

ACCESS TO JUSTICE IN WELFARE LAW AND LITIGATION: JUDICIAL REFORM IN SOUTH AFRICA*

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Summary

The paper argues that extensive judicial reform is still required in order to ensure true access to justice for the millions of people dependent on welfare in South Africa. Courts have to be more forceful in their insistence on compliance by government with their very orders – so as to avoid a situation where the required redress is still wanting, years after a judgment had been handed down. On the other hand, it may require curtailing the unnecessarily wide ambit of powers and discretion given to government in the empowering legislation. Furthermore, some of the provisions of the 2004 legislation and the accompanying regulations still do not accord with the constitutional framework of welfare entitlement and the binding impact of the constitutional jurisprudence. Also, it is of crucial importance to ensure that welfare applicants and beneficiaries have proper access to the judicial system. For this reason it is imperative to direct a sufficient part of publicly-provided legal aid to these people and to embark upon a comprehensive reform of the framework of welfare adjudication, in the sense of establishing an alternative dispute resolution mechanism. Also, still to be addressed are matters which go to the very substance of the system of social security provisioning in this country. The most important of these matters requiring intensive legal reform relates to finding ways and means to achieve the meaningful and progressive extension of social security protection to the millions who are, due to very nature of the system, excluded from the social security framework.

1 INTRODUCTION

This contribution deals with innovative developments with regard to access to justice in welfare matters, in particular in the area of social security, from the perspective of judicial reform in South Africa. It reflects on access to justice from the point of view of developments in substantive law aimed at enhancing access to justice in social security matters. This it does with

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reference to important constitutional law developments and the interpretation accorded these developments. It further reflects on recent statutory developments which emphasise welfare entitlements and facilitate accessing these entitlements. The contribution also addresses the important role played by administrative justice requirements in this field, and the manner in which these requirements have been interpreted by the courts. In addition, concrete access to justice in social assistance matters is reflected on, among others with reference to allowing class actions in these matters which affect the indigent in particular. Finally, areas of legal deficiency are highlighted, with particular reference to the limited availability of legal aid in welfare litigation, the apparent non-incorporation of particular administrative justice elements in the governing legislation, the unsuitability of the high court system as the final (external) dispute resolution mechanism and the current exclusion of millions of South African residents in need of welfare support from the system.

2 CONSTITUTIONAL PERSPECTIVES¹

2.1 Background

The Constitution of the Republic of South Africa is clearly intended to avoid a repetition of past injustices and to forge a new culture of accommodation, mutual respect, equality and freedom in South Africa. The Preamble to the final Constitution of 1996 bears clear testimony to this.² In addition, in one of its first judgments, the Constitutional Court had this to say:³

“[T]he Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction ...”

Fundamental reform of South Africa’s social security system aims to redress past injustices, particularly the country’s legacy of poverty and inequality.⁴ This approach is in accordance with the provisions of the Constitution. For the first time in South Africa’s history, the Constitution compels the state to ensure the “progressive realization” of social security.

¹ See also the author’s contribution Olivier, Khoza, Jansen van Rensburg and Klinck “Constitutional Issues” in Olivier, Smit and Kalula *Social Security: A Legal Analysis* (2003) 49 51-54, on which part of this paragraph is based.

² “We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. May God protect our people.”

³ *S v Mhlungu* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC) par 111.

⁴ See the remarks of the Constitutional Court in *S v Mhlungu supra*.

Section 27 of the Constitution clearly and unambiguously obliges the state to develop a comprehensive social security system. It affirms the universal right to access to social security, including appropriate social assistance⁵ for those unable to support themselves and their dependants, and orders the state to take reasonable legislative and other measures – within its available resources – to achieve the progressive realisation of these rights.⁶

Several core principles underlie and enhance the constitutional protection of social security as a human right in South Africa, amongst which are the principles of:

- Constitutional supremacy (effectively replacing the principle of parliamentary sovereignty);⁷
- Entrenchment of the rights contained in the Bill of Rights;⁸
- A general human rights-friendly approach in terms of which, amongst others, the state is compelled to give effect to the said rights;⁹
- An international law-friendly approach, which allows institutions entrusted with interpreting and enforcing fundamental rights to rely extensively on international law norms and precedent;¹⁰
- A strong emphasis on socio-economic rights and the recognition of an intimate relationship between the various categories of fundamental rights;¹¹
- An obligation on the state to give effect to these rights,¹² and an obligation on the courts, tribunals and forums – entrusted with the

⁵ S 27(1)(c).

⁶ S 27(2).

⁷ This follows from the supreme status which has been allocated to the Constitution: according to s 2 it is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

⁸ S 74(2) of the Constitution signifies enhanced protection accorded to the Bill by requiring comprehensive support for its amendment: the amending Bill must be passed by the National Assembly, with a supporting vote of at least two-thirds of its members, while at least six provinces in the National Council of Provinces must cast a supporting vote.

⁹ The Constitution places a specific duty on the state to take positive measures in order to give effect to the constitutional rights, in particular the second and third generation fundamental rights, including the right to have access to social security. See, for example, s 27(2). This is fortified by the constitutional provision that the state must respect, protect, promote and fulfill the rights in the Bill of Rights: see s 7(2).

¹⁰ S 39(1)(b) stipulates that a court, tribunal or forum must, when interpreting the Bill of Rights, consider international law. According to the constitutional court decision in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 35 (quoted with approval in *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC)) in the context of this provision, public international law would include non-binding as well as binding law. Furthermore, s 233 provides that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

¹¹ The Constitutional Court has affirmed that all the rights contained in the Bill of Rights are interrelated and mutually supporting: *Government of the Republic of South Africa v Grootboom supra* par 53; and *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development* 2004 6 BCLR 569 (CC) par 40.

interpretation of any legislation¹³ – to promote the spirit, purport and objects of the Bill of Rights;¹⁴ and

- Wide-ranging constitutional jurisdiction allocated to the courts, in particular the Constitutional Court,¹⁵ supported by the specific powers granted to certain constitutional institutions (in particular the South African Human Rights Commission)¹⁶ to monitor compliance with fundamental rights.

2 2 Compelling compliance with socio-economic, including social security rights

From the approach adopted by the Constitutional Court it is clear that the courts entrusted with constitutional jurisdiction in South Africa are not restricted to mere declaratory orders,¹⁷ but are also entitled to grant mandatory orders.¹⁸ In certifying the draft text of the 1996 Constitution, the constitutional court stressed that the socio-economic rights contained in the Constitution *are* justiciable, even though the inclusion of these rights may have direct financial and budgetary implications.¹⁹ Recent decisions of the Constitutional Court²⁰ and of the High Court²¹ have affirmed this position,

¹² S 7(2) stipulates: “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.” As is evident from the discussion below, certain of the fundamental rights place a specific duty on the state to realise the rights in question in a specific manner.

¹³ Or when developing the common law or customary law.

¹⁴ S 39(2). The courts have not hesitated to enforce the supremacy of the Constitution, in the area of social security, in circumstances where its principles have not been adhered to: *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) 800D-F par 76-77; and *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC).

¹⁵ The Constitutional Court is the highest court in all constitutional matters and may decide only constitutional matters: s 167(3). The courts are empowered, whenever they decide on any issue involving the interpretation, protection and enforcement of a fundamental right contained in the Constitution, to make any order that is just and equitable (see s 167(4)(e)) and may grant “appropriate relief” (see ss 172(b) and 167(7) of the Constitution).

¹⁶ A particularly important role is allocated to the South African Human Rights Commission (HRC) in the area of fundamental rights advocacy, promotion, and monitoring; see s 184(1). The Commission fulfils its constitutional mandate by undertaking research in order to produce protocols to organs of state; by submitting reports to Parliament and making them available to organs of state; by receiving individual complaints and involving itself in particular meritorious court actions (it intervened in the *Grootboom* case as *amicus curiae*); and by monitoring compliance with the order of a Constitutional Court, for example when requested to do so by the Court (as has been the case in the *Grootboom* matter). See also the Human Rights Commission Act 54 of 1994.

¹⁷ That is, determining what the respective rights of the parties are.

¹⁸ That is, ordering a party to act in a particular way.

¹⁹ *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996 supra* par 76–78. In par 77, it is remarked: “It is true that the inclusion of socio-economic rights may result in the courts making orders *which have direct implications for budgetary matters*. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications” (own emphasis).

²⁰ “[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without

even though the Constitutional Court has at times been relatively cautious in its approach to the issue.²²

It is clear, therefore, that the courts *can* enforce social security and social assistance rights and *can* order state organs to act positively. In other words, South African courts entrusted with constitutional jurisdiction have the power to order the state to take particular positive steps. In concrete terms this power of the courts has been used in several cases of social assistance and related socio-economic rights enforcement. For example, where necessary, the court will allow a class action²³ to be brought before it, in order to protect the interests of the poor and vulnerable, in particular.²⁴ Also, in a matter involving the constitutional right to access to adequate housing²⁵ of those without any form of shelter, the Constitutional Court ordered government to make available some form of suitable housing.²⁶ And in yet another landmark judgment the court ordered government to make available anti-retroviral treatment to pregnant and lactating women and their new-born children in public facilities where this is possible to do so, in order to reduce the risk of mother-to-child transmission of HIV.²⁷

2 3 The constitutional focus on vulnerable people

Also, in a number of cases it was held that the impact of the constitutional imperative of affording the right to access to social security may be to include categories of vulnerable people who are unjustifiably excluded from the framework of social assistance. For example, when certifying the text of

compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion." (*Government of the Republic of South Africa v Grootboom supra* par 20, quoting with approval from the judgment in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* par 78.) See also the Constitutional Court decision in *Minister of Health v Treatment Action Campaign supra* par 25.

²¹ *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T).

²² In *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC), the court invoked the dual test of rationality and *bona fides* as the yardstick in this regard. It opined: "A court must be slow to interfere with rational decisions taken in good faith by the political organs and (medical) authorities whose responsibility it is to deal with such matters" (par 29). In this case the court upheld a decision by a state hospital not to provide kidney dialysis treatment to a patient because of the limited facilities available. These facilities had to be made available on a priority basis to patients who could still qualify for a kidney transplant, and not to somebody such as the applicant who was in an irreversible and final stage of chronic renal failure. Also, from other judgments in the broad area of social security, it is apparent that the Constitutional Court will not lightly interfere with the underlying structure or financial balance of (publicly organised) social security schemes: cf *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 9 BCLR 1106 (CC); and *Tsotetsi v Mutual and Federal Insurance Co Ltd* CCT16/95.

²³ See s 38 of the Constitution.

²⁴ As happened in the Supreme Court of Appeal matter of the *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Nguzuza* 2001 4 SA 1184 (SCA) – see par 4 below.

²⁵ S 26 of the Constitution.

²⁶ *Government of the Republic of South Africa v Grootboom supra*.

²⁷ *Minister of Health v Treatment Action Campaign supra*.

the 1996 Constitution, the Constitutional Court held that the inclusion of socio-economic rights in the Constitution may imply that a court may require the provision of legal aid, *or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits*.²⁸ Also, in the recent important Constitutional Court judgment in *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development*²⁹ the majority held that permanent residents are entitled to those social assistance grants which were the subject of enquiry in the case.³⁰

It is also clear that the courts entrusted with constitutional jurisdiction are in principle empowered to undertake a policy review of the social security, and in particular the social assistance, framework available to residents of the country, even though it must be recognised that the courts “are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community”.³¹ And yet, in cases of constitutional non-compliance, in particular where the fundamental rights of vulnerable groups or categories of people had clearly been infringed, the courts did not hesitate to intervene and to force upon government a review of existing policies. This they did not only indirectly through the granting of mandatory orders,³² but also, at times, by directly ordering government to undertake a particular policy review.

From the above it follows, and this appears to be of crucial importance in informing the interpretation and application of the welfare-related rights in the Constitution, that there is a specific constitutional focus on addressing the plight of the most vulnerable and desperate in society.³³ In particular, where categories of people belonging to deprived and impoverished communities are negatively affected, and the right infringed is fundamental to their well-being (such as appropriate social assistance, or adequate housing), the Constitutional Court appears to be willing to intervene. This is, in particular, the case where the said communities have been historically

²⁸ *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996 supra* par 77 (own emphasis).

²⁹ *Supra*.

³⁰ The court relied on a purposive approach to give meaning to the entitlement of “everyone” to the right(s) enshrined in s 27(1)(c). It found that this notion includes “all people in our country” (par 46 and 47). However, it reasoned that it might be reasonable to exclude citizens from other countries, visitors and illegal residents – see par 2 3 above (par 58-59).

³¹ *Minister of Health v Treatment Action Campaign supra* par 38.

³² Such as where it was held that the exclusion of permanent residents from the social assistance grant system is unconstitutional. See *supra* and *infra*.

³³ *Government of the Republic of South Africa v Grootboom supra* par 52 and 69, where the failure to make express provision to facilitate access to temporary (housing) relief for people who have no access to land, no roof over their heads or who live in intolerable conditions was found to fall short of the obligation set by s 26(2) in the Constitution. See also *Minister of Health v Treatment Action Campaign supra* where government was ordered to “[R]emove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites” (par 135).

marginalised and/or excluded or appear to be particularly vulnerable.³⁴ In *Treatment Action Campaign* the court emphasised again that:

“To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.”³⁵

The criterion of reasonableness, so the Constitutional Court held, *inter alia* implies that (in particular in relation to dealing with the plight of the vulnerable):

- The measures adopted by the state must be reasonable both in their conception and implementation,³⁶
- That a wide range of possible measures could be adopted of which many might meet the requirement of reasonableness;³⁷
- That reasonableness must be assessed in the light of the context; and³⁸
- That informing this context are factors such as:
 - the vulnerable status of an affected category of people subject to the infringement of a particular right such as the right to access to social security, the extent and impact of historical disadvantage, the need to ensure that basic necessities of life are available to all, and the importance of not neglecting particularly vulnerable groups,³⁹
 - the extent of the impairment and the impact thereof on an affected category of people,⁴⁰
 - the purpose of social security,⁴¹ and
 - the impact of the infringement or exclusion on other intersecting rights.⁴²

³⁴ *Government of the Republic of South Africa v Grootboom supra* par 35. A statistical advance may not be enough and the needs that are the most urgent must be addressed; it is not only the state that is responsible for the provision of (for example) houses, but it may be held responsible if no other provision has been made or exists.

³⁵ Par 68, quoting from *Government of the Republic of South Africa v Grootboom supra* par 44. From this it follows that regard must be had to the extent and impact of historical disadvantage. Furthermore, particularly vulnerable groups may not be neglected. Finally, basic human dignity must be seen to be accorded to everyone when a social security programme is constructed and implemented.

³⁶ *Government of the Republic of South Africa v Grootboom supra* par 42.

³⁷ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* 572H.

³⁸ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra*.

³⁹ In *Government of the Republic of South Africa v Grootboom supra* par 42. See above.

⁴⁰ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* 572I.

⁴¹ *Ibid.*

⁴² *Ibid. Eg.* in *Khosa* the court held that *in casu* where the right to social assistance was conferred by the Constitution on “everyone” and permanent residents were denied access

In particular, as far as social security is concerned, the Constitutional Court itself remarked, when considering the purpose of providing access to social security to those in need, that:⁴³

“A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right of access to social security, including social assistance, for those unable to support themselves and their dependants was entrenched because society in the RSA valued human beings and wanted to ensure that people were afforded their basic needs.”

All of this also relates to the fact that the state's duty to realise the right in question may differ according to the ability or inability of those affected to realise the right themselves. For example, the Constitutional Court held that where the ability to afford to pay for adequate housing exists, the state's primary role is not one of direct provider, but rather one of

“unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance”.⁴⁴

For those who cannot afford to pay, “issues of development and social welfare are raised”.⁴⁵ This was forcefully stated in a subsequent judgment of the Constitutional Court, where it was assumed that flood victims, left homeless, have a constitutional right to be provided with access to housing.⁴⁶ The point here is that state policy needs to address both of these groups – those who indeed have the ability to realise needs themselves and those who do not – and that it should be recognised that the poor are particularly vulnerable and their needs therefore require special attention.⁴⁷

The same principled approach has been adopted by the court as far as the rights of children are concerned. Section 28(1)(c) of the Constitution accords certain rights to children: basic nutrition, shelter, basic health care services and social services. Unlike the right to access to adequate housing

to this right, the equality guarantee entrenched in s 9 of the Constitution was directly engaged (572J).

⁴³ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* 573A (case headnote summary).

⁴⁴ *Government of the Republic of South Africa v Grootboom supra* par 36.

⁴⁵ *Ibid.*

⁴⁶ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 7 BCLR 652 (CC); 2001 3 SA 1151 (CC) par 28. In this matter, the court had to deal with the erection of temporary transit housing on state land for the said victims. The court concluded: “This was an essential national project implemented in terms of a policy decision taken by government that called for a co-ordinated effort by different spheres of government and the application of substantial funds. The provision of relief to the victims of natural disasters is an essential role of government in a democratic state, and government would have failed in its duty to the victims of the floods, if it had done nothing. There was no legislation that made adequate provision for such a situation, and it cannot be said that in acting as it did, government was avoiding a legislative framework prescribed by parliament for such purposes. Nor can it be said that government was acting arbitrarily or otherwise contrary to the rule of law. If regard is had to its constitutional obligations, to its rights as owner of the land, and to its executive power to implement policy decisions, its decision to establish a temporary transit camp for the victims of the flooding was lawful” (par 52).

⁴⁷ *Minister of Public Works v Kyalami Ridge Environmental Association supra* par 52.

or to social security, these rights have not been made subject to the “reasonable measures”, “available resources” and “progressive realisation” qualifiers. Despite this, the Constitutional Court was not prepared to hold that the state bears the primary responsibility of giving effect to children’s rights and that it must do so immediately and despite the availability of resources. Rather, the court noted that the section does not create separate and independent rights for children and their parents.⁴⁸ The state’s obligations, emanating from its international obligations,⁴⁹ require the state to take steps to ensure that children’s rights are observed:

“In the first instance, the state does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children.”⁵⁰

Hence, the court argued, a proper construction of section 28 implies that:

“[A] child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in subsection (1)(c) is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that section 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.”⁵¹

2.4 The impact of the right to equality

The impact of the interrelated nature of the fundamental rights contained in the South African Constitution in the area of social assistance, and in particular the interplay with the constitutional right to equality,⁵² has been clearly illustrated in a recent Constitutional Court case dealing with the exclusion of permanent residents from the purview of the South African

⁴⁸ *Government of the Republic of South Africa v Grootboom supra* par 74.

⁴⁹ In terms of the Convention on the Rights of the Child (General Assembly Resolution 44/25 of 20 November 1989). The Convention entered into force on 2 September 1990, was signed by South Africa on 29 January 1993 and ratified on 15 December 1995.

⁵⁰ *Government of the Republic of South Africa v Grootboom supra* par 75.

⁵¹ *Government of the Republic of South Africa v Grootboom supra* par 77. The court went to great lengths in explaining what the duties of the state are where children are cared for by their parents and families: “This does not mean, however, that the state incurs no obligation in relation to children who are being cared for by their parents or families. In the first place, the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28. In addition, the state is required to fulfil its obligations to provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27. It follows from this judgment that sections 25 and 27 require the state to provide access on a programmatic and coordinated basis, subject to available resources. One of the ways in which the state would meet its section 27 obligations would be through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances” (par 78).

⁵² S 9 of the Constitution.

social assistance system. In *Khosa* the court once again stressed the importance of adopting a holistic approach which takes into account the fact that all rights are interrelated, interdependent and equally important,⁵³ the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness, and other factors that may be relevant in a given case.⁵⁴ It remarked that where the state argues that resources are not available to pay benefits to everyone entitled under section 27(1)(c), the criteria for excluding a specific group (in this case permanent residents) must be consistent with the Bill of Rights as a whole.⁵⁵ Whatever differentiation is made must be constitutionally valid and cannot be arbitrary, irrational or manifest a naked preference.⁵⁶

The court relied on a purposive approach to give meaning to the entitlement of “everyone” to the right(s) enshrined in section 27(1)(c). It found that this notion includes “all people in our country”.⁵⁷ However, it reasoned that it might be reasonable to exclude citizens from other countries, visitors and illegal residents, who have only a tenuous link with the country (eg, non-citizens in South Africa who are supported by sponsors who arranged their immigration). Temporary residents are, therefore, excluded from this case, the court found.⁵⁸ Permanent residents, though, have been residing in South Africa for some time, they have made South Africa their home, their families might be with them and their children might have been born in South Africa. They have a right to work and they owe a duty of allegiance to the state.⁵⁹

To exclude permanent residents from entitlement to social assistance would fundamentally affect their human dignity (which is both a constitutional right – see section 10 – and a constitutional value) and equality (which is likewise both a constitutional right – see section 9 – and a constitutional value). Also, to use the non-availability of social grants as a tool to regulate immigration (in the sense that this could be seen as part of the immigration policy of the state that aims to exclude persons who may become a burden on the state and to encourage self-sufficiency), is of no avail. Instead, so the court argued, through careful immigration policies the state could ensure that those people who are admitted will not be a burden on the state. The court also noted that in this particular case one is concerned with the aged and

⁵³ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 40.

⁵⁴ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 43-44.

⁵⁵ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 45.

⁵⁶ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 53.

⁵⁷ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 46-47.

⁵⁸ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 58-59.

⁵⁹ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 59.

children and they are unlikely to provide for themselves: the self-sufficiency argument does not hold up in such a case.⁶⁰

Referring to the earlier Constitutional Court judgment in the *Larbi-Odam* case,⁶¹ the court reiterated that non-citizens constitute a vulnerable group in society. In determining whether excluding permanent residents from the social assistance system would amount to *unfair* discrimination, the court held:⁶²

“There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance.”

If the exclusion were to be upheld, that would imply that permanent residents would become a burden on other members of the community – something which would impair their dignity and further marginalise them.⁶³ Weighing up the competing considerations and taking into account the intersecting rights that were involved, the majority came to the conclusion that by excluding permanent residents from the scheme for social security, the legislation limited their rights in a manner that affected their dignity and equality in material respects. Dignity and equality were founding values of the Constitution and lay at the heart of the Bill of Rights. Sufficient reason for such invasive treatment of the rights of permanent residents had not been established.⁶⁴ The exclusion could, therefore, not be justified under the Constitution.⁶⁵

⁶⁰ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 65.

⁶¹ *Larbi-Odam v Member of the Executive Council for Education (North-West Province) and the Minister of Education* 1997 BCLR 1655 (CC).

⁶² *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 74.

⁶³ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 76-77 and 80-81.

⁶⁴ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* 573I-J (case headnote summary).

⁶⁵ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 80 and 83-84.

3 STATUTORY CONTEXT: CEMENTING WELFARE ENTITLEMENTS

3.1 Background

The Social Assistance Act⁶⁶ and its attendant regulations make provision for several social assistance grants, including the:

- (a) old age grant available to females from age 60 and males from age 65;
- (b) war veteran grant and supplementary grant payable to war veterans;
- (c) disability grant for persons 18 years and older with a disability;
- (d) disability-related care dependency grant for children with disabilities;
- (e) child support grant payable to the primary care-giver of a child under the age of seven, but recently extended to progressively cover older children as well;
- (f) foster care grant in respect of foster children;
- (g) grant-in-aid where an intended beneficiary referred to in (a), (b) and (c) above has a physical or mental condition which requires regular attendance; and
- (h) temporary social relief.

Vast numbers of welfare beneficiaries are dependent upon these grants: according to recently released figures there are about 11-million beneficiaries, roughly 25% of the South African population. These grants have an important direct effect on the livelihood and survival of the individual beneficiaries and, in many instances (in particular in the case of the old age grant), they have a hugely important distributional impact. For example, it has been remarked that the social old age grant reaches 68% of all persons 60 years and over.⁶⁷ While the grant is estimated to reduce the poverty gap for older persons by 94%, it has been reported that, on the basis of a study in the KwaZulu-Natal province, the pension income made up more than half the income of a third of rural households.⁶⁸ Similarly, research conducted in 1999 found that the grant is used to support entire households, many consisting of three generations.⁶⁹ Also, the Welfare White Paper of 1997

⁶⁶ 13 of 2004.

⁶⁷ Approximately 2,1 million of the total old age population of 3 million over the age of 60 are dependent upon this grant.

⁶⁸ Ardington and Lund *Pensions and Development: The Social Security System as a Complementary track to Programmes of Reconstruction and Development* (1994). The 1999/2000 Race Relations Survey confirms this was still true in 1997: South African Institute of Race Relations *Annual Survey* 274.

⁶⁹ The result is that the basic needs of older persons in poor households are not met: *1994-2002 National Report on the Status of Older Persons* Report to the Second World Assembly on Ageing: South Africa, Madrid, Spain, April 2002 par 3.1.

indicated that the social assistance-based old-age grant serves the purpose of supporting an additional five members of an African household.⁷⁰

The social assistance grant system is characterised by: (a) a categorical approach, in that grants are only available for certain categories of people in need, thereby excluding large categories of vulnerable people in South Africa from coverage; (b) means testing, aimed at targeting categories of poor people; and (c) with one exception, a citizenship restriction, thereby effectively excluding non South African citizens from coverage.⁷¹

3 2 A protective rights-based foundation provided by the statutory framework

Several important issues flow from the way in which the South African legislation accords social assistance grants to needy beneficiaries. In the first place, statutory regulation (as supported by administrative law tenets) potentially plays an immensely important role in extending protection to poor families, and has to be interpreted accordingly. Laws normally serve as the primary source of individual beneficiaries' entitlement to benefits available under the formal social assistance grant system. It has often been emphasised that the courts will guard jealously against the unlawful infringement of social security rights, inclusive of social assistance rights, which are statutorily guaranteed.⁷²

Secondly, a statutory entitlement to the grant vests in a person who complies with the provisions of the Act and the conditions imposed in terms thereof.⁷³ The Social Assistance Act of 2004 makes it clear that if the applicant for a social assistance grant qualifies for the grant, the Agency must render the relevant social assistance.⁷⁴ If the applicant does not qualify, the Agency must in writing inform the applicant of this, the reasons why he or she does not qualify, and of his/her right of appeal.⁷⁵

Thirdly, the basic rights of users of the system, in particular applicants and beneficiaries, are also protected in other, often innovative, ways. The Social Assistance Act of 2004 stipulates that all reasonable assistance must be given to a person who, due to his or her age, a disability or an inability to

⁷⁰ White Paper for Social Welfare (GN 1108 in GG 18166 of 1997-08-08) ch 7.

⁷¹ Except for the foster care grant, in the event of all the other grants both residence in and citizenship of South Africa are required.

⁷² *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* 1998 1 All SA 525 (E); *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 BCLR 1322 (E); *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 7 BCLR 728 (E); *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 4 SA 385 (T); and *Mpofu v MEC for the Department of Welfare and Population Development in Gauteng Provincial Government* unreported WLD case 2848/99 of 18 February 2000. The *Ngxuza* judgment was upheld by the Supreme Court of Appeal: *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza supra*.

⁷³ See s 5(1) of the Social Assistance Act 13 of 2004.

⁷⁴ S 14(3)(a) of Act 13 of 2004.

⁷⁵ S 14(3)(b).

read or write, is unable to understand, appreciate or exercise his or her rights, duties or obligations in terms of the Act, in the official language of the Republic which he or she is likely to understand.⁷⁶ In addition, the Act stipulates that the Agency (*ie*, the South African Social Security Agency) must, out of moneys appropriated by Parliament for this purpose or with funds donated for this purpose, publish and distribute to beneficiaries and potential beneficiaries, brochures in all official languages of the Republic setting out in understandable language the rights, duties, obligations, procedures and mechanisms contemplated in this Act, as well as contact details of the Agency or anyone acting on its behalf.⁷⁷ Also, both the Act⁷⁸ and the South African Social Security Agency Act⁷⁹ contain stringent provisions which protect the security of confidential information held by the Agency.

Fourthly, it is part and parcel of government's administrative responsibilities to ensure that grants are paid to legitimate beneficiaries and are also not open to abuse by those entrusted with administration and by beneficiaries. Specific protective measures have therefore been built into the legislation. For example, in order to prevent the misspending of social grants, beneficiaries who misspend their grants may have the payment of their grants terminated or a person appointed to receive and apply the grant on their behalf.⁸⁰ Also, grants may not be the subject of a cession, pledge, attachment or any form of execution under a judgment or order of a court of law.⁸¹

3 3 Contrary tendencies

However, the recently introduced social assistance legislation also contains provisions which make unjustified infringements on the rights of applicants and beneficiaries possible. Two issues could in particular be mentioned. Firstly, section 5(2) of the Social Assistance Act authorises the Minister of Social Development to prescribe additional requirements or conditions in respect of, for example, means testing, age limits, disabilities and care dependency. This, one would think, is inappropriate and, read with other provisions of the Act, reflects inconsistency. Substantive requirements (*eg*, age limits, disabilities, *etc*) should be regulated in the law itself, and not in regulations. Also, the Act is inconsistent, in so far as these requirements/substantive issues are sometimes contained in the Act (*eg*, age provisions regarding older persons grant; criteria for care dependency grant), and sometimes left to Ministerial discretion.

⁷⁶ S 2(3).

⁷⁷ S 2(4).

⁷⁸ S 14(4).

⁷⁹ S 16 of the South African Social Security Agency Act 9 of 1004.

⁸⁰ S 19 of the Social Assistance Act 13 of 2004.

⁸¹ S 20.

The second issue relates to disclosure of information provisions in the Act. In terms of these provisions:⁸²

- An organ of state may be required, at the request of the Agency and notwithstanding anything to the contrary in any law, but subject to a particular condition,⁸³ to furnish it with all relevant information relating to an applicant or beneficiary.⁸⁴
- A financial institution must, at the request of the Agency and notwithstanding anything to the contrary in any law, but subject to a particular condition,⁸⁵ furnish the Agency with all relevant information relating to the assets and investments of an applicant or beneficiary as may be prescribed and with any additional information requested, if such information is necessary for a decision on an application.⁸⁶
- Existing beneficiaries/applicants must be informed of this in writing; "new" beneficiaries/applicants are *deemed to have agreed, by making such an application, that any other person who holds personal information relevant to that application may, without requesting permission from him or her, make that information available to the Agency.*⁸⁷

It is submitted that these disclosure of information provisions seem overly broad and, in fact, go too far. While it is necessary to combat fraud, mechanisms for sufficient protection of the rights and interests of the individual should be provided for as well. The constitutional right to privacy and the Promotion of Access to Information Act⁸⁸ provide a measure of protection. However, there is a need to ensure *further protection of private information*. In other jurisdictions, laws have been promulgated to deal with the threat to privacy that is occasioned by the ease with which databases can be accessed.⁸⁹ The European Union's Directive 95/46/EC provides guidelines on the processing of personal data and on the free movement of such information. Individuals who are subject to the processing of personal data have the right to know that their information is in a specific database; what information is contained in it; the purpose for which such data is used; that the information is adequately protected; that they have the right to correct information or to have personal information removed from the database and that the providers give notice of corrected information. In the United States, the Privacy Act of 1974 deals with the protection of records kept on individuals. In fact, it was stated in *Doyle v Wilson*⁹⁰ that

⁸² See s 22 of the Social Assistance Act 13 of 2004.

⁸³ A person who furnishes information obtained before the commencement of this Act to the Agency must, when doing so, inform the person concerned of that fact in writing – s 22(3).

⁸⁴ S 22(1).

⁸⁵ A person who furnishes information obtained before the commencement of this Act to the Agency must, when doing so, inform the person concerned of that fact in writing – s 22(3).

⁸⁶ S 22(2).

⁸⁷ See s 22(3) and (4) (own emphasis).

⁸⁸ Act 2 of 2000.

⁸⁹ See Olivier *et al* 115-117.

⁹⁰ (D.Del.1982), 529 F. Supp. 1343, 1348.

“the purpose of the Privacy Act of 1974 was to curtail the expanding use of social security numbers by federal and local agencies and, by so doing, to eliminate the threat to individual privacy and confidentiality of information posed by common numerical identifiers”.

And in terms of section 552a(b):

“[N]o agency shall disclose any record which is contained in a system of records by means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains ...”

This kind of protection ensures that the individual whose information is stored in a database is involved where there is a threat to his or her privacy. In fact, there is a limit on the information that can be kept by any agency that maintains a system of records. In section 552a(e) it is stated that:

“[E]ach agency that maintains a system of records shall (1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.”

It is this type of further protection of individuals – provided in the United States – that is required in South Africa as the social security system grows and social assistance grant administration is streamlined.

4 ENHANCING ACCESS TO JUSTICE: CLASS ACTIONS AND SUPERVISORY JURISDICTION

4.1 The availability of class actions to the poor and vulnerable

It is in particular the vulnerability and plight of the poor dependent upon social assistance grants which caused the Supreme Court of Appeal (the highest court in non-constitutional matters) to allow a class action to be brought on behalf of a whole group of welfare beneficiaries affected negatively by the (unlawful) suspension of a grant. For example, in the case of *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*⁹¹ an application was made for the reinstatement of disability grants to some 37,000 people with disabilities who had summarily lost their grants.⁹² The provincial authorities in the Eastern Cape (one of the poorest of the nine South African provinces) unilaterally and without notice, revoked the welfare benefits of various groups of persons receiving social assistance. The affected beneficiaries had to re-apply for their existing entitlements, but this procedure, according to the court was harsh and unlawful. The court ruled in favour of the applicants.

⁹¹ 2001 2 SA 609 (E).

⁹² Their grants had been stopped because the authorities suspected that there were large numbers of “ghost pensioners”.

On appeal the judgment of the court *a quo* was upheld by the Supreme Court of Appeal.⁹³ Taking into account the vulnerable position in which the said beneficiaries found themselves, the court remarked:

“[I]t is precisely because so many in our country are in a ‘poor position to seek legal redress’, and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice, that both the interim Constitution⁹⁴ and the Constitution⁹⁵ created the express entitlement that ‘anyone’ asserting a right in the Bill of Rights could litigate ‘as a member of, or in the interest of, a group or class of persons’.”

and:

“[T]he situation seemed pattern-made for class proceedings. The class the applicants represent is drawn from the very poorest within our society – those in need of statutory social assistance. They also have the least chance of vindicating their rights through the legal process. Their individual claims are small: the value of the social assistance they receive – a few hundred rands every month – would secure them hardly a single hour’s consultation at current rates with most urban lawyers. They are scattered throughout the Eastern Cape Province, many of them in small towns and remote rural areas. What they have in common is that they are victims of official excess, bureaucratic misdirection and unlawful administrative methods.

It is the needs of such persons, who are most lacking in protective and assertive armour, that the Constitutional Court has repeatedly emphasised must animate our understanding of the Constitution’s provisions.⁹⁶ And it is against the background of their constitutional entitlements that we must interpret the class action provision in the Bill of Rights.

The circumstances of this particular case – unlawful conduct by a party against a disparate body of claimants lacking access to individualised legal services, with small claims unsuitable for if not incapable of enforcement in isolation – should have led to the conclusion, in short order, that the applicants’ assertion of authority to institute class action proceedings was unassailable.”

The responsible government department was chastised for its unacceptable treatment of the beneficiaries:

“All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticise government’s decisions in the area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution,⁹⁷ and requires that public administration be conducted on the basis that ‘people’s needs must be responded to’.⁹⁸ It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province’s approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was at war with its own citizens, the more

⁹³ *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuzo supra*.

⁹⁴ 200 of 1993, s 7(4)(b)(iv).

⁹⁵ S 38(c).

⁹⁶ *Bernstein v Bester NNO* 1996 2 SA 751 (CC) par 149; *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) par 14; *Soobramoney v Minister of Health, KwaZulu-Natal supra* par 8; and *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par 25.

⁹⁷ S 41(1)(d).

⁹⁸ S 195(1)(e).

shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere. We were told, in extenuation, that unentitled claimants were costing the province R65 million per month. That misses the point, which is the cost the province's remedy exacted in human suffering on those who were entitled to benefits. What is more, the extravagant cost of 'ghost' claimants would seem to justify the expense of imperative administrative measures to remedy the problem by singling out the bogus – something the province conspicuously failed to do. It cannot warrant unlawful action against the entitled."

4 2 Employing supervisory jurisdiction to protect and enforce welfare entitlements

While the Constitutional Court has accepted that it retains supervisory jurisdiction, in particular in relation to monitoring compliance with its own orders,⁹⁹ government in South Africa has not always complied fully or reasonably speedily with orders granted by the Constitutional Court as regards socio-economic rights, including social security-related rights. For example, appropriate housing in accordance with the *Grootboom* judgment has not been made available to the claimants, while the roll-out of the anti-retroviral drug Nevirapine, as directed by the court in *Treatment Action Campaign*, has only recently commenced. And despite the extension in principle of the social grant system to permanent residents per the *Khosa* judgment, changes to the provisions of the Social Assistance Act of 1992¹⁰⁰ and of 2004¹⁰¹ to give effect to this have not yet been effected.¹⁰²

It is clear that the underlying assumption adopted by the court is that the state would comply with its orders and that it is, therefore, unnecessary to expect or demand of government to report back or for the court to invoke supervisory mechanisms to monitor compliance. In one case, though, it invited the South African Human Rights Commission to report in terms of its powers on the efforts made by the state to comply with the state's duties in accordance with the judgment.¹⁰³

And yet the court has also made it clear that it retains supervisory jurisdiction to monitor and enforce compliance with its orders. This would involve the courts giving orders directing the legislative and executive branches of government to bring about certain reforms¹⁰⁴ and then retaining supervisory jurisdiction regarding the implementation of those reforms.¹⁰⁵ As far as appropriate remedies are concerned, the courts are empowered –

⁹⁹ See the discussion below.

¹⁰⁰ 59 of 1992.

¹⁰¹ 13 of 2004.

¹⁰² S 2(1) of Act 13 of 2004 does provide for a limited possibility that a non-citizen could qualify for social assistance in terms of the Act if there is an international agreement with that country, in terms of which reciprocal assistance would be granted to a South African citizen.

¹⁰³ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) par 97.

¹⁰⁴ In *Grootboom*, the court ordered (national and provincial) government to redraft its housing policy and programme so as to make provision for those without any form of temporary housing.

¹⁰⁵ *Minister of Health v Treatment Action Campaign supra* par 104. The court also remarked that, in appropriate cases, the courts should exercise such a power if it is necessary to secure compliance with a court order (par 129).

when deciding on any issue involving the interpretation, protection and enforcement of a fundamental right contained in the Constitution – to make any order that is just and equitable¹⁰⁶ and may also grant “appropriate relief”.¹⁰⁷ Specific constitutional remedies include orders of invalidity,¹⁰⁸ the development of the common law in order to give effect to constitutional rights¹⁰⁹ and the creation of procedural mechanisms necessary for the protection and enforcement of constitutional rights.¹¹⁰ Procedural remedies, derived from some of the substantive rights,¹¹¹ are also available.

The power to exercise supervisory jurisdiction, it would seem, has not been used effectively. Our conclusion is that in this area there is a need for further development in our constitutional jurisdiction by, for example, where necessary:

- In appropriate cases, in particular where large categories of vulnerable people are potentially affected by the order of the court, ordering government to report back to the court on progress made;
- Mandating supervisory institutions, such as the South African Human Rights Commission, to monitor compliance and report back to the court; and
- Ordering the legislature to adopt particular appropriate instruments which would give effect to the judgments of the court.

5 ENHANCING ACCESS TO JUSTICE: ADMINISTRATIVE JUSTICE

5 1 Constitutional and statutory framework

It is evident from the evolving administrative law jurisprudence in South Africa that administrative justice is one of the core areas of protection extended to social security, and in particular social assistance, applicants and beneficiaries. Constitutional protection of the right to just administrative action is regulated in section 33 of the Constitution which stipulates, firstly, that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.¹¹² Secondly, everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.¹¹³

¹⁰⁶ Ss 172(b) and 167(7) of the Constitution.

¹⁰⁷ S 38. In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) “appropriate relief” was described as follows: “Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. 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” (par 19).

¹⁰⁸ S 172(1)(a).

¹⁰⁹ Ss 173 and 8(3).

¹¹⁰ S 173.

¹¹¹ Ss 32(10), 33(2) and 34.

¹¹² S 33(1).

¹¹³ S 33(2).

In *President of the Republic of South Africa v South African Rugby Football Union*¹¹⁴ the Constitutional Court held that:¹¹⁵

“[T]he principal function of section 33 is to regulate conduct of the public administration and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades.”

Furthermore, decisions taken by officials in relation to, for example, social security benefits, must be rational and may not be arbitrary. The constitutional court explained the principle as follows in *Pharmaceutical Manufacturers Association of South Africa: In Re: Ex Parte Application of the President of the Republic of South Africa*:¹¹⁶

“It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”

Several constitutional provisions relating to co-operative government and public service conduct have a bearing on social assistance service delivery. For example, chapter 3 of the Constitution on “Co-operative Government” requires of all spheres of government and all organs of state to secure the well-being of the people or the Republic.¹¹⁷ In *Ngxuza v Secretary, Department of Welfare Eastern Cape Provincial Government*¹¹⁸ it was stressed that there could be no compliance with the constitutional duty to provide effective, transparent, accountable and coherent government for the Republic as a whole,¹¹⁹ where a social grant has been withdrawn unilaterally. Also, in the same chapter, section 41(1)(d) commands all organs of state to be loyal to the Constitution. This provision was relied upon by the Supreme Court of Appeal in the *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza*.¹²⁰

Chapter 10 of the Constitution sets out in section 195(1) the basic values and principles governing public administration and the public service. Many of these principles are highly relevant to social assistance service delivery and have been referred to in some of the judgments dealing with the payment of social assistance grants. For example, in the *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v*

¹¹⁴ 1999 BCLR 1059 (CC).

¹¹⁵ *President of the Republic of South Africa v South African Rugby Football Union supra* 1117E-F.

¹¹⁶ 2000 3 BCLR 241 (CC).

¹¹⁷ See s 41(1)(b).

¹¹⁸ 2000 12 BCLR 1322 (E).

¹¹⁹ See s 41(1)(c).

¹²⁰ *Supra*.

*Ngxuza*¹²¹ the Supreme Court of Appeal referred to section 195(1)(e) which requires that public administration be conducted on the basis that “people’s needs must be responded to”. In terms of the Constitution the democratic values and principles enshrined in the Constitution govern public administration.¹²² These values and principles also apply to the public service, since the public service forms part of public administration¹²³ and since these principles apply to administration in every sphere of government¹²⁴ and to organs of state,¹²⁵ which include, amongst others, any department of state or administration in the national and provincial sphere of government.¹²⁶ The democratic values and principles include the following principles:¹²⁷

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-orientated.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career development practices, to maximise human potential, must be cultivated.
- (i) Public administration must be broadly representative, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

The Promotion of Administrative Justice Act (PAJA)¹²⁸ gives expression to the constitutional requirement that national legislation be enacted to provide the details of the broad framework of administrative law rights enshrined in the Bill of Rights.¹²⁹ Since this law stipulates guidelines and benchmarks for administrative action and decisions, it is particularly relevant for the area of welfare entitlement. PAJA requires a fair procedure in the event that administrative action materially and adversely affects the rights or legitimate

¹²¹ *Ibid.*

¹²² S 195(1).

¹²³ See s 197(1).

¹²⁴ See s 197(2)(a).

¹²⁵ S 197(2)(b).

¹²⁶ See s 239 definition of “organ of state” par (a).

¹²⁷ See s 195(1).

¹²⁸ 3 of 2000 (PAJA).

¹²⁹ S 33 of the Constitution. The PAJA is a partial codification of the administrative common law principles: *Schoonbee v MEC for Education, Mpumalanga* 2002 4 SA 877 (T).

expectations of any person. What constitutes fair administrative procedure depends on the circumstances of each case,¹³⁰ but must, as a rule,¹³¹ include the following:¹³²

- (a) adequate notice of the nature and purpose of the proposed action;
- (b) a reasonable opportunity to make representations;
- (c) a clear statement of the action;
- (d) adequate notice of any right of review or internal appeal, where applicable; and
- (e) adequate notice of the right to request reasons.

On a discretionary basis the administrator may give the individual the opportunity to:¹³³

- (i) obtain assistance and, in serious or complex cases, legal representation;¹³⁴
- (ii) present and dispute information and arguments (presenting evidence and challenging evidence); and
- (iii) appear in person (an opportunity to submit written representations may therefore in certain circumstances be sufficient).

The Act envisages that an empowering provision in, for example, a law or agreement, may authorise a different but nevertheless fair procedure.¹³⁵

If reasons have not been given to any person whose rights have been materially and adversely affected by administrative action, the person may within a 90-day period¹³⁶ request that written reasons be furnished.¹³⁷ Failure to furnish adequate reasons will be presumed to imply that the administrative action was taken without good reason.¹³⁸ Departure from the requirement to

¹³⁰ S 3(2)(a).

¹³¹ If it is reasonable and justifiable in the circumstances, an administrator may depart from any of these requirements: s 4(4)(a). Certain relevant factors to be taken into account when determining whether the departure is reasonable and justifiable are indicated: s 4(4)(b).

¹³² S 3(2)(b).

¹³³ S 3(3).

¹³⁴ See *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 ILJ 1531 (SCA); *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province* 2003 9 BLLR 963 (T); *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* 2005 2 BLLR 173 (SCA); and *Majola v MEC, Department of Public Works, Northern Province* 2004 25 ILJ 131 (LC).

¹³⁵ S 3(5).

¹³⁶ After the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action: s 5(2).

¹³⁷ Promotion of Administrative Justice Act 3 of 2000: s 5(1).

¹³⁸ S 5(3). Adequate reasons would require that the aggrieved person must be able to consider whether an administrative act or decision is justifiable in relation to the reasons where his/her rights are affected to threatened by it: *King Williams' Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 4 SA 152 (E). The presumption of unreasonableness kicks in if the reasons were requested and have not been furnished: *Perils v South African Police Services* 2004 2 BALR 161 (PSSSBC).

furnish written reasons must be reasonable and justifiable.¹³⁹

Proceedings for the judicial review of an administrative action may be instituted in a court or tribunal. Several review grounds are contained in the Act.¹⁴⁰

- (a) where the administrator who took the action was not authorised to do so; or acted under an irregular delegation of power; or was biased or reasonably suspected of bias;
- (b) where a mandatory and material procedure or condition was not complied with;
- (c) where the action was procedurally unfair;
- (d) where the action was materially influenced by an error of law;
- (e) where the action taken was for a reason not authorised by the empowering provision; was for an ulterior purpose or motive; took into account irrelevant considerations or did not take into account relevant considerations; was because of the unwarranted dictates of another person or body; was taken in bad faith; or was taken arbitrarily or capriciously;
- (f) where the action concerned consists of a failure to take a decision; or
- (g) where the action taken is so unreasonable that no reasonable person could have so exercised the power or performed the functions.

Judicial review proceedings must be instituted within 180 days.¹⁴¹ There is an obligation to exhaust internal remedies (where applicable), unless a court or tribunal in exceptional circumstances exempts the person from the obligation if the court or tribunal deems it in the interest of justice.¹⁴²

5 2 Jurisprudential interpretation and application: welfare entitlements

While an applicant for a social assistance grant under the relevant legislation generally has no substantive right to receive a grant unless he/she has satisfied the entitlement criteria for the grant and has submitted an application to this effect, regard must be had to section 27(1)(c) of the Constitution which provides for a right to access to social security, including appropriate social assistance, if persons are unable to support themselves and their dependants. The effect of section 27(1)(c) is to protect an applicant's procedural interests.¹⁴³ As remarked in *Sikutshwa v MEC for Social Development, EC Province*:¹⁴⁴

¹³⁹ S 5(4).

¹⁴⁰ S 6(2). The grounds of judicial review are now partly codified in s 6: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC).

¹⁴¹ S 7(1).

¹⁴² S 7(2).

¹⁴³ Burns *Administrative Law under the 1996 Constitution* (2003) 29.

¹⁴⁴ Case 847/2004, unreported judgment of 12 May 2005 (par 81).

“The Applicant, like so many grant applicants is in dire circumstances. Whether he is entitled to social assistance or not, I cannot say. But he is certainly entitled to be treated with dignity and respect, and he is entitled to be informed of the reasons for the decision not to approve his grant application. He ought to have been given those reasons on request.”

The application of the administrative justice principles has been extensive. It is particularly in the area of social assistance that the administrative law principles of natural justice – underpinned by the constitutional imperative in this regard – have contributed significantly to the protection of the rights and interests of those dependent on state support, against arbitrary and unlawful state action. The following serve as examples:¹⁴⁵

- (a) The courts have often held that unreasonable delays in the processing of grant applications may constitute unlawful administrative action.¹⁴⁶
- (b) In other cases, the courts emphasised that the unilateral withdrawal or suspension of grants – without proper adherence to the administrative law principles of natural justice and to the rights which had accrued in terms of statute – is unlawful and invalid.¹⁴⁷
- (c) Irrational decisions taken by social security officials will fall foul of the administrative law prohibition in this regard.¹⁴⁸
- (d) Awarding a temporary disability grant when the condition of the applicant was to continue beyond the prescribed 12-month period was found to be unlawful.¹⁴⁹
- (e) In the event that there was an error in deciding if the time period for a grant has expired, then the affected beneficiary is entitled to an opportunity to challenge the lapsing.¹⁵⁰

¹⁴⁵ See generally De Villiers “Social grants and the Promotion of Administrative Justice Act” 2002 SAJHR 320-349.

¹⁴⁶ See *Mpanga v MEC for Welfare (Eastern Cape)* 2002 1 SA 359 (SE); and *Mahambehala v MEC for Welfare (Eastern Cape)* 1998 1 SA 342 (SE).

¹⁴⁷ *Bacela v MEC for Welfare (Eastern Cape Provincial Government) supra*; *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 12 BCLR 1322 (E), upheld in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza supra*; *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government supra*; *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province supra*; and *Mpofu v MEC for the Department of Welfare and Population Development in Gauteng Provincial Government supra*.

¹⁴⁸ Eg, in *Rangani v Superintendent-General, Department of Health and Welfare supra*, the state had a policy that the applicant had to be found by a medical officer to be 60% disabled in order to qualify for a permanent disability. The court found that this was not a rational outcome, because the degree of severity of the medical condition was not rationally linked to the duration of the disability. A similar policy was also struck down in *Mpofu v MEC Welfare and Population Development, Gauteng supra*.

¹⁴⁹ *Mashishi v Minister of Social Development* (unreported TPD case 4239/03).

¹⁵⁰ In *Sibuye v MEC for Health and Welfare, Northern Province* (unreported TPD case 17713/03), Mr Sibuye was wrongly registered as deceased, and his grant lapsed automatically. He challenged the decision on the basis that the registration of his death was fraudulent. The court ordered that the applicant be reinstated as a beneficiary and directed the state to amend the regulations to allow for a hearing in such situations.

- (f) Social assistance grants may only be suspended for the reasons and on the grounds provided for in the relevant legislation and the regulations.¹⁵¹ Furthermore, beneficiaries must be given an opportunity to make representations before a grant may be suspended.¹⁵² Also, written reasons have to be furnished when it is decided to cancel or suspend a grant¹⁵³ and the affected person should be informed of his/her right to appeal.¹⁵⁴
- (g) The period for the initiation of an internal appeal under the applicable legislation does not start to run until the applicant has received a written explanation of the unfavourable decision and of his/her right to appeal.¹⁵⁵

6 SOME AREAS OF DEFICIENCY¹⁵⁶

6.1 Introduction

Despite the extensive legal protection available to welfare recipients in terms of the South African social assistance grant system, glaring disparities of a legal nature, and at times also an evident mismatch between legal regulation and actual service delivery, appear to characterise the system. The mismatch refers to limited access to social assistance and unacceptable levels of poor service delivery, aggravated by the fact that many of the intended beneficiaries are uninformed and often illiterate, while the legal issues concerned refer to the limited availability of formal legal aid to welfare beneficiaries, and the insufficiency of the available review/appeal system. Also, the exclusionary nature of social security in South Africa in general and the social assistance system in particular, constitutes another area of

¹⁵¹ In *Maluleke v MEC for Health, Northern Province* 1999 4 SA 367 (T), the provincial government decided to cancel almost 92 000 grants of those it deemed to be "suspect beneficiaries", and to wait for those affected to come forward to enquire why their grants had been cancelled, obtaining current information on each beneficiary and re-instating the grants in appropriate cases. Southwood J held that the suspension of the applicant's pension because she was identified as a "suspect beneficiary whose particulars needed to be checked" was "unlawful because the enabling statute – the Social Assistance Act 7 of 1976 (*Gazankulu*) did not authorize suspension of a grant for such a purpose" (own emphasis). See also *Bacela v MEC for Welfare (Eastern Cape Provincial Government) supra*; *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 12 BCLR 1322 (E), upheld in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza supra*.

¹⁵² *Rangani v Superintendent General, Department of Health and Welfare, Northern Province supra*. See also *Mpofu v Member of the Executive Committee for the Department of Welfare and Population Development in Gauteng Provincial Government supra*, where it was held that the applicant's right to fair administrative action had been infringed by the failure to give him notice of their intention to review the disability grant and he had not been given a hearing before canceling his grant. See also *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government supra*.

¹⁵³ *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government supra*.

¹⁵⁴ *Njongi v MEC Social Development, Eastern Cape* (unreported case 1281/04 ECD).

¹⁵⁵ *Vumazonke v MEC for Welfare* (unreported case 110/04 ECD).

¹⁵⁶ This part is partly based on Olivier "The Role of Law in Extending Protection to Welfare Beneficiaries: Innovative Perspectives from South Africa" in *Instituut Voor Sociaal Recht* (ed) *Sociale Bescherming op Nieuwe Paden – Liber Memorialis Béatrice Van Buggenhout* (2003) 667-683.

deficiency. The same applies to the restrictions flowing from the particular characteristics of the social assistance system.

6.2 Limited access and poor service delivery

As regards access to social assistance, it is clear that notwithstanding the poverty alleviation role played by social grants, particularly in poor families, the take-up rate of social grants is still a cause of concern.¹⁵⁷ From a practical perspective, social grants are not accessible to all South Africans – in particular to people who live in rural, semi-urban and informal settings. Ignorance and illiteracy among the prospective beneficiaries appear to be particularly rife. In a recent governmental report it was noted that:

“Older persons who are caregivers of young children are not aware of the availability of other grants such as the Child Support Grant, the Care Dependency Grant for disabled children and the Foster Care Grant.”¹⁵⁸

Also, the recent report of the Committee on the Abuse, Neglect and Ill-treatment of Older Persons¹⁵⁹ remarks that: “The delivery of social services to the elderly is fragmented, poorly managed, racially divided, under resourced and beyond the reach of the vast majority of the old.” These are real-life issues which have a dramatic impact on the actual availability and accessibility of the social assistance grant system.

It is mainly for these reasons, and the inconsistencies in the provincial treatment of social grant applicants and beneficiaries, that government decided to establish a centralised body known as the South African Agency for Social Assistance to streamline and standardise social assistance grant payments. It is clear from the preamble of the South African Social Security Agency Act¹⁶⁰ that the effective provision of social security services requires uniform standards and standardised delivery mechanisms. This was recently also confirmed by the Constitutional Court, which declared the transfer of the administration of social assistance service delivery to provincial governments in 1996 constitutionally invalid.¹⁶¹

¹⁵⁷ See Olivier and Mpedi *Extending Social Protection to Families in the African Context: The Complementary Role of Formal and Informal Social Security* (2003) Unpublished paper read at the research conference hosted by the International Social Security Association in Antwerp, May 2003.

¹⁵⁸ In January 2002, 4 356 320 people were reported to benefit from grant system: 1994 – 2002 *National Report on the Status of Older Persons* Report to the Second World Assembly on Ageing: South Africa, Madrid, Spain, April 2002 23.

¹⁵⁹ “Mothers and Fathers of the Nation – The Forgotten People?” accessed <http://www.welfare.gov.za/Documents/2001/March/elder.htm>.

¹⁶⁰ 9 of 2004.

¹⁶¹ *Mashava v President of the Republic of South Africa* 2004 12 BCLR 1243 (CC). “Van der Westhuizen J, writing for the Court, held that the SAA [Social Assistance Act] falls within the ambit of section 126(3) of the interim Constitution, as argued by the applicant, and that it was therefore in terms of section 235(6) not capable of being assigned to the provinces. The Court held that, in view of South Africa’s history of discrimination based not only on race and ethnicity, but also on geographical areas, uniformity is required in order not to offend equality as a constitutional value and right. It would be constitutionally untenable to allow the country to be divided into favoured and disfavoured areas, by for example paying higher grants in richer provinces than in poorer areas” (extract from Media Summary).

6 3 Absence of legal aid to welfare beneficiaries

The second issue relates to the limited availability of legal aid in social welfare matters. The national legal aid system in South Africa makes little provision, if at all, for legal aid to be granted for social assistance cases. As remarked:¹⁶²

“The Legal Aid Board only covers a limited scope of legal matters, for example, criminal representation, defended divorces, and certain civil claims. Furthermore, there is no tribunal or body that provides free legal services for such cases. Some NGOs do assist with social security cases, for example the Legal Resources Centre, but they are also limited in the legal aid that they provide due to a lack of resources. In as much as section 27 of the Constitution guarantees a right to social security, including social assistance, there are few measures in place to ensure enforcement of this right. The only recourse available to a person who has been refused social assistance is to approach the High Court and, if necessary, the Constitutional Court, and in order to do so, such person will need to engage the services of an attorney. This is another dilemma as the very person who would apply for social assistance would be an indigent person with no means to support himself/herself. How would he/she then be able to instruct an attorney, considering that legal fees are so high? How then does such a person have access to justice and how does he/she exercise his/her right to social assistance?”

These issues desperately need to be addressed by our government. A tribunal or forum needs to be set up that offers free legal assistance to such persons whereby people with social security problems can approach such tribunal or forum. Belgium has such a system. The alternative is for the state to provide free legal aid in social security matters, as is the position in China. The procedures in such institution should also be informal and user friendly. Many of the persons applying for social security are lay people, and are often illiterate. Some of these people do not qualify for social assistance just because their forms have been incorrectly completed. There should be qualified experienced personnel on duty to help such people fill in forms and to advise them.”

6 4 Insufficiency of the available review/appeal system

With this, thirdly, the issue of the insufficiency of the social assistance grant review/appeal system is simultaneously raised.¹⁶³ Dispute resolution in the South African social assistance system is regulated by means of both the statutory law and the common law.

In certain cases (*eg*, where the suspension of a grant is contemplated) the Social Assistance Act¹⁶⁴ and its regulations¹⁶⁵ do not provide for an opportunity to make representations, as required by the constitutional, statutory and common-law framework of administrative justice.¹⁶⁶ Also, the

¹⁶² See Mpedi, Kuppan and Olivier “Social Assistance and Legal Aid” in Olivier *et al Social Security: A Legal Analysis* (2003) 197-215.

¹⁶³ See Jansen van Rensburg and Olivier “Adjudication and Enforcement of Social Security” in Olivier *et al Social Security: A Legal Analysis* (2003) 169-196.

¹⁶⁴ Both the Social Assistance Act 59 of 1992 and the Social Assistance Act 13 of 2004.

¹⁶⁵ Reg 23(2)(b).

¹⁶⁶ See par 3 above.

final review/appeal decision is taken by the responsible Minister who can either vary or set aside the decision or appoint an independent tribunal to consider the appeal in accordance with prescribed conditions.¹⁶⁷ Apart from the fact that these provisions are unusual,¹⁶⁸ inappropriate¹⁶⁹ and incoherent,¹⁷⁰ the reality is that in the event of a negative decision, the aggrieved person does not have access to an equity-based external adjudication institution: the aggrieved party's only recourse is to approach the courts of law¹⁷¹ on the common law basis. This implies that a court of law has to be approached on the basis of administrative law review, subject to the provisions of the Promotion of Justice Act (PAJA).¹⁷² The PAJA requires that any internal remedy provided for in any other law must first have been exhausted.¹⁷³ This means that the internal review/appeal options foreseen by the Social Assistance Act and its regulations must have been followed first.

It is often maintained that normally the courts only have review and no appeal powers; the normal courts of the country are apparently not specialised enough to deal effectively with social security matters; access to the courts is limited, in particular as far as the indigent are concerned; cases are often dealt with on a pure technical and legalistic basis, with little regard to broader fairness considerations; and the court proceedings tend to be prohibitively expensive.¹⁷⁴

What viable alternatives are available? Should one consider the creation of a separate and specialist court and/or tribunal, and if so, what should be the powers of such an institution, how should it be composed and how should it be funded? One of the guiding principles in devising an adjudication system is the need to ensure that an institutional separation exists between administrative accountability, review and revision, and a wholly independent, substantive system of adjudication. In most countries with a developed

¹⁶⁷ S 18(1) and (2) of the Social Assistance Act 13 of 2004.

¹⁶⁸ This provision is *unusual*, in that the establishment of a tribunal mechanism in the South African social security context is normally regulated by statute – see, eg, ss 30B-30X of the Pension Funds Act 24 of 1956, which regulates in detail the establishment of the office of the Pension Funds Adjudicator.

¹⁶⁹ It is also *inappropriate* to appoint a tribunal either *ad hoc* or otherwise purely on the basis of Ministerial direction/regulation, given the gravity and importance of the issues at stake – dealing with, amongst others, establishment, appointment, main objects, functions and powers, disposal of complaints, opportunity to comment and to be represented, jurisdiction, time limits, procedures, record-keeping, determination and enforceability of determinations, review possibility, accountability, remuneration, and limitation on liability.

¹⁷⁰ It is *incoherent* as a systematic approach to the issue appears to be absent. One would expect that: (i) there would be a possibility for internal appeal/objection against the administrator before appeal is made to the Minister; (ii) an institutional separation be made between *internal appeal* (to the administrator and then to the Minister) and *external appeal* (to a court or the tribunal, *as of right* and not dependant on Ministerial direction). Cf the discussion *infra*.

¹⁷¹ “Courts of law” denote ordinary courts of the country with competent jurisdiction. South Africa, unlike the majority of European countries (eg, Germany), has no special system of separate or integrated social security courts.

¹⁷² 3 of 2000. Cf par 3 3 above.

¹⁷³ S 7(2) PAJA.

¹⁷⁴ Jansen van Rensburg and Olivier 195.

social security system the need has been felt to introduce special and earmarked adjudication procedures and institutions to deal effectively with social security claims of individuals. In broad terms the two basic options relate to relying on either a court structure, or on a more informal tribunal system. Germany provides an example of the first possibility, and the United Kingdom of the second.¹⁷⁵

It is in the light of the above considerations that the *Committee of Inquiry into a Comprehensive Social Security System for South Africa*¹⁷⁶ in 2002 recommended that a uniform adjudication system be established to deal conclusively with all social security claims. It should, in the first instance, involve an independent internal review or appeal institution.¹⁷⁷ It should, in the second place, according to the Committee, involve a court (which could be a specialised court) which has the power to finally adjudicate all social security matters, and that this court has the power to determine cases on the basis of law and fairness.¹⁷⁸ It is submitted that these recommendations could go a long way to ensure that the social assistance grant system is indeed accessible to those who are most in need of welfare support in South Africa.

6 5 Exclusionary nature of social security and social assistance in South Africa

Despite the large numbers of welfare recipients who are entitled to, and are receiving, social assistance in South Africa, millions of the impoverished and destitute are left outside the framework of social security and in particular social assistance support in South Africa. This flows from the formal employment relationship basis required for the most part by the social insurance part of the social security system and the means-testing, categorical and citizenship criteria set by the social assistance part of the system.¹⁷⁹ Consequently, large categories of persons who work atypically and/or informally¹⁸⁰ or who form part of the 27% of the economically active population¹⁸¹ who are officially¹⁸² regarded as unemployed,¹⁸³ and

¹⁷⁵ Jansen van Rensburg and Olivier 196.

¹⁷⁶ *Transforming the Present – Protecting the Future* (Draft Consolidated Report) (March 2002).

¹⁷⁷ *Transforming the Present – Protecting the Future* 124 (par 13.3.6).

¹⁷⁸ *Ibid.*

¹⁷⁹ Cf Olivier and Kalula "Scope of Coverage" in Olivier *et al Social Security: A Legal Analysis* (2003) 123-147 131-137, 147.

¹⁸⁰ In particular independent contractors, so-called dependent contractors, the self-employed, and other categories of the informally employed.

¹⁸¹ The "economically active population", according to Statistics South Africa (Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xxiv), "consists of both those [persons] who are employed and those who are unemployed".

¹⁸² According to Statistics South Africa the meaning of the official definition of the 'unemployed' comprehends: "The unemployed are those people within the *economically active population* who: (a) did not work during the seven days prior to the interview, (b) want to work and are available to start work within two weeks of the interview, and (c) have taken active steps to look for work or to start some form of self-employment in the four weeks prior to the interview" (italics in the original) (Statistics South Africa *Labour Force Survey: September*

consequently also the dependants of these people, are excluded from protection. Given the vulnerable status of many of these categories and the insufficient social security support available to them, particularly in the form of social assistance, it could – in the light of the relevant constitutional provisions and developing jurisprudence¹⁸⁴ – be constitutionally expected of government to roll out some kind of comprehensive programme to deal effectively with their plight. The absence of proper policies in this regard would certainly leave the state exposed to major constitutional challenges. As remarked by the court in *Government of the Republic of South Africa v Grootboom*:¹⁸⁵

“The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state’s obligations in respect of other socio-economic rights.”

6 6 Restrictions flowing from the characteristics of the social assistance system

Finally, the very characteristics of the social assistance grant system referred to above, constitute important restrictions which could, due to their specific formulation and impact, become the subject of constitutional scrutiny. For example, according to Lund¹⁸⁶ the means test mechanism is widely misunderstood and inconsistently applied. It has also been criticised on the basis that it penalises grant beneficiaries who take up temporary work, as a low income from such work will already reduce the value of the grant. Furthermore, it also serves as a disincentive to save. Finally, means tests also serve as a prerequisite for accessing other benefits, services and facilities. This may have the effect that once an applicant no longer qualifies for a social assistance grant or qualifies only for a reduced grant, due to the application of the relevant means test, the entitlement to these other benefits, facilities and services may also be affected.

Accordingly, abolishing the means test and effectively replacing it with universal grants, needs to be seriously considered – as suggested by the

2005 (Statistics South Africa (2005)) xxiv). The “expanded definition”, on the other hand, excludes criterion (c) (Statistics South Africa *Labour Force Survey: March 2005* (Statistics South Africa (2005)) xxi). It should be recalled that the expanded definition of the unemployed includes the discouraged work-seekers. The “discouraged work-seekers” are, according to Statistics South Africa (Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xxiv), those persons who “did not take active steps to find employment in the month prior to the survey interview”. The total number of discouraged work-seekers was hovering at 3 312 000 in September 2005 (Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xvi).

¹⁸³ Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) ii.

¹⁸⁴ See, in particular, par 2 above.

¹⁸⁵ *Supra* par 36.

¹⁸⁶ “Social Benefits in South Africa” 1993 *International Social Security Review* 1.

Committee of Inquiry into a Comprehensive System of Social Security for South Africa in its recent report submitted to Cabinet.¹⁸⁷

7 CONCLUDING REMARKS

It is clear that a strong and extensive rights-based framework supports the extension of social protection to welfare beneficiaries in South Africa. This much appears from the progressive provisions of, and enlightened stances adopted by, the South African Constitution, the statutory context, the administrative law regime, and the interpretation given to welfare rights by the South African judiciary.

And yet it would appear that these remarkable developments are qualified by serious deficiencies in the service delivery system and insufficient access to the grant system. Legal aid is rarely available, while those who seek to benefit from and/or are dependent on social assistance grants have little opportunity to effectively pursue their cause, should the internal review/appeal process render a negative outcome. These are matters which require the urgent attention of policy-makers and the legislature alike. In doing so, the hard-won legal protection to which potential and actual welfare beneficiaries have become entitled will find its logical consequence. The alternative, it is suggested, would do a grave injustice to the most vulnerable members of South African society: denying access to a system which has the real potential to provide a basis for truly dignified living.

It is, therefore, clear that extensive judicial reform is still required in order to ensure true access to justice for the millions of people dependent on welfare in South Africa. On the one hand, it may require of the courts to be more forceful in their insistence on compliance with their very orders by government – so as to avoid a situation where years after a judgment had been handed down, the required redress is still wanting. On the other hand, it may require curtailing the unnecessarily wide ambit of powers¹⁸⁸ and discretion¹⁸⁹ given to government in the empowering legislation. Furthermore, while it is clear that the 2004 legislation and the accompanying regulations give more recognition to the rights and entitlements of welfare beneficiaries,¹⁹⁰ some of the provisions still do not accord with the constitutional framework of welfare entitlement¹⁹¹ and the binding impact of

¹⁸⁷ *Transforming the present – Protecting the Future: Draft Consolidated Report* (2002) par 3.6.3. Recouping the extra costs through the tax system appears to flow from such an approach. Alternatively, rationalisation of the various grants means tests has to be introduced: *Transforming the present – Protecting the Future: Draft Consolidated Report* (2002) par 3.6.3.

¹⁸⁸ Such as the provisions in the 2004 legislation which authorise the Minister of Social Development to prescribe additional requirements or conditions in respect of, *eg*, means testing, age limits, disabilities and care dependency, and which allow for extraordinary powers relating to disclosure of information. See par 3 3 above.

¹⁸⁹ Such as the discretion exercised by the Minister when deciding whether she/he will dispose of a matter personally or have a tribunal disposed of same. See par 6 4 above.

¹⁹⁰ *Eg*, in the area of informing applicants and beneficiaries of their rights in terms of the social assistance legislation: See par 3 2 above.

¹⁹¹ *Eg*, as far as compliance with administrative justice requirements is concerned.

the constitutional jurisprudence.¹⁹² Also, it is of crucial importance to ensure that welfare applicants and beneficiaries have proper access to the judicial system. For this reason it is imperative to direct a sufficient part of publicly-provided legal aid to these people¹⁹³ and to embark upon a comprehensive reform of the framework of welfare adjudication, in the sense of establishing an alternative dispute resolution mechanism.¹⁹⁴ It is to be hoped that the creation of a new institutional framework to deal with social assistance service delivery, in the form of the South African Social Security Agency, will succeed in eradicating the system of poor service delivery.¹⁹⁵ However, still to be addressed are matters which go to the very substance of the system of social security provisioning in this country. The most important of these matters, which requires intensive legal reform, relates to finding ways and means to achieve the meaningful and progressive extension of social security protection to the millions who are, due to very nature of the system, excluded from the social security framework.¹⁹⁶

¹⁹² *Eg*, the failure of the relevant legislation to reflect the outcome among others of the *Khosa* judgment.

¹⁹³ See par 6 3 above.

¹⁹⁴ See par 6 4 above.

¹⁹⁵ See par 6 2 above.

¹⁹⁶ See par 6 5 above. Also, the current social assistance means test requirements are in need of serious review and reform: see par 6 6 above.