney to handle the matter on behalf of the State employee;

xii. In view of the fact that most criminal matters against State employees involve collisions, the relevant information that are needed include the following: -

Statement of the driver and passengers;

Sketch plan and key to plan;

Copy of case docket;

Case Number;

Damages affidavit by panel beaters;

A written request for legal representation by the office of the State Attorney;

A duly completed accident report form;

Full particulars of motor vehicles that are involved in an accident;

The name of the Court where the matter will be heard;

Further or additional information to be furnished by the Directorate Motor Fleet;

The name of the Investigating Officer

i) Trip authority?

ii) Parking authority at home?

iii) Request to be assisted with legal representation using private representation?

xiii. Where the criminal matter will be heard outside Mafikeng, it will be the responsibility of the relevant Directorate to arrange transport for that official and witnesses to and from Court.

GARNERSHEE ORDERS AND EMOLUMENT ORDERS

This will not be addressed unless it is against the department as they are private matters.



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APPROVED

MR P. MOTHUPI

HEAD OF DEPARTMENT

13/01/2017
DATE: