

CHARITY BEGINS – BUT DOES NOT END – AT HOME

**Khosa v Minister of Social Development;
Mahlaule v Minister of Social Development
2004 6 BCLR 569 (CC)**

1 Introduction

Social assistance has emerged, within a broader social security system, as an important part of those measures that prevent and/or alleviate destitution in South Africa. Social assistance, as defined by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (*Transforming the Present – Protecting the Future: Consolidated Report* (2002) 36), means “state-provided basic minimum protection to relieve poverty, essentially subject to qualifying criteria on a non-contributory basis”. In April 2004, more than 7.9 million people were reported to benefit from the social grants (National Treasury (Republic of South Africa) *Trends in Intergovernmental Finances: 2000/01-2006/07* (2004) 74). In most instances, predominantly in black households, grants (especially old-age grants) are the only family income. Old-age grants in particular are used not only to see the elderly through their old-age, but they also stretch far beyond that to cater for the needs of the family. (See, eg, *Case Does Money Protect Health Status? Evidence from South African Pensions* (2001); Bhorat “Is a Universal Grant the Answer?” 2002 *SA Labour Bulletin* 19 20-21; Bhorat “A Universal Income Grant Scheme for South Africa: An Empirical Assessment” – <http://www.sarpn.org.za>; Lloyd-Sherlock “Old Age and Poverty in Developing Countries: New Policy Challenges” 2000 *World Development* 2157 2162-2163; Barrientos and Lloyd-Sherlock “Non-contributory Pensions and Social Protection” 2002 – <http://idpm.man.ac.uk/ncpps>; Graham-Brown “Social Protection in South Africa” 2002 *NCPPS Newsletter* 3 – <http://idpm.man.ac.uk/ncpps>; Samson, Haarmann, Haarmann, Kathi, Mac Quene and Van Niekerk *Research Review on Social Security Reform and the Basic Income Grant for South Africa* (2002); Duflo *Grandmothers and Granddaughters: Old Age Pensions and Intra-Household Allocation in South Africa* (2000); and Alderman *Safety Nets and Income Transfers in South Africa* (1999).) This important scheme, particularly its scope of coverage, has been a source of recent social security law debates. Central to these debates was the issue of non-citizens’ (non-)entitlement to the same social assistance benefits as citizens. (See, eg, Olivier and Kalula “Scope of Coverage” in Olivier, Smit and Kalula (eds) *Social Security: A Legal Analysis* (2003) 123 135-136; Liffmann, Mlalazi, Moore, Ogunronbi and Olivier “Scope of Application” in Olivier, Okpaluba, Smit and Thompson (eds) *Social Security Law: General Principles* (1999) 21 26-29; and Ogunronbi, Shipman,

Joubert, Munro and Reineck "Old Age" in Olivier *et al* (eds) (1999) 101 111-112.) This subject has no clear-cut answer(s). The fact of the matter is that there are a variety of conflicting factors which need to be taken into account:

- (a) Firstly, access to social security, which includes social assistance, is a fundamental right which should be enjoyed by everyone. Access to social security is entrenched as a human right in section 27(1)(c) of the Constitution of the Republic of South Africa Act (108 of 1996, hereinafter "the Constitution"). It is, in addition, recognised as a human right by a plethora of international instruments. These international instruments include the following: the Income Security Recommendation (1944), the Universal Declaration of Human Rights (1948) and the International Covenant on Economic, Social and Cultural Rights (1966). (Also see Eichenhofer "Social Security Reform and the Law" in Pieters (ed) *Confidence and Changes: Managing Social Protection in the New Millennium* (2001) 237; Schulte "Legal Protection of Social Benefits and Expectancies – Social Rights under International and National Law" in Kremalis (ed) *Simplification and Systematisation of Social Protection Rules* (1996) 137; Craven *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (1995); Van Langendonck "The Right to Social Security and Allied Rights" in Ruland, Von Maydell and Papier (eds) *Verfassung, Theorie und Praxis des Sozialstaats* (1998) 477; and Perrin "The Recognition of the Right to Social Protection as a Human Right" 1985 *Labour & Society* 239.) Questions arise about who are (or should be) included in the word "everyone". That is, does "everyone" refer to citizens only or does it extend to non-citizens? If the latter holds true, which categories are included? In other words, does the word "everyone" differentiate between documented and undocumented non-citizens? Assuming that the answer to the foregoing question is positive, is there (or should there be) a further differentiation between the different categories of documented non-citizens (*ie* between those who are in the country for a short period of time and those who are in the country on a permanent basis)?
- (b) Secondly, the extent to which a country can discharge its obligation to provide access to social security (particularly social assistance) to everyone depends on its financial muscle. Limited resources, in a majority of instances, restrict the scope of social assistance coverage. The government is compelled to prioritise in its social security provisioning endeavours. The questions that arise are, in view of financial constraints, whether citizens should be preferred above non-citizens; whether non-citizens should receive public assistance apart from humanitarian assistance; and, most importantly, which categories of social benefits should be provided to (which) documented non-citizens. These questions trigger viewpoints such as "citizens first" or "charity begins at home". The essence of this point of view is that it is hypocritical for the state to undertake or endeavour to provide access to social security to non-citizens whilst it is unable to provide for its own vulnerable citizens. For this reason, available resources should be reserved and utilised for the welfare of citizens. It should be mentioned, however, that the justifiability and reasonableness of the foregoing is doubtful in view of the human rights culture (which embraces rights such

as equality, dignity and life) envisaged by the Constitution and international human rights instruments. (See, generally, Olivier "Constitutional Perspectives on the Enforcement of Socio-economic Rights: Recent South African Experiences" 2002 *Victoria University of Wellington Law Review* 117; Jansen van Rensburg and Olivier "International and Supra-national Law" in Olivier *et al* (eds) (2003) 619; Malan and Jansen van Rensburg "Social Security as a Human Right and the Exclusion of Marginalized Groups: An International Perspective" in Olivier, Kalula, Van Steenberge, Jorens and Van Eeckhoutte (eds) *The Extension of Social Security Protection in South Africa: A Legal Enquiry* (2001) 74; and Tiburcio *The Human Rights of Aliens under International and Comparative Law* (2001) 75-102 and 171-175.)

- (c) Thirdly, it is desirable that policymakers design and implement immigration policies that serve the various public objectives. These public objectives include, among others, deterring illegal immigration, preventing social benefits from serving as a magnet, preventing non-citizens from becoming a burden on the public purse, encouraging and enabling non-citizens to become members of the community, and ensuring the human treatment of children and other needy persons. Notwithstanding these, policymakers face the challenge of balancing the rights and values embraced by the Constitution, social security and immigration law.

In this contribution the recent Constitutional Case of *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* (2004 6 BCLR 569 (CC)), involving the constitutionality of the exclusion of non-citizens from access to social assistance benefits, is reviewed. This case provided an opportune moment for the Constitutional Court to articulate on the abovementioned conflicting factor which has proved to be a challenge notably to policymakers and non-citizens.

2 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*

2.1 *Facts*

The applicants in both cases are destitute Mozambican citizens with permanent resident status in South Africa. All applicants in both cases, with the exception of the second applicant in the *Khosa* case, fled Mozambique in the 1980's on account of the civil war. They have since acquired permanent residence status following a series of amnesties and concessions granted by the South African government as exemptions to the immigration process. The litany of these amnesties and concessions is as follows:

"In October 1993, a tripartite agreement was signed between South Africa, the United Nations High Commissioner for Refugees and the Mozambican government granting formal status to those Mozambicans who had fled to South Africa as a result of the civil war in Mozambique. In October 1995, the South African government granted an amnesty to Mozambican miners permitting them to apply for permanent residence status. In July 1996, the South African government granted amnesty to nationals of the Southern

African Development Community, which included Mozambique. Finally, in December 1996, the South African government permitted all Mozambicans who wished to remain in South Africa and who were not covered by the previous amnesties to apply for permanent residence status" (*Khosa v Minister of Social Development; Mahlaule v Minister of Social Development supra* par 1 above).

It is interesting to note that, while applications for amnesty were being processed, the then Department of Welfare (now Department of Social Development) issued new regulations which restricted eligibility for social assistance (particularly the old age grant) to South African citizens (Fultz and Pieris *The Social Protection of Migrant Workers in South Africa* (1998) 9). In both matters the applicants challenged the constitutionality of certain provisions of the Social Assistance Act (59 of 1992) which excluded them from accessing certain social assistance benefits. In *Khosa v Minister of Social Development (supra)* the applicants challenged the constitutional validity of section 3(c) of the Social Assistance Act which restricts the old age grant to South African citizens. In the same way as in *Khosa's* case, the applicants in *Mahlaule v Minister of Social Development (supra)* challenged the constitutionality of sections 4(b)(ii) and 4B(b)(ii) of the Social Assistance Act which reserves the child support grant and care dependency grant for South African citizens only. In both cases the applicants would have qualified for the grants in question but for the requirement of citizenship. On account of the similarity between the issues to be addressed, the two cases were heard together in both the High Court and the Constitutional Court. (In accordance with s 172(2) of the Constitution, read in conjunction with s 167(5), an order of constitutional invalidity granted by the High Court is of no force and effect unless confirmed by the Constitutional Court. See De Waal, Currie and Erasmus *The Bill of Rights Handbook* 4ed (2001) 166-196. It is on account of the foregoing that the High Court referred its order of constitutional invalidity to the Constitutional Court for confirmation.)

2.2 Central question before the court

The central question before the court was whether the exclusion of non-citizens from the social welfare system was consistent with the Constitution. The High Court, which was the court *a quo*, granted in its order that the sections of the Social Assistance Act challenged by the applicants were inconsistent with the Constitution and invalid. In addition, it struck down the sections challenged by the applicants. The Constitutional Court, in the majority judgement of seven against two, held that the High Court orders have the effect of obliging the state to provide social assistance to both temporary and permanent residents.

2.3 Applicants' main arguments

The applicants argued that that the exclusion of all non-citizens from the social assistance scheme was inconsistent with the state's constitutional obligation to provide access to social security for everyone. Secondly, they contended that the exclusion unfairly limited their right to equality (s 9 of the Constitution) and that the limitation was unjustifiable. In addition, they

asserted that their right to life (s 11 of the Constitution) and their right to dignity (s 10 of the Constitution) were infringed without justification. They argued further, in as far as the grants relating to children are concerned, that the exclusion infringed the rights that children have under the Constitution (s 28 of the Constitution).

2 3 1 Right of access to social security for everyone

The Constitution does not distinguish between citizens and non-citizens in as far as access to social security is concerned. Section 27 of the Constitution provides every person in South Africa with the right of access to social security (including, if they are unable to support themselves and their dependents, appropriate social assistance) (s 27(1)(c)). It, in addition, imposes a duty on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the foregoing rights (s 27(2)). (See, for further reading, Olivier, Khoza, Jansen van Rensburg and Klinck "Constitutional Issues" in Olivier *et al* (eds) (2003) 49 71-76; Liffmann "Social Security as a Constitutional Imperative: An Analysis and Comparative Perspective with Emphasis on the Effect of Globalization on Marginalization" in Olivier *et al* (eds) (2001) 29; and Klinck "It Takes Three to Tango: The Right to Equality, Social Security and Constitutional Law in South Africa" 2001 *European Journal of Law Reform* 163 164-166.) The applicants, relying on the foregoing constitutional provisions, argued that the exclusion of all non-citizens from the social assistance scheme was inconsistent with the state's constitutional obligation to provide access to social security for everyone.

In dealing with the above-mentioned argument, the court addressed the question whether the right of access to social assistance is confined to citizens only or extends to a broader class of persons. It resolved that the word "everyone" cannot be construed as referring to "citizens" only. This finding, which is in line with the purposive approach to the interpretation of rights which the court adopted, is premised around the express provision in the Constitution that the Bill of Rights (s 7(1)) enshrines the rights of all people in South Africa. (See De Waal *et al* 130-132; McCreath "The 'Purposive Approach' to Constitutional Interpretation" – <http://www.kas.org.za>; *S v Makwanyane* 1995 3 SA 391 (CC) par 9; and *S v Mhlungu* 1995 3 SA 867 (CC) par 8.) Above all, there is no indication (in the Constitution) that the socio-economic rights enshrined in section 27(1) are to be restricted to citizens as in other provisions of the Bill of Rights. (The Bill of Rights draws a line of demarcation between rights which should be enjoyed by every person and the rights which are restricted to citizens. The words "Everyone has the right to ..." (eg, equality (s 9), human dignity (s 10), life (s 11), have access to housing (s 26(1)), have access to health care, food, water and social security (s 27(1)), and education (s 29)) and "No one may be ..." (eg, subjected to slavery, servitude or forced labour (s 13) and deprived of property (s 25 (1)) appear to be referring to all human beings without any distinction as to whether they are citizens or not. Where distinction is intended between citizens and non-citizens the Bill of Rights employs the wording "Every citizen ..." This is true of, eg, political rights (s 19), citizenship (s 20), right to enter, to remain in and to reside anywhere in South Africa (s

21(3)), right to a passport (s 21(4)) and freedom of trade, occupation and profession (s 22.) The court, in addition, ascertained the reasonableness of the legislative scheme (*ie* the social assistance scheme) complained about. In its quest to establish whether the exclusion is reasonable, it had regard to the purpose served by social security; the impact of the exclusion on permanent residents; the relevance of citizenship requirement to that purpose; and the impact that the exclusion has on other intersecting rights (*eg*, the right to equality).

2 3 1 1 Purpose served by social security

The court observed, regarding the purpose of social security, that the right of access to social security is entrenched in the Constitution because “as a society we value human beings and want to ensure that people are afforded their basic needs” (par 52). It remarked further that “[a] society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational” (par 52).

2 3 1 2 Impact of the exclusion on permanent residents

The court found the denial of social assistance benefits, apart from being unfair, to have grave consequences. It argued that the exclusion impacts negatively not only on permanent residents without other means of support but also on the families, friends and communities with whom they have contact. The exclusion, the court pointed out, relegates permanent residents to the margins of society. In addition it deprives permanent residents of what may be essential to enable them to enjoy other rights vested in them under the Constitution (par 77).

2 3 1 3 Relevance of citizenship requirement

The court admitted that “it is necessary to differentiate between people and groups of people in society by classification in order for the state to allocate rights, duties, immunities, privileges, benefits or even disadvantages and to provide efficient and effective delivery of social services” (par 53). It conceded, however, that for the differentiation between citizens and non-citizens to pass the constitutional muster, such differentiation must not be arbitrary or irrational nor must it manifest a naked preference (par 53). In addition the court remarked that “[t]here must be a rational connection between that differentiating law and the legitimate government purpose it is designed to achieve” (par 53). The effect of a lack of such a connection is that the differentiating law will be in contravention of section 9(1) (s 9(1) provides that: “Everyone is equal before the law and has the right to equal protection and benefit of the law”) as well as section 27(2) (which serves as an internal limitation clause). The court concluded, contrary to the minority finding, that the exclusion of permanent residents who would qualify for social assistance but for their citizenship does not constitute a reasonable legislative measure as contemplated by section 27(2). The court acknowledged that permanent residents may apply for naturalisation after five years

in accordance with the present legislation. Be that as it may, it held that this was not within the control of the applicant (par 56).

2 3 1 4 Impact of the exclusion on other intersecting rights

The importance of having regard to the impact that the exclusion has on other intersecting rights flows from a variety of factors. In the first instance, the denial of access to social assistance to permanent residents despite the constitutional right of access to social security for “everyone” directly implicates the right to equality. Secondly, the rights to life and dignity – which are intimately linked in the Constitution (see *S v Makwanyane supra* par 327) – have been implicated in the applicants’ arguments. (See, on the right to life, *S v Makwanyane supra* and De Waal et al 238-245. See, on the right to human dignity, Chaskalson “Human Dignity as a Fundamental Value of Our Constitutional Order” 2000 *South African Journal on Human Rights* 193; De Waal et al *Bill of Rights* 230-237; Davis “Dignity” in Davis, Cheadle and Haysom (eds) *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 70; Nishihara “The Significance of Constitutional Values” – <http://www.kas.org.za>; Van Wyk “Values, Values, Values or Mere Words, Words, Words?: Values in the 1996 Constitution” – <http://www.kas.org.za>; Goolam “Human Dignity – Our Supreme Constitutional Value” – <http://www.kas.org.za>; and Venter “Utilising Constitutional Values in Constitutional Comparison” – <http://www.kas.org.za>.) Moreover, socio-economic rights as entrenched in the Constitution are closely intertwined with the founding values of human dignity, equality and freedom. (S 1 provides that the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. S 7(1) further states that the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.) The court held that while it might be reasonable to exclude those non-citizens with a tenuous link to South Africa (eg, visitors and illegal residents), the exclusion of permanent residents from the social security scheme limited their rights in a manner which affects their dignity and equality in material respects. (This finding echoes the pronouncement of the Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 1 SALR 46 (CC) (par 23) where it was held that: “There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in [the Constitution]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are generally able to achieve their full potential.”)

2 3 2 Unfair and unjustifiable limitation of fundamental rights

The applicants argued that the exclusion of non-citizens from the social assistance scheme unfairly and unjustifiably limited their right to equality.

(See, for further reading about the equality clause, *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC); *Baloro v University of Bophuthatswana* 1995 4 SA 197 (BSC); *Larbi-Odam v Member of the Executive Council for Education (North West Province)* 1997 12 BCLR 1655 (CC); Cock "Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution" 2003 *Women's Studies International Forum* 35; Tveiten "The Right to Health Secured HIV/Aids Medicine – Socio-economic Rights in South Africa" 2003 *Nordic Journal of International Law* 41; Olivier 2002 *Victoria University of Wellington Law Review* 150-151; Klinck 2001 *European Journal of Law Reform* 163 176-185; and De Vos "Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness" 2001 *South African Journal on Human Rights* 258.) They argued further that their right to life and their right to dignity were infringed without justification. The court, albeit acknowledging the difficulty in applying section 36 (which is the general limitation clause) to the socio-economic rights enshrined in section 27 due to the internal limitation clause it contains, ruled that the exclusion of permanent residents from the social assistance scheme is neither reasonable nor justifiable within the meaning of the general limitation clause. (S 36 provides that: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.")

2 3 3 Infringement of children's rights

The Constitution, in addition to section 27, dedicates a separate section to children (s 28). Section 28(1)(c) provides every child (a child, in accordance with s 28(3) of the Constitution, means a person under the age of 18 years) in South Africa (without distinguishing between children of citizens and those of non-citizens) with a right to, among others, basic nutrition, shelter, basic health care services and social services. (S 28(1)(c). See Guthrie "Children/Family" in Olivier, Smit, Kalula and Mhone (eds) *Introduction to Social Security* (2004) 343; and Sloth-Neilsen "The Child's Rights to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of Grootboom" 2001 *South African Journal on Human Rights* 16.) The court held that the exclusion of needy children from the ambit of social assistance, on the basis of their parents' nationality, violates section 28(1)(c) of the Constitution. Apart from violating children's rights as enshrined in the Constitution, the above-mentioned exclusion of needy children, it is opined, undermined South Africa's obligations to provide access to social security to needy children. This opinion flows from the fact that South Africa ratified the United Nations Convention on the Rights of the Child (1989). This important Convention provides that: "States parties shall recognize for every child the right to

benefit from social security, including social insurance” (a 26(1)). It provides further that: “State Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” (a 27(1)). There is, in addition to the Convention on the Rights of the Child, the African Charter on the Rights and the Welfare of the Child (1990) which obliges States Parties to ensure, to the maximum extent possible, the survival, protection and development of the child. (A 5 of the African Charter on the Rights and the Welfare of the Child (1990). See Jansen *et al* in Olivier *et al* (eds) (2003) 626-631; Chirwa “The Merits and Demerits of the Africa Charter on the Rights and Welfare of the Child” 2002 *International Journal of Children’s Rights* 157; Clark “Child Maintenance and the Role of the South African State” 2000 *International Journal of Children’s Rights* 307; Sloth-Nielsen “The Contribution of Children’s Rights to the Reconstruction of Society: Some Implications of the Constitutionalisation of Children’s Rights in South Africa” 1996 *International Journal of Children’s Rights* 323; and Clark 2000 *International Journal of Children’s Rights* 307.)

The foregoing assertions, coupled with the fact that the respondents conceded that the exclusion of children from accessing social assistance benefits cannot be justified, provide a hint as to one unfortunate situation in South Africa. That is, most national laws, particularly in the area of social security, are not in conformity with the Constitution and international law. Consequently, a general trend has emerged whereby social security schemes (both social assistance and social insurance) wait for a constitutional challenge and/or ruling before they provide access to social benefits or schemes to groups and categories of persons who should not be excluded. (See, *eg*, *Du Plessis v Road Accident Fund* (2003) JOL 11582 (SCA); *Satchwell v The President of the Republic of South Africa* 2002 6 SA 1 (CC); and *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T).) This “wait and see approach” is regrettable for the reason that a constitutional challenge involves financial resources and know-how which are not always available to most excluded and marginalised groups – of which non-citizens form part. Furthermore, it means that the extension of access to social security is provided in a piece-meal fashion.

2.4 Respondents’ main arguments

The respondents, in their endeavour to justify the decision to exclude all non-citizens, contended that citizenship is a requirement for social benefits in a majority of developed countries (*Khosa v Minister of Social Development; Mahlaule v Minister of Social Development supra* par 47). Secondly, they maintained “immigrants, before entering the country, are required to show self-sufficiency in order to qualify for permanent residence status”. (*Khosa v Minister of Social Development; Mahlaule v Minister of Social Development supra* par 55. The gist of this argument was that: “[non-citizens] are only restricted from accessing the right in question for a temporary period of five years, after which they can apply for citizenship by reason of naturalisation. On receipt of citizenship, they would have a right to social security...any infringement of the right was therefore only of a temporary nature.” *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development supra* par 55.) In addition, they contended

that the state has an obligation towards its own citizens first. Fourthly, they averred that the extension of social assistance to permanent residents “would impose an impermissibly high burden on the state” (par 60).

2 4 1 Majority of developed countries apply the citizenship requirement

The respondents argued that citizenship is a requirement for social benefits in a majority of developed countries – including the United States, Canada and the United Kingdom. According to the minority judgement, the developed countries cited by the respondents which exclude non-citizens from accessing welfare benefits, albeit having constitutions and laws different to ours, have resources that far exceed those of South Africa. The point, in accordance with the minority judgement, is that South Africa is not alone in denying social assistance benefits to permanent residents. It argues further that: “The rationale for this approach includes, amongst other things, the policy of encouraging the non-citizen’s self-sufficiency, preventing the creation of incentives for immigration, and preserving the public treasury by confronting the rising costs of operating benefits programs” (par 124).

The majority judgment, unlike the minority judgment, rejected the respondents’ argument. In doing so, it alluded to the contrast between the constitutions and the welfare laws of these countries as compared to those of South Africa. The court held that the countries mentioned by the respondents as using citizenship as a requirement do not have constitutions that entitle “everyone” to have access to social security, nor are their immigration and welfare laws necessarily the same as those of South Africa (par 54). This assertion should be viewed from the perspective that the Constitution is the supreme law of the country, and law or conduct inconsistent with its provisions is invalid. (S 2 of the Constitution. See, for further reading, about the notion of constitutional supremacy, Limbach “The Concept of the Supremacy of the Constitution” 2001 *Modern Law Review* 1.) Secondly, one of the goals of the Constitution is to “establish a society based on democratic values, social justice and fundamental rights”. (Preamble of the Constitution.) Thirdly, it should be recalled that South Africa is founded on, among others, the following constitutional values: human dignity; the achievement of equality; the advancement of human rights and freedoms; and supremacy of the Constitution and the rule of law (s 1 of the Constitution). It is, indeed, correct that rights entrenched in the Constitution are not absolute. Be that as it may, requirements embodied in social assistance and immigration laws which violate values and rights that underpin the Constitution cannot be allowed to stand merely because affluent countries apply them. Welfare and immigration policies, to survive a constitutional challenge, must be consistent with the Constitution.

2 4 2 Self-sufficiency

The respondents averred that the exclusion of permanent residents was in line with the immigration policy of the state. That is an immigration policy “which seeks to exclude persons who may become a burden on the state

and thereby to encourage self-sufficiency among foreign nationals” (par 63). The majority judgment acknowledged that containing social welfare costs is a legitimate government concern and it is permissible, if deemed necessary, to control applicants for permanent residence by excluding those who may become a burden on the state. It, nonetheless, pointed out that such a step should be done in compliance with the Constitution and its values. The court highlighted several ways in which the state could protect itself against persons becoming burdens. These ways are, according to the majority ruling, the following: careful consideration in the admission of immigrants, or by taking adequate security from those admitted, or by demanding such security or guarantees from their sponsors at the time the immigrants are allowed into the country or are permitted to stay as permanent residents. In the light of the foregoing options at the state’s disposal, the court averred that the state has a choice at the time an immigrant applies for admission to take up permanent residence. And when it allows immigrants to make their homes in South Africa it is because it sees some advantage to the state in doing so (par 65). It maintained that careful immigration policies could ensure that permanent residents are persons that would benefit (and not burden) the state. The court argued further that “[i]f a mistake is made in this regard, and the permanent resident becomes a burden, that may be a cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who make their home here” (par 65).

2 4 3 Citizens first

The respondents claimed that the state has an obligation towards its own citizens first. This line of argument is built around the thinking that South Africa has its own social challenges which it must address first and that before these challenges are met it would be insincere of the state to devote resources to the social assistance needs of non-citizens. In other words, the state should be allowed to marginalise non-citizens, inclusive of permanent residents, so that it could channel the available resources towards addressing social challenges (such as poverty and unemployment) facing citizens. The respondents argued further that preserving welfare grants for citizens only creates an incentive for permanent residents to naturalise.

In responding to the respondents’ averments, the court asserted that this argument is based on the social citizenship contract assumption, commonly found in American jurisprudence, that non-citizens are not entitled to the full benefits available to citizens. The court rejected the “citizens first” argument on the basis that it is not in line with the stated legislative goal of the Immigration Act. (S 25(1) of the Immigration Act 13 of 2002 provides that: “The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.” Also see par 2 3 1 above.) The preceding pronouncements by the court, it is opined, are to be welcomed. This assertion stems from the fact that, while it is true that there are limitations to what the state can achieve with the limited resources at its disposal to address social challenges facing South African citizens, it does not necessarily mean that

the state is at liberty to shy away from its constitutional obligations. (As pointed out in the *Grootboom* case (par 94): “[I]t is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources to realise these rights immediately ... however ... despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.”) In this case shying away from constitutional obligations would be marginalising permanent residents from accessing social assistance benefits. *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* (*supra*), a case involving the constitutionality of regulations disqualifying non-citizens from permanent employment as teachers in state schools, confirms the foregoing view. In this judgment, the Constitutional Court rejected, in its interpretation of the right to equality, the notion that social challenges facing South Africa could be used as a ground to justify the distinction between citizens and permanent residents. (The Constitutional Court held (par 30-31) that: “Permanent residents should ... be viewed no differently from South African citizens when it comes to reducing unemployment. In other words, the government’s aim should be to reduce unemployment among South African citizens and permanent residents ... permanent residents have been invited to make their home in this country. After a few years, they become eligible for citizenship. In the interim, they merit the full concern of the government concerning the availability of employment opportunities. Unless posts require citizenship for some reason, *eg*, due to particular political sensitivity of such posts, employment should be available without discrimination between citizens and permanent residents. Thus it is simply illegitimate to attempt to reduce unemployment among South African citizens by increasing unemployment among permanent residents. Moreover, depriving permanent residents of posts they have held, in some cases for many years, is too high a price to pay in return for increasing jobs for citizens.”)

In addition, the argument that permanent residents should be prevented from accessing social assistance benefits underscores the precarious position of non-citizens “as easy targets of the state and [policymakers], particularly when they go looking for ways to save some money”. (Aleinkoff “First Class: A Response to ‘The Immigrant as Pariah’ by Owen Fiss” – <http://bostonreview.net/BR23.5/Aleinkoff.html>.) It is, indeed, easy for policymakers (as political appointees) to prefer citizens (who are the electorate) above non-citizens (who may not be eligible to vote) when providing access to social security. The point is that non-citizens wield little or no political influence. (To stress this point, the Constitutional Court in the *Larbi-Odam* case referred to the Canadian decision in *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1 (32) where it was remarked that: “Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among ‘those groups in society to whose needs and wishes elected officials have no apparent interest in attending’.”) The fact that permanent residents lack the ultimate weapon that citizens have against policymakers, that is the ability to vote them out of

office, makes courts an extremely important platform from which they can claim their fundamental rights. As Fiss puts it:

“Immigrants who are not citizens are a numerical minority. Some can count on other nationals who are citizens to voice their concern, but that is exceptional. For the most part, they encounter great difficulties in forming coalitions that are the mainstay of politics, since all the others can gain by shunning them. In that sense, [non-citizens] ... are a discrete and insular minority, yet their powerlessness has another and more dramatic dimension – they are denied the vote. They are excluded, openly and formally, from the electoral process and for that reason make a very special claim to the protection of the judiciary ... the political disabilities immigrants suffer stand as a powerful reason why the one institution that stands above the political fray – the courts – should make doubly certain that the life of an immigrant, never an easy matter, is not more difficult than it has to be. The Constitution denies the majority the power to turn any group into a pariah, and the burden properly falls on the judiciary to make this rule...a living truth.” (Fiss “The Immigrant as Pariah” – <http://bostonreview.net/BR23.5/Fiss.html>.)

For this reason, the majority judgment could not have protected the powerless permanent residents better against the almighty policymakers.

2 4 4 Financial considerations

The respondents averred that the inclusion of permanent residents would result in an unacceptably high financial burden on the state (par 60). The court acknowledged the dearth of clear evidence indicating what the additional cost of extending social assistance to permanent residents would be. Notwithstanding that, the court held that even if the speculated additional annual cost of including permanent residents were to be taken into account it does not support the contention that the inclusion of permanent residents would impose a huge cost on the state (par 62). It, therefore, held that the importance of providing access to social assistance to permanent residents, and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies (par 82). In addition, the court found that: “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” (par 74).

2 5 *Remedy*

The court found that the most appropriate remedy was to modify the High Court’s orders (see par 2 2 above) by reading the words “or permanent residents” after “South African citizens” into the relevant legislative provisions (par 89). The underlying principle behind this remedy is that “it retains the right of access to social security for South African citizens while making it instantly available to permanent residents” (par 89).

3 Concluding remarks

This case draws attention to the challenges involved in dealing with the question of whether non-citizens should be entitled to social assistance benefits or not. It does that by highlighting the aims of a social security system, the legitimate concern of the government to contain social welfare costs and the principled policy of the immigrations authorities to encourage self sufficiency amongst non-nationals admitted to the country. In addition, it addresses the issue of preserving resources for the welfare of citizens as well as the legitimacy of an immigration policy which is aimed at preventing social security benefits from serving as an incentive for immigration. With the foregoing in mind, the following non-exhaustive issues arising from this case are most notable, and so are emphasized in conclusion:

- (a) Firstly, the right of access to social security, although it could be limited by the unavailability of resources as well as the general limitation clause, applies to everyone. Having said that, it might be reasonable to exclude non-citizens with a tenuous link with South Africa, such as visitors and illegal residents, from accessing social assistance benefits. The exclusion of permanent residents fundamentally affects their human dignity and equality.
- (b) Secondly, the exclusion of children on the basis of their nationality cannot be justified for it violates children's rights which essentially entitle them to access to social assistance, as enshrined in the Constitution. In light of South Africa's ratification of the Convention on the Rights of the Child (which recognises every child's right to benefits from social security), it is regrettable to remark that the exclusion of children from drawing social assistance benefits disregards South Africa's international law obligations. In addition, the exclusion underscores the slow pace at which national laws are brought into conformity with the Constitution and international law.
- (c) Thirdly, containing social welfare costs is a legitimate government concern and it is permissible, if deemed necessary, to control applicants for permanent residence by excluding those who may become a burden on the state. It, nonetheless, follows that such a step should be done in compliance with the Constitution and its values. As a result, careful immigration policies – and not the unavailability of social assistance benefits – could ensure that permanent residents are persons who would benefit (and not burden) the state.

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