

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 2023/071891

In the matter between:

INSTITUTE FOR ECONOMIC JUSTICE

First Applicant

#PAYTHEGRANTS

Second Applicant

and

MINISTER OF SOCIAL DEVELOPMENT

First Respondent

SOUTH AFRICAN SOCIAL SECURITY AGENCY

Second Respondent

THE MINISTER OF FINANCE


Third Respondent

MINISTER OF FINANCE'S ANSWERING AFFIDAVIT

I, the undersigned,

EDGAR SISHI

do hereby make oath and state as follows:



- 1 I am the acting Director General of the National Treasury. By virtue of my position, I am duly authorised to depose to this affidavit and oppose this application on behalf of the Minister of Finance.
- 2 The contents of this affidavit are within my personal knowledge and / or gleaned from documentation under my control, unless otherwise indicated. Where I rely on information provided to me by others, I indicate the source and confirm that I believe such information to be true.
- 3 Where I make submissions of a legal nature, I do so based on advice given to me by the Minister of Finance's legal representatives, which I believe to be correct.

INTRODUCTION

- 4 This answering affidavit sets out the grounds on which the Minister of Finance opposes this application, which I describe as "**the IEJ application**" below.
- 5 The applicants have consented to the intervention of the Minister of Finance and his joinder as a respondent in this application. To avoid a multiplicity of litigation, a formal order joining the Minister of Finance will be sought at the main hearing of this application, rather than in unopposed interlocutory proceedings. For convenience, I proceed (both in the heading above and in the discussion below) on the basis that the Minister of Finance is the Third Respondent in this application.

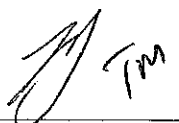
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6 The issues raised below reflect the policy position of the National Treasury, of which the Minister of Finance is the political head. The stance of the National Treasury is within my personal knowledge in my capacity as the Acting Director-General and so I am able to give evidence on behalf of the National Treasury in this affidavit. In the discussion below, rather than referring repeatedly to the Minister of Finance, I shall simply refer to “the Treasury” for convenience. Where it is necessary for me to refer specifically to the Minister of Finance – for instance in the discussion on condonation – I shall do so. Since the Regulations Relating to Covid-19 Social Relief of Distress are the only regulations relevant to the IEJ application, I shall describe them below simply as “**the Regulations**”.

7 In short, the Treasury’s position in this litigation is the following:

7.1 The Regulations do not violate section 27(1) of the Constitution, properly interpreted. They facilitate greater access to social security than was the position prior to their adoption and provide as much coverage and protection to the most vulnerable South Africans that the state can afford at the moment. They therefore do not limit the positive component of the right (because they constitute a reasonable government intervention aimed at the progressive realisation of the right) or the negative component of the right (because, by providing greater access to social security than existed prior to their adoption, they cannot be held to restrict pre-existing access to social security).

7.2 Should this Court disagree, then the Regulations constitute a reasonable and justifiable limitation of the right to social assistance in section 27(1)

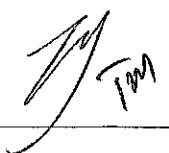


of the Constitution, as envisaged by section 36 of the Constitution. This is because they provide the maximum support to the poorest South Africans which can presently be afforded, taking South Africa's budgetary constraints into account, and the multiple demands in other spheres of daily life.

7.3 In either case, the Regulations are not reviewable under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") or the doctrine of legality (or on any other basis). They constitute a reasonable and rational set of measures designed to protect as many desperately poor people as possible, within available resources.

7.4 Lastly, if this Court is against the Treasury on all of the contentions summarised above, the Treasury submits that the relief sought by the applicants in the notice of motion is inappropriate and would result in disastrous economic consequences for the country's finances. As a result, only in the event of this Court upholding any of the applicants' challenges, it is submitted that any order of invalidity which this Court might wish to make should be suspended (whether under section 172(1)(b) of the Constitution, section 8 of PAJA or both) to allow the Minister of Social Development to make new regulations, which give effect to whatever invalidity is identified by this Court but do not have the dire budgetary implications of the relief now sought.

8 These contentions will be addressed in detail in argument, and flow from the evidence which I present below.

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9 In the discussion below, I adopt the following structure:

9.1 First, before responding to the founding affidavit, I provide the necessary context in which the IEJ application must be assessed. This is essential because I have been advised that this context is indispensable to the interpretive exercise in relation to the Regulations which this Court must conduct.

9.2 Secondly, again before addressing the founding affidavit directly, I provide more detail on the considerations which are relevant to the determination of the budget for the Covid-19 Social Relief of Distress grant ("Covid 19 **SRD grant**"), which is the subject of this application.

9.3 I then turn to respond to the founding affidavit directly. In doing so, I adopt a thematic response by addressing the same topics as set out in the founding affidavit in the order in which they appear in the founding affidavit. As part of this discussion, I address the relief sought in the notice of the motion.

THE CONTEXT – THE TREASURY’S APPROACH TO SOCIAL ASSISTANCE

10 The first topic which I address is the overall approach of the Treasury to social assistance. This is very important, because it provides the context in which the IEJ application should be understood.

11 Before dealing with the topic in more detail, I record at the outset that one issue is not in dispute between the Treasury and the applicants: that is the extreme

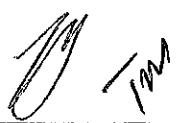
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levels of poverty faced by far too many South Africans. As I show below, the Treasury's appreciation of this problem is at the root of much of its approach to the budget as a whole and goes beyond just its narrow focus on social assistance. Many compromises and adaptations have to be made in order to address the problem as effectively as possible. So, while the applicants and the Treasury might part ways on how best to address the problem, that there is a severe problem of poverty is not in dispute.

The overarching problem

- 12 Social grants are a downstream intervention in response to an upstream problem: lack of economic opportunities and jobs. Without these economic opportunities, the ultimate objective of reducing poverty will never be achieved.

- 13 The Treasury's medium to long-term plan, therefore, is to facilitate and promote economic growth which creates jobs (in other words, inclusive growth). This is how poverty will first be reduced and then, in time, eradicated. The government has tabled a plan to increase economic growth and job creation. This includes measures outlined in chapters 1 and 2 of the Medium-Term Budget Policy Statement ("the MTBPS") published in 2023. By way of summary, I note that these measures include: improving electricity supply to promote growth and jobs; improving logistics, which enables faster and higher-volume transportation and sale of goods and commodities, thus increasing job opportunities; injecting more funding into infrastructure projects within the budget, which increases the activities of the construction sector and, in turn, facilitates job creation.

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- 14 I do not mean to suggest that a broad reference to promoting growth is an answer to the question posed by the IEJ application: i.e., how to protect those most desperately in need, now. But I mention this issue upfront because, as I show below, there are a range of approaches to social assistance which can reasonably be adopted, some of which are better suited to facilitating increased employment than others. And, with respect, the approach adopted by the applicants in this matter is not only unrealistic, based on South Africa's current fiscal position, but somewhat short-sighted. I return to this point shortly.
- 15 South Africa already has one of the highest fiscal spending on social protection of any developing or emerging-market country in the world. For instance, South Africa's programme is larger than the Brazilian Bolsa Familia system and is widely cited, globally, as a good example of targeted social assistance. It covers at baseline around 30% of the population (receiving monthly payments, excluding the Covid-19 SRD grant), which is very high by international standards. Between 2014 and 2027 (the latter, being based on the projections in the MTBS published in 2023), South Africa has spent, or will spend, between 55.8% (the lowest, in 2014) and 61.6% (the projected spend in 2024/25) of its total budget on what is defined as "social wage", which includes social security, and the fulfilment of the various other socio-economic rights such as education, health and housing.
- 16 There can be no doubt, therefore, that the government's long-standing policy has been to offer as much social assistance as possible, as one of the measures to address poverty. At the same time, government can only spend money it extracts

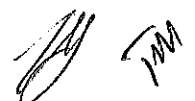


from the economy through taxes. Borrowing money is nothing more than deferred taxation and the only other alternative is to issue currency/print money, which is just a form of taxation through inflation. In short, something has to fund social assistance and, one way or the other, the taxpayer has to shoulder the burden.

- 17 Government's fiscal position has weakened dramatically in the last decade or so. More spending, including on grants, in the absence of economic growth has led to rising debt. Debt has risen faster in South Africa than in other emerging market economies. At present, debt-service costs consume more than 20% of revenue, and redemptions on previously-raised government debt now exceed R155 billion and continue to rise.

- 18 A large proportion of South Africa's population currently receives social grants. In 2022, for instance, this proportion exceeded 43%.¹ This is simply unsustainable. Over the MTEF period, 61% of consolidated non-interest spending goes to social wage, this covers education, health, housing, social protection, transport and amenities. So, government is faced with a multifaceted challenge: the weakened fiscal position and poor economic conditions make it difficult to create growth and thereby increase employment. This causes more people to be in desperate need of assistance. But, because of the weakened

¹ I referred above to a figure of 30%. One must distinguish between those receiving regular, monthly grants (30% of the population), and the entire population of recipients of social assistance in any form (43% of the population in 2022). 13% of the population which received some or other social grant in 2022 received the Covid -19 SRD grant.



fiscal position, government is not in a strong position to provide as much assistance as expected. By way of elaboration:

- 18.1 What looms large above this entire application is the ability of the State to raise revenue through taxation and thereafter make budgetary allocations for a multitude of often competing demands. These demands concern virtually every facet of society, including the obligations flowing from the socio-economic rights in the Constitution: access to adequate housing; access to health care services, sufficient food and water and social security; the right to a basic education and the right to an environment that is not harmful to health and well-being.
- 18.2 But the State's obligations go well beyond socio-economic rights. At a general level, all rights have costs. The right of access to court, and fair civil and criminal trials, requires a functioning court system and paid personnel, a functioning police force to investigate and detect crime, and legal aid. There are massive infrastructural needs like roads and transportation. The list goes on and on.
- 18.3 The basic point is simple: without adequate income from taxation (revenue from taxation is not limitless), and without adequate infrastructure and investments to stimulate growth and employment and increase the tax base, complex and often agonising choices have to be made. Borrowing also has distinct limits, lest the State falls into bankruptcy.

- 18.4 The South African Revenue Service is responsible for collecting taxes. Progress has been made in increasing the amount of revenue collected from taxes after a series of tax increases between 2015 and 2019 and from improvements in tax administration. However, the tax-to-GDP ratio for 2022/23 is at a record high of 25.1 per cent, and that ratio is one of the highest amongst upper-middle income countries. Since 2020, Treasury has stated that further tax increases would be detrimental to economic growth and put further pressure on businesses and households, and the government has focussed on improving tax administrative efficiencies as the preferred approach to increasing revenue. The Budget Reviews of the last four years provide further context and information related to this tax policy approach. The reality is that South Africa has a relatively small tax base and a problem of tax evasion and non-compliance. In this regard, I annex as “ES1” a presentation given by the Treasury to the National Council of Provinces in August 2022, which addresses the issue of budget “leakage” generally, including measures to address tax avoidance and evasion. The various challenges faced by the fiscus are evident from that presentation.
- 18.5 There are distinct budgetary constraints on the State if it is to endeavour to meet the many competing needs of the population. How to meet those needs is complex and not always within the control of the State. The Covid pandemic well illustrates the devastating economic consequences of a sudden and essentially unpredictable event.

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18.6 It is also entirely simplistic to argue that the solution lies in raising the level of taxation. That argument is always available whenever there is a demand on the State to spend money on anything. But the rate of taxation and the levels at which a particular rate kicks in are extremely complex and policy-laden questions the world over. I have addressed this elsewhere in this affidavit.

How to address the overarching problem

19 The Social Assistance Act 13 of 2004 (“the Act”) focuses on the elderly, disabled persons and children as the neediest target groups. This is apparent from Chapter 2 of the Act. As part of continued reforms and amendment of the Act, social relief of distress is recognised as a form of social assistance, as may be seen from the definition of “social assistance” in section 1 of the Act, which provides: ‘**social assistance**’ means a social grant, social relief of distress or an additional payment contemplated in section 12A”. In 2020, chapter 2 was amended to make provision for social relief of distress in the case of disasters – this is addressed in the amended form of section 13 of the Act.

20 SRD grants are temporary grants designed to deal with disasters or emergencies. The Covid -19 SRD grant (R350) is a special form of SRD initially designed to deal with the inability of people to work during the lockdowns of the Covid period. To elaborate on this:

20.1 The Covid-19 SRD grant was introduced in May 2020 to mitigate the impacts of the COVID-19 pandemic on hunger, poverty and

unemployment and to support vulnerable citizens during lockdown. The grant was meant to be a temporary measure to aid unemployed persons and informal sector workers between the ages of 18-59 who were unable to meet their families' most basic needs due to the lockdown. The monetary value of the grant was set at R350 per person per month. The grant was introduced under the national state of disaster and was scheduled to last for six months – i.e., from May 2020 to October 2020. It has been extended five times, with the latest extension for 12 months which will run until 31 March 2024. There is a budget allocation for the grant for the 2024/25 financial year, which means that the government is able to extend it until 31 March 2025, albeit at a further reduced allocation.

- 20.2 There is no permanent funding source for the grant, nor is there a policy framework. All the extensions have been treated as temporary arrangements to mitigate the lasting impact of the pandemic on the economy and continuing levels of hunger experienced within households.
- 20.3 When the COVID-19 pandemic hit, South Africa already had a weak fiscal outlook and the country's policy makers had to battle with balancing the immediate need to support the economy during the pandemic with ongoing efforts to close a large, pre-existing budget deficit. The deteriorating fiscal outlook with a growing debt to GDP ratio, coupled with the introduction of new income support measures for households, put a strain on our already struggling public finances. This required the government to acquire debt to fund the support measures for both



households and businesses that were announced as part of government's overall response. The continued spending pressures resulted in the country's fiscal outlook deteriorating substantially with an even bigger increase in the debt to GDP ratio.

- 20.4 Resources available to fund short-term social relief of distress measures have always been limited, compelling the setting of the SRD grant at R350 per month in 2020. The lack of resources forced the Treasury to explore a range of restrictive measures to ensure that the SRD grant is received by those in distress and is affordable within the limited available budget. It also prompted Cabinet and Parliament to approve follow-up extensions at the same value of R350, to fit within budget constraints.
- 21 The issue of social assistance for long-term unemployed adults has emerged as a new area of attention in the post-Covid period, as a direct result of this new form of support for unemployed people and continued weak participation of this group in the economy. The IEJ application is premised on the notion that a temporary stop-gap measure to address the Covid disaster should be transformed into, essentially, a permanent (or, at least, long-term) solution to alleviate the poverty caused by long-term unemployment. In other words, a major premise of the IEJ's application is an assumption that this is now a permanent right and entitlement from which the government cannot depart. This simply cannot be correct.

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- 22 Government has not yet reached a single way forward to address the increasing problem of unemployed working-age adults. A complex set of interventions is required to address this problem: these include measures to improve the economy as a whole, and the labour market in particular; and job creation in the form of, amongst others, public employment programmes and improved skills programmes.
- 23 There are a number of plans in place which are of relevance. Attached, as "ES2", "ES3", "ES4" and "ES5" respectively, are The South African Economic Reconstruction and Recovery Plan, the Employment Tax Incentive Act, the Expanded Public Works Programme, and Putting South Africa to Work, as examples of concrete plans already underway. These plans, and the plans reflected in the MTBPS, are meant to include more people in the economy and steer them away from social grants. The problem of the inability to support oneself is a function of many factors, the most prominent one being unemployment. To address this, a focus is needed on causal factors which include economic growth, skills building, prioritisation of specific groups of people in the provision of employment opportunities, education, training and others. However, at the moment South Africa has a higher pool of unemployed people than the number of people who are economically active and contributing to the tax base, and thus limited resources are available to support the many programmes which are currently being undertaken across government.
- 24 For these reasons, it is unrealistic and counterproductive to commit the state to providing significantly more resources to grants as opposed to investing more in

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creating opportunities for people to have sustainable livelihoods. Social assistance, at least in the form of relevance here, is meant to be a stop-gap measure while people are enabled to become economically active. The unfortunate truth is that the two problems are inextricably linked – the fewer people who are economically active, the less resources available to the fiscus. And the fewer resources available to the fiscus, the less the state is able to assist the poorest of the poor with social assistance.

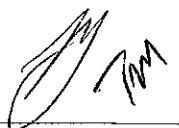
- 25 All Covid-19 SRD grant recipients are working-age people that should ideally be economically active. Compensating for absence of economic activity with cash payments is only viable on a short-term basis.

- 26 As a result, over the past 3 years, various attempts have been made to develop policy proposals to replace the SRD grant. Government has not been able to reach an agreement on the way forward and the process has been made more difficult by the worsening economic circumstances and revenue declines detailed in the MTBPS. This does not mean that the government has abandoned its attempts to address this problem. It simply means that the problem admits of no easy solutions in a constrained economic environment.

- 27 The Treasury commissioned the Southern Africa Labour and Development Research Unit (“**the SALDRU**”) to investigate various issues to do with social grants. Some of the options that have been discussed by government, including with reference to the work of the SALDRU, include:



- 27.1 Replacement of the SRD grant with a family grant similar to that of the Brazilian Bolsa Familia grant, which could ultimately include the child support grant. This option scored well in the technical review conducted by the SALDRU. The advantage of grants which focus on the position of a whole household is that they can take account of the income of working spouses. The feasibility of the model is yet to be tested in South Africa where household make-up varies extensively. But when the aim is to prioritise those most in need, it makes sense to focus on households and not individuals.
- 27.2 The introduction of a job-seeker allowance. This would specifically link the stipend to job seeking activity and would require links between the second respondent (“**SASSA**”) and the Department of Employment and Labour.
- 27.3 Temporary continuation of the SRD grant while pro-employment policies are put into place. These would include expanding public employment programmes, addressing anti-employment labour market policies, the improved use of National Skills Fund and Sector Education and Training Authority funds, recrafting active labour market policies, pathway management, and informal sector support.
- 28 The fundamental point to emphasise at this stage is that any permanent increase in social grants will require a permanent increase in funding through higher revenue to avoid a deterioration in debt dynamics. There are various profound implications for the economy of increasing tax, especially in the context of an



already weakened economic position. This is yet a further example of the knock-on effects of the economic difficulties facing the country, which I mentioned in paragraph 24 above. The harder the financial circumstances facing the taxpayer, the harder it is to use taxation to raise revenue without causing other negative effects on the economy.

29 Since the current poor economic conditions have precluded cabinet from taking a decision to increase taxation in this way, the reality is that the continuation of the SRD grant in its current form is not affordable and is being financed through borrowing. The selection of a mechanism, from the mix of possible interventions, to replace the grant has not been decided by government and this decision is made much more difficult by the fiscal situation.

30 The Treasury and the Department of Social Development are working together to craft strategies and responses relating to a social security reform agenda. This involves a consideration of whether to prioritise the SRD grant over inflation-based increases to other social grants. It also involves consideration of whether to promote the SRD grant at the expense of social welfare services provided primarily by provinces and non-profit organisations which rely on the state for some of their funding. The discussion includes the future of basic income support including assessing and reflecting on which form of support could be the most impactful and sustainable at addressing causal factors of poverty and vulnerability.



31 The government believes, of course, that employment creation, better functioning labour markets and economic growth would be first prize. However, in the interim, government has decided to adopt the following approach as a short-term measure:

31.1 The continuation of the SRD grant in an amount of R350 on a year-to-year basis but only until improved interventions are put in place.

31.2 Progressively putting other interventions in place which are more participatory and linked to job seeking and encouraging employment.

32 If the SRD grant is continued into the medium term, a clear source of revenue will have to be determined in advance.

33 Since the main focus of the IEJ application is the question of the value of the SRD grant and the extent of its duration, I return below to demonstrate why the option summarised in paragraph 31.1 above is the only option available in the light of the current fiscal constraints.

34 In the meantime, and as discussed briefly above, it must be emphasised that there have been differences within government on the best approach to replace the SRD grant. The general approach of the Department of Social Development has been to move to universal grants for much of the population. This approach is very unusual internationally and generally the Treasury supports an approach which is based on linking the working age population to employment opportunities. While a mixture of interventions is probably necessary, it has been

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very difficult to resolve this matter in the context of a fiscal and debt crisis in which none of the reforms is affordable and government is forced to reduce expenditure.

Why government cannot go as far as the applicants would like

35 In the light of what has been said above, I turn now to explain why the Treasury, and therefore government as a whole, is constrained in the interventions it can make regarding the general category of unemployed adults of working age.

The general financial malaise

36 The MTBPS lays out an extremely serious fiscal position. Expenditure exceeds revenue by R321.6 billion in 2024/25 and the gross borrowing requirement is R559.6 billion rising to R623.3 billion in 2025/26. As I have mentioned briefly above, the SRD grant was always meant to be temporary. The reality is that the government did not have sufficient funds to extend the SRD grant for a further year i.e., to 2024/25. However, government saw the need to retain the grant for a further one-year period, in some form, because of the need which it fulfils. Unfortunately, though, the necessary funds will largely have to be borrowed and at increasing interest costs. Interest as a share of government revenue now exceeds 20% and is severely squeezing out other government expenditure. The MTBPS cuts R63 billion from government expenditure in 2024/25 including from health and education because of this, and general fiscal constraints.

37 So, what is of cardinal importance is to appreciate that any further or continued expenditure on the SRD grant by definition must come at the expense of some other expenditure. At the moment, given the significant financial challenges discussed above and discussed again below, the Treasury is in the process of reducing expenditure wherever it can. This is the context in which the applicants' case must be understood.

The specific context of grants/social assistance

38 A total of R190.3 billion was paid in 2019/20 for social grants, increasing to a budget allocation of R253.8 billion in 2023/24, with R248.4 billion expected to be paid in 2025/26. Social grants make up 12.3% of government main budget expenditure and 3.6% of GDP in 2023/24. Social development expenditure including social security funds is anticipated to comprise about 4.8% of GDP in 2024/25 and 15.3% of public expenditure.

39 The MTBPS tabled in Parliament on 1 November 2023 shows that government faces severe fiscal pressures, including revenue declines which will require expenditure reductions of up to R206.9 billion between 2024/25 and 2026/27. At present there are various cost-reduction scenarios under consideration, which include one in which no inflationary increase to any grants is allowed in 2026/27. Even during budget development for 2023/24 and 2024/25 serious consideration was given to a scenario in which there would be no social grant increases – i.e., no compensation for inflation at all. Although this was ultimately not adopted, government has had to borrow to retain the current level of social grant spending.

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To make things more challenging, the pool of total social grant recipients continues to expand. In particular:

39.1 The total cost of the old-age grant is growing by around 3 per cent per year because of the aging population, which requires approximately R6 billion per annum over and above inflation.

39.2 Uptake of the child support grant continues to grow by about 200 000 per year.

39.3 A new benefit to cover orphans (as a top-up of the child support grant) was introduced from 2022.

39.4 The Covid-19 SRD grant, which is of course the focus of this case, has resulted in a massive increase in social grant recipients, especially taking into account that it has been kept in place longer than initially anticipated.

40 Despite the ever-expanding pool of recipients, government cannot expand social grants further at this point because:

40.1 Government revenue is expected to drop by R66 billion in 2024/25 and R89.5 billion in 2025/26.

40.2 Government debt service costs are expected to increase from R354 billion in 2023/24 to R425 billion in 2025/26 and now exceed social protection spending. Escalating debt service costs are progressively squeezing out non-interest expenditure.



40.3 Economic growth remains extremely subdued, and GDP is at levels below that of 2008 in real per capita terms.

40.4 Overall government non-interest spending per capita will decline given low growth, low revenue and higher interest payments.

41 The above discussion demonstrates the fiscal constraints which preclude government from spending more on social grants than it currently does. But there are also issues of policy, which serve to constrain government. That is what I address next.

Why Covid-19 SRD grants have to be seen as temporary

42 In his 2022 State of the Nation Address, the President said this:

“Mindful of the proven benefits of the grant, we will extend the R350 SRD Grant for one further year, to the end of March 2023. During this time, we will engage in broad consultations and detailed technical work to identify the best options to replace this grant. Any future support must pass the test of affordability and must not come at the expense of basic services or at the risk of unsustainable spending.”

43 Following this, the Treasury embarked on an exercise to consider various options. Through this process, government partners identified and analysed a myriad of programmes to explore alternatives to replace the short-term Covid-19 SRD grant.



44 Analysis conducted by the World Bank and the Treasury reveals that approximately R100 billion is spent by the fiscus on at least 106 Active Labour Market programmes, i.e. excluding social grants, school feeding programmes, and housing subsidies, amongst others. Work is in progress and the intention is to strengthen labour market activation responses and create opportunities through a range of interventions including public employment. The danger in falling into the temptation of throwing all available resources into the SRD grant is that this leaves no space for long-term development, and it is a path that has no scope for sustainability or changing people's fortunes. In other words, focusing on social assistance at the expense of longer-term interventions is a path which will simply create more financial emergencies.

45 So government's overall policy approach at the moment is to aim towards aligning social security programs and prioritising long term solutions, while addressing immediate distress in the short term. It is against this backdrop that the MTBPS envisages that the Minister of Finance only makes an allocation towards the SRD grant one year at a time. This is because:

45.1 Given the scale of the unemployment challenge, it is apparent that structural reforms must play a key role. These have been mentioned above. These structural reforms involve a significant contribution by the fiscus, which must be taken into the account in the budgeting process.

45.2 Previous costing by the Department of Social Development shows income support for people of working-age (18-59) costed between R76 billion and R139 billion per annum depending on the value of the grant.

At the income threshold of R624 per month (2021 food poverty line (FPL)) and a grant value of R350 the cost is R76 billion per annum and increases to R139 billion at a grant value of R663 and income threshold of R4 600 per month (at the child support grant income threshold level).

45.3 As I discuss again below, an SRD grant is not a long-term solution – it is not affordable in both the short and long run. At the same time, Basic Income Grant (“**BIG**”), that many hope the SRD grant will morph into, is not affordable. The long-term impact on the economy is not positive – it will result in pressure on growth because of increased debt, tax increases, and diversion from investment. Evidence from literature shows little or no effect on inequality. Scenarios generated as part of the SALDRU analysis show that a BIG is not an effective means of income distribution or addressing the poverty gap.

46 Therefore, there are both budgetary and policy constraints, which make it impossible for the Treasury to commit to the SRD grant other than on a year-to-year basis. This is the only way to ensure that it is considered alongside other primary services; already acknowledging that it has to be funded by debt (and so, technically, is not affordable at all).

THE BUDGET FOR COVID-19 SRD GRANTS

47 The applicants have criticised the budget allocation for the SRD grant for 2023/24. The reason why I have addressed the topics discussed above, before

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dealing directly with that issue, is to demonstrate the context in which the attack must be understood.

- 48 As the applicants have correctly stated, the budget for the SRD grant in 2023/24 was R36 billion. Although, as explained above, the grant was intended to be temporary, there is a budget of R33.6 billion for 2024/25 and the Minister of Finance has announced the extension of the SRD grant for one year.
- 49 The amount of R36 billion was informed by several factors including projected growth in uptake informed by administrative data provided by SASSA, and available resources. Actual spending on the SRD grant in 2022/23 was only R30.3 billion, so the increase from actual spending to R36 billion for 2023/24 was considerable. At the time of writing, the grant budget is still underspent by approximately R2 billion based on October In-Year Monitoring information 2023/4.
- 50 The budgeting process is undertaken in consultation with departments and entities and also guided by available resources. For social grants planning, SASSA shares data of actual monthly uptake. The trend is analysed by both SASSA and Treasury to project the number of eligible applicants to be covered each year. So, the trend in the number of people qualifying for the Covid-19 SRD grant is used as a proxy for need – i.e., to determine those without other means, which is the category which the grant seeks to reach. The available budget allocation is also a factor in determining how many eligible applicants can be covered. In projecting for all social grants, the Treasury uses the cost of the



current trajectory of people receiving the particular grant, considering the forecasted rate of change of uptake.

51 In responding directly to the founding affidavit, I explain the Treasury's position on safeguarding and verification methods, one of the main focuses of attack of the applicants. But, at this stage, I note that the applicants have the true position precisely the wrong way around. They start from the premise that X million number of people should be entitled to the SRD grant and then reason that the government has deliberately put hurdles in place to prevent those entitled to the grant from receiving it. But, this is not how Treasury approaches the allocation. Rather, it works like this:

51.1 The starting point for the budgetary allocation for 2024/25 must be how much was spent in 2023/24. In other words, expenditure in the previous financial year is the base from which each future allocation is made because, as mentioned above, uptake is used as a proxy for determining need.

51.2 As I have noted, I discuss safeguarding below. But for present purposes, part of the framework in which the budgetary allocation must be made is an understanding that procedural safeguards will be used to tighten the process and ensure that only those truly qualifying for protection receive it. Again, the applicants have the position upside down. They assume that, because less has been spent on the SRD grant than expected, it must mean that illegitimate obstacles have been put in place. But the opposite is true – the use of procedural safeguards has served to ensure

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that only those entitled to the grant receive it, and that limited resources are well targeted.

51.3 This consideration is then taken into account as part of the budgetary process. So, for instance, because of the change to bank verification (one of the issues which the applicants criticise in their founding papers), the Treasury anticipated that fewer grants would be paid. This affected the budget allocation. So too would historical data showing that a certain number of applicants will qualify for payment but will not be paid because of problems in being able to verify their bank accounts – ie, the issue which accounts for the fact that in May 2023, as an example, only 84% of approved applications were actually paid (see table 2, beneath paragraph 110 of the founding affidavit). Historical data on this issue is taken into account in each future budget allocation.

51.4 A simple analogy/example to demonstrates my point about how the budget works. If one may imagine a person trying to organise a training seminar for all employees of a company or organisation. This is a seminar which is held every year and so the person's experience of organising the seminar in previous years would be an important contribution to the planning process. If the person budgeted carefully, he or she would try to work out how many people attended the previous year, and what the actual cost implications were. When deciding what to allocate for this year's seminar, the person would want to take account of wastage and what items acquired for the seminar last year were, or were not, used. In other words, if 200 people attended the seminar the previous year, 200



notebooks were acquired in order to give one to each attendee, but only 150 were taken, the organiser might assume that there is a predictable (at least approximately) number of employees who do not need notebooks because, perhaps, they work electronically. Or, if the tradition is to have branded stationery bags handed out to each staff member, the organiser might realise that only 100 bags were taken, even with 200 attendees. The organiser would probably not spend too much time speculating on why this might be. This is particularly so – and this is the crucial issue – because his or her boss has warned him or her that finances are tight, the company/organisation has not done so well that year and therefore that the budget for the seminar is even less than last year.

51.5 If the organiser was not faced with these constraints, he or she might say “I want to make this seminar as fancy as possible in order to project confidence to the employees, and I assume that the lower uptake of stationery and branded items last year was caused by the staff not knowing about them or perhaps not liking what was on offer. I shall therefore make sure that there are still 200 notebooks and 200 branded pens, but provide more variety and make a more concerted effort to inform the staff about the options available to them.”

51.6 However, faced with the tight budget, and an overall desire to make the seminar as productive as possible without overshooting the budget, the rational response of the organiser might be to say: “to prevent waste, I’ll use historical data to predict how many notebooks I need and how much

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branded stationery to order. Yes, I appreciate that this creates a risk of a few people who wanted a notebook not getting one, or people wanting a special company stationery bag going without. But, overall, the seminar will be productive without undermining the budget.”

51.7 The bottom line is that in 2022/23, R44 billion was allocated for the SRD grant but only R30.3 billion was spent. This had to be the basis from which the 2023/24 allocation was made. It would have been grossly irresponsible for the Treasury to ignore these inputs and the evidence of actual uptake. To have done so would have entailed adopting the approach favoured by the applicants – i.e., to try to determine the number of people without work (the figure they give is 18.5 million) and then use that as the basis of the allocation. This would involve ignoring entirely the fact that the budget was underspent in the previous financial year and that not all 18.5 million are in distress. Here, what the applicants do not take into account is that the Covid-19 SRD grant necessarily competes with all other expenditure. So, to ignore historical uptake, in the constrained fiscal environment, would be to say to any other categories of expenditure in which last year’s budget allocation was too little: the Covid -19 SRD grant must be prioritised at your expense, even though it has not used its previous budget allocation and yours was not enough. This reasoning applies to every category of public importance, perhaps the two most notable being health and education.

51.8 Again, I emphasise that the idea behind the Covid-19 SRD grant is to focus on people with insufficient means/immediate need and not overall

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poverty. The government has different programmes to mitigate poverty, including subsistence farmer support under the Department of Agriculture, Land Reform and Rural Development, the Expanded Public Works Programme (EPWP), which provides short-term public employment at minimum income and which is aimed at providing short-term income and acquisition of skills, the Community Work Programme (CWP), which is similar to the EPWP but focuses on community outreach, National School Nutrition programmes, free basic services (water and electricity), SME support programmes and so on.

- 51.9 It must be emphasised that budgeting is both a top- down and bottom - up process. The starting point (ie, the top-down process) is determining the available resources and deciding whether new projects will be entertained. The bottom -up end is driven from departments- assessing challenges/needs and clarifying the amounts needed to address the challenges/needs identified. Budget negotiations are about finding a middle ground between available resources and cross-sectoral requirements. Grant allocations are subject to precisely the same process. There have been times when social grant recipients received increases which were less than inflation while disaster responses and school nutrition, or NSFAS, received a moderate increase. Special attention is placed on ensuring efficiency across all programmes to make sure each get a piece of the pie, even with limited resources. It would, in this context, be entirely reasonable of government to discontinue SRD and provide support to programmes where efficiency and sustainable

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outcomes are evident. The point is that the budgeting process is polycentric and needs to balance many competing demands.

- 51.10 The basic, inappropriate premise of the IEJ application is that Covid -19 SRD grants must be prioritised over all government expenditure. This despite the fact that they are meant to be temporary in nature and cannot solve the long-term unemployment problem which is what causes them to be necessary in the first place. And this leaves out of account the pressing demands in other spheres such as health and education. In truth, the IEJ seeks judicial intervention in budgeting allocation. This is a highly complex and indeed contested sphere influenced by difficult (and sometimes, agonising) policy choices.
- 52 The premise of the IEJ application is that 18 million people should receive the grant. It is important to understand that the 18 million is the whole universe of people unemployed and below the upper bound poverty line (UBPL). This includes those with some source of income/financial support of up to R1335 (in 2021 prices) per month. Not all are considered to be in severe distress, at least assessed in relation to people earning significantly less or nothing at all.
- 53 The last point to address on the issue of the budget is the applicants' criticism of the condition in the Regulations relating to capping – ie, the notion that the SRD grant may only be paid out in terms of the budget allocation. In this regard, I note the following:



- 53.1 To date, in practice no one has been turned away because of budget depletion. This has already been addressed above – in fact, the budget has thus far been underspent.
- 53.2 The 2022/23 R44 billion budget was based on the actual number of people on the grant at the time. As I have explained, the budget ended up being underspent by R13 billion. It is not sensible, in this context, to argue that the budget should have been higher.
- 53.3 It is true that the Treasury did suggest in the allocation letter (ie, when allocating a budget to the Department of Social Development) that the grant should potentially be capped – ie, that no more than the budget allocation could be spent on it. This is unlike other social grants which are considered a statutory right. This approach was adopted because the Covid – 19 SRD grant was, and still is, a temporary intervention and almost all Covid interventions and other departmental budgets are subject to a spending cap. This was a mechanism intended to try to encourage the Department of Social Development to set administrative criteria which would broadly fit within a budget envelope.
- 53.4 In reality, though, no one has ever been denied the SRD grant because of funding limitations and the grant has persistently underspent. The Treasury does not accept the premise that a spending cap is unfair for this particular temporary intervention. The original SRD grant, which covered food parcels, was an intervention limited by budget.

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54 It is therefore the Treasury's position that the Covid-19 SRD grant constitutes a reasonable, short-term intervention which goes as far as the country's resources will allow.

DIRECT RESPONSE TO THE FOUNDING AFFIDAVIT

55 I now proceed to respond to the founding affidavit directly. It is not necessary for the Treasury to respond to every allegation in the founding affidavit. In the discussion below, I therefore try to avoid repetition and keep this affidavit as brief as possible by dealing with the founding affidavit thematically. No allegation should be taken as admitted unless I expressly say so. That said, this is not a matter in which there are likely to be many disputes of fact. Ultimately, the parties have a different view on their respective rights and obligations and also the impact of certain facts (likely to be common cause) on the relief sought – for instance, the impact of the budgetary constraints under which the government must operate on the scope of social assistance which it can provide. Therefore, my main purpose below is to provide the Treasury's perspective on the various arguments of the applicants, drawing on the facts already given above and certain others discussed below.

56 In that spirit, I do not embark on an exercise in which each contention of the applicants in support of their case is denied individually. For example, in paragraph 11 of the founding affidavit the applicants say that they "seek relief in relation to systemic failures to pay". Another example is paragraph 6 (and various other paragraphs where essentially the same thing is said), where the applicants

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allege that the purpose of "bureaucratic obstacles" is to prevent people from benefitting from the SRD grant. I do not need to deny these allegations on every occasion on which they are made because it should be clear from this affidavit as a whole that the Treasury does not consider the applicants to be entitled to any of the relief which they seek.

57 In short, as already appears from what I have said above, and as elaborated upon below, Treasury's position is that:

57.1 The Regulations are reasonable, rational and lawful and the applicants are not entitled to any of the relief which they seek.

57.2 The verification methods used by the Regulations may not be perfect. However, in an economic environment like this one, proper verification is absolutely essential to ensure that only those who are entitled to benefit from the SRD grant receive it and that those who are not, do not. That being so, the verification methods used by the Regulations are the fair and appropriate way in which to strike a balance between ensuring that those in distress receive the grant and the need to preserve the precious and finite resources available for the payment of the grant.

57.3 The government is not constitutionally obliged to provide more social assistance than what the country can afford. And when dealing with the allocation of resources, the government is entitled to make policy decisions about which recipients of social assistance must be prioritised; so too, to make decisions on what compromises should be made to

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protect as many people as possible without jeopardising the country's financial standing and resources as a whole. The approach now taken by the government to the Covid -19 SRD grant satisfies the requirements of the Constitution because it strikes this balance appropriately and with sufficient cognisance of (a) the needs of the category of persons intended to benefit from the SRD grant (b) the needs of beneficiaries of social grants generally, including the most vulnerable (such as children) and (c) the severe fiscal constraints under which the state is now operating.

58 It will therefore be apparent from what I say below and what I have already said above where the Treasury parts ways with the applicants. It should therefore be taken as read that the Treasury denies the various allegations and contentions of law made by the applicants in support of the relief sought.

59 In the discussion below I use the same headings as the applicants when describing each of the themes which I address.

Ad paragraphs 3 to 12 – Introduction

60 The Treasury agrees that the SRD grant has provided critical relief for millions of South Africans. This is why the grant has been extended when it was initially intended only to provide very short-term assistance during the Covid-19 pandemic. The Treasury also accepts that R350 buys less in late 2023 than it did in May 2020 when the grant was first introduced. The issue is affordability. I have



explained in detail above that the Treasury simply cannot afford to commit more than R350 per recipient, and even that sum has to be funded by borrowing.

61 For the reasons given above, I deny the contents of paragraph 5 of the founding affidavit. I revisit that issue below.

Ad paragraphs 13 to 30 – Parties

62 The Minister of Finance does not contest the standing of the applicants to bring this application.

63 The allegations in these paragraphs afford me an opportunity to raise certain issues regarding the policy goals of the applicants:

63.1 I appreciate that the applicants have a good-faith position on social assistance which is motivated by a desire to assist the poor. But it may be seen from these paragraphs of the founding affidavit that the applicants have a series of very specific policy positions, which all coalesce around their overt support for a universal basic income grant (**“UBIG”**).

63.2 A UBIG is in no way a potential solution for South Africa at the present time, however attractive it may feel intuitively. The basic feature of a UBIG is that it is not means tested. There are over 32 million adults in the 18–60 age group. A UBIG would cost several hundred billion rand per year and would require huge increases in taxes – for example a 10 percentage

point increase in VAT from 15% to 25%. In fact, this is common cause. If one looks at annexure FA2 to the founding affidavit, then one may see that the UBIG model proposed by the IEJ is based on the premise that various forms of taxation will have to be increased.

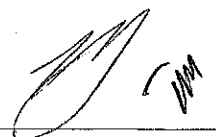
63.3 As much as a UBIG may appear an attractive option, it is totally unaffordable in our context. In fact, there are only 2 countries in the world, the Islamic Republic of Iran and Mongolia, which have substantial UBIGs and both have moved to contain them. The approach to unemployment of people of a working age in most countries is a combination of economic and labour market reforms, and unemployment insurance, with some richer countries having temporary job seeker allowances. As annexure FA2 to the founding affidavit demonstrates, the IEJ is a strong advocate of a UBIG. Again, I accept that the IEJ is well-intentioned and that its desire to see the implementation of a UBIG is based on a desire to help the poor. But the position taken by the applicants is based on various strong policy stances, with which the Treasury, and the government as a whole, respectfully disagree.

63.4 The Treasury's legal stance in this matter – to be developed in argument – is that the right of access to social assistance in section 27 of the Constitution does not entitle parties such as the applicants to mount an argument which, in essence, boils down to saying: we can identify areas in the budget where we believe that government should spend differently, and if our recommended changes to the budget were to be adopted, X or Y increases in social assistance could be afforded. The applicants are

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not entitled to straitjacket government in this way. Nor, I respectfully submit, is a court entitled to do so. I have gone to the trouble to explain the fiscal constraints above. It is to show that the Treasury is doing the best that it can to manage finite resources responsibly.

- 63.5 For the reasons given above, I also part ways with the applicants when they say that government's approach to the SRD grant is "short-sighted". On the contrary, devoting an unaffordable level of expenditure to social assistance, at the expense of other programmes which are essential to uplift the poor on a long-term basis, would be short-sighted of government. The clear policy stance of the applicants, as reflected in the paragraphs under reply and also the annexures mentioned in them, is that unemployment is not going to be addressed in the near or even long-term future and so it is necessary to increase the tax rate substantially in order to offer substantially increased social assistance. This is not government's policy because government considers it to be short-sighted. After many years of tax increases to arrest the growing debt stock, government has instead avoided tax increases since 2020 to limit the negative impact on businesses, households and the economy. Again, I have already explained that South Africa has one of the most expansive social-assistance programmes of any emerging economy in the world. So it is not as if the government is "anti-social assistance". On the contrary, providing adequate social assistance is one of government's core policy positions, which is why such a high percentage of the annual budget is devoted to the payment of the various social grants. The applicants are entitled to take the view that even more should be committed. But the



Treasury does not take these decisions lightly, is staffed by people with economic and financial expertise and, as I have hopefully shown throughout this affidavit, has crafted a budgetary approach which strikes an appropriate balance in the current circumstances. I accept that the applicants disagree but, from a legal perspective, that disagreement is of no moment, provided constitutional requirements are respected, which I submit is clearly the case.

Ad paragraphs 31 to 41 – The Social Relief of Distress Grant

64 I broadly agree with the contents of these paragraphs. There is a difference of opinion, I suspect, between the applicants and government as to how quickly unemployment can be addressed. But I certainly accept that, in the short to medium term (see paragraph 41 of the founding affidavit), there are likely to be millions of unemployed South Africans, as is the case now. In short, this Court may take it as common cause that there is a poverty crisis in South Africa, and that the Treasury does not dispute the statistics mentioned in these paragraphs.

Ad paragraphs 42 to 50 – The national social assistance framework

65 I have already provided the Treasury's broad response to the application as a whole, which necessarily involved discussing certain legal matters. But, the purpose of this answering affidavit is primarily to deal with factual matters, and policy positions which the Treasury (rather than its lawyers in argument) needs to explain. Therefore, these paragraphs will be addressed in argument.

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Ad paragraphs 51 to 55 – The social assistance policy framework

66 These paragraphs are admitted.

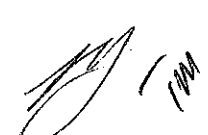
Ad paragraphs 56 to 64 – The social welfare system

67 I address the issue of the various procedural requirements applicable to accessing the Covid -19 SRD grant later in this affidavit. At this stage, I wish to emphasise the following:

67.1 I do not dispute the differences between the Covid-19 SRD grant and other grants highlighted by the applicants, and I note the policy recommendations summarised by the applicants in these paragraphs.

67.2 I refer to the contents of paragraph 45.2 above, where it was explained that the increases proposed by the applicants would involve an additional cost of between R76 billion and R139 billion to be allocated towards the SRD grant depending on what approach one adopts to (a) the value of the grant and (b) the income threshold. I also refer to the general discussion above about the extent to which the SRD grant is already funded by debt.

67.3 If one takes the contents of the paragraphs under reply (ie paragraphs 56 to 64 of the founding affidavit) together with the applicants' overall policy stance, then it is clear that their primary contention is that South Africa should introduce a UBIG, which would not be means tested. But then their alternative proposal, at least in the short-term, is to increase the

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scope of the Covid-19 SRD grant in its present form substantially, by increasing (a) the value of the grant and (b) the income threshold. As I have already explained, government does not consider the introduction of a UBIG to be feasible, or even necessarily desirable, in the budgetary and economic context, and so that may be left aside. But regrettably, even the expansion of the Covid-19 SRD grant is not currently affordable. The applicants appear to accept that the expansion of social assistance in the present context would only be possible with substantially higher taxation and/or incurring much more debt. Government policy, guided by Treasury, simply cannot acquiesce in either of those approaches because of the knock-on devastating effect which they would have on the economy. Government has shown itself willing both to increase taxation and debt in appropriate circumstances. But these interventions have to be undertaken very carefully and not in the manner proposed by the applicants.

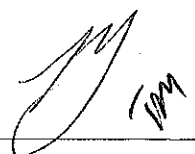
- 68 Regarding the contents of paragraph 61.1 of the founding affidavit: the numbers given by the applicants are broadly accurate but are slightly incorrect in some respects. Therefore, for completeness, I include the table below which shows the correct figures.

	2020/21	2021/22	2022/23	2023/24
Older persons	1860	1890	1985	2085

Older persons, over 75	1880	1910	2005	2105
War Veterans	1880	1910	2005	2105
Disability	1860	1890	1985	2085
Foster Care	1040	1050	1070	1125
Care dependency	1860	1890	1985	2085
Child support	445	460	480	505
Grant-in-aid	445	445	480	505
SRD grant	350	350	350	350

Ad paragraphs 65 to 94 – The introduction of the SRD grant

- 69 The applicants deal with their various criticisms of the procedural requirements necessary to access the SRD grant in more detail later in their founding affidavit. I therefore address that topic in detail below. As I explain below, the Treasury disputes the paragraphs under reply to the extent that they create the impression that obstacles were deliberately put in the way of deserving applicants to reduce the number of recipients.
- 70 The Treasury cannot speak to each and every one of the procedural approaches adopted by the Department of Social Development in the Regulations, or by



SASSA in applying them. But it is correct that, at the level of generality, the Treasury has emphasised the need to ensure strict compliance with various procedural safeguards to ensure that the SRD grant is not abused. I address that in further detail below.

71 As to the contents of paragraph 94:

71.1 There is nothing inaccurate about the extracts and quotes reproduced by the applicants in these paragraphs. They all speak for themselves. What is clear about all of these statements, though, is that the issue of affordability comes up again and again. There is no doubt that there are various stakeholders with different views and my ability to speak for government is limited to the position of the Minister of Finance and the Treasury. What I can say, and this is apparent from the quotes provided by the applicants, is that there is general consensus that there should be a comprehensive social security system. The issues are, first, how to pay for such a system and, secondly, what precise form the system should take. It is not correct that the Minister of Finance, in the article annexed as FA49 to the founding affidavit, gave support for a UBIG, in the form proposed by the applicants (or even at all). It is true, as quoted by the applicants, that the Minister said that the call for a BIG was "reasonable and legitimate". This is consistent with the stance which I have taken in this affidavit – ie, to acknowledge that the applicants hold sincere views about what policy government should adopt to address poverty and unemployment. This does not mean that I endorse the policy which the applicants would prescribe; and, by the same token, the Minister's



description of the calls for a BIG as reasonable and legitimate did not mean that he endorsed them either. It is clear, in fact, from the sentences of the article which follow immediately after the extract quoted by the applicants, that the Minister pointed to the “debate about the affordability of a BIG” and said that, rather than engage with that debate in the article, he proposed instead to focus on the structural nature of South Africa’s unemployment. The Minister then proceeded to go into detail on some of the very topics which I have addressed in the introduction above – ie, the need for an active labour market strategy and a growth strategy.

71.2 The position of the Treasury, and government generally, is that a more developmental and sustainable form of social security will have to replace the Covid-19 SRD grant, which is designed to be temporary. One of the main issues is affordability, but there are also various substantive policy considerations which will have to be addressed. I refer to what I have said above, especially in the introductory sections of this affidavit. Nothing said in the extracts quoted by the applicants contradicts this.

Ad paragraphs 95 to 105 – The social impact of the SRD grants

72 These paragraphs are admitted.

Ad paragraphs 106 to 120 – Pool of qualifying applicants and actual recipients

73 The statement in paragraph 106 is too broad. This is because it overlooks regulation 2(1) of the Regulations, which provides that, in order to qualify for

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receipt of the SRD grant, a person must be “in need of temporary assistance” and have “insufficient means”. Regulation 2(2) then introduces a series of additional qualifications to the right to receive the SRD grant as envisaged in regulation 2(1). Regulation 2(5) makes clear that any person who earns more than R624 per month cannot satisfy the definition of having “insufficient means”. But that does not serve to undermine the rule as reflected in regulation 2(1). In other words, regardless of the content of regulation 2(5), it always remains necessary for a person to satisfy the two requirements of regulation 2(1).

- 74 The reason why I emphasise this issue at the outset is that the Treasury’s approach to budgeting for the SRD grant, which I have explained in detail above, must be understood in the light of the contents of regulation 2(1), read with the procedural requirements in regulation 3. I realise that the applicants have several criticisms of those procedural requirements, which I address next. But, the starting point is that the approach followed by the Treasury to budgeting is different to the approach proposed by the applicants in the paragraphs of the founding affidavit under reply. I have explained in detail above why the Treasury cannot budget on the basis of trying to estimate the number of people in South Africa earning less than R624 per month and then allocating sufficient funds to ensure that each person receives the Covid-19 SRD grant. The Treasury has to budget with reference to historical uptake (in practical terms, taking figures from the previous financial year). This flows from two equally important imperatives. First, the need to reach an accurate budget. But, secondly and even more importantly, to prevent wastage and to preserve finite resources.

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75 I do not dispute that the Treasury has insisted on various procedural safeguards being introduced in order to ensure that the SRD grant is not abused and does not exceed what the fiscus can afford. But this has to be understood in the proper context.

76 To start with procedural safeguards generally:

76.1 In any reasonable system, anywhere in the world, in which public money is used to provide benefits to members of the population, procedural safeguards are applied to ensure that only those to whom a particular benefit is due may access it. This should be relatively uncontroversial. It should also not be necessary for me to explain the justification for this approach since it is self-evident. Abuse of state funds is a possibility in any economy and the more sophisticated the economy, the more sophisticated the safeguards.

76.2 Safeguards imposed in respect of public funds are particularly important in a country such as South Africa in which there are limited, finite resources available for public spending. I have already explained above the extent to which the annual budget in this country is devoted to the payment of grants. That being the case, procedural requirements and safeguards apply to all grants in this country – because preventing waste, fraud, erroneous payment and payment to persons falling outside of a particular beneficiary category are important ways to ensure that the budget is used appropriately. It is also important in ensuring that scarce



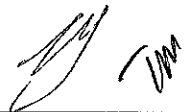
resources are distributed to those who properly qualify, in the interest of all welfare recipients.

77 Regarding the procedural requirements applicable to the SRD grant in particular:

77.1 The SRD grant is the first large scale grant to assist people of working age. The number of adults between 18-60 far exceeds the number of the elderly, disabled persons and children. There are over 34,9 million adults in this age group. Because of this, it is absolutely essential to have a proper system of means testing. If this is not adopted, then the system will collapse.

77.2 The original budget allocation for the SRD grant in 2022/23 was R44.4 billion, which was later reduced to R38.9 billion in the adjustment budget, following lower than anticipated uptake of the grant. The applicants are correct that lower uptake followed the introduction of a stricter means of income verification in the form of bank verification. Whereas income was verified through government databases only between 2020/21 and 2021/22, bank verification was introduced in 2022/23. This saw approved applications drop from 10.8 million at the end of 2021/22 to 8.5 million at the end of 2022/23.

77.3 As part of the application process, each applicant gives permission for his or her bank account(s) to be accessed. The introduction of the bank means test was an absolutely invaluable reform as no other method could as reliably provide proof of individual income (and financial support). The



introduction of the assessment of multiple bank accounts – ie, the ability of SASSA to check various bank accounts held by an applicant – was very helpful to address the problem of people providing only one bank account which did not show other sources of income.

77.4 It needs to be emphasised that the methods of processing grant applications, and the methods of assessment (including the application of safeguards to ensure that only those entitled to payment receive it), are constantly evolving. The details are left to SASSA and the Department of Social Development. But, the fact that the procedural requirements applicable to the SRD grant do not apply in all cases to other grants is at least partially a feature of the fact that some of the procedures applicable to the other grants are either outdated or, at the very least, have not kept up with modern technology. Government is entitled to introduce new measures as they become workable and appropriate and it is not realistic for them to be adopted immediately, across the board, to all social grants.

77.5 I have referred above to the underspending of the budget; and, as may be seen from the founding affidavit, this issue is common cause. But it must be appreciated that much of the underspending was because means testing used previously on an emergency basis in 2020 and 2021 was substantially inadequate because it relied largely on self-declared income. It must be recalled that, during the height of the pandemic, many ordinary systems and processes could not function properly and there

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was also acute distress caused by essential lockdowns. There was no opportunity at that stage to tighten the application process.

- 77.6 In the case of all grants, there are potential inclusion and exclusion errors. The means tests which are used have to be practicable. It is certainly possible that certain people are excluded because they do not, for instance, have access to electronic application tools such as a cell-phone. However, at the same time, the introduction of online applications and electronic processes and bank means testing have been massive steps forward for social security payments and provide lessons for other social grants. The dilemma faced by decision-makers such as the Treasury and the Department of Social Development is that, generally speaking, procedural verification methods can be either under-inclusive or over-inclusive. In other words, one can either adopt a system which inevitably will lead to some worthy applicants being excluded but ensures that the system is not abused, or one can adopt a system which pays as many people as possible but is likely to facilitate payment to people who do not objectively qualify because of lax enforcement mechanisms and procedural safeguards. Even in a system with lots of resources and access to technology, it is close to impossible to adopt procedures which are capable, without any exceptions and errors, of ensuring that every deserving recipient of public funds receives them, and every illegitimate claim is weeded out. In South Africa, the situation is exacerbated by (a) the lack of access of some members of the population to technology (b) the constraints applicable to the technology used by government itself (c) the fact that high levels of poverty incentivise illegitimate claims on the

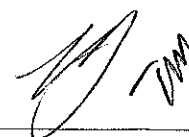


SRD grant (and this would apply to all grants and even to other publicly funded projects and programmes). Therefore, some compromises have to be made. As I have mentioned, during the height of the pandemic an over-inclusive approach was adopted, largely out of necessity. Now, the Treasury has to insist on much tighter testing and procedures because of the significant budgetary constraints discussed above.

- 77.7 The applicants have referred to the research by the SALDRU, which was based on 2015 income survey data, which shows that the grant has the potential to reach 16.8 million people who are not in formal employment and live below the food poverty line of R624. Some of these individuals may however be living in households where they are provided with some form of support, based on current income data. To cover the 16.8 million recipients as proposed by the applicants would require a budget allocation of R70.6 billion in any given year. The fiscus cannot accommodate this significant amount. So, to manage this, mechanisms had to be explored to target the neediest. The database and bank checks are used to provide the most up-to-date income data. Again, I accept that, by using these methods, some of the neediest might slip through the cracks. But, given the budgetary constraints, government has to err on the side of using the best available methods of means testing – ie, from the perspective of reliability – to ensure that, overall, the neediest people benefit from the grant. To put it slightly differently: the idea is that, by using the most reliable means testing, those who are approved will clearly satisfy the description of being the neediest. To mitigate the erroneous exclusions, a process of appeal is available to applicants.



- 77.8 In this regard, the absence of a centralised/common database of beneficiaries makes it challenging to work out which applicants have insufficient means. It is for this reason that bank verification is so important. The SALDRU report, and many others referenced by the applicants, used modelling in a context where we do not have adequate and up-to-date income data (as acknowledged by the applicants in paragraph 107 of their founding affidavit). Therefore, determining the number of people with insufficient means is highly dependent on administrative processes. The database and bank checks are the most up-to-date methods of doing this.
- 77.9 The R44 billion allocated in the initial 2022/23 budget was based on the actual number of approved persons based on data available at the time when the allocation was made. Government has never budgeted for allocations in respect of any of the social grants on the basis of a theoretical maximum population coverage. For all grants, over many years, allocations have been based on actual trends in uptake. The introduction of bank means testing, in the Treasury's view, has on balance been an excellent intervention as it has greatly improved means testing. It has also excluded many people who should not have been receiving the grant. The significant decrease in recipients was unanticipated by all parties, but should not be interpreted necessarily as a bad thing. As I have already said, it should rather be seen as a necessary correction of the inaccurate approach adopted in 2020 and 2021. If the SRD grant is kept in place over time, it is likely that there will be changes in criteria that address particular errors of exclusion and



inclusion. However, the difficulty with the approach of the applicants is that, if means testing was substantially scaled back in the way which they suggest, it could completely destabilise the grant by rendering it unaffordable.

77.10 Globally there is a big shift in the provision of social security to electronic systems and data. These systems increasingly involve interoperable social security registries across government departments. Therefore, the use of multiple databases indicated in the Regulations is a big advance, and government should build on it, and not regress.

Ad paragraphs 121 to 122 – The legal basis of the application

78 These paragraphs are disputed. They will be addressed further in argument.

Ad paragraphs 123 to 136 – Online process only

79 The legal submissions in these paragraphs, which are disputed by the Minister of Finance, will be addressed in argument.

80 Much of what is said in these paragraphs has been addressed by what I said in paragraphs 73 to 77 above. I would only wish to place emphasis on the following:

80.1 The premise of the applicants' contentions (especially regarding equality before the law) is that government either has to change its approach to assessing applications for all grants at exactly the same time or be guilty

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of unlawful unequal treatment. This cannot be correct. Government is entitled to embark on an evolution of grant assessment based on changing technology and requirements. If anything, the experience of the SRD grant shows that other grants would benefit from a better use of technology, and not the other way around.

80.2 I appreciate that there may be some people who are constrained by the use of technology, but it must be recalled that cell-phone coverage in South Africa has increased dramatically in recent years. The trend throughout the world is to progress towards as much use of online processes as possible. The affidavit filed by the Department of Social Development deals with this issue in substantial detail in paragraphs 68 to 91. There it is explained very clearly why the use of an online system in respect of the SRD grant has been very successful. The key point overlooked by the applicants is that the use of SASSA offices to process applications in respect of an entirely new category of grant would require investment of additional resources. The point is well-made by the deponent to Social Development's affidavit that, as things stand, the SRD grant remains a temporary grant, which militates against the investment of the significant resources which would be required to facilitate in-person applications. When one takes this into account, as well as the genesis of the grant (at a time when in-person applications were not possible), and the general increased coverage as a result of online processes, the attack on the online system is baseless.

Ad paragraphs 137 to 154 – the “overly broad” definition of income

81 In order to contextualise what I say below, it is important to recall the relevance of the terms “income” and “financial support”:

81.1 As noted above, the main qualifying criteria to be paid the SRD grant are that a person is in “need of temporary assistance” and has “insufficient means”. Regulation 2(1) makes this clear.

81.2 The term “insufficient means” in section 1 of the Regulations makes clear that a person has insufficient means if he or she is “not in receipt of income or financial support”.

81.3 These terms must be read with regulation 2(5) of the Regulations, which says that the income threshold for “insufficient means” is R624 per person per month. The combined effect of these provisions is that any person receiving more than R624 per month in the form of either income or financial support is disqualified from receiving the grant.

81.4 I return to discuss the significance of these terms below.

82 I do not intend to address, here, the applicants’ interpretation of section 27 of the Constitution. This will be addressed in argument. What I do wish to address here, because it is relevant not only to the proper interpretation of section 27(1) of the Constitution, but also the application of section 36 of the Constitution, is the policy behind the Covid-19 SRD grant and how it implicates the definitions of “income” and “financial support”. The only legal point which I would wish to make here, on the advice of the Treasury’s legal representatives, is that the terms “income” and



“financial support” must be interpreted purposively and in the proper context. As I show below:

82.1 When it comes to purpose, the applicants repeatedly overlook that the grant is meant to be of temporary application, to assist those in need of immediate relief from financial distress. The applicants’ narrow proposed definitions of the terms “income” and “financial support” will undermine this purpose because they will expand the pool of recipients to the extent that the entire grant will collapse.

82.2 When it comes to context, the Regulations have to be interpreted in the context of (a) the circumstances in which they were first made and (b) the context in which they are now applied.

82.3 As to the first, I again place emphasis on the temporary nature of the grant and its goal of addressing the specific circumstances of Covid 19. It has been extended on an ad hoc, year-to-year basis because of a recognition by government that it would cause too much financial distress to remove the grant overnight, because of the number of people who have come to rely on it. But it remains an extension of a temporary measure, which as shown above the fiscus can ill afford. It cannot be divorced from the fact that it was introduced as a temporary measure to address the impact of the pandemic. Its extension flows from that pandemic and its ongoing effects.

82.4 As to the second, the fact that the fiscus is currently under such strain is relevant to the interpretive exercise. The interpretations proposed by the

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applicants in paragraph 143 of their founding affidavit are not businesslike and commercially sensible, given the constraints in which South Africa now operates.

83 To elaborate on what I have said above, I wish to begin by providing this Court with certain figures which demonstrate the budgetary implications of different possible interpretations of the concepts of "income" and "financial support":

83.1 As the applicants have acknowledged, and as discussed above, it is difficult to give precise figures as to how many people have access to less than R624 per month. So, the most reliable numbers which I can provide are those which show the different budgetary implications of various scenarios.

83.2 Using round numbers, and assuming that the allocation of R350 per person, per month remains the same – ie, there is no adjustment for inflation – the position is the following:

83.2.1 If 8 000 000 people receive the grant, the grant will cost the fiscus R33.6 billion a year. As shown above, this is roughly in line with Treasury's estimates forming the basis of the present budget.

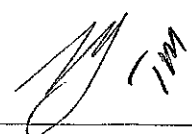
83.2.2 If 16 000 000 people receive the grant, the cost will of course simply double; ie, it will be R67.2 billion.

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83.2.3 If this number increases to 18 000 000, the cost to the fiscus is R75.6 billion.

83.3 Before I point out the specific implications of the definitional approach proposed by the applicants, I note that, later in their affidavit, the applicants address the implications of the failure of government to alter the SRD grant to take account of inflation. I realise that the applicants do not seek a court order prescribing the precise amount of the increase of the grant which they seek; rather, they want a court-ordered plan to provide for the progressive increase of the value of the grant over time. I address that later on, and it will also be dealt with in argument. But, for now, I wish to explain the implications of the suggestion of the applicants that, if inflation is taken into account, the grant should today (ie, assessed on the basis of numbers relevant to the present financial year) be somewhere between R416.96 per month (based on CPI increases – see paragraph 224 of the founding affidavit) and R449.25 per month (based on the applicants' assessment of food inflation – see paragraphs 225 to 227 of the founding affidavit). For the sake of illustration, I use the average of these two amounts; ie, R433.11 per month. If I use that amount and conduct the same exercise as in paragraph 83.2 above, then the position is the following:

83.3.1 If 8 000 000 were to receive the grant at this value, it would cost the fiscus R41.578 billion per year, which is approximately R5.5 billion more than the 2023/24 budget allocation for the SRD grant.



83.3.2 If 16 000 000 were to receive the grant at this value, it would obviously cost double – ie, R83.16 billion.

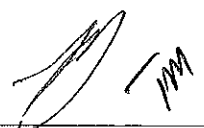
83.3.3 If 18 000 000 were to receive the grant at this value, it would cost the fiscus R93.55 billion.

84 With these numbers in mind, it is then necessary to consider the implications of the applicants' proposed interpretation summarised in paragraph 143 of the founding affidavit.

84.1 In both cases – ie, in their proposed definition of “income” and “financial support” – they place emphasis on the “regular” receipt of funds. They accept that “income” should not be understood only as the regular receipt of a salary, because they include regular receipt of other money – such as returns on investments and money generated by business activities. But they require the income to be “regular” to fall within the definition.

84.2 Their definition of financial support also requires the money in question to be received regularly by the applicant. So, if a person receives maintenance from a spouse or ex-spouse, this would qualify. But if a person receives an ad hoc gift of R10 000 to fund essential household items, the applicants make clear that this would not qualify. By the same token, “loans from friends of family” would be excluded on their definition, regardless of the amount.

84.3 The first problem with this approach, which is also relevant to some of the other attacks mounted by the applicants, such as against the use of bank

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verification, is that their proposed definitions would be impossible to apply. They would require SASSA officials to comb through financial documents to try to draw a distinction between sources of support. The applicants say that loans from friends or family should be excluded, presumably because they think that it would go too far to exclude arms-length loans. But what if an applicant says that a loan given by X company is actually a loan given by a friend's business and is not truly at arms' length because, for instance, the repayment terms are more generous than a normal commercial loan? How is a SASSA official meant to determine this in a speedy, efficient way – which on the one hand ensures prompt payment and, on the other hand, does not place an unbearable administrative demand?

- 84.4 The second, and for present purposes much more worrying, implication of the applicants' proposed definition is that the pool of recipients would self-evidently expand dramatically to include vast numbers of people who cannot be described as being in need of temporary assistance to alleviate financial distress. It is impossible to predict how many additional applicants would qualify on the basis proposed by the applicants, which is why the best I can do is to provide the figures mentioned in paragraphs 83.2 and 83.3 above. They demonstrate the budgetary implications of an increased pool of recipients. The relevance of this is to show that, on the applicants' proposed definitions, the SRD grant would quickly become entirely unaffordable and would simply have to be scrapped.

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84.5 So, faced with this possibility, it is entirely rational and reasonable for SASSA and the Department of Social Development to interpret the terms “income” and “financial support” to include any money which the applicant can use in a given month to survive. This approach allows the finite resources available for the payment of the grant to be used for those in most desperate need. To be blunt about it, it is simply not fair for a person who receives R4000 (for example) from a family member to buy essentials for a few months to put the entire system at risk. In other words, what the applicants miss entirely in their analysis is the reality that, if the SRD grant becomes any more expensive to the fiscus, it will have to be eliminated for the obvious reason that there is a limit to the amount of debt which the state can incur and the amount of tax increases it can impose. So, by arguing for a much more limited set of definitions, they do not take account of the fact that this prejudices the viability of the grant as a whole – they simply proceed as if the debate is about who is included and who is excluded. Once one appreciates that the definition of these terms advanced by the applicants does place the entire grant at risk, then one may see that I am not being hyperbolic when I say that the hypothetical recipient of the R4000 gift puts the receipt of the grant by a truly destitute person, trying to survive on less than R624 per month in real terms, at risk.

84.6 In saying all of this, I do not mean to underplay the difficulties faced by all of the people relevant to the present discussion – a person who regularly receives less than R624 from employment and is obliged to rely on handouts from family members to survive is clearly in a parlous position.

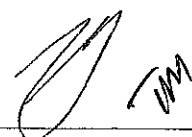
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But faced with the financial constraints discussed above, government has to prioritise the needs of the most desperate.

84.7 I therefore ask this Court to proceed on the basis that, as shown above, the applicants' proposed definitions will not only go far beyond what is intended – ie, to protect the most desperate on a short-term basis. They will also result in the entire grant collapsing, meaning that even the most desperate people will not receive the assistance that they need. The government's approach, in this context, therefore reflects both the better interpretation of the terms "income" and "financial support", and a constitutional outcome.

85 I must make clear, by way of conclusion, that it is not the Treasury's position that any receipt of money, of whatever nature, should qualify. For example, holding money on behalf of someone else – ie, in circumstances where the person in question cannot use the money, as appears to be the case in the scenarios described in paragraphs 147.9 and 148 of the founding affidavit. At the level of principle, only money which can actually be used by an applicant to stave off financial disaster should be treated as "income" or "financial support". But the difficulty becomes one of practicality.

86 I have already explained above, and this issue is addressed in more detail in the affidavit of the Department of Social Development, the benefits of a bank verification system. It has also been explained, mainly in the affidavit of Social Development, why this grant has been designed to ensure speedy payment in

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an online process. It is inevitable that, in any system of this nature, some people will be excluded who are meant to be included. This will apply regardless whether applications are made in-person or online. As soon as one accepts the premise that it is essential to check applicants' bank accounts as the most reliable form of verification of the receipt of funds, then it follows that these types of situation will arise from time to time. It is the Treasury's submission that it is reasonable and justifiable to accept the premise that there will be some unfortunate outliers who are rejected inappropriately – ie, because they ought to qualify – in order for the system as a whole to operate as efficiently as possible. This goes back to the distinction I drew above to the policy choice between an under-inclusive or over-inclusive approach. That said, the Treasury is concerned about the prospect of people slipping through the cracks – for instance, by being excluded because SASSA sees money in a bank account held for someone else, and treats it as income. A possible remedy to this problem would be to expand the appeals process, which is one of the issues raised by the applicants. The Treasury would not wish to be prescriptive to the Department of Social Development as to how this is to be addressed – and submits that, for the reasons given above, the system is lawful and constitutional in its present form. However, it is appropriate for constant refinements to be considered to improve the system to address current weaknesses.

Ad paragraphs 155 to 163 – Unlawful questions in online application form

- 87 On the applicants' own version, their arguments in the paragraphs under reply only apply if this Court accepts their definitions of "income" and "financial



support". Therefore, for the reasons given above, I cannot accept that the questions in the questionnaire are unlawful.

88 I would only wish to add that the table reproduced under paragraph 159 of the founding affidavit serves to strengthen what I have said above:

88.1 The applicants accept that it cannot be established how many answers reflected in that table led to disqualification. And it is not clear from the annexure to which they refer precisely what the statistics were meant, in the presentation, to convey. However, the applicants say that up to 76% of applicants are vulnerable to disqualification based on what they describe as the improper understanding by SASSA/the Department of Social Development of the concepts of "income" and "financial support".

88.2 A conservative figure to use is the 25% used by the applicants in paragraph 161 of their founding affidavit. On this basis:

88.2.1 One must take the difference between the figure of 14 416 844 as reflecting the total number of applications made in May 2023 (as the most recent number reflected in the founding affidavit) and 8 429 524 as reflecting approved applications to reach the figure of how many applications made in May 2023 were declined. This means that 5 987 320 applicants were rejected in May 2023.

88.2.2 If one then assumes that, on the definitions proposed by the applicants, 25% of these applications would have been



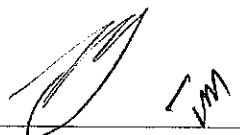
successful, then it means that a further 1 496 830 people would have been successful.

88.2.3 This means that, even if only 25% of applicants would have to be awarded the grant based on the applicants' proposed definitions, this would have cost the fiscus approximately R524 million more in May 2023. Across the year, this accounts for approximately R6.3 billion.

88.2.4 It is reasonable to assume that the number of successful applicants would be much greater than what I have posited above, if the applicants' definitions were to be adopted. This is because the pool of applicants would no doubt increase and the numbers discussed above are based on the assumption (possibly wrong) that this pool would get no bigger.

88.3 It is therefore common cause that, on the applicants' interpretation, the number of successful applicants would increase significantly, which in turn would make the grant significantly more expensive. The only difference between the parties is the legal significance of this. I have addressed that at length above. For the reasons already given, the applicants cannot be correct, either at the level of interpretation or in respect of their argument that the government's approach is unconstitutional.

Ad paragraphs 164 to 195 – Bank and database verification process

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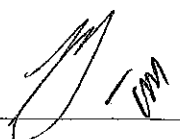
89 The contents of these paragraphs have largely been addressed above. There are also certain aspects of the paragraphs under reply – for instance, the criticisms of the way in which verification is implemented – which have to be addressed by SASSA and the Department of Social Development and on which I cannot comment.

90 I therefore would simply wish to note that:

90.1 The applicants are wrong to say, as they do in paragraph 189.2 of the founding affidavit, that the Covid -19 SRD grant is no longer temporary and is a “fixture of the social assistance scheme” or that “government has confirmed [it] is here to stay”. I have addressed this above and simply make the point that the grant is, despite what the applicants say, different to other grants because it is meant to provide speedy, short-term and immediate relief to desperate people. It may also not be extended beyond the 2024/25 financial year and is therefore not a “fixture of the social assistance scheme”.

90.2 It is not irrational to treat grant recipients in different categories differently when regard is had not only to what I said in paragraph 90.1 above but also the fact that methods of verification are constantly evolving, as I have addressed above.

90.3 Subject to what I have said above about constantly refining the system, some degree of inappropriate exclusion has to be accepted as baked into

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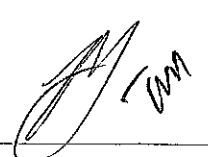
the system and as constituting a reasonable exchange for tightening the verification system as a whole to preserve the finite budget.

Ad paragraphs 196 to 213 – Narrow appeal process that excludes new evidence

91 Treasury does not necessarily agree with all of the legal submissions in the paragraphs under reply. It does not, however, have a direct interest in the question of whether a narrow or wide appeal is allowed. On the one hand, I can see the merit in some of the applicants' contentions about the need to be able to provide better evidence on appeal. On the other hand, I understand fully when the Department of Social Development says that it would be impossible to process 7 million monthly appeals in the way suggested by the applicants. Other than to reiterate what I said earlier – ie, that an expanded appeal could potentially ameliorate the effects of inappropriate exclusion, as long as practical – the Treasury considers it appropriate not to address this component of the case further in this affidavit. It will be the subject of argument.

Ad paragraphs 214 to 218 – the “arbitrary” exclusion of qualifying applicants when funds are depleted

92 I have explained above the basis on which the 2023/24 and 2024/25 budgets for the SRD grant were determined. I shall not repeat any of that discussion here; I would simply note that, for reasons already given, I do not accept the applicants' premise that there has been deliberate underbudgeting.

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93 In response to these paragraphs, I would simply point out that it is noteworthy that the applicants cannot point to any person who has been excluded from receiving the grant on the basis of depleted funds. This is because, as I have shown above in demonstrating that the budget has thus far been underspent, this has not happened. The scenarios in paragraph 217 of the founding affidavit are therefore entirely hypothetical. I would say, though, that at the level of principle there is nothing irrational or unreasonable about including a qualification along the lines reflected in regulation 5(3)(a). Again, this is done simply out of necessity and in appreciation of the fact that no overspending of any budget line-items is defensible in the present context.

Ad paragraphs 219 to 235 – Retrogressive grant value

94 The main response to the paragraphs under reply is the detailed information which I have provided above about the inability of the state to afford the increases proposed by the applicants. Even a basic increase to accommodate CPI inflation based on an assumed 8 million recipients would cost the fiscus an additional R6.4 billion per year. And, on the applicants' own version, this would hardly make a difference because R416.96 per month (the CPI-adjusted value of R350 in today's terms) is far below what the applicants say is the minimum needed to survive (see table 5, beneath paragraph 228 of the founding affidavit).

95 Therefore, the Treasury was left with no option but to preserve the value of R350, and make no upward adjustments, simply because there are competing social support priorities and there is no money available to provide more. It is not



unreasonable or irrational to treat this grant as different to the other categories of social assistance, because its nature is very different. This has been explained more than once above. It is perfectly reasonable to take the view that inflationary increases, to the extent affordable at all, should be prioritised for grants which are expressly permanent and which have been in existence now for decades and which are, by definition, the only means of support the recipient will ever receive. In other words, since a child cannot, by definition, work, he or she is entirely dependent on a child-support grant to survive (of course, assuming that he or she is not adequately supported by a parent or guardian with sufficient means). By the same token, a pensioner cannot be expected to find work as an alternative to receiving an old-age grant. The recipients of the SRD grant are, by definition, of working age. I have explained that addressing unemployment at a systemic level is one of government's main priorities. For this reason, the SRD grant is only a stop-gap measure. And, while I appreciate what the applicants have said in the paragraphs under reply and I accept that, in real terms, the value of the grant has declined over time, these are simply unavoidable features of the finite resources now available to the state.

- 96 The notion that the real-term diminution of the grant's value violates the negative component of the right in section 27(1) of the Constitution will be addressed in argument. I simply note here that this is disputed. It is based on a misunderstanding of the reach of section 27(1) and its proper meaning. The Covid -19 SRD grant, by definition, expands the pool of recipients of social assistance significantly. For this reason alone, it could never be treated as violating the negative component of the right of access to social assistance, even

if it gives recipients less than what the applicants consider appropriate. The argument also ignores the fact that the Covid-19 SRD grant was introduced as a temporary measure to alleviate the impact of the Covid 19 pandemic.

Ad paragraphs 236 to 239 – the “irrational” and “retrogressive” income threshold

97 These paragraphs raise the same issues which I have addressed in the previous section. I would simply say that in no sense can the use of R624 be described as “irrational” or “arbitrary”. On the applicants’ own version, it is the precise opposite of arbitrary because it was reached with a specific, and reasonable statistic in mind – ie, the 2021 FPL. The reason why the threshold has not been increased is because it will make the grant unaffordable. Again, this is the precise opposite of irrational – there is a clear link between the measure (ie, retaining the threshold at R624) and the purpose (ie, preserving finite resources).

98 The reality is that there is no constitutional right to an inflationary increase in the threshold, just as much as there is not a constitutional right to an inflationary increase in the value of the grant itself. It is obviously easy, and understandable, to motivate for real-term increases at the level of principle and policy. But it is also rational and reasonable for government to make a choice designed to prevent the collapse of the entire grant category, and at least preserve it for those in most desperate need. Self-evidently, those with real income and financial support of less than R624 are more in need of urgent assistance than those with real income and financial support of less than R696 per month (to take the 2023



FPL), R1042 (to take the 2023 LBPL) or R1488 (to take the 2023 UBPL). It is equally self-evident that people with access only to any of those sums are struggling to survive and are deserving of upliftment. But it is neither irrational, nor unreasonable nor unconstitutional for government to prioritise those in the first category in circumstances where it has insufficient money to cater for all of those categories.

Ad paragraphs 240 to 247 – non-payment of approved beneficiaries

99 These paragraphs deal with practical issues outside of my knowledge and beyond the scope of the Treasury's legal interest in this matter. I therefore leave them to the Department of Social Development to address.

Ad paragraphs 248 to 258 – relief

100 Most of the reasons why the Treasury opposes the relief sought by the applicants flows from what I have already said above. But it is necessary for me to address the issue of relief in more detail. This is because, as noted in the introduction, even if this Court is with the applicants on one or more of their substantive complaints, the remedies which they seek are constitutionally inappropriate. They will have significant budgetary implications and expose the fiscus to serious risk. The Treasury therefore contends that, rather than granting the relief sought, this Court should suspend any declaration of invalidity which it wishes to make for at least 18 months (save in respect of prayers 18 to 21 of the notice of motion, which will require even longer), to enable the defects to be addressed in a way which will not have the severe consequences of the relief as presently framed. I

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must make clear that this argument is advanced in the alternative; and only applies if this Court rejects the respondents' primary contention that the application should be dismissed.

101 In order to make out the case for suspension, I need to address some of the prayers in the notice of motion individually:

101.1 The prayers sought in prayers 10, 11, 12, 14, and 15 of the notice of motion relate to aspects of the dispute which do not concern the Treasury. Although the Treasury does not concede that a proper case has been made out for any of that relief to be granted, I say nothing further about it here.

101.2 The relief sought in prayers 1 and 2 of the notice of motion is largely the concern of SASSA and the Minister of Social Development because it will have significant logistical implications for the way in which the Covid -19 SRD grant is processed. It will also have operational implications for SASSA's offices. The Treasury supports the use of electronic platforms for processing social grants for the reasons given above. However, I leave the specific issue of paragraphs 1 and 2 of the notice of motion to the Minister of Social Development.

101.3 Regarding prayers 3 to 5:

101.3.1 Prayers 3 to 5 of the notice of motion will have profound budgetary implications. They will also force the government to

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pay the SRD grant to people who cannot justifiably be prioritised in the current economic climate.

101.3.2 I have addressed these issues above. The use of the word “regular” in prayers 3 to 5 will have the implication that an unemployed person who receives no regular income, but receives ad hoc financial support of significantly more than R624 from – for example – friends and relatives, will still qualify for the grant.

101.3.3 It is impossible to predict the budgetary implications of prayers 3 to 5 because it is impossible to know in advance how many people will take advantage of the much narrower definitions of “income” and “financial support”. But this relief has the potential to cost the fiscus billions of Rand per year.

101.4 Regarding prayer 6:

101.4.1 Prayer 6 is essentially an extension of prayers 3 to 5 because it attempts to give effect to the applicants’ contention that “gifts”, “assistance from anyone”, “donations” and other forms of ad hoc support should not be taken into account when assessing a person’s financial position.

101.4.2 For the same reasons as summarised in paragraphs 101.3 above, the Treasury considers prayer 6 to be inappropriate.

101.5 Regarding prayers 7 to 9:

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- 101.5.1 Prayers 7 to 9 will have the implication, if granted, that a large pool of persons who receive income or other assistance far in excess of R624 per month will gain access to the Covid -19 SRD grant (at least potentially, given that it is unknown at this stage how many people will take up the grant if prayer 7 is granted).
- 101.5.2 I have already explained above that one of the main reasons, as far as the Treasury understands the position, for the decrease in the number of persons receiving the grant is that, during 2020 and 2021, there were many people who, while not objectively qualifying for the grant, could not be assessed properly. SASSA needs to be able to use as many verification mechanisms as possible, to ensure that only those who fit within the parameters of the Regulations are paid the SRD grant.
- 101.5.3 Again, I cannot put a number on the cost to the fiscus if prayers 7 and 8 are granted in their present form. Prayer 8, in particular, has the potential to cost the fiscus billions of Rand because it will be possible for applicants to conceal sources of revenue which can only be picked up by looking at all bank accounts held by that person.
- 101.5.4 Prayer 9 does not minimise the impact on the fiscus of prayers 7 and 8 because, in terms of prayer 9.4, bank verification will immediately become unlawful if the whole of prayer 9 is granted

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and could only be used in the future if this Court approves the plan envisaged by prayers 9.2 and 9.3 of the notice of motion.

101.5.5 The problem with prayers 7 to 9 is that the difficulties identified in paragraph 9.1 are not easy to address. I have explained above that some degree of incorrect exclusion is inevitable in a system like this. It is always going to be extremely difficult for a SASSA official assessing an application to be able to distinguish between money held by an applicant on his or her own behalf and money held on behalf of someone else (to give one of the examples highlighted by the applicants).

101.5.6 If these problems could easily be addressed, then the solutions would already have been reflected in the Regulations because the government does not wish to exclude any qualifying applicant unnecessarily. To expect these problems to be addressed in a plan formulated within six months (or at all) is unrealistic. It is presumably for this reason that the applicants have included prayer 9.4. But the problem is that this will leave a gap in which no bank verification can be used and potentially millions of people will qualify for the SRD grant who do not qualify now. For every million extra people who receive the grant, it costs the fiscus R4.2 billion per year. Roughly 7 000 000 people now receive the grant (see paragraph 110 of the founding affidavit) and, on the applicants' version, roughly 18 000 000 people should receive it. It is therefore not

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unrealistic to assume that prayers 7 to 9 of the notice of motion will see several million new beneficiaries.

101.5.7 I have explained above why the fiscus cannot afford that, especially in circumstances where the vast numbers of these potential recipients do not qualify for the assistance (because they have monthly income in excess of R624) and will receive the grant simply because SASSA will essentially be precluded from conducting meaningful means testing.

101.6 Regarding prayer 13:

101.6.1 I have already explained that no person has, thus far, been excluded from receiving the SRD grant because of lack of funds. This is because the budget is determined on the basis of proper modelling and with reference to the recent history of actual uptake.

101.6.2 I accept that the possible suspension of any declaration of invalidity in respect of regulation 5(3)(a) does not arise because this Court either accepts the argument of the respondents that regulation 5(3)(a) is reasonable and lawful, or it does not. I therefore simply reiterate that regulation 5(3)(a) constitutes a reasonable measure to ensure that the budget is not overspent.

101.7 In so far as the relief sought in prayers 18 to 21 of the notice of motion is concerned:

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101.7.1 In the first place, it is inexplicable to me how the applicants could have believed they could seek this relief against the Minister of Social Development without joining the Minister of Finance. I need not belabour that point here, since the applicants consented to the Minister of Finance's intervention. But it is relevant to the question of condonation, which I address again below.

101.7.2 Secondly, even if the relief was competent on its own terms, the two-month period envisaged by the applicants is patently unreasonable.

101.7.3 Thirdly, and in any event, the Minister of Finance disputes the notion that government is obliged to increase the value of the grant based on the considerations identified in paragraph 258.2 of the founding affidavit. This will be addressed in argument.

101.7.4 Fourthly, it is not entirely clear whether the prayers in paragraphs 18 to 21 of the notice of motion are contingent on the declarations of invalidity sought by the applicants or are intended to be self-standing – ie, to be ordered whether the Regulations are unlawful or not. But, either way, the relief sought is entirely inconsistent with the separation of powers. The applicants have provided no proper basis for such an interventionist order, in circumstances where the executive is clearly the entity constitutionally empowered to make budgetary allocations. This will be addressed further in argument.



101.7.5 Fifthly, and in any event, I wish to reiterate that Treasury's primary position is that the Regulations are not unlawful. However, Treasury also relies on section 36 of the Constitution, in the alternative. The prayer for the relief summarised in paragraph 258 of the founding affidavit is therefore also opposed on the basis that it should not be granted in circumstances where section 36 of the Constitution serves to preserve the validity of the Regulations.

101.7.6 Sixthly, even accepting that the Minister of Finance is now also a respondent in the IEJ application, it is not appropriate to expect two Ministers to formulate the plan envisaged by prayers 18 to 21. The plan envisaged by the applicants, whatever its precise terms, implicates the whole of cabinet because it will have knock-on budgetary implications for the government as a whole. It is therefore submitted that, at the very least, the Presidency is a necessary participant in the formulation of the plan. It is not for the Minister of Finance to take steps to join the Presidency as a respondent in this application, but I simply cannot see how the Ministers of Finance and Social Development can be expected to formulate such a wide-reaching plan without input from the rest of cabinet. Every cabinet portfolio receives budgetary allocations. The relief, if granted, would therefore affect every other portfolio and other social assistance programmes.

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101.7.7 Lastly, any court-ordered plan along the lines of the plan envisaged by prayers 18 to 21 will require a substantial period of time to formulate. I have already said that two months is manifestly unreasonable. I have also already explained that I simply cannot see any constitutional basis on which this Court may order the government to make inflation-based increases which it objectively cannot afford – and that is the premise of prayer 19 of the notice of motion. But if the Court is against the respondents on this, then the government would require at minimum 24 months, but more realistically 36 months, to comply with what the applicants envisage in prayers 18 to 21 of the notice of motion.

102 For all of these reasons, even if this Court is against the respondents on one or more of the substantive issues addressed in the founding affidavit, none of the relief sought in the notice of motion is appropriate. The Treasury's position is that the more appropriate order would be:

102.1 This Court should issue declaratory relief in respect of any point raised by the applicants which it is minded to uphold. The first step would be for the Court to itemise its findings of unconstitutionality.

102.2 This Court should then suspend any declarations of invalidity which it has made for a period of 18 months (preferably) but at least 12 months to enable the defects to be addressed. This submission must be qualified



by me repeating that, when it comes to the plan envisaged by prayers 18 to 21 of the notice of motion, much longer is required.

Ad paragraphs 259 to 262 – Conclusion

103 It is not necessary for me to address these paragraphs because their contents have already been addressed above. They are denied to the extent that they are inconsistent with what I have said above.

CONDONATION

104 Before concluding, I must address the late filing of this answering affidavit, and the condonation application reflected in the attached notice of motion (marked as “ES6”). I have addressed this at the end of the affidavit because I am advised that the prospects of success is a relevant consideration in condonation applications. It was therefore considered appropriate to deal with condonation last, so that the Minister of Finance’s substantive defence to this application could first be demonstrated.

105 The background to the Minister of Finance’s participation as a respondent in this matter is the following:

105.1 On 26 October 2023, the Minister of Finance launched an application to intervene as the third respondent in this matter. Dr Duncan Pieterse



deposed to the founding affidavit in the application. In the Minister's founding affidavit, Dr Pieterse suggested that the applicants should consent to the intervention of the Minister (it being self-evident that he ought to have been joined as a respondent in the first place) and consent, further, to the Minister filing this affidavit within 20 days.

105.2 On 27 October 2023, the applicants' attorney wrote to the State Attorney, Pretoria (who acts for the Minister of Finance in this matter). The letter consented to the intervention of the Minister of Finance and indicated that the applicants would "strictly hold [the Minister of Finance] to the timeframes to which he has committed himself under oath". I do not annex the letter here, because it was overtaken by subsequent events and, in any event, is unlikely to be contentious.

106 It subsequently became clear that Treasury would require more time to prepare this answering affidavit. This is because:

106.1 First, as is clear from the above, a proper response to this application required a considerable amount of data gathering.

106.2 Second, an application with the type of relief sought is unprecedented in South Africa. Counsel with specialised knowledge of constitutional law had to be briefed. Counsel were duly briefed but given their ongoing commitments could not attend to the matter immediately.

106.3 Third, after counsel were retained, time had to be spent giving them appropriate instructions. This of itself was time-consuming.

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106.4 Fourth, the sheer magnitude of the founding affidavit self-evidently was long in the making and took considerable time to assess and understand.

106.5 Fifth, the sheer drafting of this affidavit has been a considerable undertaking and time-consuming.

106.6 Lastly, as noted above, the MTBPS was presented in Parliament on 1 November 2023. The same team responsible for putting together the evidence in this affidavit was involved in the preparation of the MTBPS and also had to attend various post-budget meetings and discussions. This delayed their ability to respond comprehensively.

107 Therefore, on 29 November 2023, the State Attorney, acting on behalf of the Minister of Finance, wrote to the applicants' attorney to request consent for this affidavit to be filed by 14 December 2023. The State Attorney's letter is "ES7". The applicants declined this request and sent the self-explanatory reply, which is marked as "ES8". I find the reaction of the applicants to be regrettable. In particular, it is not fair for them to say that the Minister of Finance has been responsible for any delay in this matter. The fact of the matter is that the applicants simply could not proceed to obtain the relief that they seek in the notice of motion without joining the Minister of Finance. This is because:

107.1 Section 32(2)(a) of the Social Assistance Act, which is the provision in terms of which the Regulations were made, envisages the making of

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regulations for “the application for and payment of social assistance”² with “the concurrence of the Minister of Finance”.

107.2 The reason for this statutory requirement is self-evident; there are clear budgetary implications of any regulations which provide for the payment of social assistance. The budgetary implications of the specific relief sought by the applicants in this matter – ie, with reference to the Regulations – was explained in the founding affidavit of the Minister of Finance’s intervention application, which will form part of the file in this matter when it is argued in due course.

107.3 Had the Minister of Finance not sought to intervene in this matter, it is inconceivable that the court hearing it could have granted any of the relief sought – even that which, on its face, does not directly implicate the budget – given the Minister of Finance’s clear legal interest in the enforceability of the Regulations as a whole. There is then the specific relief addressed in paragraph 258 of the founding affidavit, which self-evidently could never have been granted without the Minister of Finance’s input and participation.

107.4 I have explained the reasons for the delay in filing this affidavit above. The Minister of Finance and Treasury accept, of course, their culpability for this delay; even though it is submitted that it is understandable in the

² I note that, prior to 30 May 2022, section 32(2)(a) referred to “grants” rather than social assistance”. Nothing turns on that for present purposes since the substantive issue – ie, the interest of the Minister of Finance in this litigation – is the same under either version of the provision.

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context described above. However, the applicants ought to have joined the Minister of Finance in the first place, could not reach the merits of this matter without doing so, and have adopted a response to the condonation request which is somewhat unbecoming. This is particularly true given that, at the time that the request was made, the matter was far from ripe for hearing, and the further extension sought was of less than two weeks in duration.

108 It is, in any event, submitted that the question of the applicants' attitude has now become irrelevant given their insistence that the Minister of Finance should bring a formal condonation application. The issue of condonation is now in this Court's hands. It is submitted that condonation for the late filing of this affidavit should be granted because:

108.1 I am advised that there is a plethora of cases which make clear that organs of state such as the Minister of Finance have a constitutional obligation to assist courts in litigation such as the present by providing as much information (in the form of both evidence and argument) about the position of the state as possible. The Minister of Finance seeks to discharge this obligation by filing this answering affidavit.

108.2 The substance of this affidavit makes clear that the Treasury has a great deal of value to add to this litigation and this Court would presumably wish to take its evidence into account when making its decision. It is not clear to me what the applicants hope to achieve by opposing the late filing of this affidavit. Perhaps they want the best of both worlds – ie, to benefit



from the Minister of Finance's intervention because it spares them being non-suited on a non-joinder point but then to exclude his evidence so that they can obtain relief on, essentially, an unopposed basis.³ But, whatever their motive, this Court would want to have regard to the Minister of Finance's evidence in a case raising such polycentric considerations as the present one.

108.3 There will be no prejudice to any party if condonation is granted. As far as I am aware, as of the time of deposing to this affidavit (but, at the very least, when the letter described in paragraph 107 above was sent) no replying affidavit had yet been filed by the applicants to the answering affidavit of the Minister of Social Development. Therefore, there are two (or possibly one, consolidated) replying affidavits still to be filed and then heads of argument. The applicants presumably only intend to file their heads of argument in the new year, given that a reply to the Minister of Social Development has yet to be filed. The Minister of Finance's counsel are open to discussing an expedited timetable for the exchange of heads of argument and the special allocation of this matter in the new year. The slight delay in filing this affidavit has therefore resulted in no prejudice to the applicants.

108.4 There is a reasonable and detailed explanation for the delay.

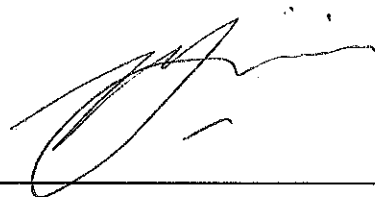
³ I appreciate, of course, that the Minister of Social Development has filed her own answering affidavit. But she has made clear, correctly, with respect, that she cannot speak to the budgetary implications of the relief sought. Therefore, on the various financial implications of the relief sought by the applicants, the Minister of Finance is the only meaningful respondent.



109 In all of these circumstances, I respectfully submit that condonation should be granted.

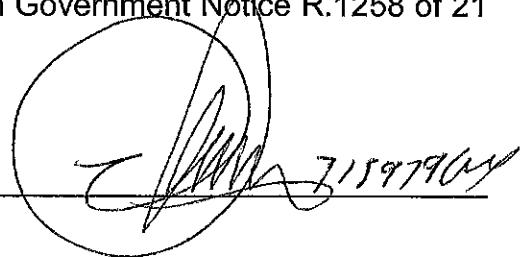
CONCLUSION

110 In the light of all of the considerations given above, the Minister of Finance and Treasury contend that the application falls to be dismissed.

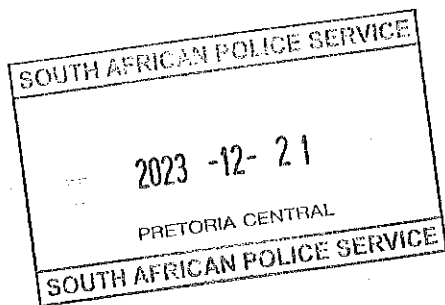


DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at PTA CENTRAL on this the 21 day of December 2023, and the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.



COMMISSIONER OF OATHS



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