

THE ADMINISTRATION OF SOCIAL SECURITY IN THE MIDST OF COVID-19: A NEED FOR A SPECIALISED AND INDEPENDENT SOCIAL SECURITY ADJUDICATION SYSTEM IN SOUTH AFRICA

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SUMMARY

The spread of the Coronavirus has had an adverse effect in many parts of the world including South Africa. Many people contracted the disease, and some even died. It is worth mentioning that to date, people are still contracting and dying from this disease. Related consequences that came with the management of the disease have had dire repercussions both on the economy of the country and social conditions of many, in particular the impoverished. In a bid to circumvent the socio-economic hardships given birth to by the disease the State made provision for a number of social relief measures to improve the conditions of those who were at the plight of poverty. These social relief measures had their own shortcomings, such as mismanagement of allocated funds, fraud and maladministration. These shortcomings left the intended beneficiaries destitute. At this point those affected by such discrepancies had no recourse available to them due to lack of awareness, lengthy adjudication processes, exorbitant legal fees and most importantly the lack of an independent social security adjudication system to solely deal with matters of this nature. The lack of an independent social security adjudication system invites quite a number of constitutional breaches such as the breach of the right to social security and the right of access to courts and in turn, has a bearing on socio-economic rights during this era of the pandemic. In an endeavour to provide amicable solutions to the above shortcomings, this article suggests that the pandemic necessitated the implementation of the long-called-for establishment of an independent social security adjudication system which will only deal with social-security-related matters. To amplify the need for an independent social security adjudication system the article makes recommendations to this effect. It is worth mentioning that the article was written at the height of Covid-19 and when the lockdown regulations were still in force and effective, this is thus reflective in the contents of the article.

1 INTRODUCTION

The coronavirus (COVID-19) started in China, and subsequently affected the rest of the world. South Africa is no exception to the casualties precipitated

by this pandemic.¹ To flatten the curve of the virus, President Cyril Ramaphosa announced that South Africa would be on lockdown for 21 days which came into effect on the 26th of March 2020 and implemented a system of monitoring the spread of the virus.² However, owing to an increase in infected persons and fatalities, the second wave was more severe than the first wave. The insurgence of the pandemic necessitated the government to extend the lockdown over the subsequent months, with adjustments being made in accordance with the lockdown regulations as empowered in terms of section 27(2) of the Disaster Management Act.³ The restrictions on most of the economic activities posed an immense threat to the economy and jobs of people, as lots of retrenchments were seen. To circumvent the hardship of the shrinking economy, the State devised measures to assist both the economy and the marginalised people of South Africa. The President announced the economic and social measures such as social relief interventions⁴ which equated to social security at play, which is the focus of this article.

The President on 21st of April 2020 announced economic and social measures, but for the purposes of this article, the focus is on social-security-related measures. There have been State social relief interventions through food parcels that were distributed at the local government level.⁵ The State also increased social assistance grants and announced the new temporary social assistance intervention of R350 for unemployed people, it was termed “social relief distress grant”. The other measure was made possible through the Compensation for Occupational Injuries and Diseases Act⁶ (COIDA) which exonerated employers from claims arising from employees occupationally acquiring Covid-19. Lastly, companies that were deemed as non-essential were permitted to lodge a claim with the Unemployment Insurance Fund on behalf of their employees.⁷

There are internal remedies available at the disposal of the aggrieved beneficiaries, should they become dissatisfied with the services of these institutions tasked with the responsibility of administering these social relief funds, this option has been in place long before the emergence of Covid-19. However, these internal dispute resolution mechanisms have been regarded to be ineffective. At the heart of this article, it demonstrates the dire need of establishing a specialised and independent social security tribunal. To better support this argument reference is therefore made to other areas of law that have been blessed with independent and specialised tribunals or

¹ Peterson, Wasserman, Lee, Go, Holmes, Al-Abri, McLellan, Blumberg and Tambyah “Covid-19– We Urgently Need to Start Developing an Exit Strategy” 2020 96 *International Journal of Infectious Diseases* 233 234.

² South African Government “President Cyril Ramaphosa: South Africa’s Response to Coronavirus COVID-19 Pandemic” (23 Apr 2020) <https://www.gov.za/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-23-apr-2020#> (accessed 2021-01-26).

³ 57 of 2002.

⁴ South African Government <https://www.gov.za/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-23-apr-2020#>.

⁵ *Ibid.*

⁶ 130 of 1993.

⁷ South African Government <https://www.gov.za/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-23-apr-2020#>.

adjudication systems and which have been efficient and effective in addressing the right to access to justice for those who are aggrieved with the decisions of the concerned institutions and those who cannot afford legal fees. This article argues further that the mishandling of these social relief funds during this pandemic amplifies the need for reforming the social security adjudication system. This article was penned at the peak of Covid-19 and during the strict lockdown regulations, therefore some of the arguments made henceforth are limited to that era.

2 THE INTERNATIONAL PERSPECTIVE

Olivier notes the importance of considering international law and further states that several factors are convincing as to why the international law perspective of social security should be assessed as far as it relates to access to social security.⁸ First, he highlights that South Africa has voluntarily obliged itself as a party to international treaties. Secondly, even in cases where South Africa is not a party to a treaty, section 39(1)(b) of the Constitution⁹ is still applicable. Thirdly, “there is substantial and developing jurisprudence and persuasive commentary available on the scope and content of socio-economic rights.”¹⁰ Section 39(1)(b) states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law; this approach is based on an internationally friendly system, which various courts of law have tested. Section 233 of the Constitution states

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law.”

This section of the article briefly notes the international and regional instruments; however, this part first tackles instruments relating to the right to access courts and thereafter instruments relating to social security.

The International Covenant on Civil and Political Rights (ICCPR) requires a member of state to afford citizens the recognisable effective remedy when their rights or freedom have been violated.¹¹ It further warrants anyone who claims such a remedy, the right for their claim to be tried and heard in a competent judicial, administrative, or legislative authority and to provide for any amicable judicial remedy.¹² The International Labour Organisation Social Security (Minimum Standards) Convention guarantees every applicant the right to appeal in the case where their application has been refused.¹³ Minimum standards make provisions for establishing social security platforms that will deal with social security-related matters.¹⁴ Regionally article 7 of the African Commission on Human and Peoples’ Rights African

⁸ Olivier *Introduction to Social Security* (2004) 164.

⁹ Constitution of the Republic of South Africa, 1996.

¹⁰ *Ibid.*

¹¹ Art 2(3)(a) of United Nation General Assembly *International Covenant on Civil and Political Rights* 999 UNTS 171. Adopted 16/12/1966; EIF: 23/03/1976.

¹² Art 2(3)(b) of the ICCPR.

¹³ Art 71(1) of International Labour Organisation *Convention Concerning Minimum Standards of Social Security* C102 (1952). Adopted 28/06/1952; EIF: 27/04/1955.

¹⁴ Art 71(3) of *Social Security (Minimum Standards) Convention*.

Charter of Human and Peoples Rights states that every citizen shall have the right to have his/her cause be heard,

“[t]he right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.”¹⁵

Moreover, the African Charter of Human and Peoples Rights makes provision for everyone’s cause to be heard.¹⁶ This right also entails the right of an individual to appeal to a competent organ of the State for fundamental rights that have been violated.¹⁷ The Code on Social Security requires the member states to establish an administrative and regulatory framework to ensure the effective and efficient delivery of social security benefits.¹⁸ The Code also makes provision for easy access to an independent adjudication system for everyone who wants his/her social security dispute to be resolved.¹⁹ To this end an analysis of South Africa’s social security adjudication system is hereby necessary, the following section of this article deals specifically with South Africa’s social security adjudication system.

3 SOUTH AFRICA’S SOCIAL SECURITY ADJUDICATION SYSTEM

The South African Social Security System consists of four necessary elements to render social security effective and efficient. The first is “social assistance”, which is defined as a scheme funded by the State and every so often it is regarded as a social grant. To this end, social assistance is non-contributory and depends solemnly on the government.²⁰ “Social insurance” on the other hand, is described as:

“Joint contributions by employers and employees to a pension or provident funds, or social insurance covering other unexpected events. The government may also contribute to social insurance covering accidents at work”.²¹

These schemes under social insurance are contributory in nature depending on both the employee and employer, unlike social assistance, where the fund depends on the State. Social insurance covers contingencies such as pensions or provident funds, medical benefits, maternity benefits, illness, disability, unemployment, employment injury benefits, family benefits and survivor’s benefits.²² Strydom describes “social relief” as follows:

“Entails short-term measures undertaken by the state to assist persons during individual or community crises that have caused the affected persons or communities to be unable to meet their most basic needs.”

¹⁵ Art 7 of Organization of African Unity *African Charter of Human and Peoples’ Rights* (1981). Adopted 27/06/1981; EIF 21/10/1986.

¹⁶ *Ibid.*

¹⁷ Art 7(1)(a) of the *African Charter of Human and Peoples’ Rights*.

¹⁸ Art 21.1 of *SADC Code on Social Security in the SADC* (2008).

¹⁹ *Ibid.*

²⁰ Strydom *Essential Social Security Law* (2012) 7.

²¹ Department of Welfare “White Paper for Social Welfare” (August 1997) 222.

²² Department of Welfare “White Paper for Social Welfare” (August 1997) 223.

These hardships include former enemies, victims of war, victims of harmful compulsory vaccination measures, persons who had sacrificed their jobs and education in the process of overturning oppressive governments and establishing democratic governments and persons whose governments or their predecessors had violated fundamental human rights.²³

The most common crisis in communities which requires social relief is natural disasters. Unlike other social security elements, there is no means test required for the supposed beneficiaries despite one's financial situation. Social relief is only temporarily available to a community that has been affected by a natural disaster, such as floods.²⁴ The other stream of social security is social compensation, which is viewed as the government's solidarity fund for persons in society who encounter hardship or misery on the government's account. Pieters describes "social compensation" as

"[t]he appreciation or sense of guilt of society towards those people on whom the government has rightfully or wrongfully and at any rate disproportionately inflicted damages."

Having highlighted all these crucial social security elements, the focal point of this article is on elements affected during the lockdown period, when the government announced social and economic relief measures. These affected elements include social assistance, social insurance with particular focus on the Unemployment Insurance Fund (UIF) and the last element which also bears attention in this article is social relief. The right to social assistance and social insurance is expressly given effect by virtue of legislation, which comprises necessary provisions for adjudication mechanisms available to parties who are less satisfied with the outcomes of their application.

This article examines alternative dispute resolutions available to persons aggrieved or beneficiaries of social security who are not satisfied with the institution's decision. Suffice to say that available dispute resolutions in this arena are meant to give effect to the constitutional right, which is the right to access courts.²⁵ This right is said to be crucial under a constitutional democratic country that subscribes to the rule of law. The right bestows citizens' the right to question the validity of specific statutes or conduct, a principle that was foreign under the apartheid government. Every citizen under this right is afforded the opportunity to challenge the law through the prism of the rule of law. The right is divided into three components which are embedded in section 34 of the Constitution.²⁶ The Constitutional Court in the case of *Napier v Barkhuizen* 2007 (5) SA 323 (CC)²⁷ alluded to the importance of the right to access to court under a democratic state, it held:

"Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the

²³ Strydom *Essential Social Security Law* 185.

²⁴ International Labour Organisation "Informal Economy" (undated). <http://www.ilo.org/global/topics/employment-promotion/informal-economy/lang-en/index.htm> (accessed 2021-05-13).

²⁵ S 34 of the Constitution of the Republic of South Africa, 1996.

²⁶ Currie and De Waal *The Bill of Rights Handbook* 6ed (2016) 711.

²⁷ 2007 (5) SA 323 (CC).

stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court."²⁸

Social assistance and social relief are regulated in terms of the Social Assistance Act,²⁹ making provisions for the administration and payment of social grants. The secondary legislation that gives effect to social assistance is the South African Social Security Agency Act,³⁰ which provides for the establishment of the South African Social Security Agency (SASSA), which is the agency responsible for administering and payment of social grants.³¹ The Social Assistance Act provides for a person or any person acting on behalf of someone who is not satisfied with the outcomes of his or her application and within 90 days of such a decision, to file a written appeal to the Minister of Social Development stating reasons why the Minister should vary or set aside the decision made by the agency.³² Having considered the decision of the agency and the reasons of the appellant, the Minister may confirm the decision or vary the decision or even set aside the decision. Alternatively, the Minister may appoint an independent tribunal and prescribe conditions of the tribunal in the Gazette and after cogitation of the appeal, the tribunal may set aside, vary or confirm the decision of the agency.³³ If the tribunal deems it just, it may make another decision.³⁴ It should be borne in mind that this alternative dispute resolution is also made available for a person whose application has been rejected and who would desire to file an appeal.

The UIF is tasked with the sole responsibility of collecting contributions from both employee and employer.³⁵ This enables those employees who are entitled to unemployment benefits to apply for these benefits when they are temporarily unemployed. The application is filed with the UIF as the institution responsible for administering and pay-outs of unemployment benefits.³⁶ If the application for the right to benefit of an employee is rejected or suspended by the Commissioner, not only the Commissioner, even the claims officer that processes the payment or non-payment, the said employee may appeal to the appeal committee of the UIF Board.³⁷ This is also in accordance with the Employment Promotion and Protection against Unemployment Convention, which gives the person claiming a right to challenge the withdrawal, suspension or refusal of an unemployment benefit.³⁸ The Act provides for further dispute alternatives for people who are aggrieved by the decision of the Board to approach the Commission for

²⁸ *Napier v Barkhuizen supra*.

²⁹ S 3(a) of the Social Assistance Act 13 of 2004.

³⁰ 9 of 2004.

³¹ Preamble of the South African Social Security Agency Act.

³² S 18(1) of the Social Assistance Act.

³³ S 18(2)(a) of the Social Assistance Act.

³⁴ *Ibid*.

³⁵ S 2 of the Unemployment Insurance Act 63 of 2001.

³⁶ *Ibid*.

³⁷ S 37(1) of the Unemployment Insurance Act.

³⁸ Article 70(1) of International Labour Organisation *Employment Promotion and Protection Against Unemployment Convention* C168 (1988). Adopted: 21/06/1988; EIF: 17/10/1991.

Conciliation, Mediation, and Arbitration (CCMA) for alternative relief.³⁹ Olivier states that the Labour Court has jurisdiction except where the criminal offence has been made according to the Act. Olivier further submits that where there is a dispute in terms of the application or interpretation of the Act, the Director-General out of his interest or in the interest of another party can lodge an application to the Labour Court for clarification.⁴⁰ The case of *Sibanda v Department of Labour*⁴¹ outlines the need of the aggrieved applicant to utilise internal dispute resolution before approaching a court of law. The case involved an applicant (Mr Sibanda) who sought to review and set aside the decision to deny him unemployment benefits in terms of the Unemployment Insurance Act.⁴² The application was brought in terms of section 146 of the Labour Relations Act,⁴³ which states:

“Any party to a dispute who alleges a defect in any arbitration proceedings under the auspice of the commission may apply to the Labour Court for an order setting aside the arbitration award.”⁴⁴

The court stated that the test placed before it was a review of the Department of Labour's decision, not the arbitration award. The court stated that it does not have jurisdiction over a decision of an official, as there is an internal procedure of appeals that needs to be followed in cases where an applicant's benefits application is declined.⁴⁵ The court further stated that section 37 of the Unemployment Insurance Act provides for internal dispute resolution, such as through the regional committee of appeals and the national appeals committee. The court dismissed the application for lack of jurisdiction.⁴⁶

Section 38 of the Unemployment Insurance Act places a duty on the labour inspector to issue a compliance order where it suspects non-compliance with the Act by the employer. The Act further provides that the labour inspector must seek to obtain a written undertaking from the employer stating that he or she will comply with the provisions of the Act.⁴⁷ In attempting to secure such, the employer must outline steps it will take to comply with this Act, or if it has failed to comply due to failure to contribute after payment has been made, then a receipt must be produced. Nevertheless, the employer may dispute the compliance order by referring the matter to the Director-General using the proper channels for review of the decision taken, the Director-General may make an application to the Labour Court in a quest of making the compliance order an order of the court.⁴⁸

³⁹ Nyenti “Reforming the South African Social Security Adjudication System: Innovative Experiences From South African Non Social Security Jurisdictions” 2016 19 *Potchefstroom Electronic Law Journal* 1 6–7.

⁴⁰ Olivier, Okpaluba, Smit and Thompson *Social Security Law General Principles* (1999) 284.

⁴¹ [2007] ZALC 30.

⁴² *Sibanda v Dept of Labour supra*.

⁴³ 66 of 1995.

⁴⁴ *Sibanda v Dept of Labour supra*.

⁴⁵ *Sibanda v Dept of Labour supra*.

⁴⁶ *Sibanda v Dept of Labour supra*.

⁴⁷ S 38 of the Unemployment Insurance Act.

⁴⁸ Ss 39 and 40 of the Unemployment Insurance Act.

In terms of COIDA, the Act makes provision for the establishment of a Compensation fund. It also makes provision for the management and administration of contributions and claims of employees who have occupationally contracted a disease or injured.⁴⁹

The Director-General/Commissioner may review any decision related to a claim of occupational injuries or diseases. This must be done after the concerned person has been afforded an opportunity to make representation.⁵⁰ The Director-General/Commissioner may, after considering evidence and representations, amend, set aside or confirm the decision. The Commissioner may further reduce, suspend, discontinue or increase the compensation award.⁵¹ Anyone who is affected by the Director-General's decision may lodge an objection or appeal within 180 days.⁵² The objection shall be considered and decided by the presiding officer assisted by two assessors. The presiding officer may with the assistance of the assessors confirm the decision or make any just and equitable decision.⁵³ An aggrieved person by the decision of the presiding officer may appeal to the High Court having jurisdiction.⁵⁴ The appeal may concern any interpretation of the Act, whether the sustained injury or contracted disease was on account of the employee's wilful misconduct. It can also relate to whether the amount of the compensation [...] was inadequate or excessive.

4 THE RIGHT OF ACCESS TO COURTS

The Constitution affords every citizen the right to have any dispute that is resolvable by applying the law to be adjudicated in a fair public hearing, a court of law or an appropriate forum or tribunal that is impartial and independent.⁵⁵ This right is not unique to other Bill of Rights in our Constitution. Against these reasons, the State must respect, protect, promote, and fulfil the right of access to the court. The realisation of the right to access justice is an intrinsic right that relates to many other fundamental rights in the Bill of Rights. This proves the long-standing stance of the Constitutional Court that there is no Bill of Rights that exists in isolation from another. Therefore, it is essential to note that the right to access a court is an important component of the right to achieve the realisation of the right to social security. The case of *Napier v Barkhuizen* held that the right of access to court to have any dispute resolved in terms of the law by an impartial and independent tribunal is a foundational right that is necessary for an orderly society.⁵⁶ This becomes imperative for South Africa which is founded on the values of the rule of law, therefore this right is beneficial for the people of our

⁴⁹ Preamble of COIDA.

⁵⁰ S 90(1) of COIDA.

⁵¹ S 90(2) of COIDA.

⁵² S 91(1) of COIDA, as amended.

⁵³ S 91(3) of COIDA, as amended.

⁵⁴ S 91(5) of COIDA, as amended.

⁵⁵ S 34 of the Constitution.

⁵⁶ *Napier v Barkhuizen supra*.

society as it guarantees redress for citizens from the court in cases of disputes.⁵⁷

The High Court in *Nedbank Limited v Thobejane*⁵⁸ pronounced this right as a substantive right which is a turning point in South Africa's history of inequality, apartheid and denial of access to courts. This right has wider intentions which are practical and give effect to the right to access court. It further held that any right must be linked to the right to access court, which must be practically accessible.⁵⁹ Social security is regarded as a fundamental right falling under the category of socio-economic rights. The monitoring and enforcement of socio-economic rights is dependent on the collaboration of the executive, legislature and judiciary. This also extends to the South African Human Rights Commission and NGO's.⁶⁰ Enforcement of socio-economic rights is very crucial for the realisation of the right to social security hence this might be made possible and effective by the State fulfilling the right to access the court. The social security reform will ideally achieve both access to social security and enforcement of the said right through the lenses of section 34 of the Constitution.⁶¹ To fully understand and give effect to the right of access to courts entrenched in our Bill of Rights it is necessary to examine the available approaches in interpreting this right.⁶² The first approach is to understand the purpose of the right, which is regarded as purposeful because it outlaws apartheid practices that denied certain groups from testing the validity of the law and bringing any dispute before a court of law. This is in line with the rule of law principle that anyone may challenge the legality of any law or conduct, needless to say, that the purpose of the right to access courts is to give effect to the founding principle of our law which is the rule of law.⁶³ For every dispute, it is a constitutional requirement that it must be a matter that is resolvable by application of law and disputes relating to the administration of social security matter are disputes which warrant to be resolvable under the perimeters of section 34 of the Constitution. If it can be ascertained that a dispute can be resolvable by application of the law, a concerned or aggrieved person to the dispute must be able to access a court, tribunal or forum to have his/her dispute resolved in terms of the law. The primary purpose of this component of the right of access to courts is to ensure that there's protection for the aggrieved and the State or other institutions do not impair access to people seeking justice in a court of law, tribunal or forum. It is so unfortunate and concerning that this leg of the right of access to court is yet a mission impossible while the legislature has tried to fulfil this aspect in other areas such as in the establishment of the CCMA, the small claims courts and the National Consumer Tribunal. Fairness forms an integral part

⁵⁷ *Napier v Barkhuizen supra*.

⁵⁸ [2018] 4 All SA 694 (GP).

⁵⁹ *Nedbank Limited v Thobejane supra*.

⁶⁰ Olivier and Van Rensburg "Protection and Enforcement of the Right to Social Security" 2000 *Law, Democracy & Development* 87.

⁶¹ S 34 of the Constitution.

⁶² Nyenti *Developing an Appropriate Adjudicative and Institutional Framework for Effective Social Security Provisioning in South Africa* (LLD thesis, University of South Africa) 2012 32.

⁶³ Currie and De Waal *The Bill of Rights Handbook* (2016) 711.

of the right to access to courts. The Constitutional Court also ventilated this in the case of *De Beer NO v North-Central Local Council and South-Central Local Council*⁶⁴ where it made the following remarks:

“This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution, the courts must interpret legislation and the rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair.”⁶⁵

The right to have a dispute fairly resolved in a tribunal alternates with section 33 of the Constitution,⁶⁶ which confers the right to administrative action that is lawful, reasonable and procedurally fair.⁶⁷ The Promotion of Administrative Justice Act (PAJA)⁶⁸ was enacted to give effect to the provisions of section 33.⁶⁹ Lastly, the right of access to a court is to be resolved in a public hearing, customarily all courts of law are open to all. Only in certain exceptions will this not be allowed.⁷⁰

5 THE STATE SOCIAL RELIEF INTERVENTIONS AND ARISING CHALLENGES THEREOF

To ensure the effectiveness of the national lockdown, regulations in a schedule were enacted to supplement the Disaster Management Act,⁷¹ which restricted the movement of people except in exceptional circumstances. Not only did the regulations have a bearing on the movement of people but they also banned most of the economic activities, such as the sale of alcohol and cigarettes to mention a few.⁷² These economic restrictions had a negative bearing on the livelihoods of indigent people and people earning a living on a hand-to-mouth basis. To mitigate the economic hardships brought about by these restrictions, the State announced both social and economic interventions to enable the vulnerable to survive during this period. Owing to the increase in the number of people who were infected with the virus and the escalating number of fatalities, it impelled the State to

⁶⁴ *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC).

⁶⁵ *Ibid.*

⁶⁶ S 33 of the Constitution.

⁶⁷ S 33(1) of the Constitution.

⁶⁸ 3 of 2000.

⁶⁹ S 33(3) provides: “National legislation must be enacted to give effect to these rights and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in sub-sections (1) and (2); and (c) promote an efficient administration.”

⁷⁰ S 34 of the Constitution.

⁷¹ 57 of 2002.

⁷² Disaster Management Act 57 of 2002: Amendment of Regulations issued in terms of s 27(2).

extend the lockdown.⁷³ The extension of the lockdown had severe effects on the daily living conditions of impoverished people *inter alia* workers, informal traders and small business enterprises. The President announced several government interventions to enable the needy to endure the challenging circumstances of the pandemic.⁷⁴ The State took seriously the fight not only against the coronavirus, but the economic effects caused by the disease on businesses and people. This is evident in the President's sentiments uttered in his speech where he said the following:

"Our country finds itself confronted not only by a virus that has infected more than a quarter of a million people across the globe, but also by the prospects of a very deep economic recession that will cause businesses to close and many people to lose their jobs. Therefore, as we marshal our every resource and our every energy to fight this epidemic, working together with business, we are putting in place measures to mitigate the economic impact both of this disease and of our economic response to it. We are today announcing a set of interventions that will help to cushion our society from these economic difficulties."⁷⁵

Government interventions that are discussed in this article, are social relief interventions as far as they relate to social security with a particular focus on social assistance, social insurance and social relief as streams of social security. The first proposed intervention was the Temporary Employee Relief Scheme, which was said to enable employers to continue paying their employees during the period of the pandemic.⁷⁶ The success of this initiative was dependent on the Department of Employment and Labour. It is against this reason that the Minister issued a directive that will provide for the payment of the Covid-19 Temporary Employee/Employer Relief Scheme (C-19 TERS).⁷⁷ The purpose of the scheme was to permit payment for contributors who had lost income owing to the effects of Covid-19⁷⁸ and to mitigate the economic pitfalls of Covid-19 and avert any contact during the application of the TERS benefit.⁷⁹ Chief amongst its purpose, the directive gave effect to the establishment of the Temporary Employee/Employer Relief Scheme and stipulated the application process that contributors need to adhere to for purposes of mitigating the economic catastrophes posed by Covid-19.⁸⁰

For a company to qualify for a claim for payment to contributors, the company must have closed shop for three months or less otherwise have suffered financial distress as a result of Covid-19 related matters.⁸¹ The TERS benefit is disjoined from the normal UIF benefits –that is, the ordinary

⁷³ Statement by President Cyril Ramaphosa on Escalation of Measures to Combat Covid-19 Epidemic (23/03/2020) <http://www.dirco.gov.za/docs/speeches/2020/cram0323.pdf> (accessed 2021-05-30).

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Directive by the Minister of Employment and Labour in Terms of Regulation 10(8) issued by the Minister of Cooperative Governance and Traditional Affairs in terms of s 27(2) of the Disaster Management Act, 2002 (Act 57 of 2002).

⁷⁸ Par 2.1.1(a) of C-19 TERS.

⁷⁹ Par 2.1.1(b)–(c) of C-19 TERS.

⁸⁰ Par 2.1.1(d) of C-19 TERS.

⁸¹ Par 3.1 of C-19 TERS.

rule which relates to unemployment insurance applies where for every four days worked the worker accumulates a one-day credit and the general rule of “days payable is 365 for every 4 (four) years” will not be applicable.⁸² Further to the outlined requirements, the company must be registered as a contributor with the UIF,⁸³ the company must adhere to the application process of the temporary relief fund⁸⁴ and the closure of the company must be on account of Covid-19.⁸⁵

The Temporary Employee Relief Scheme has been an admirable unemployment insurance initiative aimed at providing financial relief for contributors of UIF during the insurgencies of Covid-19. However, the administration and pay-out turned out to be a debacle. One of the major reasons for this relates to fraud and corruption as it was discovered that approximately R1 billion was paid to persons who did not qualify.⁸⁶ The other challenge of the scheme is that payments to contributors were delayed as there were claims that some companies were not paid, and this negatively affects employees who are in dire need of these funds.

The reasons for delays in payment were on account of inadequate IT resources and flawed administration processes. These two factors have been identified as the roots of the Temporary Employee Relief Scheme problems.⁸⁷ Obscurities continue to exist in this scheme as the Act only permits companies who have registered their workers to lodge a claim to the Temporary Employee Relief Scheme (TERS).⁸⁸ This has raised concerns as there are a number of companies that have never registered their workers. This means that in terms of the directive Covid-19 Temporary Employee/Employer Relief Scheme were and they are still not beneficiaries of the scheme.⁸⁹

The President announced that employees exposed to the coronavirus and who have contracted the said virus are permitted to claim from the Compensation Fund for having contracted the disease.⁹⁰ The Compensation Commissioner gazetted a Notice on Compensation for Occupationally-Acquired Novel Coronavirus Disease under COIDA.⁹¹ The notice makes provision for employees who are defined as employees in terms of COIDA to claim compensation for Covid-19 acquired diseases.⁹² The compensation is

⁸² Par 3.2 of C-19 TERS.

⁸³ Par 3.7.1 of C-19 TERS.

⁸⁴ Par 3.7.2 of C-19 TERS.

⁸⁵ Par 3.7.3 of C-19 TERS.

⁸⁶ Business Insider SA “UIF Corona Payouts: 157 Employers Investigated for Fraud, R3bn in Wrong Payments Recovered” (06/10/2020) <https://www.businessinsider.co.za/uif-TERS-payments-2020-10-2>.

⁸⁷ <https://www.businessforSA.org/important-message-to-all-employers-regarding-temporary-employer-employee-relief-scheme-TERS> (accessed 2021-06-20).

⁸⁸ Par 3.7.1 of C-19 TERS.

⁸⁹ Runciman “Gaps in South Africa’s Relief Scheme Leave Some Workers With No Income” (22/04/2021) <https://theconversation.com/gaps-in-south-africas-relief-scheme-leave-some-workers-with-no-income-136403> (accessed 2021-06-27).

⁹⁰ Statement by President Cyril Ramaphosa on Escalation of Measures to Combat Covid-19 Epidemic <http://www.dirco.gov.za/docs/speeches/2020/cram0323.pdf>.

⁹¹ The Compensation Commissioner gazetted a notice on Compensation for Occupationally-Acquired Novel Coronavirus Disease.

⁹² Par 2 of Notice on Compensation for Occupationally-Acquired Novel Coronavirus Disease.

paid out when an employee has been exposed to many sources or a single source of Covid-19 or has travelled to a high-risk area.⁹³ The report from the Auditor-General shows that there has been a delay in processing compensation for occupationally-acquired novel coronavirus disease which was system related.⁹⁴ Internal control measures have been identified as a long-existing problem; these include poor financial reporting and poor record management. With these inadequate control measures, the Compensation Fund is not able to manage claims for compensation for occupationally-acquired novel coronavirus disease.⁹⁵ This outrageous lack of effective control measures might exacerbate the protracted challenges of the fund because restrictions have been relaxed on our economy and more people are now back at work. This means that more workers are contracting the disease and the influx of applications will continue.

On 21 April 2020, the President announced additional coronavirus economic and social-relief measures. The President also announced the extension of the lockdown on account of the rise in people who were infected with the virus as well as an increase in the number of fatalities.⁹⁶ These much anticipated economic and social-relief measures were the second-phase of the economic response of the State following the first address on 23 March 2020. The second-phase of the economic response package was supposed to amount to R500 billion which equated to 10 per cent of GDP.⁹⁷ The State had budgeted for relief of hunger and social distress. The State further reprioritised an amount of R20 billion which was meant for municipalities to enable them to provide emergency water supply, increased sanitation of public transport and facilities as well as food and shelter for those who do not have such.⁹⁸ The measures which were announced to support workers in the formal sector were going to be extended to also cater for workers in the informal sector.⁹⁹

Furthermore, R50 billion was reserved for those most adversely affected by the virus. This included a six-month at the amount of R350 coronavirus grant which was known as Covid-19 Social Relief of Distress grant. To qualify for this grant, a person must be unemployed and must not be receiving any other form of a social grant or UIF payment.¹⁰⁰ The State, through SASSA, announced the rollout of food parcels which were to be issued as vouchers or via cash transfers for efficiency purposes. An amount of R100 billion was allocated to guard against job losses as well as to create employment.¹⁰¹

⁹³ Par 3 of Notice on Compensation for Occupationally-Acquired Novel Coronavirus Disease.

⁹⁴ Auditor-General of South Africa *First Special Report on the Financial Management of Government's Covid-19 Initiatives* (2020) 140.

⁹⁵ *Ibid.*

⁹⁶ Department of Health: Covid-19 Online Resource & News Portal "Statement by President Cyril Ramaphosa on Further Economic and Social Measures in Response the Covid-19 Epidemic" (21 April 2020) <https://sacoronavirus.co.za/2020/04/21/extraordinary-budget-for-coronavirus-response> (accessed 2021-06-30).

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

6 SHORTCOMINGS OF THE EXISTING SOUTH AFRICAN SOCIAL SECURITY DISPUTE RESOLUTION SYSTEM

This part of the article demonstrates the long-drawn-out deficiencies of South Africa's social security system. To this effect, substantive reasoning will be charted on as to why a social security adjudication system will suffice and ultimately realise the right of access to court.¹⁰² South Africa does not have a singular or universal social security dispute resolution system, however, each relevant statute to social security makes provision for dispute resolution. The government interventions during the pandemic period can be qualified as the State living up to its socio-economic commitments as entrenched in different provisions of the Constitution. These socio-economic interventions dating back to April 2020 have been so beneficial to some targeted groups of people throughout the difficulties given birth by Covid-19 and the repercussions brought by lockdown regulations. However, these socio-economic interventions did not reach all the desired groups of people on account of various reasons as alluded to above. Now when this happens vulnerable persons who are beneficiaries of these socio-economic rights turn to court with the hope that the court will rule in their favour as the supposed beneficiaries of these socio-economic interventions.¹⁰³ However, this is not necessarily the case in the social security arena, the unfortunate inadequacies of the adjudication systems in place have their own designed shortcomings and the debacle of the Covid-19 social relief measures warrants a reflection on the reason for the absence of such an adjudication system as well as discussion on the envisaged social security adjudication system.

Accessing some of these social security institutions is from time to time a challenge, precipitated by factors such as the locations of the operating offices of these institutions being centralised.¹⁰⁴ This is an impediment for people living on the outskirts of the city and in rural areas. Sometimes, people in rural areas do not have the means or knowledge to access institutions that are centrally based on their geographical location. Another factor impeding access to these adjudication systems is that lodging a claim is usually a laborious process and the appeal process provided by these statutes and finalisation of matters for the aggrieved party is not guaranteed as there is no mention in the statutes of when the process should be finalised. Nyenti argues that some of these social security statutes provide for appeal and review at ordinary courts, usually High Courts. However, ordinary courts are not the best forums to deal with social security matters as they have little power to deal with appeals and more power to deal with reviews.¹⁰⁵ Review and appeal to such ordinary courts may not be to the advantage of many indigent people owing to a lack of revenue to access

¹⁰² S 34 of the Constitution.

¹⁰³ Govindjee "Adjudication of Socio-Economic Rights by the Constitutional Court of South Africa: Walking the Tightrope Between Activism and Deference" 2013 25 *National Law School of India Review* 62 65.

¹⁰⁴ Nyenti 2016 *Potchefstroom Electronic Law Journal* 7.

¹⁰⁵ Nyenti 2016 *Potchefstroom Electronic Law Journal* 8.

these courts. Owing to the inherent delays in court cases and legal technicalities in every court case one can tell that the current system is not user-friendly for the needy people who seek justice on their social security matters. The system is only accessible to those who can afford legal representation. This is a concern as most if not all beneficiaries of these social-relief measures are marginalised people who are not able to afford exorbitant legal fees.¹⁰⁶ Nyenti, the well-known advocate of social security adjudication reform, suggested a designated institution that deals with appeals. This is because there is a lack of a systematic approach as far as it relates to the social security appeal system.¹⁰⁷ He further makes the following assertions on the inappropriateness of the social security appeal system:

“It is inappropriate to establish an appeal tribunal purely on the basis of Ministerial or Registrar direction/regulation, also due to the gravity and importance of the issues at stake, such as the establishment of the institution; the appointment of its members; its main objective(s); its jurisdiction, functions and powers; procedures for the disposal of complaints; giving parties an opportunity to comment and to be represented; time limits; record-keeping; making a determination and enforceability of determinations; review possibility; accountability; remuneration; and limitation on liability etc.”¹⁰⁸

An additional issue with the existing social security adjudication system is that these institutions have limited jurisdiction in dealing with the matters of social security, their scope and jurisdiction only go as far as stipulated in the relevant statutes. Even the High Court, as an external adjudicator on social security matters, has limited powers to deal with appeals and mainly deals with reviews because of the nature of social security matters. Social security institutions are not only limited in terms of jurisdiction but also in terms of remedies because remedies are circumscribed by legislation. This means that responsible forums do not completely enjoy autonomy when deciding on the best possible remedy. The independence of these social security adjudication systems is questionable because there is a lot of internal processes involving internal appeals to personnel employed by the same institution. To some extent, appeals are required to be forwarded to the Director-General or Minister whose lack of impartiality is concerning because he or she is not detached from the said social security institution that adjudicated on the matter.¹⁰⁹

The inadequacies of social security were also identified and addressed at length by the Committee of Inquiry into a Comprehensive System of Social Security in South Africa, also known as the Taylor Committee.¹¹⁰ The Department of Social Development formed the committee so as to review and investigate obscurities in the South African social security system.¹¹¹ The Committee stressed its concerns and challenges, which related to South

¹⁰⁶ *Ibid.*

¹⁰⁷ Nyenti *Developing an Appropriate Adjudicative and Institutional Framework for Effective Social Security Provisioning in South Africa* 292.

¹⁰⁸ *Ibid.*

¹⁰⁹ S 4 of COIDA.

¹¹⁰ Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future: Consolidated Report* (March 2002) 10.

¹¹¹ *Ibid.*

Africa's social security framework. The first challenge which was identified was a lack of consistency from officials of different social security institutions on complaints and appeals lodged by beneficiaries.¹¹² It also found that delays were inevitable and court outcomes on social security matters in dealing with such issues were not pleasing. The Committee further discovered that ordinary courts are not well equipped to deal with social security matters, and access to court was limited to indigent persons. Cases were found to be more legalistic, less consideration of the beneficiaries concerned, and the cost of litigation was found to be exorbitant.¹¹³

7 HOW TO ENSURE A SPECIALISED AND INDEPENDENT SOCIAL SECURITY ADJUDICATION SYSTEM

7.1 A constitutional framework approach

Earlier on, this article demonstrated the underlying Constitutional standards and principles for the transformation of the social security system. The proposed reform of the social security adjudication system clearly finds expression within the ambits of our constitutional framework and the realisation of this proposed adjudication system would be the fulfillment by the State of its constitutional commitments. The long overdue call to have a specialised adjudication system of social security is influenced by the interrelated constitutional provisions, at the core of which is the right to social security. In this regard, the first point of departure is section 2 of the Constitution, which recognises the Constitution as the supreme law of the land.¹¹⁴ Chapter 2 of the Constitution guarantees everyone a Bill of Rights.¹¹⁵ The State has an obligation to respect, protect, promote and to fulfill the Bill of Rights.¹¹⁶ The Constitution guarantees everyone equal treatment and status before the law as well as equal protection.¹¹⁷ This can be translated to mean that every beneficiary of social security who is aggrieved by a certain outcome of his or her application, or by the ill-treatment of one of the social security institutions should receive equal treatment and status in the new proposed social security system. The human dignity of citizens is to be protected and respected.¹¹⁸ At the centre of this proposed adjudication system is the effective realisation of the right to social security, as the lack of an effective system compromises the right to social security as well as other supplementary constitutional provisions. Having delineated these crucial constitutional provisions, the reforming of the social security adjudication system should be informed and guided by these provisions of the Constitution.

¹¹² Taylor Committee of Inquiry *Transforming the Present* 23.

¹¹³ *Ibid.*

¹¹⁴ S 2 of the Constitution.

¹¹⁵ Ch 2 of the Constitution.

¹¹⁶ S 7(2) of the Constitution.

¹¹⁷ S 9(1) of the Constitution.

¹¹⁸ S 10 of the Constitution.

7 2 Implementing the recommendations of the Taylor report

The described recommendations of the Taylor Committee should be implemented as they pertain to the establishment of a social security adjudication system. This would be made possible through the collaboration of the office of the Chief Justice and the Department of Justice and Constitutional Development working closely with other relevant departments, such as the Department of Social Development and the Department of Employment and Labour. The committee on a comprehensive social security system for South Africa was established to devise methods of reviving South Africa's social security to be a comprehensive system.¹¹⁹ It is recommended that there is a need for a dismantled institutionalised administration, accountability, review and revision, and an impartial substantive adjudication system.¹²⁰ Chief amongst its recommendations, it suggested a uniform social security adjudication system established to precisely deal with social security claims that will have an independent internal review or appeal institutional process.¹²¹ The Taylor report has thus described the much-needed adjudication system, a special social security court, that deals solely with social-security-related matters, and which will determine these cases based on law and fairness. The envisaged special court system should have jurisdiction in all social security matters from UIA, COIDA, the Road Accident Fund¹²² and the Social Assistance Act.¹²³

7 3 Aligning the social security adjudication system with other adjudication frameworks

The proposed adjudication system in the social security arena is not entirely foreign to South African jurisprudence. There are a number of specialised adjudication systems in other areas of South African law that arise from their respective statutes. For the purposes of this article, attention is drawn to at least four areas of law with fully functioning adjudication systems. This is to validate the call for the proposed social security adjudication system and to prove that the State has previously committed to ensuring that there is a fair and effective adjudication process available to affected persons within the specified area of law. For ease of reference, discussions under this section are limited to the dispute adjudication systems provided for under the Labour Relations Act (LRA),¹²⁴ Consumer Protection Act¹²⁵ and the National Credit Act (NCA).¹²⁶

¹¹⁹ Taylor Committee of Inquiry *Transforming the Present* 9.

¹²⁰ Taylor Committee of Inquiry *Transforming the Present* 122.

¹²¹ Taylor Committee of Inquiry *Transforming the Present* 124.

¹²² 56 of 1996.

¹²³ *Ibid.*

¹²⁴ 66 of 1995.

¹²⁵ Consumer Protection Act 68 of 2008.

¹²⁶ 35 of 2005.

The LRA¹²⁷ was enacted to give effect to section 23 of the Constitution,¹²⁸ to provide for collective bargaining on wages, and on terms and conditions of employment and any other related matters of mutual interest.¹²⁹ Chapter 7 of the LRA puts in place specialised institutions to deal solely with labour-related issues.¹³⁰ The first is the Commission for Conciliation, Mediation and Arbitration popularly known as the CCMA.¹³¹ The CCMA enjoys an independent status from the State or any other stakeholders such as the employers, employees and trade unions.¹³² Chief amongst its functions, the CCMA is tasked with conciliating any matter brought before it in terms of the Act.¹³³ If a matter remains unresolved at the conciliation level, the Act provides for it to be referred to arbitration.¹³⁴ As part of having an effective and efficient labour adjudication system, section 151 of the LRA gives effect to the establishment of the Labour Court.¹³⁵ This court is a superior court that has inherent jurisdiction and shares an equal status to the High Court.¹³⁶ Subject to the provision of section 173, the Labour Court has exclusive jurisdiction on all labour matters.¹³⁷ The LRA further makes provision for the establishment of the Labour Appeal Court.¹³⁸ Subject to the provisions of the Constitution, the Labour Appeal Court has exclusive jurisdiction to hear appeals against judgments of the Labour Court,¹³⁹ although the Judge President of the Labour Appeal Court may permit the Labour Appeal Court to sit as a court of first instance.¹⁴⁰

A second specialised adjudication system concerns the effective and procedural adjudication of consumer-protection-related matters, which is the National Consumer Tribunal and is hereby established by the National Credit Act. The NCA aims to ensure non-discriminatory and fair practices in the credit marketplace to enable consumers to access the credit market system.¹⁴¹ The NCA makes provision for the establishment of the National Credit Regulator and National Consumer Tribunal.¹⁴² The Regulator is an independent institution that is subjected only to the Constitution and the law.¹⁴³ The NCA requires the Regulator to always be impartial¹⁴⁴ and to perform its functions in a transparent manner¹⁴⁵ and without fear, favour or

¹²⁷ 66 of 1995.

¹²⁸ S 1(a) of the LRA.

¹²⁹ S 1(c)(i) of the LRA.

¹³⁰ Ch 7 of the LRA.

¹³¹ S 112 of the LRA.

¹³² S 113 of the LRA.

¹³³ S 115(1)(a) of the LRA.

¹³⁴ S 115(1)(b) of the LRA.

¹³⁵ S 151(1) of the LRA.

¹³⁶ S 151(2) of the LRA.

¹³⁷ S 157(1) of the LRA.

¹³⁸ S 167(1) of the LRA.

¹³⁹ S 173(1)(a) of the LRA.

¹⁴⁰ S 175(1)(a) of the LRA.

¹⁴¹ Preamble of the NCA.

¹⁴² *Ibid.*

¹⁴³ S 12(1)(c) of the NCA.

¹⁴⁴ S 12(1)(e) of the NCA.

¹⁴⁵ S 12(f)(i) of the NCA.

prejudice.¹⁴⁶ The Regulator is tasked with promoting informal dispute resolutions to resolve credit-related matters between consumers and credit providers or credit bureaux, without the Regulator intervening in such matters.¹⁴⁷ The Regulator is also tasked with receiving complaints with regards to the contravention of the Act and investigating such complaints.¹⁴⁸ The Regulator is empowered by the Act to refer matters to the National Consumer Tribunal and to appear before the Tribunal regarding credit-related matters.¹⁴⁹ It is against such reasons that the National Consumer Tribunal is established¹⁵⁰ with functions such as adjudicating on any application made before it in terms of the NCA and making any order provided for in the NCA.¹⁵¹ The Tribunal has the power to adjudicate any prohibited conduct as per the NCA and make a remedy to that effect.¹⁵²

The purpose of the Act is to ensure that there is a legal framework for fair, accessible, efficient, responsible and sustainable marketplace for the better good of the consumers.¹⁵³ The Act also aims to prohibit unfair market practices and makes provision for the establishment of the National Consumer Commission.¹⁵⁴ A person whose consumer rights have been violated, infringed or impaired and would want redress in the National Consumer Tribunal must do so in a manner prescribed by the Consumer Protection Act (CPA) and rules of the National Consumer Tribunal regulating proceedings. The National Consumer Tribunal is tasked with the role of adjudicating on applications brought before it and allegations brought before it and grants remedies to that effect.¹⁵⁵

7 4 Compliance with international standards

There are several international instruments that South Africa is a member of but for purposes of this article and for narrowing discussion, attention is drawn to the most relevant and crucial instruments. These include but are not limited to the International Covenant on Civil and Political Rights (ICCPR),¹⁵⁶ the ILO Minimum Standards of Social Security,¹⁵⁷ the African Charter on Human and People's Rights¹⁵⁸ and Code on Social Security.¹⁵⁹ The above-mentioned international instruments outline some minimum standards relating to the right to adjudication and the right to social security that are to be followed by member states and South Africa as a member of

¹⁴⁶ S 12(f)(ii) of the NCA.

¹⁴⁷ S 15(a) of the NCA.

¹⁴⁸ S 15(b) of the NCA.

¹⁴⁹ S 15(i) of the NCA.

¹⁵⁰ S 26(1) of the NCA.

¹⁵¹ S 27(a)(i) of the NCA.

¹⁵² S 27(a)(ii) of the NCA.

¹⁵³ Preamble of the Consumer Protection Act 68 of 2008.

¹⁵⁴ *Ibid.*

¹⁵⁵ Van Eeden and Barnard *Consumer Protection Law in South Africa* 2ed (2017) 478–479.

¹⁵⁶ Art 49 of the ICCPR.

¹⁵⁷ ILO *Social Security (Minimum Standards) Convention* 102.

¹⁵⁸ African Commission on Human and Peoples' Rights *African Charter of Human and Peoples Rights*.

¹⁵⁹ SADC *Code on Social Security*.

these above-mentioned international instruments should comply and incorporate these instruments into domestic instruments law. The Constitution makes it an obligation of any court, tribunal or forum to consider international law¹⁶⁰ and foreign law.¹⁶¹ With the supremacy of the Constitution and the concerned international instruments on the inevitability of an adjudication of the framework for social security, South Africa should factor in this regard and join the long ongoing call of reforming its social security adjudication system to align itself with international instruments.

7 5 Accessibility of the social security adjudication system

To ensure the effectiveness of this proposed social security adjudication system, it should be accessible to every aggrieved person who wants redress in a social security matter. Persons must be able to apply for their cases to be heard and present their cases. Accessibility is said to mean that everyone must have access to bring his or her dispute. As highlighted above, most social security institutions are situated in geographical areas where it becomes difficult for people in the outskirts or rural areas to access. Nyethi describes accessibility in social security adjudications to mean:

“Accessibility is promoted through aspects such as the geographic or physical location of an institution; hearing venues and modalities education of claimants on available avenues for redress; the language(s) utilised during proceedings; the friendliness of the prescribed documents and forms; the diversity of dispute lodgement options; the reasonableness of timeframes for lodging disputes; and the provision of financial and other support.”¹⁶²

7 6 Procedural fairness

At the heart of this proposed adjudication system should be the procedural fairness as stipulated in section 33 of the Constitution,¹⁶³ which bestows on everyone the right that is procedurally fair.¹⁶⁴ Procedural fairness entails good administration that is sensitive in its application. Procedural fairness encompasses two components, the first being *audi alteram partem* and the second being *nemo iudex in sua causa*.¹⁶⁵ *Audi alteram partem* means people should have an opportunity to partake in the decision making that affects them, and they are therefore afforded an opportunity to sway the outcomes of the process.¹⁶⁶ This principle is also made effective through the enactment of the Promotion of Administrative Justice Act (PAJA),¹⁶⁷ which guarantees every affected person by a decision the right to administrative action that is lawful, reasonable and procedurally fair, as well the right to be

¹⁶⁰ S 39(1)(b) of the Constitution.

¹⁶¹ S 39(1)(c) of the Constitution.

¹⁶² Nyenti *Developing an Appropriate Adjudicative and Institutional Framework for Effective Social Security Provisioning in South Africa* 303.

¹⁶³ S 33 of the Constitution.

¹⁶⁴ S 33(1) of the Constitution.

¹⁶⁵ Hoexter *Administrative Law in South Africa* 2ed (2013) 362.

¹⁶⁶ Hoexter *Administrative Law in South Africa* 363.

¹⁶⁷ 3 of 2000.

given written reasons.¹⁶⁸ The *nemo iudex in sua causa* is better described as a common-law principle against bias and requires decision-makers to be impartial in making decisions.¹⁶⁹ This principle is made effective in terms of section 6 of PAJA,¹⁷⁰ which makes provision for a review of administrative action.¹⁷¹

8 CONCLUSION

The call to reform the current South African social security system so as to allow for the establishment of an independent adjudication system has long been advocated for in our scholarship. This call has not yet been realised in our jurisprudence, nor has the State committed or pondered on the possibility or feasibility of the proposed adjudication system. The lack of such an adjudication system has been demonstrated to occasion its own shortfalls, particularly to the impoverished and marginalised beneficiaries of social security benefits. This compromises important constitutional rights in a country that embraces the Constitution as the supreme law of the land and bestows equal rights on everyone. The rapid increase in the number of fatalities and infections on account of Covid-19 exposed the deficiencies and inadequacies. This necessitated the State to put in place and implement measures to curb the spread of the virus and implement lockdown regulations which were said to be an ideal solution to the Covid-19 crises. Due to South Africa's state of affairs where many people live below the poverty line and have a high unemployment rate required the State to provide social relief measures to reduce the hardships which were caused by the lockdown regulations.

As noted, the success of these social relief measures was halted by the State's maladministration at all levels of government. This had an immense impact on the livelihoods of the supposed beneficiaries of the social relief interventions as they were delayed, insufficient and some beneficiaries have still not received their benefits. Accessibility and knowledge of the existing adjudication system remains a challenge in the social security arena. In a worst-case scenario, those who finally make use of these adjudication processes lose faith and give up as they have been proved to be laborious, inefficient and ineffective and have failed beneficiaries, since many, if not all beneficiaries are either low-income earners or do not have the necessary means to afford legal representatives to seek redress in courts of laws.

With all this debacle at play especially in the prevalent circumstances of the pandemic and the maladministration of social relief measures, the consequences of such, negatively affects both the right of access to courts and the right to social security. This has been evident through a number of challenges presented by the lack of a specialised system of social security as some of the challenges between beneficiaries and officials of the concerned institutions could have been fairly resolved by an independent and specialised social security tribunal or court system. Therefore, the call

¹⁶⁸ S 3 of PAJA.

¹⁶⁹ Hoexter Administrative Law in South Africa 362.

¹⁷⁰ S 6 of PAJA.

¹⁷¹ Hoexter Administrative Law in South Africa 362.

for a social security adjudication system is more necessary considering the persistent shortcomings of the internal dispute resolution processes which are provided by social security statutes. The establishment of a social security adjudication system is more of a dire need during the past prevalent circumstances of the pandemic, it would thus be an ideal solution to have a social security adjudication system in place which will uphold the principle of procedural fairness at all times.