REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 071891/2023

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

23 January 2025

DATE SIGNATURE

In the matter between:

INSTITUTE FOR ECONOMIC JUSTICE	First Applicant
#PAYTHEGRANTS	Second Applicant
and	
MINISTER OF SOCIAL DEVELOPMENT	First Respondent
SOUTH AFRICAN SOCIAL SECURITY AGENCY	Second Respondent
MINISTER OF FINANCE	Third Respondent

Summary: *Constitutional Right to Social Assistance – Access to Social Security– Right to Dignity – Right to Equality - Constitutional Validity of Regulations - Social Relief of Distress (SRD) Grant – Exclusionary Regulations – Definition of Income and Financial Support – Grant Value and Inflation – National Treasury Oversight – Limitation of Rights*

JUDGMENT

TWALA, J

Introduction

[1] The advent of the covid-19 pandemic led to alarmingly high unemployment levels in the Republic, with nearly 30 percent of the population being unemployed and unable to support themselves and their dependants. In response, the government introduced the Social Relief of Distress grant in May 2020 to assist individuals aged 18-59 with insufficient means to support themselves and their dependants. As hunger and poverty continue to persist in the country, the grant has been extended with various amendment of regulations, prompting the current application.

[2] The first applicant is the Institute for Economic Justice ("IEJ"), a non-profit and independent economic policy think tank organisation advancing and promoting economic justice to improve the living conditions of the economically excluded.

[3] The second applicant is #Paythegrants ("#PTG"), a non-profit organisation that organises working class communities for the protection and realisation of their right to social security in the Republic.

[4] The first respondent is the Minister of Social Development ("the Minister"), the Cabinet and National Executive member in charge of the department of social development and specifically responsible for the management and

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oversight of social security including the provision of social assistance in terms of the Social Assistance Act ("the SAA") [1]and the Regulations relating thereto.

[5] The second respondent is the South African Social Security Agency ("SASSA"), a juristic entity established in terms of section 2 of the South African Social Security Agency Act[2] whose objective is to ensure the efficient and effective management, administration and payment of social assistance to the beneficiaries.

[6] The third respondent is the Minister of Finance, the Cabinet and Executive member in charge of the department of National Treasury which advises on fiscal policy and public finances, financial relations and expenditure planning and priorities. It further manages the annual budget process and provides public finance management support and manages government's assets and liabilities. The Minister of Finance intervened and joined as a party with substantial interest in the determination of the issues in this case.

[7] In this judgment I propose to refer to the IEJ and #PTG as the applicants and to the Ministers and SASSA as the respondents. However, where necessary, I will refer to each of the parties by name or by its number in these proceedings. Further, reference to the National Treasury will include reference to the Minister of Finance.

[8] The applicants initiated these proceedings in both their own capacity and in the public interest seeking the following orders against the respondents:

8.1 It is declared that the Regulation 3(2) of the Regulations Relating to Covid-19 Social Relief of Distress (GN3210 IN GG46271 of 22 April 2022) introduced on 29 May 2023 ("the Regulations") is unconstitutional

[1] 13 of 2004.
[2] 9 of 2004.

and invalid to the extent that it provides for Social Relief of Distress ("SRD") grant applications to be lodged on an electronic platform only.

8.2 To remedy the defect in Regulation 3(2), the words "or at the offices of the Agency" shall be read in after the words "on the electronic platform".

8.3 It is declared that the "income" in Regulation 1 means money received on a regular basis from formal or informal employment, business activities or investments.

8.4 It is declared that the words "financial support" in Regulation 1 means money received on a regular basis which benefits the recipient, that does not constitute income, and which the recipient has a legal right to receive.

8.5 In the alternative to paragraphs 3 and 4:

8.5.1 Regulation 1 is declared unconstitutional and invalid to the extent that the words "income" and "financial support" mean any payment received by an SRD grant applicant, regardless of its source, frequency, or basis.

8.5.2 To remedy the defect:

8.5.2.1 a definition of "income" shall be inserted in Regulation 1 which defines "income" as money received on a regular basis from formal or informal employment, business activities or investments; and

8.5.2.2 a definition of "financial assistance" shall be inserted in Regulation 1 which defines "financial support" as money received on a regular basis which benefits the recipient, that does not constitute income, and which the recipient has a legal right to receive.

8.6 It is declared that the following questions included in the online application questionnaire for the SRD grant are unconstitutional and invalid:

8.6.1 "How do you usually obtain your basic necessities on a monthly basis or where do you get money to support yourself if there is no R350 grant?"

8.6.2 "How much money did you receive in the last month, including gifts, assistance from anyone, donations, dividends, earnings from formal or informal employment, but excluding the R350 grant?"

8.7 Regulation 2(3)(c)(i) is declared unconstitutional and invalid to the extent that it makes provision for "checks against databases that may indicate income or alternative financial assistance".

8.8 Regulation 2(3)(c)(ii) is declared unconstitutional and invalid to the extent that it directs that SRD grant applicants' applications are assessed according to a proxy means test consisting of verification of insufficient means with banks.

8.9 In the alternative to paragraph 8.8, the applicants seek orders:

8.9.1 declaring the conduct of the South African Social Security Agency ("SASSA") in applying bank verification to SRD grant applications unconstitutional and invalid to the extent that it:

8.9.1.1 is unable to identify payments that constitute neither "income" nor "financial assistance";

8.9.1.2 erroneously registers income where no funds have been received by the applicant;

8.9.1.3 double-counts intra-household payments; and/or

8.9.1.4 fails to take into account fluctuations in an applicant's income.

8.9.2 directing the DSD and SASSA, within six months of this Court's order, to file a report with this Court, confirmed on affidavit, on what steps they have taken and what steps they intend or are able to take in order to remedy these deficiencies;

8.9.3 allowing the applicants, within 15 days of delivery of this report, to file an affidavit in response to the report; and

8.9.4 until this Court is satisfied that the above-mentioned deficiencies have been remedied, directing DSD and SASSA to disregard the outcome of bank verification when assessing SRD grant applications.

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8.10 Regulation 2(3) is declared unconstitutional and invalid to the extent that it does not stipulate how a conflict between the various methods of validating "Insufficient means" listed in Regulations 2(3)(a), 2(3)(b) and 2(3)(c) must be resolved.

8.11 Regulation 6(c) is declared unconstitutional and invalid to the extent that it precludes unsuccessful applicants for the SRD grant from relying on new information or evidence in an appeal.

8.12 To remedy the defect in Regulation 6(c), the word "not" after the word "may" is deleted from Regulation 6(c).

8.13 Regulation 5(3)(a) of the Regulations is unconstitutional and invalid to the extent that it makes payments to beneficiaries of the SRD grant subject to available funds and permits SASSA to withhold payment of the SRD grant to SRD grant beneficiaries if available funds are depleted.

8.14 It is declared that SASSA's failure to pay successful applicants for the SRD grant, timeously or at all, is unconstitutional and unlawful.

8.15 It is directed that the SASSA must investigate the cause of widespread delays in payments to successful SRD grant applicants and devise and implement a plan to address those delays.

8.16 SASSA is directed to:

8.16.1 deliver the plan referred to in paragraph 8.15 to the parties and this Court within two months of the date of this order; and

8.16.2 implement the plan without delay

8.17 The applicants are entitled to re-enrol the matter, on duly supplemented papers, to seek further relief in relation to the SASSA's implementation of paragraphs 8.15 or 8.16 above.

8.18 Regulation 2(5) is declared unconstitutional and invalid to the extent that it sets the income threshold for insufficient means at R624 per person per month.

8.19 Regulation 5(1) is declared unconstitutional and invalid to the extent that it sets the monthly amount of the SRD grant at R370 per person.

8.20 It is declared that sections 27(1)(c) and (2) of the Constitution requires government to devise and implement a plan to redress the retrogression in the value of the SRD grant and income threshold, and progressively increase the value of the SRD grant in Regulation 5(1) and the value of the income threshold prescribed in Regulation 2(5).

8.21 In devising the plan referred to in paragraph 8.20, the Minister of Social Development, in consultation with the Minister of Finance, must:

8.21.1 in setting the income threshold to qualify for the SRD grant, give due consideration to:

8.21.1.1 the right to social assistance in section 27(1)(c) of the Constitution for people unable to support themselves, and the need to provide the SRD grant to all persons unable to support themselves;

8.21.1.2 increases in inflation and the cost of living;

8.21.1.3 objective income measures, including the NPLs published from time to time by Statistics South Africa; and

8.21.1.4 the need to ensure that no-one living in poverty is excluded from accessing the grant.

8.21.2 in setting the value of the SRD grant, giving due consideration to:

8.21.2.1 the right to social assistance in section 27(1)(c) of the Constitution for people unable to support themselves;

8.21.2.2 the right to food in section 27(1)(b) of the Constitution and the impact of the SRD grant in addressing hunger;

8.21.2.3 the need to remedy the retrogression in the value of the grant since May 2020;

8.21.2.4 the real terms value of the grant, in the light of inflation and cost of living; and

8.21.2.5 the value of the grant in relation to objective income poverty measures, including the NPLs published from time to time by Statistics South Africa.

8.22 The Minister of Social Development is directed to:

8.22.1 deliver the plan referred to in paragraph 8.20 to the parties and this Court within two months of the date of this order; and

8.22.2 implement the plan without delay.

8.23 The applicants are entitled to re-enrol the matter, on duly supplemented papers, to seek further relief in relation to the Minister of Social Development's implementation of paragraphs 8.21 or 8.22 above.

8.24 Any of the respondents that oppose the application are directed to pay the applicants' costs.

8.25 Further and/or alternative relief.

[9] The application is opposed by the respondents who have filed substantial answering and supplementary affidavits.

Preliminaries

[10] The third respondent was initially not part in these proceedings until it brought an application to intervene as an interested party which application was granted with the consent of the parties on 14 August 2024. Further, there were delays in the filing of the answering affidavits by the respondents who sought condonation for the late filing in their papers which was not opposed by the applicants. Likewise, the applicants were delayed in filing the replying affidavit and sought condonation for the late filing which was not opposed by the respondents. Furthermore, the applicants and the third respondent agreed to and filed supplementary affidavits after the applicants amended their notice of motion which amendment was not opposed.

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[11] However, the granting of condonation is solely in the discretion of the Court after the party who sought condonation has demonstrated, by furnishing a reasonable explanation covering the whole period of the delay, that it is in the interest of justice that its failure to comply with the time frames be condoned. It is also trite that the filing of further affidavits can only be done with the permission of the Court.

[12] In *Van Wyk v Unitas Hospital and Another*[3] the Constitutional Court stated the following:

> "This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[13] The Constitutional Court continued and stated that:

> "An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And what is more, the explanation given must be reasonable".[4]

[14] It is my respectful view that the explanation proffered by the parties for the late filing of the affidavits and the filing of supplementary affidavits, being the nature and complexity of the case which necessitated consultation with a number of people in the respective departments and the applicant in gathering more information and the promulgation of the amendment to the regulations to the Social Assistance Act, is reasonable and it would serve the interests of justice to condone the non-compliance with the time frames and the rules of court.

[3] [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.
[4] Id at para 22.

[15] It is noteworthy that the respondents conceded in their heads of argument and their submissions before the Court that the appeal process as provided for by the regulations does not permit for the filing of further evidence except for what appears on the application form. Therefore, the appeal procedure is too narrow, and it would need to be reconsidered to the extent that it be a broader and wider appeal process which would allow for the filing of further evidence and constitute a complete rehearing of and fresh determination on the merits.

[16] Furthermore, it happened on the second day of the hearing that the first and second respondents' counsel handed up a document which the applicants were not afforded an opportunity to consider as it was given to them minutes before the Court started. In their reply, the applicants objected to the admission and use of this document. They contended that there was no application and or an affidavit accompanying the document to explain why it was necessary to be filed at this late stage of the proceedings.

[17] I am unable to disagree with the applicants that it is impermissible for the first and second respondents to file the document without observing the normal rules of the Court which provide for the party who wishes to file further documents to make an application to Court. No such application was launched by the respondents. However, counsel for the applicants engaged the document in his submission and I will elaborate on that in the body of this judgment.

[18] In *Khunou & Others v M Fihrer & Son (Pty) Ltd and Others*[5] the Court stated the following:

> "The proper function of a Court is to try disputes between litigants who have real grievances and to see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and

[5] 1982 (3) SA 353 (W) at 355E-H.

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> indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner."

[19] In *Trans-African Insurance Co Ltd v Maluleka*[6] the court stated the following:

> "No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand, technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

[20] Although it is impermissible for parties to ambush each other in court proceedings, it is my considered view that the applicants did not suffer any prejudiced by the filing of this document. It is a document which dealt with the recent statistics of the payment or failure to pay by the first and second respondents of the SRD grant to the successful beneficiaries who are entitled to receive the SRD grant. The document conveyed the same message as the others which were annexed to the founding papers except that the numbers changed in time. I hold the view therefore that, in the circumstances of this case, its magnitude and complexity and the impact it will have on the public, it is in the interest of justice to consider all the information that is placed before this Court.

Factual Background

[21] The genesis of this case arose when in May 2020 the government promulgated the Social Relief of Distress ("SRD") grant as a temporary mechanism in terms

[6] 1956 (2) SA 273 (A) at 278F-G. Quoted with approval in *Life Healthcare Group (Pty) Ltd v Mdladla and Another* [2014] ZAGPJHC 20.

of the Disaster Management Act ("DMA")[7], which was at the time intended to be of temporary duration to alleviate hunger to people with insufficient means and who could not support themselves and their dependants following the devastation caused by the Covid–19 pandemic. The SRD grant targeted unemployed working-age adults and was not means-tested at the time. The value of the grant was an amount of R350.00 per month. The SRD grant has been extended for some time until the end of the State of Disaster in 2022.

[22] In terms of the directives which were issued by the Minister introducing the SRD grant in May 2020, the value of the grant was R350 and was meant for individuals who were South African citizens, permanent residents or refugees currently residing in the Republic who were above the age of 18 and were unemployed. The grant was only available to people who did not receive any income or other social grant. The applicants for the SRD grant were to lodge their applications electronically over and above any other available means of lodging such applications.

[23] Furthermore, the directives provided for the verification of the applicants' income and social security benefits with input from the banking institutions and having regard to the various government databases, including the Home Affairs; UIF; NSFAS; and SARS. In June 2020 a substantive change to the directives was effected by a court order which declared the exclusion of asylum seekers and special permit holders from benefiting from the grant unconstitutional and invalid.

[24] In August 2021, the Minister issued directives which introduced an amendment to the grant eligibility criteria aimed at including unemployed caregivers receiving the childcare grant and introduced the qualifying threshold for insufficient means of R595 which was only applied in the appeals process.

[7] 57 of 2002.

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Further, the directive introduced the electronic appeal process which barred the appellants/applicants from submitting any new or additional evidence.

[25] On 22 April 2022, the Minister promulgated regulations under the SAA which placed the SRD grant under the SAA, and it continued unchanged from what it was under the DMA. In these April 2022 regulations, an applicant would qualify for the grant if he or she is of insufficient means and does not unreasonably refuse to accept employment or educational opportunities. It also decreased the qualifying insufficient means threshold from R595 to R350 per person per month and dispensed with the requirement of unemployment. The applicants for the SRD grant were now only required to lodge their applications electronically.

[26] Further, for the purposes of validating insufficient means of the applicants, the bank verification was regarded as definite in the event that there was a conflict between the bank verification and database verification. The recipient of the SRD grant would be paid for a period not exceeding three months at a time without him or her confirming that he or she still meets the grant's eligibility. All the payments of the SRD grant were subject to the availability of funds and that SASSA was to limit disbursement when the funds were depleted.

[27] It is undisputed that, as a result of the stringent criteria for eligibility for the SRD grant, the applications between March 2022 and April 2022 dropped from over 15.8 million to just over 8.1 million and the approvals from 10.9 million to 5.6 million. However, in June 2022 the Black Sash, a civil society organisation brought an application challenging the reduction of the income threshold from R595 to R350 as well as other exclusionary provisions in the April 2022 regulations. This resulted in a settlement agreement reached between the parties which was made an order of court that the Minister amend the regulations and increase the insufficient means or qualifying threshold to the current sum of R624.00 which was in line with the food poverty line at the time.

[28] The SRD grant regulations have been amended on three occasions since May 2020 which amendments introduced the new qualifying criteria for the applicants and the latest amendment was on the 25 March 2024 when the SRD grant received an increase of R20.00 to increase its value to R370. However, since August 2022 there has been no increase in the value of the income threshold of R624 even though the food poverty line had been raised to R663. It is the March 2024 amendment to the SRD grant regulations that necessitated the amendment of the applicants' notice of motion and the filing of the supplementary affidavits.

[29] It is not in dispute that when the SRD grant was introduced in May 2020, it was restricted to unemployed adults and later it was extended to adults with little or no income. More than 16 million poor South Africans benefited from the SRD grant in the initial stages. With the promulgation of the regulations to the SRD grant and the subsequent amendments to these regulations, the number of applicants that were approved to receive the grant was drastically reduced. While in March 2023, 14 million people applied for the grant, only 8.3 million of those applications were approved. This has resulted in the National Treasury reducing its budget for the grant from R44 billion to R36 billion in the 2023/2024 budget.

[30] Furthermore, it is undisputed that the government acted swiftly in establishing and implementing the SRD grant in May 2020 which has been extended beyond the end of the state of disaster to alleviate the problems of hunger, reduce poverty and stimulate the economy. It is not in dispute that hunger, poverty and unemployment are the most profound crises confronting the Republic.

The Parties Submissions

[31] The applicants say that they are challenging the lawfulness and constitutionality of the steps the government has taken and or failed to take, to implement its own commitment to meeting its constitutional obligation to progressively realise access to social assistance by providing the SRD grant to working-age adults

who need it. This is so because certain aspects of the SRD grant regulations and the procedures for applying for the SRD grant have as their effect, if not their purpose, the irrational, arbitrary and unfair denial of social assistance to persons who are legally entitled to receive it.

[32] Section 27 of the Constitution, so the argument continued, creates a justiciable right to social security as it provides that everyone has the right to have access to sufficient food and water and social security if they are unable to support themselves and their dependants. Further, section 7 of the Constitution provides that the State bears an over-arching obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.

[33] The applicants say that there is a positive obligation which is created by the Constitution on the State which is the right of access to social security for everyone who is unable to support themselves and their dependents; and on the other hand, it imposes a negative obligation on the State to desist from preventing or hindering of access to social security or social assistance. Further, the right to social security, as entrenched in the Constitution, has as its purpose, as part of the of socio-economic rights, to ensure that the State continues to take reasonable legislative and other measures to progressively achieve the realisation of the rights to the necessities of life.

[34] Although the SRD grant is means-tested like all other grants, so it was contended, the people who are entitled to receive it are however treated differently as they have to apply strictly on-line to access it. The online only application process for the SRD grant applications is restrictive and imposes an insuperable barrier for many would-be applicants who lack access to digital technology or lack digital literacy and who experience poor or limited internet connectivity. The online application process ignores the fact that the SRD grant is meant for poor people, some of whom do not have smart cell phones and access to the internet.

[35] The applicants submitted further that the respondents are differentiating the SRD grant from the other grants as some kind of *sui generis* grant on the basis that they classify it as a temporary measure both in the relief it provides and its status as a social grant. However, the SRD grant is listed in the SAA as the same as the other social grants which are means-tested but whose applicants are not required to apply online-only, and it allows an in-person alternative where applicants could be assisted by the SASSA staff. These barriers, so it was argued, disproportionately affect poor and rural South Africans who ought to apply for and qualify to receive the SRD grant.

[36] Furthermore, the screening questions on the on-line application form for ascertaining an SRD grant applicant's financial means seeks irrelevant information and are ultra vires the SRD grant regulations. These questions require the SRD grant applicants to state what they were living on or how they usually obtain their basic necessities on a monthly basis or where they get money to support themselves if they were not in receipt of the R350, now R370, SRD grant. Furthermore, SRD grant applicants must state how much money they have received in the previous month, including gifts, assistance from anyone, donations, dividends, earnings from formal or informal employment, but excluding the R370 SRD grant.

[37] Following the correct interpretative process, these two questions as they appear on the online application process, so it was contended, would elicit information about money which the applicant received but which is neither income nor financial support and is therefore irrelevant to an applicant's eligibility for the SRD grant. It was contended further that these questions elicit irrelevant answers which do not assist SASSA in its determination of whether the applicant meets the income qualifying threshold.

[38] The first and second respondents, so it was contended, have buckled under pressure from National Treasury and have put in place procedural barriers that

arbitrarily and unreasonably exclude people who are eligible to receive the SRD grant from receiving it. This is so because the Department of Social Development ("DSD") has openly admitted that these barriers are designed to reduce the number of SRD grant recipients in order to remain within the budget allocated by National Treasury.

[39] It was contended by the applicants that the use of the automated bank verification as a way of verifying an applicant's means is unreasonable since it only shows how much money the grant applicant has received that month without verifying the reason why the money was paid into the account of the applicant. The government databases verification is fraught with errors and inaccuracies since it is not regularly updated. Further, so it was argued, there is no reason to regard the bank verification as conclusive if there is a contradiction between it and the databases verification as the applicant may have received money for purposes other than supporting himself or herself.

[40] The government databases such as the Home Affairs; SARS; NSFAS; and UIF are unreliable and cause a lot of inclusion and exclusion errors. In its report of efficiency vs implementation of the 4 October 2021, the Southern African Labour and Development Research Unit ("SALDRU") stated that the current SRD implementation highlights result of lower feasibility and large exclusion errors. Furthermore, that discussions with SRD officials reveal that the unemployment data used is over 1-2 years old and that together with high labour market churn, this suggests a 35% false rejection rate. Thus, in the current SRD it suggests that 4.5 million of the 13 million truly eligible claimants are falsely rejected and potentially accounting for almost all current rejections.[8]

[41] The applicants submitted that it is an unreasonable expectation that the claimants or beneficiaries should always endeavour to update their details on the

[8] SALDRU and the National Treasury Health and Social Development Team *Report on Social Policy Options* (4 October 2021)

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government's databases. However, so it was argued, the respondents must come with a plan to resolve the issue of exclusions of such proportions. DSD and the SASSA have not shown what has been done to change the situation and has failed to take the Court into its confidence in this regard.

[42] The interpretation ascribed to income and financial support by the respondents in order to determine that a person qualifies to receive the SRD grant is incorrect since it includes all moneys received in the bank account of the applicant in that particular month. The interpretation includes any money received for any purpose. This, so the argument went, results in the assessment of eligibility including even once-off payments which are for a different purpose. The proper interpretation is to consider the purpose of the legislation and that it must be consistent with the Constitution. The interpretation that should be preferred is one that should best give effect to the rights in the Bill of Rights.

[43] The applicants submitted that it is perverse to classify payments that were made to a recipient as income and or financial support because they do not have sufficient means to support themselves. The correct interpretation is that income means money received on a regular basis from formal or informal employment. Financial support should be interpreted to include regular payments which benefit the recipient, that do not constitute income and which the recipient has a legal right to receive. The purposive interpretation of income and financial support should be referring to payments which afford a person the means to support themselves without the need to rely on the discretion or charity of others.

[44] Government has estimated that approximately 18.3 million people are within the eligible age group with income below the threshold. DSD and SASSA have been able to remain within budget by reducing the uptake of deserving and qualifying people by using the procedural barriers to access the SRD grant. DSD and SASSA have done so because the amended regulations provide that all payments of the SRD grant are limited to the amount appropriated for the 2023/2024

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financial year to the vote of Social Development. Once the funds as allocated by National Treasury are depleted, so it was contended, no payments would be made to successful and approved beneficiaries.

[45] Although the budget cap of the SRD grant has not yet been implemented, so the argument went, it threatens the right of beneficiaries to receiving the grant. The respondents do not anticipate an increase in the pool of people who will apply for the grant – hence the regulation providing for the SRD grant not to be paid when the funds appropriated by National Treasury have been depleted.

[46] Despite admitting that the number of people who would be eligible to receive the SRD grant may be as high as 18.3 million, National Treasury has reduced the budget for the SRD grant from R36 billion to R33.6 billion for the 2024/2025 financial year which is sufficient only to cover 8 million beneficiaries. This is the result of the use of administrative and procedural obstacles which serve the purpose of excluding people who are most vulnerable and in need of social assistance, and who would ordinarily be eligible, from receiving the grant.

[47] The applicants contended that National Treasury cannot appropriate to itself the right to speak on behalf of the whole of government. National Treasury has, in order to supress the number of beneficiaries, pressurised the DSD and SASSA to put in place procedural barriers that arbitrarily and unreasonably exclude persons who are eligible to receive the SRD grant from receiving it. The reduction of the number of eligible beneficiaries, results in National Treasury's continuation to provide inadequate funding for the SRD grant.

[47] The applicants say that the value of the SRD grant has declined from what it was when it was introduced in May 2020 since it has not been increased until March 2024 when an increase of R20 was effected to make the value of the grant R370 per month. The increase of R20, so it was contended, does not come close to keeping up with inflation and this means that the real value of the grant has

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declined substantially from what it was in May 2020. Further, the income qualifying threshold of R624 has not been increased like other social grants meaning an applicant for the SRD grant must be poorer than an applicant who received the grant in 2022. This means that the grant has substantially retrogressed in value.

[48] It was argued by the applicants that, although National Treasury has emphatically stated that an increase in the value of the SRD grant was unaffordable, surprisingly it afforded an increase of R20 with effect from April 2024. Such an increase in the value of the SRD grant does not cure the government's breach of its obligation to take steps to progressively realise access to social assistance for it has not corrected the substantial erosion of the grant's real value as it remains well below the 2023 National Food Poverty Line ("NFPL") and in particular, it equates to less than half the 2023 NFPL of R760.

[49] National Treasury, so it was submitted, must weigh its priorities to make funds available to DSD in terms of budgeting. There is substantial room when dealing with underspending coupled with budget cuts. The budget for the SRD grant in 2023/2024 was R36 billion but due to underspending the budget for 2024/2025 is R33.6 billion. The R36 billion was informed by several factors including projected growth in uptake and available resources. However, the actual spending for the SRD grant in 2022/2023 was R30.3 billion and the increase to R36 billion for 2023/2024 was considerable.

[50] The applicants say that besides the cap and limitation placed by the regulations not to pay the SRD grant once the funds, as appropriated by the National Treasury to DSD for the SRD grant, are depleted, there are also systemic delays and failures to timeously pay the SRD grant to successful and approved applicants. It is apparent, so it was contended, that SASSA does not have a plan to address the non-payment since thousands of approved beneficiaries are not

paid their SRD grant each month. This has devastating consequences on SRD grant applicants who reasonably depend on receiving payment of the grant.

[51] It was contended that in its report to Parliament in September 2023, SASSA's explanation as to why people have not been paid the SRD grant was because they had not furnished SASSA with their new banking details which is not plausible. SASSA cannot proffer a cogent explanation as to how many people have not submitted their new bank accounts or how many have changed their payment details and how many accounts are pending bank verification. It is not sufficient for SASSA to say certain payments were returned by the bank and that cash send clients' payments also bounced back without furnishing the exact number of such payments and what it has done to resolve the problem.

[52] Furthermore, the applicants submitted that the *Plascon-Evans*[9] rule is applicable in this case in that the respondents have completely failed to address the issues raised by the confirmatory affidavits filed by the many SRD grant beneficiaries with the applicants' founding affidavit. The respondents were dead silent in their answering affidavits on the confirmatory affidavits detailing the exclusion of people due to errors in the government databases and the non-payment of the SRD grant to approved beneficiaries. Further, people have been excluded by the online application due to lack of access to smartphones and for receiving money in their bank accounts other than the SRD grant.

[53] Even if National Treasury says that an increase in the SRD grant is unaffordable, so it was contended, it cannot justify the deployment of exclusionary, irrational and unreasonable procedural barriers to accessing the SRD grant. Further, government must devise and implement a plan to address the retrogression in value of the SRD grant and the income qualifying threshold rather than say that the SRD grant is already unaffordable. National Treasury cannot usurp the power

[9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

of the Minister to determine the value of the SRD grant as provided for in the SAA.

[54] It is submitted further by the applicants that National Treasury has no role to speak on behalf of the whole government and on substantive issues. The vital role of National Treasury is resource and revenue generation and application. Although the regulations require the concurrence of National Treasury, such concurrence should not be unreasonably withheld. The role of the Minister is to promulgate the regulations, and National Treasury is to provide a budget to enable the Minister and his department to perform its functions.

[55] The applicants say that the deployment of exclusionary, irrational and unreasonable procedural barriers; the differentiation of the SRD grant from other grants; the retrogressive and irrational value of the SRD grant and income threshold; and the widespread non-payment of thousands of successful applicants by SASSA, limit the rights to social assistance for the applicants of the grant. The onus is on the Minister to establish that these limitations of fundamental rights are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[56] National Treasury says that the SRD grant is a temporary measure as explicit in the regulations in that it provides for relief to a person in need of temporary assistance. It is a form of temporary assistance which is paid to persons with insufficient means, subject to the various rules and qualifications set out in the SRD regulations. The medium to long-term plan of National Treasury, having realised the extreme levels of poverty faced by far too many South Africans, is to facilitate and promote economic growth which creates jobs. Government policy, as reflected in the SAA and the SRD grant regulations, is not to treat the SRD grant and the other grants in the same way.

[57] There are a number of plans which are aimed at reducing poverty and in time eradicating it. These plans are detailed and complex. The most important factor which features in the problem of the inability to support oneself is unemployment. To address this, a focus is needed on factors which include economic growth, skills building, prioritisation of specific groups of people in the provision of employment opportunities education, training and other, so says Treasury.

[58] National Treasury submitted that there are fiscal constraints since government can only spend money it extracts from the economy through taxes. Borrowing money does not solve the problem for it is nothing more than deferred taxation. Something has to fund social assistance and in particular the SRD grant. It is the taxpayer, so it was argued, who has to shoulder the burden, and the tax base is relatively small. The demands on the State are virtually every facet of society including the obligations flowing from the socio-economic rights in the Constitution. However, the State's obligations go well beyond socio-economic rights.

[59] At the moment, says National Treasury, the Republic has a high level of unemployed people compared to the number of people who are economically active and contributing to the tax base - thus limited resources are available to support the many programmes which are currently being undertaken across government. The fiscal position of the country is precarious as expenditure exceeds revenue by R321.6 billion in 2024/2025 and the gross borrowing requirement is R559.6 billion rising to R623 billion in 2025/2026. Therefore, government cannot expand social grants further due to drops in anticipated revenue and increasing debt service costs.

[60] Furthermore, to expand social grants and the SRD grant would require substantial expenditure, and the money has to come from somewhere and it would have to come at the expense of some other expenditure. Increasing taxes

is not a solution because after many years of increasing taxes to arrest the growing debt, government has instead avoided tax increases since 2020 to limit the negative impact on businesses, households and the economy. Extending the SRD grant any further will place the entire grant system in jeopardy.

[61] The government's prioritisation of other grants, so it was submitted, must be understood in the context that the State spends R250 billion per year on social grants which is 12.3% of government's main budget expenditure. The fiscal constraints facing government require the expenditure to be reduced by R200 billion between now and 2026/2027 whilst revenue is projected to drop by R66 billion in 2024/2025 and 89.5 billion in 2025/2026 and the debt servicing costs will be R425 billion by that time. At the same time the pool of social grant recipients is expanding by 200 000 recipients per year leaving aside the massive increase in grant recipients as a result of the SRD grant.

[62] National Treasury submitted further that, in any reasonable system in which public money is used to provide benefits to members of the population, procedural safeguards are applied to ensure that only those to whom a particular benefit is due may access it. It is so to prevent the abuse and the more sophisticated the economy, the more sophisticated the safeguards. The Republic has limited and finite resources available for public spending. Hence the safeguards are particularly necessary and important for the SRD grant, which is on a large scale, in order to prevent fraud; waste; erroneous payments; and payments to persons falling outside of a particular beneficiary category.

[63] The introduction of the bank means testing was, so it was contended, an invaluable reform as no other method could as reliably provide proof of individual income and financial support. Although it is not applicable to other grants, it is a reliable means testing which weeds out every illegitimate claim since the SRD grant is on a large scale. By using the bank verification test, those who are approved will clearly satisfy the description of being the neediest.

000-24

Further, to mitigate the erroneous exclusions, an appeal process is available and the regulation relating thereto may be amended to make the process wider to accommodate the furnishing of further information on appeal.

[64] It is submitted further by the National Treasury that the SRD grant is large and as such there is an obvious need to put in place procedural safeguards to minimise the misuse of public funds. Hence the online application and the bank means testing, although regarded by some as a blunt instrument, are necessary and achieve the purpose of excluding those applicants who are not entitled to receive the SRD grant. If the means test by a bank verification process were not available, such will result in SRD grants paid on a universal basis and would have the result that those who do not need social benefits would receive them.

[65] The applicants avoided approaching the Court by way of a review which would have afforded the respondents an opportunity to produce a record and reasons for the decision to pass the regulations under attack. National Treasury does not usurp the powers of the Minister to pass the regulations of the social grant but has, by law, a veto power on the regulations of the social grants. National Treasury is better placed to put up evidence of financial constraints and other matters concerning the budget and allocation of resources.

[66] The intention of parliament, so it was argued, is embodied in the SAA and the Regulations and no more or less. Public statements by politicians, even if they are members of parliament including the Minister or the President, are just statements and cannot supplant the legislative function of parliament. It is only parliament which is empowered to make the law in the Republic. Should parliament's discretion be fettered in advance of its exercise, it would infringe on fundamental constitutional principles.

[67] Like other socio-economic rights, the State is obliged to take reasonable legislative and other measures within its available resources to achieve the

progressive realisation of these rights. However, there are various components to the right, one of which is effectively a condition precedent in that access to social assistance arises only if a person is unable to support themselves and their dependants. This, says National Treasury, necessitates an inquiry into whether the applicant for the grant is unable to support themselves and their dependants.

[68] It was contended further that all the social grants are different and are subject to different requirements. The SRD grant is a temporary measure and there are legislative exclusions which are meant to benefit the majority. It cannot be immediately realisable, instead it is subject to progressive realisation and there has been progressive realisation of the SRD grant even though it is not enough, so says the National Treasury. The resources available to fund the SRD grant have always been limited compelling the setting of the grant at R350 per month in 2020.

[69] The SRD grant has been progressively realised by the very fact that it was introduced for the first time in 2020 with the eligibility criteria being R0 at the time. The eligibility criteria of the SRD grant was increased to R350 and further to R595 and then to R624 thereby substantially increasing the pool of the beneficiaries. Recently, in 2024 the value of the grant amount was increased by R20 to the sum of the R370. A factor that distinguishes it from other grants is that it is intended to be of a temporary nature and designed to deal with disasters.

[70] It was submitted on behalf of the National Treasury that the State does not have unlimited resources, and these resources are to be distributed to meet a vast range of competing demands. It does not avail the applicants to have a cavalier attitude when dealing with budgetary constraints. The state has a budget for the SRD grant based on certain considerations which include the amount spent in the previous financial year. The tax base of the Republic has shrunk due to unemployment and increasing taxes would not improve the situation but will cause more distress on the taxpayer.

[71] National Treasury says the online application process is a measure which is designed to minimise fraud and to ensure that the eligibility criteria are met. It was never enacted for a different and improper or ulterior purpose other than to weed out all those applicants who do not qualify and are not entitled to receive the SRD grant. Although this measure may reduce the uptake, it is not unreasonable or irrational. It is unreasonable to expect the State to retrofit the SASSA offices to provide for a less efficient form of application process instead of implementing the more efficient online process.

[72] The National Treasury contended that the questions on the online process are intended to elicit disclosures of payments which are not income or financial support. These questions are legitimate and go to the core issue of insufficient means. They require the applicants to show how they obtain their basic necessities if they have not received the R350 and how much money they received in the previous month from any other source except from the SRD grant. These questions are not irrelevant for the purpose of the eligibility criteria of the SRD grant.

[73] If any applicant was impermissibly excluded, so it was argued, that would be addressed by the wide appeal process which the respondents are not opposing. The questions are therefore not unlawful and the abuse of power by officials cannot be the reason to declare the regulation constitutionally invalid. There is a presumption that administrative power conferred by an act of parliament will be exercised in a manner which is fair in all the circumstances.

[74] The interpretation ascribed by the respondents to the meaning of “income” and “financial support” accords with the regulations and is not unbusinesslike. The reliance on the dictionary definition of income is misconceived in that it does not include ad hoc payments or charity from others. The only correct approach to interpretation is firstly the words used in the statute, the context in which they

are used and the purpose of the statute. The approach to exclude loans and gifts in substantial amounts would lead to outcomes which are insensible and would increase the value of the grant by up to R60 billion per year.

[75] Regarding the absence of conflict resolution mechanisms to address conflicts between the information on the databases and the information provided through the bank verification system, the respondents contended that these conflicts could be resolved by the wide appeal process which could rehear the matter with the provision of further evidence. It cannot be said, so it was argued, that the regulation is therefore irrational and was enacted for an improper or ulterior purpose.

[76] The attack on the regulation that payments are subject to the availability of funds and are limited to the amount appropriated to the 2024/2025 financial year to the vote of social development for social relief of distress is unmeritorious and speculative. There has never been a time previously that the budget has been exceeded, and no person has been turned away because money has run out. However, so it was argued, if it happens that money runs out, the inevitable outcome would be eligible people not receiving their SRD grant, and that is not illogical, arbitrary and or irrational.

[77] The National Treasury submitted that it does not dispute that the value of the SRD grant and the qualifying threshold levels are worth less than when they were introduced and that they have not kept pace with inflation or the NFPL. Indeed, all grants have to be progressively increased in value to keep pace with inflation to avoid retrogression and a resulting risk of being in breach of the Constitution. However, the obligation to increase the SRD grant and all other grants is dependent on the availability of resources.

[78] Nevertheless, there has been progressive realisation of the SRD grant as it has been increased by R20 to R370 per month in the current financial year. But

because of budgetary constraints, the increase is not enough and does not accord with inflation and still places the SRD grant below the food poverty line. To increase it to be in line with inflation, it means money must come from somewhere and that is difficult since the tax base has shrunk due to unemployment in the country.

[79] The first and second respondents, making common cause with the National Treasury, contended that it is important not to lose sight of the purpose of the SRD grant. It is a temporary measure to relieve people who are of insufficient means to support themselves and their dependants. The database verification process is a useful tool in providing information about people who appear thereon which is proof that they have received funds from those institutions. The online process is quicker, simple and can be accessed by anyone using a smartphone which they could even borrow from friends or relatives or from their Chief if living in rural areas.

[80] The delays in payment of the SRD grant, so it was contended, was caused by glitches that were experienced with the system in the beginning but has since been resolved. Other problems are caused by the approved beneficiaries who do not update their details or bank accounts and cell phone numbers regularly. The delays in payment and non-payment of the SRD grant to the beneficiaries has been reduced drastically as it was more than a million previously and now is in the hundreds of thousands.

Legal Framework

[81] To put the matter into perspective, it is now opportune to restate the relevant provisions of the Constitution.

000-29

Section 7:

"**Rights.**—(1) This Bill of Rights is a cornerstone of the democracy in South Africa. It enshrines the right of all people in our country and affirms the democratic values of human dignity, equality and freedom

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

Section 9:

"**Equality.**—(1)Everyone is equal before the law and has the right to equal protection and benefit of the law

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more ground, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

…

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Section 27:

"**Health care, food, water and social security.**—(1) Everyone has the right to have access to —

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3)…"

Section 39:

"**Interpretation of Bill of Rights.**—(1) when interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law, or legislation, to the extent that they are consistent with the Bill."

[82] This case involves the administration of the SRD grant which falls within the purview of the second respondent and the Minister being the responsible head. It is therefore useful to restate the provisions of the Social Assistance Act and the Regulations which are relevant to the discussion that will follow.

Section 4:

"**Provision of social assistance.**—The Minister must, with the concurrence of the Minister of Finance, out of moneys appropriated by Parliament for that purpose, make available—

(a) a child support grant;

….

(h) social relief of distress"

Section 5:

"**Eligibility for social assistance. —** (1) A person is entitled to the appropriate social assistance if he or she—

(a) Is eligible in terms of section6, 7, 8, 9, 10, 11, 12, or 13;"

Section 13:

"**Social Relief of Distress.**—(1) A person is, subject to section 5, eligible for social relief of distress if the person qualifies as prescribed.

(2) Notwithstanding subsection (1) and sections 27, 41 and 55 of the Disaster Management Act, any person may qualify for social relief of distress if his or her household has been affected by a disaster.

(3) The Agency must, subject to subsections (1) and (2), disburse the social relief of distress as prescribed.

(4) Notwithstanding subsection (2), the Agency may in the event of a disaster and depending on the magnitude of the disaster and the availability of resources, determine as prescribed, the needs of the affected communities and disburse the social relief of distress."

[83] The Regulations to the SAA which are relevant to the discussion that will follow provide the following—

Regulation 1:

"**Definitions …**

'Insufficient means' means that a person is not in receipt of income or financial support;"

Regulation 2:

"**Persons eligible for Covid–19 Social Relief of Distress.—**(1) Subject to section 5, read with section 13 of the Act, a person in need of temporary assistance, may qualify for the social relief of distress called the Covid–19 Social Relief of Distress if he or she is a person with insufficient means.

…

(3) For the purposes of validating insufficient means, the Agency may use–

(a) a declaration from the applicant attesting to such; and

(b) a screening questionnaire; and

(c) a proxy means test consisting of–

(i) checks against databases that may indicate income or alternative financial assistance; and

(ii) verification of insufficient means with banks.

(4) …

(5) The income threshold for insufficient means, contemplated in this regulation, is R624 per person per month."

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Regulation 3:

"**Procedure for application for Covid Social Relief of Distress.—**(1) A person may apply for the Covid–19 Social Relief of Distress if the person complies with the criteria set out in regulation 2.

(2) An application for the Covid–19 Social Relief of Distress must be lodged on the electronic platform."

Regulation 5:

"**Amount and period of payment.—**(1)The monthly amount of the Covid–19 Social Relief of Distress is R370 per person and is payable for the months in the period 1 April 2024 to 31 March 2025

(2) …

(3) The payments in terms of these regulations –

(a) are limited to the amount appropriated for the 2024/2025 financial year to the vote of Social Development for social relief of distress; and

(b) may only be made in respect of applications, made during the period 1 April 2022 to 31 March 2025, and approved by the Agency."

Regulation 6:

"**Appeal against decision of Agency.—**Notwithstanding the regulations governing appeals as contemplated in section 14(3)(b)(iii) and section 18 of the Act, the appeal process for the Covid–19 Social Relief of Distress is as follows:

(a) If an applicant disagrees with the decision of the Agency in relation to an application for the Covid-19 Social Relief of Distress contemplated in regulation 3(1), the applicant or a person acting on his or her behalf may, within a period not exceeding 90 days of the date of the decision, lodge an appeal on the electronic platform;

(b) the Minister must appoint such number of persons as members of the Independent Tribunal as may be necessary to consider and decide on the appeals regarding the Covid-19 Social Relief of Distress;

(c) When lodging an appeal, the applicant or the person acting on his or her behalf may not submit any evidence or information which was not provided to the Agency at the time of the application;

(d) …"

Discussion

[84] Section 7 of the Constitution provides that the Bill of Rights is a cornerstone of democracy in the Republic and enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. The rights as enshrined in the Bill of Rights may be limited only if it is reasonable and justifiable when taking into account all relevant factors. Further, the State is enjoined by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.

[85] In section 9, the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms and to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. Furthermore, the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds unless it is established that the discrimination is fair.

[86] The applicants are challenging the lawfulness and constitutionality of the steps taken or not taken by government in implementing its own commitment to meeting its constitutional obligations imposed by section 27 of the Constitution to progressively realise access to social assistance by providing the SRD grant to working-age adults who are entitled to it. The applicants' stance is that the regulations and the procedure for applying for the SRD grant have as their effect, if not their purpose, the irrational, arbitrary, unreasonable, and unfair denial of social assistance to persons who are legally entitled to receive it.

[87] In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*[10] the Constitutional

[10] [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) ("*Khosa*") at paras 42 and 52-3.

000-34

Court, dealing with the issue of reasonableness of the legislation governing the SRD grant, stated the following:

> "Equality is also a foundational value of the Constitution and informs constitutional adjudication in the same way as life and dignity do. Equality in respect of access to socio-economic rights is implicit in the reference to 'everyone' being entitled to have access to such rights in section 27. Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.
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> ….
>
> The right of access to social security, including social assistance, for those unable to support themselves and their dependants in entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all it is to be a society in which human dignity, freedom and equality are foundational.
>
> 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. However, those classifications must satisfy the constitutional requirement of 'reasonableness' in section 27(2). In this case, the state has chosen to differentiate between citizens and non-citizens. That differentiation, if it is to pass constitutional muster, must not be arbitrary or irrational nor must it manifest a naked preference. There must be a rational connection between that differentiating law and the legitimate government purpose it is designed to achieve. A differentiating law or action which does not meet these standards will be in violation of section 9(1) and section 27(2) of the Constitution."

Temporary Measure of the SRD grant

[88] The SRD grant was initially launched to alleviate hunger for people who were unemployed due to the Covid-19 pandemic. It was promulgated under the Disaster Management Act. In 2022 the SRD grant was promulgated and fell within the parameters of the Social Assistance Act in terms of section 13. It is now available to provide temporary assistance to persons who may qualify for

the social relief of distress if such persons are between the ages of 18–59 and are of insufficient means and unable to support themselves and their dependants.

[89] The SRD grant has been extended on numerous occasions under the Disaster Management Act and has since been promulgated under the SAA to be in line with other social grants. I hold the view that SRD grant has the same legal status as the other social grants which are provided for by the SAA and is not a temporary measure as contended by the respondents. The SRD grant provides social assistance to persons who are of working-age and who are with insufficient means to support themselves and their families and therefore cannot be said to be temporary in a country wherein almost thirty percent (30 %) of the population is unemployed.

[90] Initially the SRD grant was promulgated under the Disaster Management Act to offer social assistance to people during the Covid-19 pandemic – hence it was named Covid-19 Social Relief of Distress. The purpose at the time was to assist people who were unemployed due to the pandemic. However, it has now been promulgated under the SAA to assist any person between the ages of 18–59 who is with insufficient means to support himself or his dependents and who meets the criteria as set out in the SAA.

[91] The SRD grant is permanent in that it is promulgated under the SAA and is available to persons who are eligible and meet the criteria of people who are of insufficient means and who are unable to support themselves and their dependants. I am of the respectful view therefore that, although the SRD grant offers temporary relief to persons who qualify in terms of the set criteria, it has the same legal status as the other social grants promulgated under the SAA. I hold the view therefore that it is permanent.

[92] It is accepted that the intention of parliament can only be discerned from legislation which is promulgated and not from public statements made by the

President of the Republic or Ministers and politicians. However, it is these statements which model the direction which parliament will follow. I accept that the government has plans to develop a model to replace the SRD grant. Developing any model to improve and replace the SRD grant does not mean it is not permanent, but it is merely to improve on its administration and management. However, the purpose remains the same, to assist those with insufficient means to support themselves and their dependants.

Procedural Safeguards

[93] I agree with the respondents that where public money is used to provide benefits to members of the population, procedural safeguards are necessary and should be applied to ensure that only those who are entitled to the benefits access it. However, the procedural safeguards must be reasonable and fair. The safeguards must be put in place to serve the purpose of the SAA to provide social relief of distress to persons who are of insufficient means and not with ulterior purpose and or to deliberately exclude persons who are entitled to receive the grant benefit.

[94] The purpose of the safeguards should be to prevent the abuse of the SRD grant and to prevent waste, fraud and erroneous payments and payment to persons who fall outside the category of the persons entitled to receive the benefits. It cannot be right to promulgate regulations with safeguards that are intended to reduce the number of people who are eligible for the SRD grant or to reduce and or limit spending on the SRD grant due to budgetary constraints. The safeguards must be reasonable and fair.

[95] The SRD grant is not temporary and although it is on a large scale, it has the same legal standing as the other grants in the SAA. Thus, there is absolutely no reason for it to be treated differently from the other grants. There is no reasonable justification to subject its potential beneficiaries, who are mainly poor and

vulnerable members of society, to a solely online application process. I agree with the applicants that the majority of people with insufficient means to support themselves and their dependants do not have smart phones nor access to computers and the internet.

[96] In *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others*[11] the Supreme Court of Appeal stated the following:

> ". . .When a decision is sought to be reviewed on the basis of irrationality, the test of rationality is concerned with the evaluation of the relationship between the means employed and the ends to be achieved. The evaluation of the relationship seeks to determine, not whether there are means that can achieve the same purpose better than those chosen, but whether the means employed are rationally related to the purpose for which the power was conferred.
>
> A rationality review also determines whether the process leading up to the decision and the decision itself are rational. The Constitutional Court cautioned that it should not be lost from sight that where there is an overlap between the reasonableness and rationality evaluations one is nevertheless dealing with discrete concepts. In *Albutt v Centre for the Study of Violence and Reconciliation and Others* the following was stated:
>
> 'The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.'"

[11] [2020] ZASCA 185; 2021 (3) SA 47 (SCA) at paras 85-6.

The Online Application

[97] There is no merit in the contention by the respondents that the online application process is fast and easy and therefore it is reasonable for government not to deploy resources for retrofitting SASSA offices to provide for an inefficient application process which it seeks to phase out in respect of all grants over time. There are eligible persons for the SRD grant who live in rural areas and who do not have access to smart phones and who are not computer literate. It is irrelevant that their Chief may have a smart phone and can lend it to them to make the online application for the SRD grant. The people in far flung areas may experience network problems which would prevent them from logging on to the online platform.

[98] There is no reason why the SRD grant beneficiaries should not be provided with an alternative method of applying for the grant like the other grants' beneficiaries. I am of the respectful view therefore that the online only application has the result of not meeting the purpose of the SAA and is excluding people with insufficient means who are unable to support themselves and their dependants. The ulterior purpose of the online application has the result of reducing the uptake of SRD grant beneficiaries.

[99] The online application process does not permit an applicant for the SRD grant to upload any other or additional information except what is required by the application. Once the applicant has completed the online application process, SASSA will rely on that information even through the appeal process. Although the respondents have conceded that the appeal process is not helpful and needs to be broadened to accommodate other information, the delay between the time of lodging the application and the appeal process would be inordinate and would be to the disadvantage of the SRD grant applicant.

000-39

[100] It was stated in *Khosa* that there is nothing wrong in differentiating between people and groups of people in society by classification in order for the State to allocate rights, but that the classification must be reasonable if it is to pass the constitutional muster. It must not be arbitrary or irrational nor must it manifest a clear preference of one group to the other otherwise it will offend sections 9 and 27 of the Constitution. Put differently, there must reasonable justification for the differentiation to pass the constitutional muster.

[101] In *Mazibuko and Others v City of Johannesburg and Others* [12] the Constitutional Court stated the following:

> "When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.
>
> Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to 'progressively realise' social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution.
>
> This case illustrates how litigation concerning social and economic rights can exact a detailed accounting from government and, in doing so, impact beneficially on the policy-making process. The applicants, in argument, rued the fact that the City had

[12] [2009] ZACC 8; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 161-3.

> continually amended its policies during the course of the litigation. In fact, that consequence of the litigation (if such it was) was beneficial. Having to explain why the Free Basic Water Policy was reasonable shone a bright, cold light on the policy that undoubtedly revealed flaws. The continual revision of the policy in the ensuing years has improved the policy in a manner entirely consistent with an obligation of progressive realisation."

[102] The contention by the respondents that the applicants' choice of the Rule 6 process instead of the Rule 53 procedure prevented them the opportunity to furnish reasons for the decisions taken to implement the differentiation between the groups of grant beneficiaries is misplaced. It is on record that, in these proceedings, the respondents filed their answering papers out of time due to the reason that they were consulting the relevant departments and personnel to obtain the correct information to answer the case of the applicants.

[103] Further, by agreement between the parties, the respondents have not only filed answering affidavits but additional supplementary affidavits to answer to the case of the applicants. It is my considered view therefore that the respondents had ample opportunity to take the Court into its confidence and furnish whatever reasons and justification it had and whatever factors were taken into consideration when the decision was made to implement the differentiation between the groups of the grant beneficiaries and especially to treat the SRD grant beneficiaries differently from the others.

[104] Given that the government has already started a pilot project to explore an alternative to the online process, the respondents' contention that it is not necessary for government to incur more costs to set up alternatives to the online process which is working well is unmeritorious. It is unreasonable and unfair for the respondents to differentiate between the beneficiaries of the SRD grant and the other grants by making it impossible for the SRD grant applicants to apply in a physical environment where they can receive assistance and guidance from the officials of SASSA.

Meaning of Income or Financial Support

[105] Regulation 2 provides that a person in need of temporary assistance, may qualify for the social relief of distress if he or she is a person with insufficient means. Regulation 1 defines the term "insufficient means" to mean that a person is not in receipt of income or financial support. It is therefore necessary to determine the meaning of the term income or financial support in relation to SAA and its regulations.

[106] It is trite that in determining whether legislation or a regulation is reasonable, regard must be had to the words used in the statute, the context in which they were used, and the purpose of the statute. In *Khosa*, the Court went on to say that it is also necessary to consider the impact that the said or relevant statute has on other intersecting rights including equality rights entrenched in section 9 which are also directly impacted.

[107] In *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and Others*[13] the Constitutional Court again had the opportunity to address the issue of interpretation of a statute and stated the following:

> "It would be a woeful misrepresentation of the true character of our constitutional democracy to resolve any legal issue of consequence without due deference to the pre-eminent or overarching role of our Constitution.
>
> The interpretive exercise is no exception. For, section 39(2) of the Constitution dictates that 'when interpreting any legislation … every court, tribunal, or forum must promote the spirit, purpose and objects of the Bill of Rights'. Meaning, every opportunity courts have to interpret legislation, must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself."

[13] [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 at paras 1-2.

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[108] The Court continued and stated the following:

> "To concretise this approach, the following must never be lost sight of. First, a special meaning ascribed to a word or phrase in a statue ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored. Fourth, a definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could be given to a word or expression in a statute, without straining the language, 'promotes the spirit, purport and objects of the Bill of Rights', then that is the meaning to be adopted even if it is at odds with any other meaning in other statutes.[14]
>
> ….
>
> It is a well-established canon of statutory construction that 'every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature'. Statutes dealing with the same subject matter, or which are *in pari materia*, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.[15]
>
> ….

[14] Id at para 18.
[15] Id at para 38.

> The canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly contextualise statutory provisions when ascribing meaning to the words used therein. While maintaining that word should generally be given their ordinary grammatical meaning, this Court has long recognised that a contextual and purposive must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, even where 'the words to be construed are clear and unambiguous'.
>
> This Court has taken a broad approach to contextualising legislative provisions having regard to both the internal and external context in statutory interpretation. A contextual approach requires that legislative provisions are interpreted in light of the text of the legislation as a whole (internal context). This Court has also recognised that context includes, amongst others, the mischief which the legislation aims to address, the social and historical background of the legislation, and, most pertinently for the purposes of this, other legislation (external context). That a contextual approach mandates consideration of other legislation is clearly demonstrated in *Shaik*. In *Shaik*, this Court considered context to be 'all-important' in the interpretative exercise. The context to which the Court had regard included the 'well-established rules of criminal procedure and evidence' and, in particular, the provisions of the Criminal Procedure Act."[16]

[109] Most recently in *University of Johannesburg v Auckland Park Theological Seminary and Another*[17] the Constitutional Court dealt with the principles of interpretation of documents and stated the following:

> "This approach to interpretation requires that 'from the outset one considers the context and the language together, with neither predominating over the other'. In *Chisuse*, although speaking in the context of statutory interpretation, this Court held that this 'now settled' approach to interpretation, is a 'unitary' exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.
>
> The approach in *Endumeni* 'updated' the position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and

[16] Id at paras 41-2.
[17] [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at paras 65-6.

> purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract".

[110] Contextually, the language used in regulation 1 and 2 is plain and unambiguous. Reference to a person with insufficient means as a person who is not in receipt of income clearly means a person who does not receive regular payment or reward. The purpose of the definition in regulation 1 is to differentiate between persons who regularly receive money which is sufficient to support themselves and their dependants and those who do not receive an income. Income in the context of the SAA means regular income as reward or compensation in exchange for work or from investments.

[111] In the context of the regulations and the SAA, a person who receives an income which is sufficient for his or her support and for his or her dependants, is rendered ineligible to qualify to receive the social relief of distress grant. I hold the view therefore that the word "income" does not encompass all moneys received by an applicant for the SRD grant including a once-off or ad hoc payment. Put in another way, income means money received on a regular basis and if it is above the threshold of R624, it precludes the applicant from qualifying to be a beneficiary of the SRD grant.

[112] I agree with the applicants that the interpretation ascribed to "income" by the respondents is narrow and rigid as it includes all moneys received by the person who is applying for the SRD grant even moneys that such person is holding or receiving on behalf of others. The intention of the legislator is plain and clear in that the SRD grant is available to persons who need temporary assistance and are of insufficient means in that they are unable to support themselves and their families. It is part of the formulation of a criterion for qualification to receive the

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SRD grant and is not intended to exclude persons who really need and are entitled to receive the SRD grant.

[113] It should be recalled that it does not necessarily mean that if a person receives a regular income is automatically excluded from qualifying to receive the SRD grant. It is one of the criteria used for the eligibility but will only disqualify a person from receiving the SRD grant if his or her income exceeds the set qualifying threshold of R624. That is the purpose of the regulation, to disqualify people from receiving the SRD grant when they are not entitled thereto if they receive an income which exceeds the threshold set by the regulations to be R624.

[114] It should be remembered that the SRD grant was initially promulgated under the Disaster Management Act to provide social relief of distress to adults who were unemployed as a result of the Covid-19 pandemic. Income in relation to the SRD grant should be interpreted to mean income from work, formal or informal, or investments. The purpose of the SRD grant was to alleviate the hunger for persons who were not receiving any income because they were unemployed as a result of the pandemic. I hold the view therefore that income means money received on a regular basis in exchange for work done or from investments.

[115] The ordinary meaning of "financial support" in the context of the SAA and the regulations is for a person being regularly supported financially to meet his or her basic needs. Section 27 of the Constitution creates a right to social security including appropriate social assistance for persons who are unable to support themselves and their dependants. At the same time, it creates an obligation on the State to take reasonable legislative and other measures within its resources to achieve the progressive realisation of each of these rights.

[116] In the context of section 27, the obligation is on the State to achieve the progressive realisation of each right within its available resources and not on any individual. It is my respectful view therefore that financial support in the context

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of the SAA means financial support which the person has a right thereto. In other words, financial support means that the person or the applicant for the SRD grant would be excluded from receiving the grant if he is entitled to and receives financial support from the State or from a person who is obliged and has a duty to support that person but that does not include financial assistance which is ad hoc or once-off.

[117] The regulations further provide that a person is not entitled to a social grant for himself or herself and Covid-19 Social Relief of Distress simultaneously. Further, that to qualify as a person with insufficient means, that person should not be a resident in a government-funded or subsidised institution. It is therefore self-evident that financial support only means financial support received by a person who is entitled to it from a person who is obliged to and has a duty to provide that financial support for the person to be able to meet his or her basic needs and does not include moneys which are received irregularly.

[118] The respondents contend that if their narrow interpretation of the word "income" and 'financial support" is not accepted, then the value of the grant would increase up to R60 billion per year. As indicated above, the regulations should not be promulgated only to further the purpose of the SRD grant and the SAA, but also to be in line with the Constitution. The interpretation ascribed by the respondents to "income" and "financial support" has the result of excluding and is intended to reduce the uptake of deserving beneficiaries of the SRD grant in order to save money – thus it offends section 27 of the Constitution and is therefore unreasonable and unlawful.

Questions in the Online Application

[119] As one of the measures to determine whether a person receives an income or financial support, an SRD grant applicant is faced with the following questions in the online application form:

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"1. How do you usually obtain your basic necessities or where do you get money to support yourself if there is not R350 grant?

2. How much money did you receive in the last month, including gifts, assistance from anyone, donations, dividends, earnings from formal or informal employment, but excluding the R350 grant."

[120] I agree with the respondents that there is nothing wrong with these questions since they require information to determine whether the SRD grant applicant does receive any income or financial support besides the R350 SRD grant. Bearing in mind the interpretation ascribed to income and financial support in the context of the SAA as indicated above, it cannot be said that these questions are not legitimate and sensible. The questions are intended to elicit information from the applicant of the SRD grant to determine whether he or she receives an income or financial support in the context of the SAA.

[121] Undoubtedly, the information required by the questions would include all moneys received by the SRD grant applicant during that period but moneys which are not determined as income or financial support will be excluded in terms of the interpretation ascribed to income and financial support. The purposive interpretation of income and financial support must be in line with the SAA and the Constitution in that it promotes the spirit, purport and objects of the Bill of Rights as enshrined in the Constitution.

[122] Section 27 provides that everyone has the right to access social security including appropriate social assistance if they are unable to support themselves and their dependants. Everyone purposively interpreted means everyone who meets the criteria set by the SAA and its regulations for social assistance is entitled to receive it. It is immaterial that a member of that person's family is assisting him or her to obtain his basic necessities and that does not absolve the State from performing its duty and meeting its obligations in terms of section 27(2).

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Validation of Insufficient Means through Database Verification

[123] Regulation 3 provides for a process of validation of insufficient means which entails the use and reliance on both the government databases and the bank account information of the applicant. Regulation 6A of the 2024 amendment regulations makes it compulsory for every applicant for the SRD grant to have a bank account since it requires that an applicant must ensure that SASSA has his or her correct banking details to enable the bank verification process and payment of the SRD grant.

[124] The use of the information from the government databases has been accepted by the parties as unreliable since these databases are not being updated regularly with the latest information. People appear on the Home Affairs, NSFAS, UIF and SARS databases even when they are no longer active on that database. It is absurd for the respondents to place a duty on the applicants for the SRD grant to update their details on the government databases. The government databases belong to the government, and it is the responsibility of the government to always update it. The inaccuracies of the databases verification process preclude many people who are entitled to receive the SRD grant from receiving it.

[125] It is incomprehensible why the respondents would continue to use the government databases verification process knowing that it provides inaccurate information which has the result of excluding eligible applicants from receiving the SRD grant. There is uncontroverted evidence by the grant beneficiaries who filed supporting affidavits that an applicant would be precluded from receiving the SRD grant since his or her name appears on the UIF, Home Affairs, NSFAS, or SARS database without SASSA going through a process of verifying the correctness of the information and the reasons why an applicant's name appears on government databases. The databases verification process is therefore

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unreasonable and unfair and is used with an ulterior purpose of excluding eligible SRD grant applicants from receiving it.

Bank Verification

[126] The bank verification process is intended to verify with an applicant's bank whether he or she has insufficient means and thus eligible for the SRD grant. The bank verification process has its own deficiencies as well in that it only considers money deposited into the bank account of the applicant. It does not consider whether the money was deposited for a different purpose and regards all the moneys deposited into an applicant's bank account as income. If the moneys deposited into the bank account of an applicant for that month exceeds the set qualifying threshold of R624, then that applicant will be excluded from receiving the grant.

[127] I am in agreement with the respondents' contention that regard must be had to the fact that the provision of social grants is massive in scale and affects millions of recipients and that since it involves billions of Rands in a depressed economy, there is a huge risk of abuse. However, it does not mean the respondents should formulate regulations as a barrier to exclude deserving and eligible applicants to access the SRD grant. It is not justified and is in fact unreasonable and unlawful for the State to pass legislation and regulations which are intended to preclude eligible SRD grant applicants in order to save on the expenditure on the SRD grant.

[128] The bank verification process does not permit any consideration for the purpose for which moneys were deposited in an applicant's account. The new regulation makes it compulsory for SASSA to ascertain the details of any applicants' bank account – thus every SRD grant applicant is presumed to and must have a bank account. It ignores the fact that SASSA uses other methods of payment such as

the ‘cash send’ which is not linked to a bank account but to a cell phone selected by the applicant.

[129] I disagree with the respondents that the bank verification process is an invaluable reform as no other method could as reliably provide proof of individual income and financial support. It has correctly been branded a blunt instrument and inhumane since it does not consider that some grant applicants do not have bank accounts and/or share their bank accounts with other members of the family and that not all moneys deposited in an applicant’s bank account are intended for his or her financial support or income.

[130] It is unfathomable why the respondent would justify an irrational and arbitrary verification procedure which excludes people who are eligible and entitled to access the SRD grant. I hold the view therefore that the persistence to use the bank verification process is intended to reduce the number of beneficiaries and, by extension, to reduce the cost of the SRD grant and is therefore not in line with the purpose of the SAA. The use of the bank verification process, which is fully automated, is unfair and unreasonable and offends the provisions of section 9 and section 27 of the Constitution.

Resolution of Conflict

[131] It is accepted that a presumption exists that where an act of parliament confers an administrative power, that power will be exercised in a manner which is fair in all the circumstances. However, it is equally impermissible to afford administrative officials with unfettered discretion where constitutional rights are at stake. The regulation permits the deployment of the databases and bank verification but does not provide a mechanism for how to resolve a conflict in information provided by both verification processes except to say that the bank verification process shall take precedent over the databases verification process.

[132] Both the databases and bank verification processes have been found to contain inaccuracies which have the result of excluding eligible SRD grant applicants. I can find no reasons why the resolution of the conflict between the two verification processes is left in the hands of the officials – thus giving them unfettered discretion in the processes. The preference of the bank verification process over the databases verification on the basis that the latter reflects the most accurate financial position of the SRD applicants is flawed. I say so because the bank verification process has been correctly described by SASSA in its reports as a blunt instrument and inhuman.

Payments Subject to Availability of Funds

[133] The applicants argue that regulation 5(3)(a) which provides for payment of the SRD grant subject to funds being available, which is limited to the amount appropriated for the 2024/2025 financial year to the vote of social development for social relief of distress is irrational and arbitrary. This is so, say the applicants, because if the money runs out, the eligible and successful applicants for the SRD grant would not receive payment.

[134] It is on record that the number of persons who fall within the category of persons who are with insufficient means is more than 18.3 million. At present the persons who receive the SRD grant are not more than 10.5 million. It has been argued by the respondents that if the interpretation of income and financial support were to exclude other payments received by the applicant for the SRD grant, the value of the grant would increase by up to R60 billion a year. To circumvent this eventuality, the respondents have put in place regulations which are a barrier to eligible SRD grant applicants.

[135] The overarching argument of the respondents is that it is speculative that eligible SRD grant applicants will not receive their grant benefit once the money allocated for the SRD grant runs out since the budget has historically not been

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exceeded. The respondents say the logical outcome when money appropriated for the social relief of distress runs out is that there would be no payment of the SRD grant, and that this is not irrational or arbitrary but the reality of the situation.

[136] I disagree with the respondents. It may not have occurred thus far that the money runs out because of the barriers put in place to exclude eligible SRD grant applicants. However, the threat to the rights of eligible and successful SRD grant beneficiaries remains in that should the funds as allocated be depleted, there will be no payment of the SRD grant. Once again, there is no reasonable explanation proffered by the respondents for arriving at such a decision. It is no defence to say that it is highly speculative for historically the budget has never been exceeded and that the budget was previously underspent.

[137] I accept that the budget has never been exceeded in the history of the SRD grant but the threat to limit payment of the grant to what has been allocated for that particular financial year is a serious threat to the rights of people as provided for in section 27 of the Constitution. Further, the threat not to pay persons who are successful applicants of the SRD grant when the limit is reached is another form of differentiation of the SRD grant beneficiaries from the other grant beneficiaries and there is no reasonable explanation for such differentiation. The decision to promulgate this regulation is therefore unfair, unreasonable and unjust and is in breach of the Constitution.

[138] It is unconscionable for government to accept that the number of people who are with insufficient means to support themselves and their dependants is more than 18.3 million but only budgets to provide for 10.5 million. This is so because the regulations have placed barriers to exclude the eligible applicants from accessing the SRD grant. The under spending of the budget by the SASSA in the previous financial years is not because there are no eligible persons to meet the estimated

number, but it is because of the exclusionary barriers put in place by the regulations.

[139] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [18] the Constitutional Court stated the following:

> "The City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. We do not know exactly what the City's overall financial position is. This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."

[140] Given that the government is aware of the number of people living below the food poverty line and the number of people eligible to receive the SRD grant due to them being unemployed or if employed, earn a salary which is below the means threshold of R624 per month, and which equates to more than 18.3 million people, it is unthinkable why the government and National Treasury in particular should not plan and budget accordingly in order to fulfil its obligations in terms of the Constitution. There is no rational basis for the government budgeting for only 10.5 million successful applicants when the estimated number of people who qualify for the SRD grant is more than 18.3 million.

Retrogressive Grant Value

[141] The SRD grant was introduced by government in May 2020 and the value thereof was set at R350. It has since 1 April 2024 been increased by a sum of R20 to the value of R370. The value of the SRD grant, according to the applicants, has not been progressively realised. The respondents do not dispute that the value of the

[18] [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) at para 74.

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grant is now less than when it was introduced but contend that the obligation to increase the SRD grant is dependent on the availability of resources. Furthermore, it is the Executive function to determine the priorities when it comes to matters of social assistance.

[142] I agree with both the applicants and the respondents that the amount of R350 in May 2020 does not have the same value in 2024 – it has in fact decreased in value. In terms of section 27(2), the government is obliged to progressively realise the value of the SRD grant, like other social grants on which the government has been effecting increases in the past four years. The increase of the value by R20 to R370 does not go far enough to meet the requirements of progressive realisation for it still puts the value of SRD grant far below the national food poverty line.

[143] I am mindful of the principle of judicial deference. Since the issue to increase the value of the SRD grant falls within the domain of the Executive, it is not for this Court to prescribe to the Executive what to do. However, the Court will continue to perform its judicial function, but it is necessary to exercise some restraint for the Court is not empowered nor is it an expert in the issues of budgeting.

[144] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[19] where the Constitutional Court quoted the following:

> "In the SCA Schutz JA held that this was a case which calls for judicial deference. In explaining deference, he cited with approval Professor Hoexter's account as follows:
>
> > '[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their

[19] [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 46.

> interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'
>
> Schutz JA continues to say that '[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function'. I agree. The use of the word 'deference' may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself."

[145] The principle of the separation of powers was emphasised in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*[20]where the Constitutional Court stated the following:

> "[G]iven the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties."

[146] It is on record that the other social grants have been enjoying increases over the years except for the SRD grant which has only recently been increased by R20 to the value of R370. Although the increase has been effected, there is no

[20] [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 47. Quoted with approval in *e.tv (Pty) Ltd v Minister of Communications and Digital Technologies and Others* [2022] ZACC 22; 2023 (3) SA 1 (CC); 2022 (9) BCLR 1055.

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explanation given as to why the SRD grant has been increased; where did the money come from since it was said it is unaffordable to increase same; and how was the increase of R20 determined. Moreover, there is no explanation given, as was highlighted above, why there is a differentiation between the SRD grant and the other social grants when they are all promulgated under the same SAA.

[147] There is no merit in the respondents' contention that there has been progressive realisation in the SRD grant since its introduction in 2020 in that there was an increase in the means threshold amount from R595 to R624 and recently the SRD grant was increased by R20 to R370. According to the statistics, the food poverty line for 2023 was R760 and the SRD grant remained at R350 at the time with the means threshold being R624. Even the means threshold amount is far below the food poverty line for 2023 let alone 2024. Therefore, there is no meaningful progressive realisation of the SRD grant, and this is in breach of the provisions of section 27 of the Constitution.

[148] It should be recalled that the R20 increase on the SRD grant was only implemented mid-stream during 2024 which is more than four years after it was introduced. Although the increase of R20 was implemented after the SASSA and the Minister had filed their answering affidavits, the respondents did not find it necessary to file a further affidavit and explain the reasons for such an increase and where the money came from since it was said it was unaffordable to effect any increase on the SRD grant nor did the respondents furnish a detailed plan as to what is the way forward to align the SRD grant with the other grants in order for it to receive increases every year.

[149] The income threshold amount of R624 was implemented in August 2022 but has now decreased in value when inflation is taken into account. I do not understand the respondents to be contending that the income threshold is set at a level which ensures that people who are unable to support themselves and their dependants receive the SRD grant or that it meets the constitutional standard. The means

qualifying threshold is also not linked to any objective measure of income such as the food poverty line. There is no reason proffered by the respondents why the means threshold is no longer linked to the food poverty line as it was initially linked to the 2021 food poverty line.

[150] There is no explanation why both the SRD grant and the means threshold are not linked to measures such as the food poverty line although the purpose of the SRD grant is to alleviate hunger and poverty in society. The respondents do not deny that the SRD grant and the means threshold are worth less than when they were introduced. The ineluctable conclusion is therefore that, by allowing the retrogression of value of both the SRD grant and the means threshold, government's decision to do so is irrational, arbitrary and in breach of its obligations in terms of section 27(2) of the Constitution.

[151] To avoid infringement of the doctrine of separation of powers, this Court is unwilling to venture into the terrain reserved for the administrative branch of government. However, it is necessary for the respondents to proffer some explanation as to why the SRD grant and the means threshold have not been progressively realised as provided for in section 27(2) of the Constitution. As much as the Constitution provides that the government must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of rights, it is not sufficient for the respondents to only say that it is unaffordable.

[152] The range of potential costs for the increase of the SRD grant value and the means threshold has been a highly speculative calculation. The respondents have not demonstrated what the additional costs would be should the SRD grant and the means threshold be increased except to say that it is unaffordable and that, if the interpretation of "income" or "financial support" excludes moneys received by the SRD grant applicants for other purposes, then the SRD grant payment would increase to R60 billion per annum.

[153] In *Khosa*, the Court stated the following:

> "There is thus no clear evidence to show what the additional cost of providing social grants to aged and disabled permanent residents would be. Taking into account certain assumptions relating to the composition of the groups and numbers of dependants, Mr Kruger concludes that the additional annual cost of including permanent residents in grants in terms of sections 3, 4 and 4B could range between R243 million and R672 million. The possible range demonstrates the speculative nature of the calculations, but even if they are taken as providing the best guide of what the cost may be, they do not support the contention that there will be a huge cost in making provision for permanent residents. Approximately one fifth of the projected expenditure is in respect of child grants and the unconstitutionality of the citizenship requirement in that section of the Act has already been conceded by the respondents. The remainder reflects an increase of less than 2% on the present cost of social grants (currently R26.2 billion) even on the higher estimate. Bearing in mind that it is anticipated that the expenditure on grants will, in any event, increase by a further R18.4 billion over the next three years without making provision for permanent residents, the cost of including permanent residents in the system will be only a small proportion of the total cost."[21]

Non-Payment of Successful Grant Applicants

[154] It is common cause between the parties that quite a substantial number ranging between 10% and 15% of successful SRD grant applicants do not receive their grant payment every month. The respondents offered no defence for the non-payment of the SRD grant to successful applicants except to say that the system experienced some teething problems and that some of the successful applicants failed to furnish their correct banking information and cell phone numbers. SASSA handed up a document which was meant to demonstrate that there was improvement in the non-payment category of successful applicants from more than a million to hundreds of thousands per month.

[21] *Khosa* above n 12 at para 62.

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[155] As indicated above, the Court admitted this document into evidence although the applicants objected thereto. The evidence provided by the document did not take the matter any further for it confirmed that there was a serious issue of non-payment of successful applicants which runs into hundreds of thousands in number. However, the document did not provide any information with regard to what SASSA was doing to address this problem as teething problems of the system cannot be allowed to go on for years. Without dictating what the government should do to alleviate the problem, however, it should provide a plan as to how it intends to resolve the issue of non-payment of successful applicants.

[156] In *Ngalo v The South* African *Social Security Agency*[22] in dealing with the issue of the failure to process an application of care dependency over a period of two years, the Court stated the following:

> "Treating human beings with dignity requires of the state to act in a reasonable manner towards those claiming social security rights, such as the right to social grant. Human dignity, as a fundamental constitutional value and a fundamental right enshrined in the Bill of Rights, is an important catalyst to alleviate poverty of the historically deprived. Hence Chaskalson J said in *Soobramoney v Minister of Health, KwaZulu- Natal*:
>
> > "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security and many do not have access to clean water or to adequate health services. These conditions already existed when the constitution was adopted and a commitment to address them and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."

[22] [2013] 2 All SA 347 (ECM) at para 26.

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[157] It should be remembered that the SRD grant is meant for the poor people and to alleviate hunger. For this group of society to not receive the grant timeously or at all has dire consequences. Although this Court is restrained to enter the terrain of the executive arm of government, in order to address the human indignity being suffered by the successful SRD grant beneficiaries who do not receive their payment, it finds it just and equitable for the government to develop a plan as to how it intends to address the issues relating to non-payment of the SRD grant to successful applicants.

[158] Although section 4 of the SAA provides that the Minister must, with the concurrence of the Minister of Finance, make available out of moneys appropriated by Parliament, the social relief of distress grant, it does not empower the Minister of Finance to encroach onto the terrain of the Minister to make policy decisions and the regulations to harmonise the administration and payment of the SRD grant. The concurrence of the Minister of Finance is only required by the SAA in matters that involves the finance and budget to enable the Ministry and its functionary to execute its mandate.

[159] In *Affordable Medicine* Trust *and Another v Minister of Health and Another*[23] the Constitutional Court stated the following regarding the power of functionaries:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.' In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power." (Own emphasis.)

[23] [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49.

[160] I therefore agree with the applicants that it is only for the Minister to determine matters of policy and promulgate the regulations and to develop any plan for the proper and efficient administration and management and payment of the SRD grant. The concurrence of the Minister of Finance is required by the law only when the budget is required in order to execute the mandate of the DSD and SASSA in relation to the SRD grant and all other grants. The regulation does not empower the Minister of Finance to prescribe to the Minister what regulations to promulgate in order curb the uptake of the SRD grant applicants to reduce spending on the SRD grant.

[161] DSD and SASSA seem to be oblivious to the human suffering and indignation caused by the deployment of regulations with barriers that preclude the eligible SRD grant applicants from receiving it and the inefficient administration and payment of the SRD grant to the successful applicants. This is so because they have totally abdicated their responsibilities in these proceedings in that they failed to fully answer to the case of the applicants and left that responsibility to the National Treasury on the pretext that the Minister of Finance has concurrent authority in the case.

[162] The applicants argued that in terms of section 172 of the Constitution, the Court has the power to grant a just, equitable and effective order when deciding a constitutional matter in which it declares law or conduct inconsistent with the Constitution and thereby invalid to the extent of its inconsistency. Furthermore, so it was contended, section 8 of the Promotion of Administrative Justice Act[24] gives the courts a wide discretion to make any just and equitable order to remedy unlawful administrative action.

[24] 3 of 2000.

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[163] In *Steenkamp NO v Provincial Tender Board, Eastern Cape*[25] the Constitutional Court stated the following:

> "It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.

[164] I do not understand the respondents to be saying that the structural relief sought by the applicants should not be granted. I understand the respondents to be saying that if the structural relief is granted, the Court should give sufficient time to remedy the injustice cause by their conduct and the impugned regulations. The respondents requested a time frame of about two years from the date of the order. However, since this case involves the poorest of the poor and those who do not know where their next meal will come from, I hold the view that two years would be an inordinate period under the circumstances.

Costs

[165] There is no reason why the costs should not follow the result in this case. However, I am not persuaded by the applicants that the appropriate scale for the costs is the punitive Scale C.

[25] [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 29.

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Order

[166] In the result, the following order is made:

1. It is declared that Regulation 3(2) of the Regulations Relating to COVID -19 Social Relief of Distress (GN3210 in GG46271 of 22 April 2022) introduced on 29 March 2023 ("the Regulations") is unconstitutional and invalid to the extent that it provides for Social Relief of Distress ("SRD") grant applications to be lodged on an electronic platform only.
2. To remedy the defect in Regulation 3(2), the words "or at the offices of the Agency" shall be read in after the words "on the electronic platform".
3. It is declared that the word "income" in Regulation 1 means money received on a regular basis from formal or informal employment, business activities or investments.
4. It is declared that the words "financial support" in Regulation 1 means money received on a regular basis which benefits the recipient, that does not constitute income, and which the recipient has a legal right to receive.
5. Regulation 2(3)(c)(i) is declared unconstitutional and invalid to the extent that it makes provision for "checks against databases that may indicate income or alternative financial assistance".
6. Regulation 2(3)(c)(ii) is declared unconstitutional and invalid to the extent that it directs that SRD grant applicants' applications are assessed according to a proxy means test consisting of verification of insufficient means with banks.
7. Regulation 6(c) is declared unconstitutional and invalid to the extent that it precludes unsuccessful applicants for the SRD grant from relying on new information or evidence in an appeal.
8. To remedy the defect in Regulation 6(c), the word "not" after the word "may" is deleted from Regulation 6(c).

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9. Regulation 5(3)(a) of the Regulations is unconstitutional and invalid to the extent that it makes payments to beneficiaries of the SRD grant subject to available funds and permits SASSA to withhold payment of the SRD grant to SRD grant beneficiaries if available funds are depleted.
10. It is declared that SASSA's failure to pay successful applicants of the SRD grant, timeously or at all, is unconstitutional and unlawful
11. It is directed that the SASSA must investigate the cause of widespread delays in payments to successful SRD grant applicants and devise and implement a plan to address those delays.
12. SASSA is directed to:
    a. deliver the plan referred to in paragraph 11 to the parties and this Court within four months of the date of this order; and
    b. implement the plan without delay.
13. The applicants are entitled to re-enrol the matter, on duly supplemented papers, to seek further relief in relation to the SASSA's implementation of paragraphs 11 or 12 above.
14. Regulation 2(5) is declared unconstitutional and invalid to the extent that it sets the income threshold for insufficient means at R624 per person per month.
15. Regulation 5(1) is declared unconstitutional and invalid to the extent that it sets the monthly amount of the SRD grant at R370 per person.
16. It is declared that sections 27(1)(c) and (2) of the Constitution require government to devise and implement a plan to address the retrogression in the value of the SRD grant and income threshold, and progressively increase the value of the SRD grant in Regulation 5(1) and the value of the income threshold prescribed in Regulation 2(5).
17. In devising the plan referred to in paragraph 16, the Minister of Social Development, in consultation with the Minister of Finance, must:
    a. in setting the income threshold to qualify for the SRD grant, give due consideration to:

i. the right to social assistance in section 27(1)(c) of the Constitution for people unable to support themselves, and the need to provide the SRD grant to all persons unable to support themselves;

ii. increases in inflation and the cost of living;

iii. objective income measures, including the NFPLs published from time to time by Statistics South Africa; and

iv. the need to ensure that no one living in poverty is excluded from accessing the grant.

b. in setting the value of the SRD grant, give due consideration to:

i. the right to social assistance in section 27(1)(c) of the Constitution for people unable to support themselves;

ii. the right to food in section 27(1)(b) of the Constitution and the impact of the SRD grant in addressing hunger;

iii. the need to remedy the retrogression in the value of the grant since May 2020;

iv. the real terms value of the grant, in light of inflation and the cost of living; and

v. the value of the grant in relation to objective income poverty measures, including the NFPLs published from time to time by Statistics South Africa.

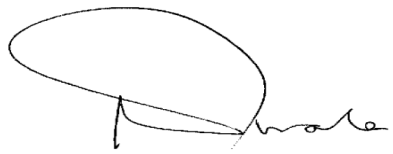
18. The Minister of Social Development is directed to:

a. deliver the plan referred to in paragraph 17 to the parties and this Court within four months of the date of this order; and

b. implement the plan without delay.

19 The applicants are entitled to re-enrol the matter, on duly supplemented papers, to seek further relief in relation to the Minister of Social Development's implementation of paragraphs 17 or 18 above.

20 The respondents are directed to, jointly and severally, the one paying the other to be absolved, pay the applicants' costs, including costs incurred after 12 April 2024 on Scale B.



TWALA M L

Judge of the High Court of South Africa

Gauteng Division, Pretoria

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Date of Hearing:	29 and 30 October 2024
Date of Judgment:	23 January 2025

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 23 January 2025.