

**Realising the Social Security Rights of Children in South Africa, with
particular reference to the Child Support Grant**

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ABSTRACT

The right to social security is guaranteed under the South African Constitution. The realisation of the right to social security for children in South Africa is in the form of child support grant, foster child grant, and care dependency grant. The focus of this article is on child support grant as a means of advancing children rights in South Africa. By recourse to international and domestic human rights standards, this article argues that the child support grant should be available to all children-up to the age of 18-in order to give meaning to their other socio-economic rights.

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ABBREVIATIONS

ACCESS	Alliance for Children’s Entitlement to Social Security
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
CSG	Child Support Grant
DoSD	Department of Social Development
HSRC	Human Sciences Research Council
CESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization,
ORC	Office of the Rights of the Child
SAHRC	South African Human Rights Commission
SASSA	South African Social Security Agency
SMG	State Maintenance Grant
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UIF	Unemployment Insurance Fund
UNICEF	United Nations Children’s Fund

Key words: social security, child support grants, social assistance

1. Introduction

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.¹

While South Africa has one of the most progressive Constitutions in the world, the realisation of socio-economic rights for the majority of its population remains a mirage.² Widespread poverty and unemployment presents significant challenges to families' capacity to care for their children.³ Historical inequalities in education, health care, basic infrastructure have contributed to poor service delivery to children.⁴ That state of affairs has particularly aggravated the vulnerability of children from poor families.

It is against that background that an effective mechanism for the protection and care of children is essential. Empirical research and data illustrates that the implementation of basic social services for children is imperative to alleviate poverty in South Africa.⁵

Section 27 of the South African Constitution establishes that everyone has the right to have access to social security, 'including if they are unable to support themselves and their dependants, appropriate social assistance'. Therefore, the state is under a legal obligation to take 'reasonable legislative and other measures' 'within its available resources' to 'achieve the progressive realisation' of this right.⁶ The express

¹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 8.

² See generally J Sloth-Nielsen 'The Child's Right to Social Services, The Right to Social Security and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*' (2001) 17 *South African Journal of Human Rights* 210.

³ See generally L Berry Rapid Assessment: The Situation of Children in South Africa (2003) Children Institute, University of Capetown

⁴ See generally Berry (2003).

⁵ See generally Berry (2003).

⁶ Section 27 (2) of the Constitution.

reference to both social security and social assistance in section 27 of the Constitution is important. That provision affirms that social security and social assistance are not only related but are interdependent and accordingly crucial to the realisation of basic human rights.⁷

Section 27 refers to 'everyone' that means including children.⁸ In addition, section 28(1)(c) guarantees every child the right to social services. The term social service in this instance refers to a group of services such as basic nutrition, shelter, basic health care, education, social security and social welfare services and to family care or alternative care when removed from the family environment.⁹

The domains of social security are: poverty prevention, poverty alleviation, social compensation and income distribution.¹⁰ Implementation of the right of access to social security requires that its beneficiaries including children receive social assistance. The right to social security for children is realised through a set target of social grants such as Child Support Grant (CSG), Foster Child Grant (FCG), and Care Dependency Grant (CDG).¹¹ For children from poor families, such assistance in the form of child support grants is not only imperative but is often a matter of basic survival in order for children to enjoy other rights such as education, adequate standard of living and to be protected from exploitative labour practices as discussed subsequently.

This article examines the role of social security in advancing children's rights in South Africa, focussing on the CSG. It advocates for enhanced implementation of this right to give meaning to other socio-economic rights of children. It begins by contextualising child poverty in South Africa. It argues that due to high levels of poverty in South Africa, and its effects on vulnerable children, the extension of the CSG to 18 years should be supported and implemented without delay. By

⁷ 'Socio-Economic Rights: Housing, Health Care, Food Water Social Security', in I Currie and J de Waal (eds) *The Bill of Rights Handbook* (2005) 566, 567.

⁸ Para 78 *Grootboom* case. Section 28 of the Constitution defines a child as a person under the age of 18 years.

⁹ Currie and deWaal (2005) 567. See section 28 (b), (c) of the Constitution.

¹⁰ Para 1, Chapter 7 The White Paper for Social Welfare GN 1108 in GG 18166 of 8 August 1997.

¹¹ Section 4 Social Assistance Act 13 of 2004.

acknowledging that challenges exist to the realisation of the right to social security in terms of the CSG grants, the article proffers strategies to improve its implementation.

2. Child Poverty in South Africa

According to the United Nations Development Programme (UNDP)'s human development index, South Africa is ranked 121 out of 177 countries.¹² UNDP's poverty index places South Africa at number 55 out of 108 developing countries.¹³ The rate of poverty in South Africa (which measures levels of absolute poverty) stands at 45 percent.¹⁴ Child and family poverty can be measured in relative terms. Households are ranked according to per capita income in quantiles, the poorest being found in the bottom two quantiles, that is, 40 percent of the population. Poverty can also be measured in absolute terms, calculated on a minimum income for basic needs and survival. Thus the poorest children are those in households with incomes below the poverty line.¹⁵

Determining child poverty is complex, firstly because the term poverty does not lend itself to easy definition and secondly because methodologies for measuring poverty thus far lack a child focus.¹⁶ Children in South Africa form 44.2 percent of the population and the extent of child poverty has been described as alarming.¹⁷ It is therefore impossible to ignore the reality of poverty in South Africa and its effects on children from poor families. Six out of every ten children live in poverty which means that welfare programmes play a fundamental role in poverty alleviation.¹⁸

According to research conducted by the Human Sciences Research Council (HSRC),¹⁹ Limpopo and the Eastern Cape provinces had the highest proportion of

¹² United Nations Development Programme (UNDP)'s human development index 2007/2008.

¹³ United Nations Development Programme (UNDP)'s human development index 2007/2008.

¹⁴ M P Olivier et al 'Introduction to Social Security' (2004) 8.

¹⁵ Olivier (2004) 351.

¹⁶ D Chirwa 'Combating Child Poverty: the Role of Economic Social Cultural Rights' in J Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 92.

¹⁷ M Dutschke 'Defining Children's Constitutional right to social services' (2006) 10 Children's Institute, University of Capetown.

¹⁸ S Robinson & M Sadan 'Where Poverty Hits Hardest: Children and the Budget in South Africa' (1999) vii as cited in J Sloth Nielsen above, 213.'

¹⁹ C Schwabe 'Fact Sheet: Poverty in South Africa' Human Sciences Research Council (HSRC) 26 July 2004.

the poor with 77% and 72% of their populations living below the poverty line, respectively. The Western Cape had the lowest proportion of poverty (32%), followed by Gauteng (42%). Poverty in South Africa is therefore of national character and needs to be addressed without delay.

Poverty (referring to a lack of disposable income) can be seen as part of the multi-dimensional and dynamic concept of social exclusion (referring to multi-faceted failure).²⁰ This has major implications for social security policy-making, as social security has to direct its attention not only at the cross-sectional incidence of income poverty, but also at the multi-dimensional set of living conditions.²¹ The South African White Paper for Social Welfare recognises that poverty cannot be measured by income alone, nor can anti-poverty programmes only address income enhancing measures.²² To be effective, anti-poverty programmes, demand a multi-sectoral and an integrated approach.

A poor child can be defined as a person below the age of 18 years who lacks access to what is essential to fulfil their basic human needs.²³ Accordingly, poverty denies children their fundamental human rights. Child poverty is therefore a measure of the extent to which a child is unable to realise his or her fundamental rights to health, food, education, water, sanitation, shelter and information. Since poor children have fewer economic and political opportunities to improve their well-being and that of their families, poverty often affects such households the most. According to the Children's Institute,²⁴ in 2004 there were nearly two-thirds (12 million) of children below the age of 18 years who lived in households with a monthly income of R1 200 or less-literally in poverty. Recent estimates by the United Nations Children's Fund (UNICEF) show that about two-thirds of children in South Africa were living in poverty (on R7.75 per day).²⁵

²⁰ Olivier (2004) 28.

²¹ Olivier (2004) 29.

²² Para 3, chapter 1, The White Paper for Social Welfare 1997. Also see definition of poverty in 1995 United Nations World Summit for Social Development and UNDP Report on South Africa.

²³ Chirwa (2008) 92.

²⁴ 'Facts about uptake of the Child Support Grant', Fact Sheet no.3, (2006) Children's Institute, University of Cape Town,.

²⁵ United Nations Development Programme (UNDP)'s human development index 2007/2008 'Women and Children in South Africa'.

While the primary responsibility to provide for the wellbeing of the child rests with the family, as explained further subsequently, the state has legal obligations in terms of the Constitution to afford protection to its citizenry including children.²⁶ Such protection includes ensuring that the basic human rights of children are upheld. The right to social security for children from poor families who would otherwise not afford the means to a livelihood in such circumstances becomes crucial. The state is therefore obliged to ensure that vulnerable children do not run the risk of falling into abject poverty.

According to Gertler, one of the greatest tragedies of poverty is its inter-generational transmission: children who grow up in poor households tend to remain poor.²⁷ Education is a weapon that can be used by societies to stem the tide of the inter-generational transmission of poverty, a true means by which children can be extricated from the family cycle of poverty.²⁸ Social security, through its distributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.²⁹ Improving lives through social security is therefore one of the central focus of the South African government in an effort to alleviate poverty. CSGs can ensure that poor and vulnerable children remain in school and enjoy their fundamental human rights especially socio-economic rights.

There are other challenges that exacerbate the state of child poverty in the country. South Africa faces significant challenges in the form of high unemployment and widespread poverty, coupled with high prevalence of HIV and AIDS. The lack of education, employment opportunities and access to services has deprived many people of their dignity and the ability to look after themselves.

²⁶ Section 7(2) of the Constitution.

²⁷ P Gertler, (2005). The impact of conditional cash transfers on human development outcomes. A review of evidence from PROGRESA in Mexico and some implications for policy debates in South and Southern Africa. Paper presented at the South African Regional Poverty Network Meeting, 27 January 2005, Pretoria.

²⁸ 'SA: Doidge: Address by the Minister of Public Works, at the Social Protection and Community Development Cluster briefing, Cape Town. (dated 9 November 2009, The Department of Public Works) Sourced : <<http://www.polity.org.za/article/sa-doidge-address-by-the-minister-of-public-works-at-the-social-protection-and-community-development-cluster-briefing-cape-town-09112009-2009-11-09>>

²⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), E/C.12/GC/19 (2008), para 3.

There are a number of factors that have impacted on child poverty. Firstly, the depth of child poverty and inequality in South Africa can be traced to its history of colonisation and apartheid.³⁰ Apartheid South Africa systematically destroyed the family structure and bound people to poverty through discriminatory laws and policies.³¹ The racially fragmented system was totally ill-equipped to assist people to cope with their social problems. Statistics illustrate the effect of the apartheid policies on the country's economic and social development.³² It is estimated that in 1995, 61% of the African population were poor whereas 1% of the white population were poor.³³ The economic stress experienced by the majority population is linked to their systematic economic disempowerment.³⁴

Secondly, one of the greatest threats to the realisation of children's rights in South Africa is the impact of the HIV and AIDS pandemic. The incidence of new infections peaked in South Africa in 1998 at around 930,000 new infections per year.³⁵ Children in households affected by HIV and AIDS risk missing school to care for sick members of their families, or to work to earn money in order to supplement the household income. There is concern over the growing number of child-headed households as a direct result of being orphaned by the AIDS pandemic. This predicament demands further social assistance.

Despite the lack of accurate national data on the prevalence of child-headed households, it is likely that the number of child headed households in South Africa will increase as the HIV and AIDS pandemic intensifies.³⁶ Children in such household assume increased responsibilities often as bread winners or supplement available household income which often result in reduced opportunities for education.³⁷

³⁰ Sloth-Nielsen (2001) 236.

³¹ Dutschke (2006) 10.

³² Dutschke (2006) 10.

³³ Dutschke (2006) 10.

³⁴ Paras 12 and 13 Chapter 8 Enhancing Social Integration, White Paper for Social Welfare 1997..

³⁵ Berry (2003).

³⁶ S Rosa 'Counting on Children: Realising the right to social assistance for child-headed households in South Africa' (2004) Children's Institute, University of Cape Town.

³⁷ Rosa (2004)

According to the 2009 State of the World's Children Report,³⁸ the main cause of under-five mortality in South Africa is HIV and AIDS (representing 35% of all deaths of children under the age of five). The government has prioritised programmes that deal with the HIV and AIDS epidemic, such as improving social conditions of the affected communities and by ensuring appropriate budgetary allocations for social needs. Access to social grants has shown a positive impact in reducing child poverty rates, especially in rural areas, where the high levels of AIDS-related mortality have left huge numbers of children in the care of grandparents.³⁹

3. The legal and policy framework on the right to social security

3.1 International standards

There are several international instruments ratified by South Africa, that protect and promote the right to social security: the United Nations Convention on the Rights of the Child (CRC);⁴⁰ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);⁴¹ the Convention on the Elimination of All Forms of Racial Discrimination (CERD);⁴² the African Charter on Human and Peoples' Rights (African Charter);⁴³ and the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁴⁴ South Africa has signed the primary international document regulating socio-economic rights, namely the International Covenant on Economic, Social and Cultural Rights (CESCR).⁴⁵

³⁸ United Nations Children's Fund (UNICEF) '*State of the World's Children 2009*' (2008).

³⁹ Berry (2003).

⁴⁰ CRC was adopted by General Assembly Resolution 44/25 of 20 November 1989; entered into force on 2 September 1990. South Africa signed the document on 29 January 1993 and ratified it on 15 December 1995.

⁴¹ CEDAW was adopted on 18 December 1979; entered into force on 3 September 1981. South Africa signed the document on 29 January 1993 and ratified it on 16 December 1995.

⁴² Entered into force on 4 January 1969. South Africa ratified the document in 1998.

⁴³ The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. South Africa acceded on 9 July 1996.

⁴⁴ The African Children's Charter was ratified by South Africa on 7 January 2000.

⁴⁵ South Africa signed the CESCR on 3 October 1994 and is yet to ratify it. The implications of a signed but unratified treaty is that south Africa assumes an international obligation to refrain from acts which would defeat the object and purpose of the treaty, and that the state undertakes to review all domestic law and policy to ensure that the same will be in compliance with the obligations imposed by the treaty. See generally C Goose et al '*International and Comparative Social Security Standards*' in M P Olivier *Social Security Law General Principles* (1999) 527,538. S Liebenberg '*The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa*' (1995)11 *South African Journal of Human Rights* 359, 371-372,378.

The legal basis for the concept of social security is found in one of the principal international legal instruments - The Universal Declaration of Human Rights (UDHR). Article 22 and 25 of the UDHR provides that 'everyone, as a member of society, has the right to social security. Everyone has the right to...security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.' It is significant that the right to social security is contained in the UDHR which is considered to have been the first codification of international human rights standards and norms, most of which have crystallised into international customary norms.⁴⁶

In addition, article 9 of the CESCR recognises the right of everyone to social security as instrumental in the realisation of family protection,⁴⁷ an adequate standard of living⁴⁸ and access to health care.⁴⁹ There are several General Comments by the Committee on Economic, Social and Cultural Rights that give authoritative guidelines on the meaning of the CESCR's provisions on social security.⁵⁰ General Comment No. 19⁵¹ specifically addresses the right to social security. The Committee recognises that the implementation of article 9 of the CESCR on social security can only be done 'within the limits of available resources' which, translates to mean progressive realisation of this right.⁵² The underlying tenet of General Comment No. 19 is the 'right to equal enjoyment of adequate protection from social risks and contingencies.'⁵³ The Committee interprets the right to social security in detail to oblige states to establish social security systems, which provide a minimum level of the right and progressively achieve an adequate level within the maximum available

⁴⁶ I Brownlie *Principles of Public International Law* (1990) 570.

⁴⁷ Article 10 International Covenant on Economic, Social and Cultural Rights.

⁴⁸ Article 11 International Covenant on Economic, Social and Cultural Rights.

⁴⁹ Article 12 International Covenant on Economic, Social and Cultural Rights. See generally W P Vandenhoele 'Article 26; the right to be benefit from social security' in A Alen et al (eds) *A commentary on the United Nations Convention on the Right of the Child* (2007).

⁵⁰ General Comment No. 5: Persons With Disabilities E/1995/22 (1994), para 28. General Comment No. 6 The Economic, Social And Cultural Rights of Older Persons E/1996/22 (1995), para 3, 26. General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights E/1999/22 (1998). General Comment No. 28: The equality of rights between men and women (2000) para 31.

⁵¹ General Comment No. 19 The Right to Social Security E/C.12/GC/19 (2008).

⁵² General Comment No. 19 The Right to Social Security E/C.12/GC/19 (2008), para 18. Also see generally A Tostensen 'Feasible social security systems in Africa' International Institute of Social Studies, Erasmus University, Rotterdam 2009.

⁵³ General Comment No. 19 para 9.

resources.⁵⁴ As such it lays the normative content of the right to social security as availability- the existence of a social security system;⁵⁵ the coverage of social risk and contingencies (family and child support being one of the listed main principal branches of social security);⁵⁶ adequate benefits both in amount and duration;⁵⁷ accessibility - all persons should be covered by the social security system;⁵⁸ and the right to social security should complement other rights guaranteed in the CESC.⁵⁹

In 2008, the UN Human Rights Council also appointed a new Independent Expert on Human Rights and Extreme Poverty who has placed a focus on the integration of a human rights perspective into international, regional and national efforts to reduce poverty and is currently paying particular attention to social protection and social security systems.⁶⁰

Furthermore, the CRC⁶¹ contains a set of rights and freedoms which are to be enjoyed by all children, throughout the world. Article 26 of the CRC guarantees the 'right to benefit from' social security which is significant by itself and also for the realisation of other rights in the CRC.⁶² The reason behind the formulation of the right to receive social security benefits being granted to the parent or the guardian, not the child itself, is the fact that the parent or guardian are responsible for the maintenance of the child.⁶³ Article 24(1) refers to 'the highest attainable standard of health'. Article 28(1) mentions 'the right of the child to education, and with a view of achieving this right progressively'. Article 4 of the CRC obliges state parties relative to economic, social and cultural rights 'to undertake such measures to the maximum extent of their available resources.'

⁵⁴ Para 4 -51. Also see paras 31 and 30 Grootboom case.

⁵⁵ Para 11 General Comment No. 19 (2008).

⁵⁶ Para 12 -21 General Comment No. 19 (2008).

⁵⁷ Para 22 General Comment No. 19 (2008).

⁵⁸ Para 23-27 General Comment No. 19 (2008).

⁵⁹ Para 28 General Comment No. 19 (2008).

⁶⁰ Report of the Independent expert on the question of human rights and extreme poverty A/64/279 (Summary)

⁶¹ CRC was adopted by General Assembly Resolution 44/25 of 20 November 1989; entered into force on 2 September 1990. South Africa signed the document on 29 January 1993 and ratified it on 15 December 1995.

⁶² Vandenhoe, above 1.

⁶³ Vandenhoe, above 15.

Article 11 of CEDAW relates to the eradication of discrimination in social security and a loss of seniority or benefits due to pregnancy or marriage. Article 13 further accords the right to equality in respect of family benefits and insurance. Article 14 empowers rural women to benefit directly from social security benefits. The fact that women are often the primary care givers means that access to social security for women directly benefits poor children. Article 5(e) of CERD also refers to equality in respect of the rights to unemployment benefits, housing and social security.

In 2001, the International Labour Conference, composed of representative of states, employers, and workers, affirmed that social security 'is a basic human right and a fundamental means for creating social cohesion.'⁶⁴ The International Labour Organization (ILO) Convention 102 establishes the worldwide-agreed minimum standards and principles for basic social security.⁶⁵ The Convention covers a range of benefits such as medical care, sickness, unemployment, old age, unemployment, family, maternity, invalidity and survivor.⁶⁶ The Convention introduces the idea of a general level of social security that should be progressively attained everywhere, since the system can be adapted to the economic and social conditions prevailing in any country, whatever the degree of its development.⁶⁷ The ILO defines social security as

the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children⁶⁸

⁶⁴ Para 6 ILO Convention No. 102 Social Security (Minimum Standards) Convention, 1952. See M Cichon and K

Hagemejer 'Social Security for All: Investing in Global and Economic Development. A Consultation' Issues in social

Protection series, Discussion Paper 16, ILO Social Security Department, Geneva, (2006).

⁶⁵ ILO Convention No. 102 Social Security (Minimum Standards) Convention, 1952.

⁶⁶ ILO Convention No. 102 Social Security (Minimum Standards) Convention, 1952, Part II-X.

⁶⁷ ILO Convention No. 102 Social Security (Minimum Standards) Convention, 1952.

⁶⁸ See ILO, Introduction to social security, 3; See also the rights stipulated under ILO Convention No 102

However, that definition is seen as being too narrow in the context of a developing country such as South Africa.⁶⁹ According to Mpedi, social security in developing countries such as South Africa should strive towards the provision of basic needs such as shelter, nutrition, adequate health care, clean water and should not only be concerned with cash benefits.⁷⁰ He asserts that social security need not be merely curative (in the sense of providing compensation), but also preventative and remedial in nature.

At the African regional level, the African Charter contains several provisions on socio-economic rights⁷¹ but does not expressly guarantee the right to social security.⁷² However, it is noteworthy that the African Charter affirms its commitment to the UDHR, which has provisions on social security and socio-economic rights.⁷³ The African Charter takes into consideration 'historical tradition and the values of African civilisation, which should inspire and characterise their reflection on the concept of human and peoples' rights.'⁷⁴ Reference to social security is made indirectly to rights that are regarded as specific contingencies of social security,⁷⁵ as illustrated in articles 16,⁷⁶ 17,⁷⁷ 18(1) and (4),⁷⁸ and 22(1).⁷⁹ Indeed the jurisprudence of the treaty monitoring mechanism of the African Charter - the African Commission on Human and Peoples' Rights (African Commission) - has implicitly, found a link between socio-economic rights that may not be expressly guaranteed in the Charter

⁶⁹ GL Mpedi 'Pertinent social security issues in South Africa', Social Economic Rights Project Research No 4 (2008), 6.

⁷⁰ Mpedi, above, 6.

⁷¹ Articles 15 right to work under equitable and satisfactory conditions; Article 16 right to enjoy the best attainable state of physical and mental health ; Article 17- right to education ; Article 18 - duty of the State to protect family as the natural unit and basis of society and Article 19 - right to equality.

⁷² L J van Rensburg & M P Olivier 'International and supra-national law' in M P Olivier et al '*Social Security: A Legal Analysis*' (2003) 619, 634.

⁷³ Articles 22 and 25, UDHR. See generally C Goose et al 'International and Comparative Social Security Standards' in M P Olivier *Social Security Law General Principles* (1999) 527, 548.

⁷⁴ Preamble to the African Charter.

⁷⁵ L J van Rensburg and L Lamarche 'The Right to Social Security and Assistance' in D Brand and C Heyns (eds) *Social Economic Right in South Africa* (2005) 210,231.

⁷⁶ Article 16 "1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick..."

⁷⁷ Article 17.

⁷⁸ Article 18 "1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral. . . . 4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs..."

⁷⁹ Article 22... " All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

such as the right to food and housing to other protected fundamental human rights such as the rights to life and dignity, thus implicitly protected in the Charter.⁸⁰ The African Children's Charter defines a child as a human being below the age of 18 years.⁸¹ The African Children's Charter addresses various contingencies of social security such as the right to survival and development,⁸² right to education,⁸³ right to health and services⁸⁴ and right to be protected from all forms child exploitation/of child labour.⁸⁵

3.2 South African Standards

South Africa has developed its own definition of social security taking into account its unique historical background as well as social and economic challenges.⁸⁶ The White Paper for Social Welfare of 1997 describes the domains of social security as 'poverty alleviation, social compensation and income distribution.'⁸⁷ It refers to social security, social services and related social development programmes as investments which lead to tangible economic gains and in turn leads to economic growth.⁸⁸

⁸⁰ See *Social and Economics Rights Action Centre (SERAC) and another v Nigeria* (2001) *African Human Rights Law Reports* 60 (ACHPR 2001), 260 para 67; para 70 (*SERAC case*).para 64-66; arts 4 and 5 African Charter.

⁸¹ Article 2, African Children's Charter.

⁸² Article 5, African Children's Charter: Survival and Development. "1. Every child has an inherent right to life. This right shall be protected by law. 2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child. 3. Death sentence shall not be pronounced for crimes committed by children."

⁸³ Article 11, African Children's Charter: Education "1. Every child shall have the right to an education. 2. The education of the child shall be directed to: (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential; . . . (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups; (e) the preservation of national independence and territorial integrity; . . (g) the development of respect for the environment and natural resources; . . ."

⁸⁴ Article 14, African Children's Charter: Health and Health Services "1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. 2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:(a) to reduce infant and child mortality rate; (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;(c) to ensure the provision of adequate nutrition and safe drinking water;(d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology; (e) to ensure appropriate health care for expectant and nursing mothers;. . ."

⁸⁵ Article 15, African Children's Charter: "Child Labour 1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development."

⁸⁶ V Moore et al 'The Concept of Social Security: in M P Olivier et el '*Social Security Law General Principles*' (1999), 11.

⁸⁷ Chapter 7, The White Paper for Social Welfare 1997.

⁸⁸ Para 8 chapter 1, The White Paper for Social Welfare 1997.

According to the White Paper, social security in South Africa is based on four pillars, namely, Private Savings, Social Insurance, Social Assistance, and Social Relief.⁸⁹ Social assistance which is a form of income transfer is 'a state provided basic minimum protection to relieve poverty, essentially subject to qualifying criteria on a non-contributory basis.'⁹⁰ In South Africa, such assistance is mainly in the form of grants such as Old Age Pension, War Veteran's Grant, Disability Grant, Child Support Grant, Foster Child Grant, Care Dependency Grant and Grant-in Aid.⁹¹ These are implemented by the Department of Social Development (DoSD) through the South African Social Security Agency (SASSA).⁹²

The target group is primarily poor people with disabilities, poor elderly people and a limited number of women and children. Before an individual can be entitled to such assistance a means test is done to determine the person's needs.⁹³ The positive social and economic impact of these cash transfers since the grants were instituted in the 1990s is widely acknowledged.⁹⁴ These grants are an important means of poverty alleviation in a country where people are vulnerable as a result of widespread unemployment, and where the scourge of HIV and AIDS pandemic is on the increase.

Social insurance is a 'mandatory contributory system of one kind or another or a regulated private sector provision, concerned with the spending of income over the life cycle or the pooling of risks.'⁹⁵ It is financed through contributions from covered employees, their employers and government. These include such schemes as Unemployment Insurance Fund (UIF)⁹⁶ the Compensation for Occupational Injuries

⁸⁹ Chapter 7, par 1, White Paper for Social Welfare, 1997.

⁹⁰ V Taylor 'Transforming the Present - Protecting the Future'. Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa. Taylor Committee (2002)

⁹¹ Section 4 Social Assistance Act 13 of 2004.

⁹² South African Social Security Agency (SASSA).

⁹³ Section 5(2)(b) Social Assistance Act 13 of 2004.

⁹⁴ F Lund, 'Changing Social Policy - The child support grant in South Africa' (2008).

⁹⁵ Taylor Committee as quoted in Mpedi (2008) 7.

⁹⁶ Unemployment Insurance Fund Act 30 of 1966.

and Diseases Fund⁹⁷ which are administered by the Department of Labour; and the Road Accident Fund⁹⁸ which is administered by the Department of Transport.⁹⁹

Private savings are sometimes referred to as social insurance schemes.¹⁰⁰ They are a form of private contributory schemes that cover instances of disability, health costs and invalidity, life insurance and funeral cost.

Social relief is a form of social grant¹⁰¹ that is available for a limited period of up to 6 months for a person who finds themselves in 'distressed' circumstances.¹⁰² Such circumstances include; death, illness and institutionalisation of a breadwinner, and disasters. The term distress in this context is ambiguous¹⁰³ because while poverty could cause a considerable amount of distress, for policy makers this distress must be caused by exogenous circumstances.¹⁰⁴

The focus of this sub-section is limited to social assistance in the form of child support grants. The legal framework governing social security in South Africa includes the Constitution, the Social Security Act, and the White Paper for Social Welfare 1997.

There was an overhaul of the social security system in South Africa in the mid-1990s soon after the formal transition from apartheid to a democratic government.¹⁰⁵ Before commencing the discussion of the current social security legal framework in South Africa, it is useful to note that the spirit of the current system is informed by the former system of social welfare system which was considered residual in nature.¹⁰⁶

The residual model of social welfare was based on the belief that the community and

⁹⁷ Compensation for Occupational Injuries and Diseases Fund Act 130 of 1993.

⁹⁸ Compensation for Occupational Injuries and Diseases Fund Act 56 of 1996.

⁹⁹ R Liffmann et al in M P Olivier et al *Social Security Law General Principles* (1999) 61, 77.

¹⁰⁰ Van Rensburg (2005) 210.

¹⁰¹ Definition of social assistance, Social Assistance Act 13 of 2004.

¹⁰² Regulation 9, Regulations of the Social Assistance Act 13 of 2004.

¹⁰³ 'South Africa: poverty, social security and civil society: Triangulating transformation' Case study of South Africa for Brot fuer die Welt. Studies in Poverty and Inequality Institute, Johannesburg, June 200829.

¹⁰⁴ Regulation 9 (4), Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

¹⁰⁵ D Budlender et al 'Formulating and implementing socio-economic policies for children in the context of HIV/AIDS: South Africa case study' Joint Learning Initiative on children and HIV/AIDS (December 2007) 7.

¹⁰⁶ Dutschke (2006) 10.

the family must provide the care and support for the individual's social welfare. The residual approach works on the basis that limited public resources target the most needy in society. The state's involvement in people's welfare is therefore kept to a minimum.¹⁰⁷ Although the welfare system was largely based on welfare policies developed in commonwealth countries, it was not responsive to the needs of most South Africans.¹⁰⁸ Like all government departments then, the department of Social Welfare¹⁰⁹ was racially segregated and comprised of twelve different racial welfare subsystems¹¹⁰ which were administratively flawed.

3.2.1 The Constitution

The South African Constitution is the supreme law of the country.¹¹¹ Its Bill of Rights – contained in chapter two of the Constitution – applies to all and binds the legislature, the executive, the judiciary, and all organs of state.¹¹²

The spirit of the 1996 Constitution is captured in its preamble which recognises the injustices of the past. It acknowledges that South Africa 'belongs to all who live in it, united in diversity, and adopts the Constitution to improve the quality of life of all citizens.' In a bid to live up to its mandate, the Constitution provides that 'everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'¹¹³

The government is constitutionally obliged to provide social assistance to everyone who is unable to support themselves, and it should continue to progressively realise this right for all, including children. The government is further obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.¹¹⁴ Section 7(2) of the Constitution requires the state 'to respect, protect, promote and fulfil the rights in the Bills of Rights' and

¹⁰⁷ Dutschke (2006) 10.

¹⁰⁸ Dutschke (2006) 18.

¹⁰⁹ Now the Department of Social Development.

¹¹⁰ Dutschke (2006) 18.

¹¹¹ Section 2 of the Constitution.

¹¹² Section 8 (1) of the Constitution. See generally Olivier (2003) 49.

¹¹³ Section 27 (1) (c) of the Constitution.

¹¹⁴ Section 27 (2) of the Constitution.

the courts are constitutionally bound to ensure that they are protected and fulfilled.¹¹⁵ Section 38 of the Constitution empowers courts to grant appropriate relief for the infringement of any rights entrenched in the Bill of Rights.

It is important to note that, the right to social security is not absolute and may be subject to limitations of a reasonable nature as referred to in section 36 of the Constitution. According to *Grootboom*,¹¹⁶ the Constitutional Court's landmark decision on the socio-economic rights pursuant to the 1996 Constitution, the formulation of socio-economic rights delimits the state's positive obligations, qualifying them in three ways: (a) the obligation to 'take reasonable legislative and other measures', (b) 'to achieve the progressive realisation' of the right; and (c) 'within available resources'.¹¹⁷ The key to justiciability of socio-economic rights in the Constitution is the standard of reasonableness, which takes into consideration the needs of vulnerable groups.¹¹⁸

The Constitutional Court further established that it is the primary responsibility of the parent and only alternatively of the state to provide shelter to children.¹¹⁹ For certain categories of individuals and children, the state is obliged to provide the legal and administrative infrastructure necessary to ensure that they are accorded their socio-economic rights such as protection of children from maltreatment, abuse, neglect or degradation, families access to land and access to adequate housing, access to health care food, water and social security, as contemplated in the Constitution.¹²⁰ It was acknowledged that one of the ways in which the state would meet its section 27 obligation would be through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances.¹²¹

¹¹⁵ Government of the Republic of South Africa v Grootboom 2000 11 BCLR 1169 (CC) para 20.

¹¹⁶ Para 20 *Grootboom* case.

¹¹⁷ 'Socio-Economic Rights: Housing, Health Care, Food Water Social Security', in I Currie and J de Waal (eds) 'The Bill of Rights Handbook' (2005) 566, 577.

¹¹⁸ Currie and de Waal (2005) 577.

¹¹⁹ Para 77 *Grootboom* case.

¹²⁰ Para 78 *Grootboom* case.

¹²¹ Para 78 *Grootboom* case.

Van Rensburg¹²² remarks that upon analysing the *Grootboom* case and comparing it to previous judgments of the Constitutional Court¹²³ on the justiciability of socio-economic rights, one is left with the clear impression that whenever the position of historically deprived and disadvantaged groups warrants judicial intervention, the courts will more readily intervene than in cases of individuals claiming assistance. This is in line with the so-called “dignitarian approach”, where the court uses the value of human dignity to come to the rescue of particularly vulnerable groups.

3.2.2 The White Paper on Social Welfare, 1997

The White Paper on Social Welfare¹²⁴ is the first overall social welfare policy under the 1996 Constitution.¹²⁵ In the mid-1990s stakeholders in the welfare field embarked on a consultative process to mediate between the different sectors of the fragmented social welfare system.¹²⁶ The process culminated with the 1997 White Paper for Social Welfare, as a policy document for the Department of Social Development. The drafters of the White Paper were generally influenced by the new Constitution (1996) which provided for the right to social security.¹²⁷

The general long-term objective of the White Paper was to ‘have an integrated and comprehensive social security system supported by the collective potential of existing social and development programmes.’¹²⁸ The aim was to address the alienation and the economic social marginalisation of vast sectors of society that are still living in abject poverty, are vulnerable and have special needs.¹²⁹ The White Paper introduced the notion of ‘developmental social welfare’ that aimed to parallel economic with social development.¹³⁰ By setting out a policy shift that advocated for

¹²² Van Rensburg and Olivier (2003) 619, 633.

¹²³ Such as the case of *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 (CC).

¹²⁴ White Paper for Social Welfare 1997.

¹²⁵ M Dutschke ‘Developmental social welfare policies and children’s right to social services’ in Proudlock P at el ‘South African Child Gauge 2007/2008’ Children’s Institute, University of Cape Town. p29.

¹²⁶ Dutschke (2006) 20. See also Chapter 1 White Paper for Social Welfare 1997. See generally Lund Committee Report on Child and Family Support (1996).

¹²⁷ Dutschke (2006) 8.

¹²⁸ Chapter 7 para 45 White Paper for Social Welfare 1997.

¹²⁹ Preamble, White Paper for Social Welfare 1997.

¹³⁰ Para 7 Chapter 8 Enhancing Social Integration, White Paper for Social Welfare GN 1108 in GG 18166 of 8 August 1997. See also M Dutschke , 2007/2008.

an approach which placed a greater emphasis on prevention and early intervention services,¹³¹ the White Paper gives insight into what is implied by the right to social services as laid out in the Constitution.

The White Paper sought to 'address past disparities and fragmentation of the institutional framework in the delivery of welfare services'¹³² particularly the country's legacy of poverty and inequality.¹³³ Van Rensburg notes that although poverty prevention and alleviation is not social security, it is an aim of social security, requiring preventative and curative measures.¹³⁴

The White Paper focuses on children from a family context as is laid out in its chapter 8 section 1 titled 'The Family and the Life-Cycle: Families, Children, Youth and Ageing.' Its underlying approach is a broad commitment to the preservation of the family as a unit in which children are raised¹³⁵ as the environment best suited to meeting the primary needs of children. It emphasises the adoption of preventative and protective measures to strengthen the family and other social structures that provide protection for children.¹³⁶ The White Paper reflects the African Charter with regard to the duty of the state to protect the family.¹³⁷ The White Paper 1997 gave form and shape to the Social Assistance Act 1997.

3.2.3 The Social Assistance Act, 2004

The Social Assistance Act provides the legislative framework for the realisation of the right to social security and stipulates eligibility criteria and procedures for access to social grants for the elderly, children living in poverty, people with disabilities,

¹³¹ S Giese 'Setting the scene for social services: the gap between service and delivery' in Proudlock P et al 'South African Child Gauge 2007/2008' Children's Institute, University of Capetown 17, 20.

¹³² Preamble, White Paper for Social Welfare 1997.

¹³³ M P Olivier *et al* 'Social Security: A legal analysis' in M P Olivier et al 'Social Security: A Legal Analysis' (2003) 49.

¹³⁴ Van Rensburg and Olivier (2003) 619, 652.

¹³⁵ Paras 46 and 48 section 1 Chapter 8 Section 1 The Family And The Life-Cycle: Families, Children, Youth And Ageing, Chapter 8 Enhancing Social Integration, White Paper for Social Welfare GN 1108 in GG 18166 of 8 August 1997.

¹³⁶ Para 44-46, Section 1 The Family And The Life-Cycle: Families, Children, Youth And Ageing, Chapter 8 Enhancing Social Integration, White Paper for Social Welfare 1997.

¹³⁷ Section 18(1) The African Charter.

children in need of foster care, and people in social distress.¹³⁸ The Social Assistance Act provides procedures to be followed in applications for all grants such as signing of forms, and the documentation to accompany the applications.¹³⁹

The Social Assistance Act 2004 was preceded by the Social Assistance Act 59 of 1992. In terms of the Social Assistance Act 1992, the provision of payment of social grants was delegated to the provincial departments. As of 1 April 2006 the South African Social Security Agency (SASSA) was established as a public entity whose mandate is management, administration and payment of social assistance grants.¹⁴⁰ SASSA is established in terms of the South African Social Security Agency Act, 2004.¹⁴¹ The establishment of SASSA is part of the recommendations made by the Taylor Committee.¹⁴²

At a practical level, the implementation of the provisions of the Social Assistance Act relating to children is in the form of three grants namely; the CSG,¹⁴³ the foster care grant (FCG)¹⁴⁴ and the care dependency grant (CDG).¹⁴⁵ According to the South African Social Security Agency (SASSA) 2008/2009 annual report, over eight million children are currently in receipt of the CSG, over four hundred and seventy four thousand are in receipt of the Foster Child Grant and over one hundred thousand are

¹³⁸ Section 2 to 9 Regulations in terms of the Social Assistance Act 13 of 2004. Regulation 162, Government Gazette No 27316, 22 February 2005. Section 5 to 13 Social Assistance Act 13 of 2004. See generally P Proudlock et al 'South African Child Gauge 2007/2008' Children's Institute, University of Capetown.

¹³⁹ Section 10 Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004. Section 5 and 14 Social Assistance Act 13 of 2004.

¹⁴⁰ Sections 3 and 4 South African Social Security Agency Act, 9 of 2004.

¹⁴¹ South African Social Security Agency Act 9 of 2004.

¹⁴² The Committee of Inquiry into a Comprehensive social security system (Taylor Committee) (2002).

¹⁴³ Section 6 Social Assistance Act 13 of 2004.

¹⁴⁴ Section 8 Social Assistance Act 13 of 2004. Foster Child Grant is available to foster parents who have a child placed in their care by an order of the court. The grant was initially intended as financial support for children removed from their families of origin and placed in foster care for protection against situations of abuse or neglect. However it is increasingly being used to provide financial support to children whose parents have died. The foster care grant is a cash grant currently R650 per month. See generally P Proudlock et al 'South African Child Gauge 2007/2008' Children's Institute, University of Cape Town.

¹⁴⁵ Section 7 Social Assistance Act 13 of 2004. Care dependency grant is available to caregivers of children with special care needs and /or severe disabilities who require permanent care. The grant can assist caregivers to care for children very sick with AIDS related illnesses. The care dependency grant is currently R940 per month. See generally Proudlock P at el 'South African Child Gauge 2007/2008' Children's Institute, University of Cape Town.

in receipt of the Care Dependency Grant.¹⁴⁶ For purposes of this paper, the focus of the discussion is limited to the CSG, discussed in detail below.

4. The Child Support Grant

The CSG is a social grant that was introduced in 1998 and its sole purpose was to help children acquire basic sustenance.¹⁴⁷ The CSG is currently a cash grant to the value of R240 per month.¹⁴⁸ It was initially offered as a modest amount of R100 per month per child under the age of 7.¹⁴⁹ Considering the inflation rates and the real value of the South African Rand, the grant amount has gradually increased. Prior to that, there was the State Maintenance Grant (SMG) which provided support for mothers and their children where the spouse was no longer present. The grant covered children aged 0–17 years and in some cases provided for the caregiver as well.¹⁵⁰ The SMG was considered squawked and was therefore replaced with the CSG. In order to qualify for the CSG, an applicant must meet certain eligibility criteria/terms.

Firstly, the CSG is available to a primary caregiver of a child. A caregiver applying for CSG does not have to go through a court process but simply has to show that s/he is the primary caregiver.¹⁵¹ However, should more than one person claim to be the primary care-giver of a child, SASSA should take into account all the relevant factors to determine the primary care-giver.¹⁵² A 'primary caregiver' includes the biological parent and relatives, or non-related person who takes the main responsibility for a child.¹⁵³

¹⁴⁶ South African Social Security Agency Annual Report 2008/2009.

¹⁴⁷ United Nations Children's Fund (UNICEF) and Department of Social Development South Africa 'Review of the Child Support Grant: Uses, Implementation and Obstacles' (2008) 7.

¹⁴⁸ Social Assistance Act 13 of 2004: Regulations on Increase in Respect of Social Grants. Regulation 261, Government Gazette No. 31987, 13 March 2009. Social Assistance Act 13 of 2004: on Increase in Respect of Social Grants. Regulation 253, Government Gazette No. 30934, 1 April 2008. The cash value has kept pace with inflation over the years, standing at R190 per child per month from April 2006.

¹⁴⁹ UNICEF (2008) 7.

¹⁵⁰ UNICEF (2008)12.

¹⁵¹ Section 4, section 10(3) (b), Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

¹⁵² Section (4)(3) Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

¹⁵³ Section 4(1) Regulations 162, Social Assistance Act 13 of 2004. See also S Giese 'Setting the scene for social services: the gap between service and delivery' in P Proudlock at el 'South African Child Gauge 2007/2008' Children's Institute, University of Cape Town 17, 20.

The CSG is available for a maximum of six children per adult,¹⁵⁴ if the children in respect of whom the application for the grant is made are not the said person's biological or legally adopted children.¹⁵⁵ However with the increasing number of AIDS orphans, recognition and support should be given to guardians, usually extended family members, who take on the care of additional children.¹⁵⁶ Notwithstanding the fact that a significant number of households are headed by children, some of the most vulnerable children are excluded from the grant by the statutory requirement that primary caretakers who claim the grant must be older than 16 years.¹⁵⁷

Initially, the CSG was available to South Africa citizens only. However the case of *Khosa and Others v Minister of Social Development and Others*¹⁵⁸ presented a novel question in the context of socio-economic rights. The Constitutional Court had to decide whether the Constitution allowed the exclusion of all non-citizens from the South African social assistance system – particularly access to social security. The Court's conclusion was that it is just and equitable to make available the grants to permanent residents, and thus ordered that permanent residents be included in the relevant legislative provisions provided for the granting of certain social assistance benefits.¹⁵⁹ As a result of the *Khosa* case, CSG is currently available to the child and primary care-giver who is a South African citizen or permanent residents residing in South Africa.¹⁶⁰ While CSG and CDG are available only to caregivers who are South African citizens or permanent residents, the 2008 regulations¹⁶¹ have extended the FCG to refugees.¹⁶² This was noted in *Scalabrini Centre and Others v Minister of*

¹⁵⁴ Section 4 Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

¹⁵⁵ Section 4(1) Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

¹⁵⁶ T Guthrie 'Children/Family' in M P Olivier et al Introduction to Social Security (2004) 343, 356.

¹⁵⁷ S Rosa 'Counting on children: Realising the right to social assistance for child headed households in South Africa' Children Institute (2004),34.

¹⁵⁸ *Khosa and Other v Minister of Social Development and Other* 2004 (6) BCLR 569 (CC).

¹⁵⁹ Para 98 *Khosa* case.

¹⁶⁰ Section 4(2) (f) Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

¹⁶¹ Social Assistance Act 13 of 2004: Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance. Regulation 898, Government Gazette No 31356, 22 August 2008.

¹⁶² Section 7 (c) Regulation 898, 22 August 2008, Social Assistance Act 13 of 2004. Also see section 27 (b) the Refugee Act 130 of 1998. In principle, refugees enjoy full legal protection, which includes the enjoyment of the fundamental rights set out in chapter 2 of the Constitution. As such refugees qualify for the constitutionally entrenched right to access to social security and social assistance, as well as the other socio-economic rights in terms of section 27 of the Constitution. See generally M P Olivier 'Social Security: a legal analysis' in M P Olivier et al, *Social Security: A Legal Analysis* (2003), 49.

*Social Development and Others*¹⁶³ where the High Court also decided that refugees may also apply for disability grants and social relief of distress.¹⁶⁴

Secondly, the applicant and spouse must meet the requirements of the means test. The CSG is a means-tested social grant.¹⁶⁵ In a means test, information on household income is collected. On the basis of this data, it is then decided whether a person or household is eligible for social assistance.¹⁶⁶ The means test is the income threshold that determines if an applicant is poor enough to qualify for the grant. Initially, it took into consideration the household income; there was a distinction between incomes in urban and rural areas and between those who live in formal and informal housing.¹⁶⁷ This test was considered impractical since income that came into a household was not necessarily equitably distributed among household members and a change was introduced in 1999 that resulted in the test being applied to the personal income of the caregiver and spouse if applicable.¹⁶⁸

This static income threshold was subject to litigation in *Ncamile and the Children's Institute v The Minister of Social Development and Minister of Finance*.¹⁶⁹ In August

¹⁶³ *Scalabrini Centre of Cape Town and Five Others v Minister of Social Development, the Minister of Finance The Minister of Home Affairs and Another* case no 32056/2005, Notice of Motion, High Court of South Africa, Transvaal Provincial Division, 19 September 2005.

¹⁶⁴ Also see L Jamieson, et al, 'Key Legislative developments in 2008/2009' in South Africa Child Gauge 2008/2009, p 10.

¹⁶⁵ Section 10(3) (a) Regulation 162, 22 February 2005 Social Assistance Act 13 of 2004. A social grant is a small, regular payment and similar to a pension or maintenance payment. See generally N De Villiers & S Giese 'A Review of Children's Access to Employment-based Contributory Social Insurance Benefits' (UNICEF in partnership with Department of Social Development 2008) 14.

¹⁶⁶ K Pauw and L Mncube 'Expanding the Social Security Net in South Africa: Opportunities, Challenges and Constraints, Development Policy Research Unit, University of Cape Town, DPRU Working Paper 07/127 (2007) 8.

¹⁶⁷ T Guthrie 'Children/Family' in Olivier M P *et al Introduction to Social Security* (Butterworths 2004) 343, 356.

¹⁶⁸ D Budlender at el 'Formulating and implementing socio-economic policies for children in the context of HIV/AIDS: South Africa case study' Joint Learning Initiative on children and HIV/AIDS (December 2007) 7.

¹⁶⁹ *Ncamile and the Children's Institute v The Minister of Social Development and Minister of Finance* Case no 227/08 Eastern Cape Provincial Division of the High Court (withdrawn and unreported). Briefly; Mrs Ncamile, a grandmother with no income cared for her grandson for over eight years and was excluded from the CSG on the basis that she failed the means test. Although she had no income of her own, her husband received a private pension of R1,500 per month. It was on this basis that the child was considered ineligible for the CSG. Mrs Ncamile's husband was not the child's grandfather; he had no legal duty to support the child and was unwilling to support the child – yet the regulations require that his income was included in the means test because he was the applicant's spouse.

2008, DoSD published new regulations¹⁷⁰ that ensured that the calculation for income threshold keeps pace with inflation. The formula introduced for calculating income threshold is set at 10 times the amount of the grant. Therefore, the 2009 income threshold is R2 400 per month for a single caregiver (and R4 800 per month for the joint income of the caregiver and married spouse). Based on detailed research, the Children's Institute advocates for the means test to be abolished and for a universal approach to grants, because it causes unnecessary barrier to access the much needed grant for children who also suffer from hunger and poverty based on the absolute poverty measure.¹⁷¹

Thirdly, a person receiving a CSG cannot qualify for another grant if s/he is already in receipt of a grant in respect of the child.¹⁷² The child must be resident in South Africa¹⁷³ and the child cannot be cared for in state institutions.¹⁷⁴ The state institutions contemplated here include but are not limited to a prison, a psychiatric hospital, a home for older persons, a treatment centre as defined in section 1 of the Prevention and Treatment of Drug Dependency Act,¹⁷⁵ or a child and youth care centre as described in section 191 (1) of the Children's Amendment Act, 2007.¹⁷⁶

Fourthly, in terms of documentation, the child's valid birth certificate is required as well as the caregivers/applicants identity document.¹⁷⁷ The issue of documentation particularly birth certificates has been one of the most formidable challenge to accessing Child Support Grant. This is the case especially in remote villages and towns where the nearest home affairs office is miles away (if one exists) for the

¹⁷⁰ Social Assistance Act 13 of 2004: Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions In Respect of Eligibility for Social Assistance. Government Gazette No. 31356, Regulation 898, 22 August 2009.

¹⁷¹ D Budlender et al 'The cost of the means test for the child support grant' A joint working paper by the Children's Institute and the Centre for Actuarial Research, University of Cape Town.

¹⁷² Section 4(2) (e) Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

¹⁷³ Section 4 (2) (f) Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

¹⁷⁴ Section 4 (2) (d), Section 4, section 10(3) (b), Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

¹⁷⁵ Prevention and Treatment of Drug Dependency Act 20 of 1992.

¹⁷⁶ Children's Amendment Act 41 of 2007. Section 2 Social Assistance Act 13 of 2004: Amendment: Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions In Respect of Eligibility for Social Assistance. Government Gazette No. 31356, Regulation 208, 26 February 2009.

¹⁷⁷ Section 10(b), Section 4, section 10(3) (b), Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

purpose of registering a child's birth and then be issued with a birth certificate.¹⁷⁸ The issue of documentation was challenged in *Alliance for Children's Entitlement to Social Security (ACCESS) v Minister of Social Development*,¹⁷⁹ where the High Court ordered DSD to implement the use of alternative forms of identity and to give a detailed statistical report in November 2008 on its progress in giving CSG to children and caregivers without identity documents. Although the acceptance of alternative forms of identification is applaudable, the government is weary of corruption and is determined to guard against undeserving individuals accessing the CSG.

Last but not least, the child/children must be under the age of 15 years.¹⁸⁰ However, in October 2009, the Cabinet announced that the CSG age threshold will be extended from 14 to 17 years.¹⁸¹ The implementation of the CSG under that category will also be phased-in as had been the practice in the past, as seen below.¹⁸² 15-year-olds will start on 1 January 2010; 16-year-olds on 1 January 2011 and 17-year-olds on 1 January 2012. Poor children under the age of fourteen¹⁸³ in South Africa are eligible to receive a child support grant of R200 per month.¹⁸⁴ The recent extension of the grant to children under 18 years of age¹⁸⁵ means that more children will benefit from the grant.

Civil society action led by ACCESS, Black Sash and the Children's Institute has been important in creating pressure for change in the social assistance policy and legislation governing the CSG.¹⁸⁶ The following section argues for the extension of child support grant to 18 year-old children.

¹⁷⁸ See generally Goldblatt B 'The right to social assistance and gender: A study of the implementation of the Child Support Grant' (2002) Center for Applied Legal Studies, Johannesburg.

¹⁷⁹ *Alliance for Children's Entitlement to Social Security (ACCESS) v Minister of Social Development* Case no 5251/2005 Transvaal Provincial Division of the High Court (Unreported).

¹⁸⁰ Section 6 (4) Regulation 898, 22 August 2008, Social Assistance Act 13 of 2004.

¹⁸¹ 'SA: Statement by Themba Maseko, Government spokesperson, on Post-Cabinet briefing'. Sourced at <http://www.polity.org.za/article/sa-statemepoint-by-themba-maseko-government-spokesperson-on-post-cabinet-briefing-22102009-2009-10-22>. (Accessed 23 October 2009).

¹⁸² 'Cabinet hikes age limit for grants to children' Business Day October 23 2009.

¹⁸³ Section 4(4) Regulation 162, 22 February 2005, Social Assistance Act 13 of 2004.

¹⁸⁴ This is the amount as set by the South Africa Government in April 2007 (Government Notice no.29726, March 2007).

¹⁸⁵ "Cabinet Announces the Extension of Child Support Grant to 18" NGO Pulse.

¹⁸⁶ K Seyisi and P Proudlock 'When the grant stops, the hope stops. The impact of the lapsing of the child support grant at age 15: Testimonies from caregivers of children aged 15 to 18 Report for Parliament' Children's Institute (UCT), Black Sash, and ACCESS (October 2009).

4.1 Case for Extension of Child Support Grant to 18 years

The courts – particularly the Constitutional Court of South Africa – play a crucial role in the enforcement and adjudication of fundamental human rights.¹⁸⁷ Although to date, a case has not yet been brought before the Constitutional Court dealing directly with interpretation of children’s right to social security, there is one case that has come before the Constitutional Court that highlights on social security. Other cases that deal with access to social security have been dealt with by the lower courts. However, past cases¹⁸⁸ on socio-economic rights give insight into how courts could approach the socio-economic right of children in general and rights to social services to children specifically. Since most socio-economic rights litigation are likely to be concerned with the positive obligations imposed by the rights, violations of the rights are likely to take the form of omissions.¹⁸⁹ The Constitutional Court in the *Khosa* case noted that;

The right of access to social security, including social assistance, for those unable to support themselves and their dependants is 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 if it is to be a society in which human dignity, freedom and equality are foundational.¹⁹⁰

A High Court case, *Mahlangu v Minister of Social Development and Minister of Finance*¹⁹¹ is challenging the age limit of 14 years for accessing the CSG and asking the Court to order the government to extend the grant to all poor children under 18 years. The applicant in this case argues that the state lacks a reasonable plan for extension, which is part of its obligation to progressively realise children’s right to social security in the Constitution. Although the former Minister of Finance in his

¹⁸⁷ Olivier (2003) , 49 64.

¹⁸⁸ *Minister of Health and Others v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) (TAC), *Government of the Republic of South Africa and Others v Grootboom and Others* 2000(11) BCLR 1169(CC), *Centre for Child Law and Another V Minister of Home Affairs and Others* 2005 (6) SA 50 (T).

¹⁸⁹ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 20. Also see ‘Socio-Economic Rights: Housing, Health Care, Food Water Social Security’, in Currie and de Waal (eds) *The Bill of Rights Handbook* (2005) 566, 594.

¹⁹⁰ Para 52, *Khosa* case.

¹⁹¹ *Florence Mahlangu vs. Minister of Social Development and Others*, Case No 25754/05, Pretoria High Court. Judgment is still pending.

2008 Budget¹⁹² announced an extension of the child support grant to children under 15 years starting in January 2009, no time frames or plans have been put forward by the government for a phased-in extension for children aged 15-17 years.

The extension of the CSG by Cabinet, stated above, will benefit approximately 2 million children from poor households. The total cost is estimated to be in the region of R1.3 billion, R2.6 billion and R3.5 billion respectively over the three-year period the grant will be phased.¹⁹³ In the past, the extension was phased over three years: 1 April 2003 – children below the age of 9; 1 April 2004 – children below the age of 11; 1 April 2005 – children below the age of 14; 1 January 2009 - children below the age of 15.

However, while the state has committed to progressively extending the CSG to 17 year-olds, there has not yet been legal commitment in terms of legislation, regulation or policy document¹⁹⁴ to detail the exact nature of that obligation. It is not clear from the government statement whether 17 year-olds or 18 year-olds is the cut off age to access CSG. Accordingly, there is no concrete plan to hold the government to account. Indeed that was one of the issues raised against government in the *Mahlangu* case over the CSG extension to 18.¹⁹⁵ The High Court has not yet issued judgment in the case.

Despite the Cabinet announcement of the intention extension, of the CSG to 14 to 17 year olds, the Ministers of Finance and Social Development¹⁹⁶ have referred to the possibility of attaching conditions to the grant to ensure that children who receive the grant remain in school. It is not yet clear exactly how the possible condition would be structured. It is also not yet clear whether the intention is for the condition to apply only to 15 to 17-year-olds or also to the younger group of children who are already eligible.¹⁹⁷

¹⁹² South Africa National Budget speech 2008.

¹⁹³ 'Cabinet hikes age limit for grants to children' Business Day October 23 2009.

¹⁹⁴ K Hall & P Proudlock 'Litigating for a better deal' Children's Institute Annual Report 2007-2008 (Children's Institute) 23, 25. Also see South African Human Rights Commission '6th Socio-Economic Rights Reports' (2006).

¹⁹⁵ *Florence Mahlangu vs. Minister of Social Development and Others*, Case No 25754/05, Pretoria High Court. Judgment is still pending.

¹⁹⁶ 'Cabinet approves R7.4bn expansion of child grants' Business Day Newspaper 22 October 2009.

¹⁹⁷ P Proudlock 'Conditionalities and the CSG' Child Rights in Focus Newsletter No 8, April 2009.

Extending the grant to 17 will ensure that child-headed households can access grants that would provide financial support to this very vulnerable group of children. In the *Grootboom* case, the Constitutional Court recognised that if the state had better social assistance programmes available for the poor, there would be less pressure on the other socio-economic rights¹⁹⁸ such as a programme for children and parents who are unable to provide for themselves, assist them by means of a child support grant.¹⁹⁹

The right to have access to social security is a constitutionally guaranteed socio-economic right.²⁰⁰ The government is obliged to support children directly when their parents or caregivers are not able to support them adequately due to poverty.²⁰¹ This is done primarily through social assistance programmes such as the Child Support Grant. The Children's Institute acknowledges that the Child Support grant is the single biggest programme for alleviating child poverty in South Africa²⁰² with the uptake having increased dramatically from 5.9 million children in 2005 to over 8 million in 2008.²⁰³

The existence of widespread child poverty in South Africa can be regarded as a failure to realise their socio-economic rights.²⁰⁴ It is acknowledged that South Africa's social security assistance programme is the single most important driver of poverty eradication.²⁰⁵ CSG is one of the means of realising this right for children and it enables them to access many of their other constitutionally guaranteed rights. The following subsection discusses the correlation of the role of social security in advancing other children's rights.

¹⁹⁸ Para 36 *Grootboom* case.

¹⁹⁹ Para 78 *Grootboom* case.

²⁰⁰ Section 27 of the Constitution.

²⁰¹ J John-Langba, D Marera, & L Berry 'Children's access to social assistance' in P Proudlock et al 'South African Child Gauge 2007/2008' Children's Institute, University of Cape Town, 71.

²⁰² John-Langba (2008) 71.

²⁰³ South African Social Security Agency Annual Report 2008/2009.

²⁰⁴ A Dawes et al (eds) *Monitoring Child Well-Being A South African rights-based approach* Human Science Research Council (2007).

²⁰⁵ See generally Olivier (2003), 49, 64.

4.2 The link between social security and other children rights

Section 28 of the Constitution establishes extensive state commitments towards children. The role of the state is to protect children against maltreatment, neglect, abuse or degradation and exploitative labour practices that risk the child's well-being, education, physical or mental health or spiritual, moral or social development.²⁰⁶ By interpreting the right to social security in the context of children's right, the aim is to establish social services as the government's constitutional obligation. There is a correlation between children accessing social security and advancing children's rights. This section explores the link between access to social grants and advancement of children's constitutional rights such as education, adequate standard of living and protection from economic exploitation, among others.

Firstly, section 29(1) of the South African Constitution, states that everyone has a right to basic education. However, at a practical level, while South Africa has constitutionally guaranteed the right to basic education, poverty limits opportunities for children and youth to attend school.²⁰⁷ The White Paper declares a war on poverty and acknowledges that poverty is often accompanied by low levels of literacy and therefore a lack of capacity to access economic and social resources.²⁰⁸ Additionally, even when basic education is provided, poor learning outcomes pervades at all levels especially among economically marginalised communities.²⁰⁹ Poor socio-economic status of learners is one of the contributing factors to poor learning outcomes. The South Africa government's Office of the Rights of the Child (ORC)²¹⁰ reported that approximately 5% of the children aged between 10-16 years were not attending school. Those attending school irregularly include those working on farms, learners attending school part-time because of work or family circumstances, street children, children with disabilities who cannot access school

²⁰⁶ Section 28(d), (e), (f) (ii) of the Constitution.

²⁰⁷ Fact sheet 'Extending the Child Support grant to 18' ACESS, 4.

²⁰⁸ Para 27 White Paper for Social Welfare of 1997.

²⁰⁹ Education is one of the highest priorities in national resource allocations. L Berry 'Rapid Assessment: The Situation of Children in South Africa' (2003) Children Institute, 25.

²¹⁰ Report by the Office of the Rights of the Child (ORC) (2000).

that accommodate their needs.²¹¹ Children also reported leaving school because their parents were too ill mainly due to HIV and AIDS-related infections.²¹²

A survey by the Department of Education observed that some children attending school came from homes that lack basic resources, including food.²¹³ Children in families affected by HIV are particularly at risk of dropping out of school. Many children were breadwinners or caregivers, and the extra pressure of caring for a sick adult or having to earn an income made it very hard for them to cope with schooling.²¹⁴ Access to CSG has shown a positive impact in reducing child poverty rates, especially in rural areas, where the high levels of AIDS-related mortality have left huge numbers of children in the care of grandparents.²¹⁵

The South African Schools Act²¹⁶ makes provision for a school fee exemption process and stipulates that no child may be refused admission to a public school because of non-payment. As a result of the 2006 Human Rights Commission Public Hearings and in light of the cumulative evidence of the burden of fees on poor communities, the government introduced fee-free schools.²¹⁷ However, apart from exemption from paying fees, where applicable, children need to be healthy and properly nourished to attend school. They also need transport, uniforms and other essentials that are not free, hence the importance of social assistance for poor vulnerable children. So far the government has shied away from making it compulsory for caregivers getting CSG to send their children to school.²¹⁸

Lack of education creates a vicious cycle of destitution by reducing the household capacity to break the poverty trap.²¹⁹ As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children

²¹¹ Report by the Office of the Rights of the Child (ORC) (2000).

²¹² Education Atlas (2000) Children's Budget Unit 2002: Budgeting for Child socio-economic rights: Government obligation and the child's right to social security and education. (The popular version).

²¹³ Department of Education (2001).

²¹⁴ Berry (2003), 26.

²¹⁵ Berry (2003) 25.

²¹⁶ South African Schools Act No 84 of 1996.

²¹⁷ L Chisholm 'Monitoring Children's Right to Education' (2008) HSRC.

²¹⁸ 'SA: Statement by Themba Maseko, Government spokesperson, on Post-Cabinet briefing'. Sourced at <http://www.polity.org.za/article/sa-statemepoint-by-themba-maseko-government-spokesperson-on-post-cabinet-briefing-22102009-2009-10-22>. (Accessed 23 October 2009) . See also 'Cabinet hikes age limit for grants to children' Business Day October 23 2009.

²¹⁹ Fact sheet 'Extending the Child Support grant to 18' ACCESS, 4.

can lift themselves out of poverty and obtain the means to participate fully in their communities and society.²²⁰ Accordingly, although there are fee-free schools, many poor children cannot attend school due to incidental costs associated with education such as uniforms, books as well as a basic nutrition. Social grants boost disposable income and make it possible for poor children to attend school and obtain higher education.

Secondly, social security is one of the avenues that guarantee the right to an adequate standard of living. Adequate standard of living for children amounts to the rights of children to basic nutrition, shelter, basic health care services and social services²²¹ and includes water and sanitation. In *Grootboom*, the Constitutional Court provided explicit guidance on the principles applicable to the interpretation of socio-economic rights of access to adequate housing in section 26.²²² The Court noted, as stated above, that since the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking,²²³ section 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.²²⁴

In the case of *Centre for Child Law and Others v The MEC for Education and Others*,²²⁵ the High Court decided that, for children who had been removed from their families and sent to a school of industries, social services included the right to be provided with warm bedding and with social work support. This advances children's right to adequate standard of living in terms of access to social services such as alternative care when children are removed from the family environment.

Thirdly, there is a clear link between the right to benefit from social security and the right to be protected from economic exploitation. Section 28(1)(c) of the South African Constitution encapsulates the conception of the scope of care that children

²²⁰ General Comment No. 13: The right to education (art. 13), para 1. General Comments adopted by the Committee on Economic, Social and Cultural Rights, (1999) HRI/GEN/1/Rev.7, 12 May 2004.

²²¹ Section 28(1)(c) of the Constitution.

²²² M P Olivier et al 'Constitutional Framework' in M P Olivier et al 'Introduction to Social Security' (2004) in 126.

²²³ Section 28(1)(b) of the Constitution.

²²⁴ Para 78 *Grootboom* case.

²²⁵ *Centre for Child Law and Others v The MEC for Education and Others*

should receive in society.²²⁶ The Constitution affirms that every child has the right to be 'protected from maltreatment, neglect, abuse or degradation . . .' and 'protected from exploitative labour. . .'.²²⁷ According to current legislation, no child under 15 may be employed.²²⁸ A household Survey of Activities of Young People (SAYP) conducted in 1999 found that 36% of the children in South Africa were working in 'economic' activities for a minimum of three hours a week.²²⁹ A significant number of children work as farm labourers as a necessity to ensure their own survival and that of their families.²³⁰ As a result, they are likely to be absent from school during periods of peak labour demand and more likely to spend out-of-school-hours on school work.²³¹ Some of the work children engage in may be harmful to them, either because of the environments in which they are required to perform duties or because they are physically, mentally or emotionally immature to the work required of them.²³² For children in such situations, access to grant income means that the family is better able to survive without the child having to work to contribute to household incomes.²³³

4.3 Challenges to accessing social security grants for children

The administration of the social assistance grants such as CSG is governed by the South African Social Security Agency Act, 2004.²³⁴ This section refers to access to social security grants and social assistance generally, these challenges are also evident in accessing CSG. Previously, the administration of social welfare was fragmented and this led to inefficiency and lack of accountability.²³⁵ Chapter 10 of the Constitution sets out the basic values and principles governing public administration and public services. These basic values and principles provide among others that a high standard of professional ethics must be promoted and maintained, efficient,

²²⁶ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 77.

²²⁷ Section 28(1)(d) and (e) of the Constitution,.

²²⁸ Section 17 Basic Conditions of Employment Act 3 of 1983. The employment of children in the advertising industry has been exempted from these provisions.

²²⁹ D Bosch 'Towards a National Child Labour Action programme for South Africa ; Discussion document prepared for the Department of Labour' (2002).

²³⁰ E Bonthuys 'Children' in Currie and de Wall (2005).

²³¹ Fact sheet 'Extending the Child Support grant to 18' ACESS, 4.

²³² Berry (2003) 33.

²³³ Fact sheet 'Extending the Child Support grant to 18' ACESS, 4.

²³⁴ South African Social Security Agency Act 9 of 2004.

²³⁵ Para 15 Chapter 1 White Paper for Social Welfare 1997.

economic and effective use of resources must be promoted, and public administration must be accountable and responsive to citizen's needs.²³⁶ These principles also apply to social security service delivery.²³⁷

The establishment of SASSA as the sole agent responsible for the administration of social security was therefore to ensure that efficient and affective services were rendered to beneficiaries.²³⁸ However, in the last decade the social security system and access to social assistance grants has faced many hurdles that have resulted in several committees being set up to address its deficiencies.²³⁹ Recommendations from these reports include a need to streamline access to social security and social assistance grant. Several problems continue to impede access to social assistance grants. The delivery of social grants has not been efficient in some parts of the country as a result of major administrative problems, poor levels of service delivery, lack of knowledge about grants, unilateral withdrawal of social grants, and corruption and fraud to mention but a few.

Major administrative problems such as lack of documentation and poor conditions prevail at grants pay points.²⁴⁰ Certain weaknesses in the administration and payments occur, resulting in some persons not timeously receiving assistance. Due to administrative delays some wait for months before they can access grants that they have applied for. This was challenged in *Vumazonka and others v MEC for Social Development and Welfare for Eastern Cape*,²⁴¹ where the applicant applied for a disability grant and she was assured that the outcome of her application would be made in three months. When she received no response in three months she went to High Court to challenge the department to take a decision if she was eligible for a

²³⁶ Section 195 (1)(a-j) of the Constitution.

²³⁷ L G Mpedi 'Administrative and institutional framework' in Olivier at el 'Introduction to Social Security' 55, 58.

²³⁸ Section 3 South African Social Security Agency Act 9 of 2004.

²³⁹ These committees are: the Lund Committee on Child and Family Support (1996), the Ministerial Committee on the Abuse, Neglect and Ill treatment of Older Persons (2001). The Committee of Inquiry into a Comprehensive social security system (Taylor Committee) (2002).

²⁴⁰ E Bonthuys 'Realizing South African Children's Basic Socio-Economic Claims Against Parents And The State: What Courts Can Achieve' (2008) 22 *International Journal of Law, Policy and the Family* 333, 340.

²⁴¹ *Vumazonka and Others v MEC for Social development and Welfare for Eastern Cape* 2005 (6) SA 229 (SE).

grant. The Court decided that the delay in dealing with her application was unreasonable.

In the case of *Kebogile Lobisa Ngamole v South African Social Security Agency (SASSA)*²⁴² the High Court decried the conduct of SASSA in respect to delays in processing applications for grants and noted that applicant's application should have been timeously communicated to avoid unreasonable delays. The Court ordered that SASSA communicate to the applicants the reasons for denial of their application within 15 days.

Corrupt and unhelpful officials further add to incessant delays to the process, often discouraging the applicants from pursuing their claim for a grant as well as in the case of CSG. According to the SASSA 2009 annual report, there were 3,930 fraud cases brought to court by SASSA, 3,605 of which were convicted.²⁴³

Potential beneficiaries are prevented from accessing social grants by their own socio-economic challenges. Some cannot even afford the cost of transport to government offices. Many potential beneficiaries do not know about the existence of grants or the correct procedures for application. There is inadequate dissemination of information to communities about the social grants, and the conditions of eligibility. Illiteracy particularly in the rural areas further exacerbate the situation since some potential and deserving applicants do not read or write and therefore find it difficult to fill out the grant application forms.

In the recent past, South Africa has been plagued by incessant service delivery protests. The situation is further aggravated by inefficient bureaucratic procedures, inadequately trained staff, poor management, serious delays and backlog²⁴⁴ in government departments. The question of service delivery improvement in all government sectors is therefore crucial for South Africa. Koma advocates for alternative service delivery that promotes the identification, development and

²⁴² *Kebogile Lobisa Ngamole v SASSA and three similar cases*, Bophuthatswana Provincial Division High Court Case No. 1033/08; Case No. 1025/08; Case No. 1024/08; Case No. 1038/08; Case No. 1039/08, Judgment dated 18 September 2008.

²⁴³ South African Social Security Agency (SASSA) 2008/2009 annual report.

²⁴⁴ For further reading refer to Goldblatt (2002) at 47; Goldblatt (2005) at 248-9; and Guthrie (2002) at 135.

adoption by public departments and agencies of means of delivering public services other than through traditional, hierarchical bureaucracy.²⁴⁵ Alternative service delivery advocates for service delivery achievement and focuses attention on innovative delivery solutions at the customer end.²⁴⁶ Given the challenges facing the roll out of social security and social assistance grants, it is hoped that the SASSA will live up to their motto of 'paying the right social grant, to the right person, at the right time and place. NJALO.!'

5. Strategies to improve access to social grants and social security rights of children

The right to social assistance ensures that people living in poverty are able to meet basic subsistence needs.²⁴⁷ As mentioned previously, social welfare policies often have very broad objectives. In addition to alleviating poverty, they often form part of a broader agenda of economic development and social transformation.²⁴⁸ While the Taylor Committee uncovered that about 75% of poor children under the age of 7 do not get the CSG,²⁴⁹ there has been much debate and proponents that CSG should be a conditional grant, based on, for instance, school attendance and visits to health clinics, as a way to monitor the impact of social grants in society. However, such conditions would require additional administrative requirements to monitor compliance. It is also feared that it will only put further strain on health and education services, as well as the agency responsible for disbursing and monitoring social security payments in the country.²⁵⁰

Apart from the need to legally translate government pronouncements over the extension of the CSG to 17 years, it is imperative that administrative measures for accessing the grants be simplified and more accessible to vulnerable children. The

²⁴⁵ S B Koma 'A critical commentary on the establishment of South African social security agency—the case of alternative service delivery' (2005) 16 *African Journal of Public Administration and Management*, 4.

²⁴⁶ Koma (2005) 4.

²⁴⁷ K Hall 'Children's access to social assistance' South African Child Gauge 2008/2009. Children's Institute, University of Capetown. P 79.

²⁴⁸ Pauw and Mncube (2007) 10.

²⁴⁹ V Taylor *Transforming the Present - Protecting the Future*. Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa. (Taylor committee) (2002), 30-31.

²⁵⁰ Pauw and Mncube (2007) 10.

possibility of denial of child support grants to deserving cases over lack of documentation is a serious concern. Perhaps the administrators of the grants should consider accepting alternative forms of identification. The state should put measures in place to guard against undeserving individuals accessing the CSG, rather than locking out vulnerable cases for want of documentation.

The recently established Social Assistance Tribunal should be supported and granted sufficient powers to adjudicate appeals from individuals whose applications are declined by SASSA. In the past, SASSA used to assess applications and also dealt with appeals against their own decisions, in contravention of one of the basic tenets of rules of natural justice - one cannot be an impartial arbiter in their own cause.

A possible solution to the challenge of providing social security in South Africa would be to implement the April 2002 Taylor Committee²⁵¹ recommendations of a Basic Income Grant (BIG) for all South Africans. Guthrie argues that since BIG is not means tested, it would not only widen the current social welfare provisioning of the state, but would also ensure that no individual falls through gaps in the system.²⁵² There is a broad campaign being built around the call by BIG coalitions including COSATU for the government to introduce a BIG to help end poverty in South Africa. The coalition is calling for an amount of R100 to be paid to everyone, whatever their income or age. A family of four would thus receive R400 a month.²⁵³

The South African Human Rights Commission (SAHRC) also supports the recommendation for the implementation of a Basic Income Grant.²⁵⁴ The SAHRC agrees with the propositions of the Taylor Committee and believes BIG will enable everyone to meet basic subsistence needs by enabling ‘...the poorest of the poor

²⁵¹ V Taylor, *Transforming the Present - Protecting the Future*. Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa. (Taylor committee) (2002).

²⁵² T Guthrie ‘Children/Family’ in Olivier M P *et al Introduction to Social Security* (Butterworths 2004) 343, 363. See also Pauw and Mncube (2007) 28.

²⁵³ S Khoza (ed) ‘Social security rights’ *Socio-economic rights in South Africa: a Resource book..* Community Law Centre, University of Western Cape (2006) 375,388.

²⁵⁴ Guthrie in Olivier 636.

who are excluded from social security and social assistance to escape poverty and have some form of income²⁵⁵ to live in accordance with human dignity.

6. Conclusion

The realisation of the right to social security for children in South Africa through the child support grant faces numerous challenges. Although the main challenges that require a comprehensive solution include administrative constraints, illiteracy and lack of awareness among potential beneficiaries, the limitation of the grant to children up to the age of 15 to this date, excludes many other children who deserve the grant. The recent government pronouncement that the child support grant will be extended up to 17 years is therefore a welcome development but still falls short of covering all children as legally defined by the Children's Act- up to 18 years. It is imperative that when according legal effect to the government pronouncement, the child support grant shall cover children up to the age of 18. Such an extension will not only ensure that child headed households in South Africa - the majority of whom fall under that age bracket - access the grant in order to realise their other socio-economic rights, especially education, but it will additionally contribute to stemming the poverty cycle that affects children in South Africa.

²⁵⁵ South Africa Human Rights Commission (SAHRC) Sixth Annual Economic and Social Rights Report: 2002/2003, 38.

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