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**

THIRD RESPONDENT'S HEADS OF ARGUMENT

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1 These heads of argument are filed on behalf of the third respondent, the Minister of Finance. For convenience, and as done in the answering affidavit, the third respondent is described as "**the Treasury**" below. These heads of argument are unusually long, but this has been necessitated by the need to respond to the applicants' significantly longer heads.

2 The applicants seek to review and set aside various regulations in the Regulations relating to COVID-19 social relief of distress ("**the SRD Regulations**").[1] At the heart of this application is an attempt to persuade this Court to re-allocate state resources to facilitate greater access to social grants. This Court is invited to second-guess budgetary decisions – which lie at the core of the State's legislative and executive authority – in order to achieve this end. This endeavour proceeds in the face of clear evidence of the State's financial constraints. The applicants' goal is laudable, for few would condemn an attempt to assist the poor. The means to achieve that goal is at stake, and whether a court can competently grant the relief sought. We submit that it cannot, on the facts of this case and the proper application of established precedent.

3 At the root of the applicants' challenge is their contention that the SRD Regulations are inconsistent with sections 27(1)(c) and 27(2), read with section 9(1), of the Constitution. This amounts to an argument that the SRD Regulations are unreasonable, do not achieve what the applicants see as their purpose, and irrationally differentiate

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1 GNR 2042 of 22 April 2022 (Government Gazette 46271), as amended

between recipients of social relief of distress grants ("**SRD grants**") and all others. It will be submitted that these arguments have no merit.

4 In the discussion below, we address the following topics:

4.1 The appropriate way to approach this application.

4.2 Various incorrect premises at the root of the applicants' case.

4.3 The Treasury's contention that no rights violations have been established.

4.4 A consideration of the applicants' detailed review of the SRD Regulations.

4.5 Remedy.

5 We deal with these topics in this order, because we consider it vital to highlight that various propositions, on which the applicants' case depends, are simply mistaken. These incorrect propositions implicate virtually all of the attacks on the individual regulations. Various cases of the Constitutional Court make clear that courts are not equipped to second-guess the allocation of resources by the state. As a result, the applicants try to navigate their case into various categories which, on their framing of the issues, would entitle them to "modest relief". They simultaneously argue that they are not asking this Court to rewrite the budget, and that the evidence of the state's inability to afford more expansive grant payments is inadequate. As we seek to demonstrate below, their approach is inconsistent with the law, inconsistent with the settled approach to assessing facts, and inconsistent with the facts themselves.

THE APPROPRIATE WAY TO APPROACH THIS CASE

6 Section 27 of the Constitution reads as follows:

> "27. (1) Everyone has the right to have access to—
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> (a) health care services, including reproductive health care;
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> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
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> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
>
> (3) No one may be refused emergency medical treatment."

7 Section 36 of the Constitution reads as follows:

> "36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
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> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

8 The applicants have addressed the various components of section 27 in their heads of argument.[2] They have referred to certain uncontroversial statements of our courts. However, they have in many cases stripped those statements from the context in which they were made. We therefore consider it necessary to focus on the caselaw a little more closely.

The proper interpretation of sections 27(1)(c) and 27(2) of the Constitution

The decision in *Khosa*

9 The decision of the Constitutional Court in *Khosa*[3] gives the following important guidance on the proper interpretation of section 27(1)(c) of the Constitution:

9.1 Sections 27(1)(c) and 27(2) cannot be treated as "separate or discrete rights creating entitlements and obligations independently of one another. Section 27(2) exists as an internal limitation on the content of s 27(1) and the ambit of the s 27(1) right can therefore not be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in s 27(1)".[4]

9.2 In this case, the applicants rely, in addition to section 27(1)(c), on what they say is a limitation of the right to equality. In *Khosa*, the Constitutional Court explained that, when the right to equality is implicated in a case which also

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2 See Applicants' Heads of Argument ("**HoA**") at para 49 p 014-30 to para 60 p 014-37

3 Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC)

4 Khosa (supra) at para 43. In this regard, the Constitutional Court referred to its previous decisions in Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC) at para 22; Government of the

deals with socio-economic rights, it must "be taken into account along with the availability of human and financial resources in determining whether the State has complied with the constitutional standard of reasonableness. This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. What is relevant may vary from case to case depending on the particular facts and circumstances."[5]

9.3 Of importance to the present case, the Constitutional Court referred to the situation where the state is "able to justify not paying benefits to everyone who is entitled to those benefits under s 27 on the grounds that to do so would be unaffordable". In such a case, the criteria upon which they choose to limit the payment of those benefits (in *Khosa*, citizenship) must be consistent with the Bill of Rights as a whole. Thus if the means chosen by the Legislature to give effect to the State's positive obligation s 27 unreasonably limits other constitutional rights, that too must be taken into account."[6]

9.4 The Court held that it is "necessary to differentiate between people and groups of people in society by classification in order for the State to allocate rights, duties, immunities, privileges, benefits or even disadvantages and to provide efficient and effective delivery of social services." But, these different ways of classifying and differentiating, must be reasonable as envisaged by section 27(2) of the Constitution. Any differentiation selected by the state, to be constitutional, must "must not be arbitrary or irrational nor must it manifest a

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Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) at para 74; and Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) at paras 23 and 39

5 Khosa (supra) at para 44

6 Khosa (supra) at para 45

naked preference. There must be a rational connection between that differentiating law and the legitimate government purpose it is designed to achieve. A differentiating law or action which does not meet these standards will be in violation of s 9(1) and s 27(2) of the Constitution."[7] We return below to the significance of that to the present case.

9.5 On the question whether a particular legislative scheme would constitute a "reasonable" measure taken as part of the progressive (ie, incremental) realisation of the right, the Constitutional Court explained that *the courts "will not enquire into whether other more desirable or favourable measures could have been adopted, or whether public resources could have been better spent. A wide range of possible measures could be adopted by the State to meet its obligations and many of these may meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement would be met*."[8] In this regard, it was also emphasised that, when dealing with reasonableness, "context is all-important".[9]

9.6 It is notable that, in *Khosa*, the Constitutional Court expressly pointed out that, in that case, the state respondents "did not suggest that the exclusion of permanent residents was a temporary measure, *nor did it argue that the exclusion was an incident of attempts by it progressively to realise everyone's right of access to social security*."[10] The question of reasonableness had to be approached as a response to what the state had argued – ie, that non-

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7 Khosa (supra) at para 53

8 Khosa (supra) at para 48. Emphasis added.

9 Khosa (supra) at para 49; See also Rahube v Rahube 2019 (2) SA 54 (CC) at para 50

10 Khosa (supra) at para 50. Emphasis added.

citizens have no legitimate claim to social security at all. The Constitutional Court's statement implies that, had the state justified the exclusion of non-citizens as part of an effort to give effect to the right progressively and within available resources, it would have been important and worthy of careful consideration.

9.7 The Constitutional Court's treatment of financial considerations in *Khosa*[11] is also noteworthy because it illustrates an important contrast between the facts of *Khosa* and the facts of the present case. It is clear that the Constitutional Court was willing to take seriously the notion that financial constraints could justify limiting access to social assistance. On the facts of that case, extending social assistance (in the relevant categories) to permanent residents was considered not to require incurring a "huge cost" and to reflect a small proportion of the total budget for social assistance.[12] The implication is that, had the budgetary implications featured more strongly, the Constitutional Court would have been less inclined to treat the state's decision to exclude non-citizens as unreasonable.

10 In *Mahlangu*, the Constitutional Court referred to the intersection between the right to social assistance in section 27(1)(c) and the right to equality. It held that "a core aspect of the reasonableness enquiry is whether a law or policy takes cognisance of the most vulnerable members of society and those in most desperate need".[13] This statement flows from the approach adopted in *Khosa*, which focuses on the explanation for

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11 Khosa (supra) at paras 58 to 62

12 Khosa (supra) at para 62

13 Mahlangu v Minister of Labour 2021 (2) SA 54 (CC) at para 61

differentiating between categories of beneficiaries of a measure which allocates resources. As we show below, it is significant in the context of this case.

Mazibuko and reasonableness

11 It is important to consider the approach adopted by the Constitutional Court in *Mazibuko*,[14] because there are some significant similarities to the present case. *Mazibuko* built on the earlier socio-economic cases of the Constitutional Court:

11.1 In *Soobramoney*,[15] the appellant argued that he ought to be accommodated by a Durban hospital's renal unit, so that he could be provided dialysis to treat his chronic kidney failure (and save his life).

11.2 The Constitutional Court accepted the evidence of the respondents that the Kwazulu-Natal provincial government did not have sufficient funds to cover all of the costs necessary to provide health services for the public. In the immediate period before the matter was heard, the Department of Health (in KZN) had overspent its health budget significantly.[16] Because there were insufficient resources to provide dialysis for everyone who needed it, guidelines were established to prioritise those who could most benefit from the treatment. This was because by "using the available dialysis machines in accordance with the guidelines more patients are benefited than would be the case if they were used to keep alive persons with chronic renal failure, and the outcome of the treatment is also likely to be more beneficial because it is

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14 Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC)

15 See footnote 4 above for the citation

directed to curing patients, and not simply to maintaining them in a chronically ill condition."[17]

11.3 The Court held that that the appellant's case had to be "seen in the context of the needs which the health services have to meet". If the appellant had to be accommodated, so would everyone else similarly placed. This would place substantial inroads into the health budget and prevent the state from fulfilling other needs.[18]

11.4 The key finding in *Soobramoney*, as it relates to the present case, was captured in the following conclusion of the Court:

> "The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."[19]

11.5 An aspect of *Soobramoney* which is particularly resonant in the context of this case, which motivated the Court's finding just quoted, is its approval of certain decisions of the English courts "in which it has been held to be undesirable for a court to make an order as to how scarce medical resources should be applied, and to the danger of making any order that the resources be used for a particular patient, which might have the effect of denying those resources to

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16 Soobramoney (supra) at para 24
17 Soobramoney (supra) at para 25
18 Soobramoney (supra) at para 28
19 Soobramoney (supra) at para 29

other patients to whom they might more advantageously be devoted."[20] This sentiment was echoed in the concurring judgment of Sachs J, in which he pointed out that the "inescapable fact is that, if governments were unable to confer any benefit on any person unless it conferred an identical benefit on all, the only viable option would be to confer no benefit on anybody."[21]

11.6 In *TAC (no 2)*,[22] the Court reiterated the point made in *Soobramoney* that courts are not institutionally equipped to decide how public revenue should most effectively be spent or to adjudicate on issues where court orders could have multiple social and economic consequences for the community. Although the justiciability of socio-economic rights means that court orders will sometimes have budgetary implications, court orders are not "directed at rearranging budgets".[23]

12 In *Mazibuko*, the above-mentioned principles were, as in the present case, key:

12.1 In *Mazibuko*, the Court considered the right to water under section 27(1)(b) of the Constitution. Despite the focus on water, the similarities between the cases outnumber the differences. This is because, first, the structure of section 27(1) makes the difference between the right to water and the right to social security/assistance largely cosmetic (at least, when it comes to analysing the content of the right). Secondly, the Court considered the interaction between section 27(1)(b) and section 27(2), and its reasoning is directly applicable here.

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20 Soobramoney (supra) at para 30

21 Soobramoney (supra) at para 53. Sachs J relied, for this proposition, on Brown v British Columbia (Minister of Health) (1990) 48 CRR 137 at 157-8

12.2 The Court pointed out that, in its previous socio-economic rights cases, it had held that sections 27(1) and 27(2) must be read together. There is thus no self-standing right to claim any of the socio-economic rights (put differently, to sue the state for a house, for food, for water or for social assistance). The structure of section 27 makes clear that "the right does not require the State upon demand to provide every person with sufficient water without more; rather it requires the State to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources."[24] Self-evidently, this applies with equal force to social assistance (see paragraph 9.1 above and the reference there to *Khosa* (supra)).

12.3 In *Mazibuko*, even accepting the above-mentioned premise, the applicants argued that the right to water required the provision of a minimum of 50 litres per person per day. They argued that the reasonableness of measures taken by the state to realise (progressively) the right to water must be assessed from that premise.[25] The Constitutional Court's reasoning is highly relevant to the present case. This is because, as shown below, the applicants inappropriately seek to bind the state to provide social assistance at a particular level, even while purporting to acknowledge that the right is not available on demand. The Constitutional Court rejected this approach for two reasons:

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22 Minister of Health v Treatment Action Campaign (no 2) 2002 (5) SA 721 (CC) ("**TAC No 2**")
23 TAC No 2 (supra) at paras 37-38
24 Mazibuko (supra) at para 50
25 See Mazibuko (supra) at paras 51 to 56

12.3.1 First, the existence of section 27(2) – and the acceptance of a need for socio-economic rights to be realised progressively – is based on the understanding that the state does not have the resources to realise provision of those rights immediately. The Constitutional Court pointed out that "what the right requires will vary over time and context. Fixing a quantified content might in a rigid and counter-productive manner prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable."[26] This is of cardinal importance when considering the scope of social assistance relevant to the present case.

12.3.2 The second reason given by the Court is of equal importance, and is critical to the proper resolution of the present application. The Constitutional Court explained that "ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of

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[26] See Mazibuko (supra) at para 60

> democratic accountability that they should do so, for it is their programmes and promises that are subjected to democratic popular choice."[27]

12.4 The Constitutional Court summarised the approach which must be followed in all cases concerning the positive component of the socio-economic rights:

> "Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom* it is clear that a measure will be unreasonable *if it makes no provision for those most desperately in need*. If government adopts a policy with unreasonable limitations or exclusions as described in *Treatment Action Campaign (No 2)*, the court may order that those be removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised."[28]

13 The authorities discussed above, and *Mazibuko* and *Soobramoney* in particular, reveal the flaws in this application very starkly. As we show below, the applicants approach this matter from a premise which the Constitutional Court has explained is impermissible – whatever language they have chosen to use in their affidavits, in substance they ask this Court to second-guess the government's prioritisation of highly scare resources, to the detriment of the whole system of social assistance. To get around this, they try to frame their relief, and the underpinnings of their case, as falling on the side of the line in which the courts *will* decline to accept budgetary constraints as a defence. As we show next, their attempt to do so is misdirected.

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27 Mazibuko (supra) at para 61

Identifying the relevance of budgetary constraints

14 The applicants, relying on the decision of the Constitutional Court in *Blue Moonlight*,[29] argue that "even the most detailed explanation of budgetary justifications will not be enough" if the state fails to budget for something which it is obliged to provide.[30] But the approach of the applicants is based on a misunderstanding of the scope of *Blue Moonlight*:

14.1 In *Blue Moonlight*, it was common cause that the City had a policy to provide assistance to people in need of emergency housing and that the eviction of the respondent occupiers from property in Johannesburg constituted an emergency.[31] The Constitutional Court held that the City could not rely on budgetary arguments if the budget had been determined "from a mistaken understanding of constitutional and statutory obligations". In other words, if an organ of state has a statutory and constitutional obligation, but prepares its budget on the mistaken belief that it does not, then this alone may preclude it from relying on resource constraints as a justification for non-fulfilment.[32] But, the crucial distinguishing factor in *Blue Moonlight* was that the City had already undertaken, in its housing code, to provide emergency accommodation. That being so, it had to budget for it.[33]

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28 Mazibuko (supra) at para 67. Emphasis added.

29 City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC) at para 74

30 See Applicants' HoA at para 60.4 p 014-37

31 See Blue Moonlight (supra) at para 47

32 Blue Moonlight (supra) at para 74

33 See Blue Moonlight (supra) at paras 73-5

14.2 As this Court recently explained, when a party litigates on the basis that a measure adopted to realise a socio-economic right progressively is supposedly unreasonable, financial constraints are clearly relevant. The *Blue Moonlight* principle, on the other hand, applies where the state has an *immediately enforceable obligation*, but has failed to budget to fulfil it. [34]

15 In the recent case of *Van Wyk*, Sutherland DJP referred to an important distinction which he considered to flow from *Khosa* (supra). In responding to an argument from the Minister (of Labour) that a certain remedy would have a financial impact, Sutherland DJP pointed out that a "distinction must be maintained between the exposure to increased costs the state experiences in this type of case from the circumstances where qualitative choices have to be made about allocation of public resources which are axiomatically unsuitable for judicial intervention. No qualitative choices are at stake in this controversy. There is no disregard for the separation of powers."[35]

16 This, with respect, highlights the circular nature of the applicants' arguments in this matter. They start by asserting that the state is obliged to provide social assistance to people aged 18-60 and then try to invoke *Blue Moonlight* (and other cases) to argue that the state has failed to budget to fulfil an obligation. But, in the context of progressive realisation, this is question-begging, because it avoids an enquiry into the extent of the obligation in the first place. As we show below, the SRD Regulations are the equivalent of the City's housing code in *Blue Moonlight*. But unlike the housing code in *Blue*

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34 See Afriforum NPC v National Energy Regulator of South Africa 2024 JDR 2943 (GP) at paras 80-1

35 Van Wyk v Minister of Employment and Labour 2024 (1) SA 545 (GJ) at para 39

Moonlight, they do not impose the obligations which the applicants accuse the respondents of failing to accommodate in the budget. This is important, because, absent a self-standing right to social assistance on demand, the only source of the rights of people aged 18 to 60 to social assistance is, at present, the SRD Regulations themselves. To the extent that they do not impose an obligation on the state, the state cannot be criticised for failing to budget for it.

The negative component of the right

17 It is not in dispute that each socio-economic right enshrined in sections 26 and 27 of the Constitution has a "negative" component. This means that neither the state nor private parties may interfere with pre-existing access to and/or enjoyment of, one of these rights. The significance of the negative component is that, unlike the positive component, it is not subject to the reasonableness dimension introduced by section 27(2). Interference with pre-existing access constitutes a limitation of the right, whether it is reasonable or not. However, any limitation of the negative component of the right may be justified by the state in terms of section 36(1) of the Constitution,[36] which means that a reasonable restriction of pre-existing access will not be unconstitutional.

18 The applicants, in their heads of argument, do not place great emphasis on the negative component of the right. However, in various contexts they refer to what they say is the retrogressive nature of the SRD grant, and frame this (in part) as a violation of the

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[36] See Jaftha v Schoeman; Van Rooyen v Stoltz 2005 (2) SA 140 (CC) at paras 32-4

negative component of the right to social assistance.[37] As we show below, they are mistaken.

Assessing justifications in limitations analysis

19 We quoted above (see paragraph 7 above) the text of section 36 of the Constitution. The provision makes clear that all rights may be limited, so long as it is reasonable and justifiable to do so.

Does section 36 apply in socio-economic cases?

20 We agree with the applicants, when they say that it is conceptually challenging to imagine how section 36 could apply once a measure has been found to be unreasonable as contemplated in section 27(2).[38]

21 This was an issue raised in *Khosa*.[39] There, the Constitutional Court pointed to the conceptual conundrum arising from the fact that, if a measure as contemplated by section 27(2) "fails to pass the requirement of reasonableness for the purposes of ss 26 and 27, s 36 can only have relevance if what is 'reasonable' for the purposes of that section, is different to what is 'reasonable' for the purposes of ss 26 and 27."[40] In that case, the majority[41] of the Constitutional Court pointed out that, while this had been the

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37 See, for example, Applicants' HoA at para 215.3 p 014-103

38 See Applicants' HoA at para 245 p 014-124

39 Khosa (supra)

40 Khosa (supra) at para 83

41 In the minority judgment of Ngcobo J (as he then was), he (with Madala J concurring) preferred to approach the matter on the express basis that section 36 was applicable (see Khosa (supra) at para 107)

subject of academic debate, the Constitutional Court had not decided the point and that it was not necessary to do so in that case.[42]

22 In any event, we make the following observations at the outset:

22.1 First, this apparent conundrum has no impact on the negative component of the right. The applicants make multiple incorrect, with respect, assertions that components of the SRD Regulations unjustifiably limit the negative component of the right – ie, they say that the SRD Regulations retrogressively limit pre-existing access to social assistance. But, even if the applicants are correct, and any limitation of the negative component of the right is established, section 36 comes into play.[43]

22.2 Secondly, the Constitutional Court has more recently proceeded from the premise that it is, in principle, possible for the limitation of a right which is subject to progressive realisation in terms of reasonable measures to be justified in terms of section 36.[44]

22.3 Lastly, a major attack directed by the applicants at the Treasury is that its "putative defences" of the SRD Regulations have no merit. In this regard, the approach which the Constitutional Court has adopted to evidence, and the way in which it relates to section 36 of the Constitution, is particularly important.

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42 Khosa (supra) at para 84

43 See Jaftha (supra) at para 34

44 Mahlangu (supra) at paras 116 to 119

23 We accept that in this case, the considerations relevant to reasonableness under section 27(2) and under section 36 as part of limitation analysis largely overlap. We therefore limit ourselves below to brief references to section 36 which, in our assessment, add something to the analysis under section 27(2). The main focus, which we address next, is on the way in which justifications under section 36 are assessed. This is because, whether one is dealing with reasonableness under section 27(2) or whether a limitation is reasonable and justifiable under section 36(1), the way in which courts will allow the government to make out its case will apply to an assessment of the respondents' answer to the applicants in this case.

How must compliance with section 36 be assessed?

24 Before the decision of the Constitutional Court in *NICRO*,[45] it was often said by litigants that the state bears an "onus" to show that a limitation of a right in the Bill of Rights was reasonable and justifiable as contemplated by section 36(1).[46] However, the decision in *NICRO* established the following:

24.1 To the extent that there is an onus on the state, it is an onus of a "special type". It is not the traditional variety which applies in civil litigation when there are disputes of fact. It is, rather, a "burden to justify a limitation where that becomes an issue in s 36 analysis".[47]

24.2 The process of discharging this burden calls for a different enquiry to that which is conducted when disputes of fact are considered. This is because:

> "In a justification analysis facts and policy are often intertwined. There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them."[48]

24.3 The Constitutional Court once again highlighted that context is "all-important", when determining whether a limitation is justified. [49] Before doing so, in elaboration of how the "burden" of justification ought to be applied, it explained that:

> "Where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends. Justification may, however, depend not on disputed facts but on policies directed to legitimate governmental concerns. If that be the case, the party relying on justification should place sufficient information before the Court as to the policy that is being furthered, the reasons for that policy and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the Court may be unable to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion. A failure to place such information before the Court, or to spell out the reasons for the limitation, may be fatal to the justification claim. There may, however, be cases where, despite the absence of such information on the record, a court is nonetheless able to uphold a claim of justification based on common sense and judicial knowledge."[50]

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45 Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) 2005 (3) SA 280 (CC)

46 See NICRO (supra) at para 34

47 NICRO (supra) at para 34

48 NICRO (supra) at para 35

49 NICRO (supra) at para 37

50 NICRO (supra) at para 36

25 We have placed emphasis on these remarks because the applicants disparage the Treasury's case based on the unaffordability of the expansion of the SRD Regulations. As we show below, their criticism is unjustified because the case presented by the Treasury comfortably satisfies the burden of justification as contemplated by *NICRO*.

International and foreign law

26 The applicants have a section in their heads of argument on international law[51] and another on foreign law.[52] It is our respectful submission that it is unnecessary for this Court to devote much energy to these topics.

27 As to international law, this is because:

27.1 Neither the International Covenant on Economic, Social and Cultural Rights ("**the ICESCR**") nor the African Charter on Human and Peoples' Rights has been incorporated into South African domestic law by Parliament. They are, as a result, not binding in South African domestic law even though they have been ratified by the South African government.[53] Therefore, as the applicants seem to accept,[54] they are merely interpretive guides.

27.2 We acknowledge that the Constitutional Court has, especially in the earlier socio-economic rights cases such as *Grootboom*[55] referred to elements of international law flowing from the ICESCR. We also acknowledge that section

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51 See Applicants' HoA at paras 29 to 44 p 014-18 to p 014-28
52 See Applicants' HoA at paras 45 to 48 p 014-29 to p 014-30
53 See section 231(4) of the Constitution
54 Applicants' HoA at para 31 p 014-19

233 of the Constitution requires a court to prefer any reasonable interpretation of legislation which is consistent with international law over one which is not.

27.3 There may be areas of South African law in which, because of the paucity of authority, reference to non-binding[56] international law could be of assistance. And the interpretive injunction in section 233 is clearly binding, to the extent that the content of international law may properly be identified.

27.4 However, in this case, we have clear authorities of the Constitutional Court, discussed above, which crystalise the principles directly applicable to this case. The international law described by the applicants does not, with respect, add much to the jurisprudence of the Constitutional Court. This is, primarily, because the Constitutional Court has repeatedly emphasised the importance of context and the facts of the case, when assessing the reasonableness of a measure aimed at fulfilling socio-economic rights.[57] Since the decisions to which we have referred were decided in factual contexts similar to the present case – or, where the facts are different, the points of difference demonstrate which side of the line of validity the SRD Regulations fall – they are binding and of direct assistance, in a way that the general references to international law are not.

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55 See note 4 above. See Applicants' HoA at para 30 p 014-18

56 Here we refer to international law, as reflected either in treaties or decisions of international courts and tribunals, which has not been incorporated into domestic law as contemplated by section 231(4) of the Constitution.

57 See, for example, Mazibuko (supra) at para 62 and its reference to Grootboom (supra). See also the discussion of Khosa discussed in paragraph 9 above

28 For the same reason, the foreign law discussed by the applicants does not, respectfully, take this matter much further. We have to confess to having faced great difficulty in finding the *Hartz IV* decision[58] online. The problem was exacerbated by the applicants' inadvertent citation of the case as being decided in 2009, rather than the correct 2010. When we did eventually find the case,[59] it immediately became clear that the circumstances applicable to it are so unrecognisable in the South African context that it is hard to find any assistance whatsoever.

29 The most obvious differences are (a) the case was decided under the right to dignity which is not subject to internal limitations such as section 27(2) (b) there appears to be much work done in the German context by the fact that its Basic Law (ie its Constitution) defines Germany as a "social" federation in article 20.1. If we understand correctly, there appears to be something akin to a minimum core in German socio-economic rights jurisprudence because Germany is constituted as a welfare state and (c) the case concerned an extremely complicated set of amendments to existing legislation. It is impossible to assess any potential analogies to the present case without a proper understanding of the scope of the amendments. This would require deeper research than simply reading the judgment in *Hartz IV*. For one thing, the amendments appear to have constituted a clear reduction in existing benefits, not merely a failure to provide inflation-based increases (ie one of the main focuses of the applicants' complaint in this

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58 The decision of the German Federal Constitutional Court in relation to legislation known as Hartz IV is the only foreign case addressed by the applicants in their submissions – see HoA at para 46 p 014-29

59 The German Federal Constitutional Court very helpfully translates its decisions and posts them on its website. The judgment may be found at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/ls20100209_1bvl000109en.html

case). All of this leaves aside the obvious difference between South Africa and Germany when it comes to available resources.

30 In short, *Hartz IV* appears to be of little assistance or relevance.

THE INCORRECT PREMISES OF THE APPLICATION

31 It is submitted that there are several fundamental flaws in the way in which the applicants have framed their case. These flaws cut across all of the relief sought in the notice of motion. As we explained in the introduction, these incorrect premises go a long way in explaining why both the constitutional attack and the review have no merit.

The first incorrect premise – evidence of the intention of government

32 The first incorrect premise on which the whole application is based is the assumption of what is admissible evidence of the intention of government. A key building block of the applicants' case is the premise that government "has committed to providing access to social assistance in a particular form (in this case, the SRD grant").[60] This premise is very important to the applicants' case because one of their central arguments is that, having made that commitment, government cannot "implement that commitment" in a way which "results in unfair exclusion and a retrogression in access to the grant and the

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60 See, for example, Applicants' HoA at para 16.5 p 014-12

protection it affords".[61] They also say that, having made this commitment, government cannot "unreasonably restrict or diminish access to this assistance".[62]

33 The reason why these first two incorrect premises – ie, (1) that government has committed to paying the grant (2) on a permanent basis – are so important to the applicants' case is this: they repeatedly argue that government is, in essence, bound not to detract from its commitment to provide permanent social assistance to working-age adults. This comes up in various ways. It comes up as part of arguing that the negative component of the right to social assistance precludes the government from taking away social assistance to which it has already committed.[63] It also comes up in the context of discussing what is reasonable and rational in the context of the applicants' reliance on the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**").[64] Most importantly, it is an attempt to pigeon-hole this case into the *Blue Moonlight* paradigm, in which government will be held to self-imposed (or other) binding obligations, even if the fulfilment of these obligations has budgetary implications (see paragraph 14 above). In other words, the premise that government has bound itself to permanent social assistance for employable adults is a critical building-block of the applicants' evasion of the prescriptiveness of their case when it comes to the allocation of resources.

34 But the question is: what is the evidentiary basis for the premise that government has made this commitment? The applicants point to:

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61 See, for example, Applicants' HoA at para 16.5 p 014-12; HoA at para 55 p 014-34

62 See Applicants' HoA para 109 p 014-58

63 See, for example, Applicants' HoA at para 21.1 p 014-14

64 See, for example, Applicants' HoA at para 208.3 p 014-99, read with para 210 p 014-101

34.1 Statements made by the President in his state of the nation addresses in 2022, 2023 and 2024 and certain other statements made by the President.[65]

34.2 A statement made by the Minister of Social Development in a question-and-answer session in Parliament.[66]

34.3 A statement of the President that the SRD grant is a "significant step in our commitment to provide a minimum level of support below which no South African should fall".[67]

34.4 A report by the Department of Social Development to a parliamentary portfolio committee in which it was said that government should not view the SRD grant as just a temporary measure, but rather as a precursor to permanent income support.[68]

34.5 A statement made by the Minister of Finance in a *Business Day* article to the effect that the SRD grant could not be withdrawn without a "fundamental replacement".[69]

34.6 A statement made by the Minister of Social Development that the government has chosen to develop the SRD grant incrementally as part of the progressive realisation of the right to social assistance.[70]

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65 See Applicants' HoA at para 2 p 014-5; Applicants' HoA at para 108.1.1 p 014-55
66 See Applicants' HoA at para 108.1.2 p 014-55 and FA para 94.5 p 002-42
67 See Applicants' HoA at para 108.2 p 014-56 and the references given there
68 See Applicants' HoA at para 108.2 p 014-56 and the references given there
69 See Applicants' HoA at para 108.4 p 014-57 and FA para 94.6 p 002-42
70 See Applicants' HoA at para 108.5.2 p 014-57 and the references cited there

35 The applicants use these statements to advance the argument that "social assistance for working-age adults is here to stay" and that Government has made a commitment to that effect. Because the Treasury insists that the SRD grant is temporary they then criticise the Treasury for purporting to "speak for Government as a whole" and say that the Treasury's stance in this application is "contradicted by the statements described above".[71]

36 The critical defect in the applicants' reasoning is that they misunderstand what may legitimately be taken into account when considering the intention of the state:

36.1 The Social Assistance Act reflects the intention of Parliament.[72] This is what Parliament has decided:

36.1.1 Section 13(1) of the Social Assistance Act provides that a person is, subject to section 5, eligible "for social relief of distress if the person qualifies as prescribed".[73] This is a major point of distinction between the social-relief-of-distress grant (ie, the SRD grant) and all of the others. The persons qualifying for all of the other grants are identified in the Social Assistance Act itself.

36.1.2 Section 5(2) provides that the Minister (which is the Minister of Social Development[74]) may prescribe additional requirements or

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71 See Applicants' HoA at para 110 p 014-58

72 We refer, below, to the remarks of Wallis JA in Endumeni, criticising the concept of the "intention of the drafter", in the sense often used in the case law. As emerges from the extracts to which we refer, the modern approach to interpretation treats "intention" objectively, rather than subjectively. This does not detract from the trite proposition that legislation, and not newspaper quotes, reflects the will of the state.

73 Emphasis added

74 See the definition of "Minister" in section 1 of the Social Assistance Act

conditions in respect of various topics covered by the SRD Regulations, such as income thresholds, means testing and measures to prevent fraud and abuse.

36.1.3 Section 32(2) of the Social Assistance Act says that when the Minister of Social Development makes regulations on various listed topics, he or she must do so with the "concurrence of the Minister of Finance". The SRD Regulations fall into this category because they deal with "the application for, and payment of, social assistance".[75]

36.1.4 Section 32(3) of the Social Assistance Act provides that the Minister of Social Development, with the concurrence of the Minister of Finance, *must determine amounts payable in respect of social assistance*.

36.2 These rules and principles reflect the will of Parliament because they are enacted in legislation. The legislature has made a clear decision that the Minister of Social Development, with the concurrence of the Minister of Finance, must determine the following issues:

36.2.1 Who may benefit from an SRD grant (see paragraph 36.1.1 above).

36.2.2 The value of the SRD grant (see paragraph 36.1.4 above).

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[75] See section 32(2)(a) of the Social Assistance Act

36.3 One of the points made by the applicants is that government does not speak with one voice, when it comes to social assistance policy.[76] They use this as a basis of arguing that the Treasury cannot give evidence of government's intention. But, with respect, the fact that government does not speak with one voice shows that the applicants' reliance on public statements, newspaper clippings and the like is impermissible. The premise of the applicants' position seems to be that there is some vague concept of "government policy" which is a binding and enforceable reflection of government's intention when it comes to social assistance. This is self-evidently incorrect. In this case, government's policy is reflected in the Social Assistance Act and the SRD Regulations.

37 Apart from the above, the applicants' reliance on various disparate announcements as creating some kind of binding obligation is misplaced for two reasons:

37.1 First, it is a matter of fundamental constitutional principle that undertakings of the sort on which the applicants rely cannot supplant the legislative function, which is vested in Parliament. They also cannot fetter Parliament's discretion in advance of its exercise.[77]

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76 See Applicants' HoA at para 273.2 p 014-139

77 See South African Reserve Bank v Public Protector 2017 (6) SA 198 (GP) at para 44 ("**SARB**"). In Minister of Home Affairs v Public Protector 2018 (3) SA 380 (SCA), the SCA overruled the finding of the High Court in SARB that remedial action ordered by the Public Protector is reviewable under PAJA (see paras 27 to 37). However, in Public Protector v President of the Republic of South Africa 2021 (6) SA 37 (CC), the Constitutional Court cited SARB, and expressed doubt about the SCA's finding that PAJA did not apply, without deciding the point (see paras 117-120). The principle on which we rely from the SARB judgment remains good law and has not been set aside on appeal.

37.2 Secondly, there can never be an expectation, legitimate or otherwise, that the law will not change.[78]

The second incorrect premise – who can the Treasury speak for?

38 The second incorrect premise flows from the first. The first proposition relates to the source of government's intention. The second incorrect premise relates to what the evidence reveals about the government's defence of the SRD Regulations.

39 On several occasions, the applicants say that the Treasury cannot speak for the whole of government.[79] In essence, the applicants seek to rely on this proposition in order to imply that there is insufficient evidence of what government considers affordable, and therefore reasonable, in the context of the realisation of the right to social assistance.[80] They also use this premise to argue that the Treasury seeks to usurp the role of the Minister of Social Development in formulating policy on social assistance and, strangely, the role of Parliament in determining the budget.[81] The applicants do not only try to limit the scope of the Treasury's evidence in so far as they say that the Treasury cannot speak for the government. They also repeatedly say that only the Minister of Social Development can defend the SRD Regulations.[82] They also try to use this flawed premise to preclude the Treasury from making submissions on remedy (see paragraphs 149 to 151 below).

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78 Durban Add-Ventures Ltd v Premier, Kwazulu-Natal (no 2) 2001 (1) SA 389 (N) at 408-9

79 See, for example, Applicants' HoA at para 231 p 014-113

80 See Applicants' HoA at para 14.5 p 14-10

81 See Applicants' HoA at paras 231-2 p 014-113

82 See, for example, Applicants' HoA at para 167 p 014-82 (the Treasury apparently not permitted to speak on behalf of the Minister of Social Development to support the use of bank verification of "insufficient means").

40 In short, the premises from which the applicants operate are that (a) only the Social Development Minister may speak to the rationality and reasonableness of the SRD Regulations (b) the Minister of Finance and the Treasury cannot dictate to the Minister of Social Development the maximum that may be spent on the SRD grant (c) the Treasury cannot speak on behalf of the whole of government when it comes to explaining what is and is not affordable.

41 The problem with the applicants' approach is that they appear, with respect, to have overlooked how evidence is treated in motion court:

41.1 The applicants elected to bring this application in terms of rule 6 of the Uniform Rules.[83] It is well-accepted that an applicant is entitled to waive his or her right to bring a review under rule 53, even where it is applicable.[84] While there is some debate about whether this entitlement is unqualified – taking into account the rights of respondents who are not organs of state in particular[85] – that issue does not arise here, because none of the respondents has objected to the use by the applicants of rule 6.

41.2 When they launched this application, the applicants inexplicably failed to join the Minister of Finance as a respondent. This was inexplicable not only because the SRD Regulations had to be made with the Minister of Finance's concurrence. It was also inexplicable because of the clear budgetary

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83 See NoM p 001-9, from which it is clear that the applicants adopted the procedure in rule 6, not rule 53. This is apparent from (a) their failure to call for the rule 53 record and (b) their adoptions of the timeframes for the filing of notices of opposition and answering affidavit found in rule 6.

84 See, for example, South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons 2003 (3) SA 313 (SCA) at para 5

85 Stanton Woodrush (supra) at para 5

implications of the relief sought. The applicants could not have been granted the relief sought without joining the Minister of Finance, which is presumably why they very quickly consented to his intervention.

41.3 In addition to deciding not to join the Minister of Finance, the applicants took no steps to join any other role-players who, on their own version, speak for government. The most notable example is the President.

41.4 We do not contend that the failure of the applicants to join the President (and any other parties whom, on their understanding, are entitled to speak for the government) means that they should be non-suited because of a non-joinder defect. However, the applicants cannot have things both ways. Having elected to forgo access to a rule 53 record, and having elected to press for relief without joining the President, they are left with the evidence reflected in the various affidavits filed. In particular, the justifications for the various rules and regulations which they attack in their notice of motion are addressed in the affidavits filed by the respondents. Any respondent, properly cited, is entitled to defend the SRD Regulations.

41.5 But, more importantly, as *NICRO* (supra) makes clear (see paragraph 24 above), there is a wide range of possible factual and policy-related matters which could serve to justify a limitation of a constitutional right. These will differ, depending on the facts of the case. The issue of financial constraints is the single most important issue in this case, when determining the reasonableness of the SRD Regulations. The respondent's main defence in this matter is that the relief sought by the applicants is unaffordable. There is no entity better qualified to give evidence on this issue than the Treasury. The

premise of the applicants' stance is that, in order to make out a proper defence of the SRD Regulations, it was necessary for the respondents to procure affidavits from each relevant department, and presumably also Parliament, to make clear that the Treasury's evidence is consistent with the attitude of all other departments. In a case in which budgetary issues are centre stage, this is plainly unnecessary.

41.6 As we have explained, when dealing with the first incorrect premise, the intention of the state in this case is to be discerned from the Social Assistance Act and the SRD Regulations. Parliament decided to leave the value of the SRD grant and the identification of categories of people qualifying to receive it, in the hands of the Ministers of Social Development and Finance. In motion court, and in view of the applicants' election not to seek a rule 53 record, their affidavit evidence is the only admissible evidence of the justification for the stance in the SRD Regulations.

The third incorrect premise – affordability

42 The third incorrect premise of the application is that this is the type of case in which this Court is at large to make an order with profound budgetary implications because it is supposedly "modest relief".[86]

43 The following propositions underpin the Treasury's case, and flow from the way in which our courts have interpreted the socio-economic rights:

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86 See, for example, Applicants' HoA at para 258.1 p 014-133

43.1 Genuine budgetary constraints will justify an approach to social assistance which differentiates between categories of recipients, prioritising some categories over others. It is not the task of courts to rearrange budgets, or second-guess decisions on the allocation of resources. Therefore, it will be reasonable for government to adopt a plan which gives rise to unequal treatment between beneficiaries. This, requires only that the unequal treatment is based on a rational imperative to avoid a situation in which, as Sachs J put it in *Soobramoney* (see paragraph 11.5 above), no benefit could be conferred on anyone.

43.2 The state has genuine and profound budgetary constraints at the moment.[87] As a result of these budgetary constraints, the state has decided to prioritise those most in need of social assistance.

43.3 In deciding how to categorise recipients to give effect to the approach described in paragraph 43.2 above, the state has prioritised recipients of the "permanent" grants envisaged by sections 6 to 12 of the Social Assistance Act. This is because those recipients have been determined to be in the most pressing need.[88]

43.4 The decision to prioritise those recipients over working-age, able-bodied adults is entirely rational and reasonable. It is precisely the type of differentiation that the Constitutional Court has repeatedly made clear it will uphold.

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87 See Treasury AA at para 36 p 008-21; paras 38-41 p 008-22 to p 008-24

88 See Treasury AA at para 95 p 008-69 to 008-70

43.5 Having decided to make the allocation in that way, the state appreciated the need to provide some form of assistance to those in desperate need during the Covid-19 pandemic. After the end of the pandemic, the state reasonably decided to retain that assistance on a temporary basis, and subject to available resources, while government determines the most appropriate way to improve the economic conditions of working-age adults.[89]

43.6 In deciding to extend this temporary assistance, the state chose to tighten the processes applicable to applying for it, in a reasonable attempt to give effect to the prioritisation described above. In doing so, it has made it clear that it intends to apply this approach incrementally to all grant recipients, as part of an ongoing obligation to improve the efficiency of the system. But because of the need to protect the viability of the grant system as a whole, it has reasonably decided to apply these methods first to the SRD grant.[90]

44 The key phrase in section 27(2) is that rights must be realised "subject to available resources". The mistake which the applicants make is to cherry pick statements made by the Constitutional Court, strip them of their context, and then use them as licence to ask for relief which is premised (whatever the applicants might say) on telling the state to rearrange its budget and expand the pool of grant recipients substantially. All of the major decisions of the Constitutional Court in which the government's attempt to fulfil socio-economic rights were set aside, had modest budgetary implications, if any. There is no case which does what the applicants now seek. In other words, there is no case in which the Treasury's evidence of a profound budget deficit and highly constrained

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89 See Treasury AA at paras 19 to 34 p 008-13 to p 008-20

ability to borrow has been disregarded or treated as a "back-of-the-envelope" calculation.[91] This is unsurprising, given the lengths to which the Constitutional Court has gone to explain that its job is not to tell the government how to prioritise resources.

The fourth incorrect premise – ignoring the temporary nature of the grant

45 Another incorrect premise, which relates to the categorisation problem just discussed, is the applicants' attack on what they see as the incorrect labelling of the SRD grant as temporary.

46 Regulation 2(1) of the SRD Regulations provides that a "person in need of temporary assistance, may qualify for the social relief of distress" grant if "he or she is a person with insufficient means".[92]

47 So, the SRD Regulations are clear that the SRD grant is a form of temporary assistance, which is paid to persons with "insufficient means", subject to the various rules and qualifications set out in the SRD Regulations. Some of those rules and qualifications are the subject of this application.

48 One of the core premises of the applicants' case is that the SRD Regulations have been enacted as a permanent measure designed to provide social assistance to working-age adults. In other words, the premise is that the SRD Regulations now reflect an additional category of permanent grants payable under the Social Assistance Act, such

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90 See Treasury AA at para 80.1 p 008-55; Social Development AA at para 64 p 009-22

91 Applicants' HoA at para 234.5 p 014-115

as the child support grant[93] or the disability grant.[94] The applicants devote a whole section of their heads of argument[95] to the contention that the Treasury's description of the SRD grant as temporary is "incorrect in fact and law".[96]

49 This premise is important to the applicants' case, because they use it as a springboard from which to argue that:

49.1 Government has decided to expand the category of recipients of social assistance to working-age adults in need of assistance – ie, primarily the unemployed.[97]

49.2 Having made this decision, government has committed itself to fulfilment of the right to social assistance to working-age adults through the mechanism of the SRD Regulations. And, if the SRD Regulations do not achieve the avowed purpose – ie, the extension of permanent social assistance to work-age adults – they are irrational and/or unreasonable and/or unjustifiable.[98]

49.3 Once government has committed to the progressive realisation of a right "in a particular way, its failure to deliver on its own commitment in a reasonable and effective manner is self-evidently unreasonable".[99]

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92 Emphasis added

93 See section 6 of the Social Assistance Act

94 See section 9 of the Social Assistance Act

95 See Applicants' HoA at paras 65 to 84

96 See Applicants' HoA at para 70

97 See, for example, Applicants' HoA at paras 2-3 p 014-5 to p 014-6; para 6 p 014-7; para 14.5 p -14-10; para 16 p 014-12

98 See, for example, Applicants' HoA at paras 2-3 p 014-5 to p 014-6; para 6 p 014-7; para 14.5 p -14-10; para 16 p 014-12

99 See Applicants' HoA at para 52.7 p 014-33

50 The applicants say that the notion that the SRD grant is temporary is wrong in "fact and law". When it comes to the law, the argument seems to be based solely on the notion that the SRD grant is "no longer housed under the Disaster Management Act" and now "derives its legal existence from section 14 of the Social Assistance Act".[100] When it comes to the facts, the applicants rely extensively (throughout their papers and heads of argument) on public statements made by various role-players such as the President and the Minister of Social Development.

51 But whatever the applicants may say, the SRD grant ***is*** intended to be temporary.

52 As we have shown above, the Social Assistance Act plainly explains that the persons who qualify for the SRD grant are those as prescribed (see paragraph 36.1 above). In other words, the legislature deliberately left this issue to the Minister of Social Development, with the concurrence of the Minister of Finance.[101] The applicants have not challenged this provision of the Social Assistance Act, and so its validity must be accepted for the purposes of everything addressed in this application.[102]

53 One then turns to the SRD Regulations themselves and, in clear language, they say that the grant is available to those in need of temporary assistance (see paragraph 46 above). Despite the fact that the notice of motion contains twenty-two substantive prayers and is ten pages long, the applicants have not sought to challenge regulation 2(1) of the SRD Regulations to the extent that it makes the SRD grant available to those in need of

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100 See RA at para 44 p 011-35, on which reliance is placed in Applicants' HoA at para 79 p 014-44

101 See section 32(2) of the Social Assistance Act

102 See, for example, Fischer v Ramahlele 2014 (4) SA 614 (SCA) at paras 13-14

temporary assistance. Again, therefore, the validity of regulation 2(1) has to be assumed for the purposes of this application.[103]

54 So, the obvious starting point is that:

54.1 Both section 13(1) of the Social Assistance Act and regulation 2(1) of the SRD Regulations are valid and binding on the parties and this Court.

54.2 Those provisions unequivocally provide that a person in need of "temporary assistance" is entitled to apply for an SRD grant.

55 On what basis do the applicants seek to overturn this starting point? It seems that the only basis on which they do so, is their reliance on public statements of various government office-bearers which they interpret to mean that the grant is permanent. As we have shown above, this evidence is not admissible (or, if it is technically admissible, certainly not weighty or even helpful) to trump the intention of the legislature (as reflected in the Social Assistance Act) and the executive (as reflected in the SRD Regulations and the affidavits of the respondents).

56 The temporary nature of the grant has most traction in relation to the budgeting process. The categorisation of who is entitled to the SRD grant has profound implications for the analysis under section 27(1)(c) of the Constitution:

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[103] See, for example, Minister of Water and Environmental Affairs v Kloof Conservancy 2015 JDR 2601 (SCA) at para 15

56.1 There is controversy, relating to one of the applicants' grounds of attack, about what is meant by "insufficient means" as the term is used in regulation 2(1). Let us leave that aside for the moment, although it is of major significance and is addressed below. For the purposes of the present argument, the precise parameters of what is meant by that term are not relevant.

56.2 If the starting point is that all working-age people between the ages of 18 and 60 with "insufficient means" are entitled to the grant, then the budgeting process would have to be focused on providing for that entire category.

56.3 If the starting point is that only those requiring temporary assistance, and who meet the criteria in regulation 2(1), are entitled to the SRD grant, then the budgeting process may be directed to that category. The Treasury has explained that it has approached the SRD grant on that basis, and with reference to each previous year's allocation.[104] A key part of the applicants' case is that this is impermissible. But that is because they proceed from the wrong premise. Because they wrongly proceed on the basis that government now treats working-age adults with insufficient means as a permanent, new category of grant recipient, their criticisms break down.

The fifth incorrect premise – section 27(1)(c) requires expansiveness

57 A theme which underpins many of the arguments made by the applicants is that section 27(1)(c) of the Constitution requires the SRD Regulations to be as expansive as

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[104] See Treasury AA at para 74 p 008-47

possible. This theme runs through the individual attacks on the SRD Regulations because the applicants repeatedly adopt arguments along the following lines:

57.1 In relation to the scope of the SRD Regulations (in particular, the interpretation of the concept of "insufficient means"), section 27(1)(c) of the Constitution requires adopting an interpretive exercise which results in the broadest coverage of the SRD Regulations possible.[105] This is expressed as the need to give effect to the interpretive rule that an interpretation of a document which gives "best" effect to the Bill of Rights must be favoured.[106]

57.2 In relation to the various procedural rules which must be satisfied before an applicant becomes entitled to payment, any measure which is "under-inclusive," and which limits the pool of recipients, is inconsistent with section 27(1)(c) of the Constitution. This becomes most relevant when the applicants criticise the Treasury for preferring an under-inclusive approach (by favouring various procedural mechanisms designed to ensure that those not entitled to the grant do not receive it) over an over-inclusive approach (which would be willing to accept that some non-qualifying applicants would receive the grant in exchange for having as wide coverage as possible).[107]

58 In short, the applicants purport to use well-accepted rules of interpretation to reach their conclusion of the need for expansiveness. But these "rules" are, in truth, an illegitimate proxy for the simple proposition that (according to the applicants): the Constitution requires the SRD Regulations to apply as broadly as possible.

59 But this is question begging. As we have shown above, when discussing the proper approach to interpreting section 27(1), the positive component of socio-economic rights is subject to a unified interpretation, in which sections 27(1) and (2) are read together (see paragraph 9 above). The Constitutional Court in *Mazibuko* expressly rejected the notion that there is some identifiable minimum component (whether one calls it a minimum core or something different) of each socio-economic right, against which the reasonableness of each government policy/legislation must be measured. Whether section 27(1) has been limited will depend in each case on whether the state has implemented reasonable measures to fulfil the relevant component (ie housing, healthcare, social assistance and the rest). One of the key determinants of reasonableness is whether the measure differentiates rationally. This was made express by the Constitutional Court in *Khosa* (supra) (see paragraph 9 above). It will in some cases be rational to differentiate between categories of recipients in a way which errs on the side of strictness (ie, to weed out non-qualifying persons from benefits). In other cases, it may not be. But in each case, this conclusion will then determine whether the right has been limited or not.

60 The Constitutional Court has recently made clear that interpretation is a "unitary exercise" in which the text, context and purpose are to be considered together, with none predominating over the others.[108] It has said that a purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the bill of rights. But it has also said that this is

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105 See Applicants' HoA at para 142.1 p 014-72 to p 014-73
106 Applicants' HoA at para 142.1 p 014-72
107 See Applicants' HoA at para 246.5.2 p 014-126
108 See note 188 below

not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision 'a narrower or specific meaning' should be given to it."[109] An approach which simply takes as the uncontentious premise that an expansive reading of section 27(1) is what is required by the Constitution short-circuits all of the above. This is clearly at odds with the case law, of the Constitutional Court in particular.

NO VIOLATION OF SECTION 27

61 It is submitted that, if one eliminates the incorrect premises discussed above, it becomes clear that the applicants' attack based on section 27(1) of the Constitution must fail. This is because:

61.1 The SRD Regulations and Social Assistance Act are valid until set aside.

61.2 That legislation is the sole admissible source of the "government's intention". The government has not bound itself to provide any more social assistance to working-age adults who cannot support themselves, beyond what is reflected in that legislation.

61.3 The question in this case is not, therefore, whether the SRD Regulations are invalid because they confer reduced benefits compared to what government has promised. This is therefore not a *Blue Moonlight* type of case (see paragraphs 14 and 15 above).

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[109] Soobramoney (supra) at para 17

61.4 Rather, the question in this case is whether the SRD Regulations are a reasonable measure enacted by the state to realise the right to social assistance progressively within available resources. This is therefore a *Soobramoney*, *Khosa* or *Mazibuko* type of case (see paragraphs 11 and 12 above). And, as we show below, it falls on the *Soobramoney* and *Mazibuko* side of the line.

The positive component of the right

62 For the reasons given below, the SRD Regulations constitute a reasonable measure, and are consistent with the duty of the state to provide social assistance as best it can, and subject to available resources.

The financial constraints facing the state

63 The Treasury has pointed out that all rights in the Constitution, including but not only socio-economic rights, have budgetary implications. There is no way of fulfilling these obligations other than through taxation. This is because the only other way for the state to raise money – literally to print it – also takes the form of indirect taxation through inflation. So, one way or the other, the state must raise sufficient revenue through taxation to fulfil all of the rights in the Constitution. The state has reached the limit of the additional revenue which it can raise by increasing taxation.[110]

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[110] Treasury AA at para 18 p 008-11 to p 008-12

64 The Treasury has explained that government expenditure exceeds revenue by R321.6 billion in 2024/25 and will rise to R623.3 billion in 2025/26.[111]

65 The applicants deride the Treasury's calculations. As noted, they describe them as a "back-of-the-envelope" calculation.[112] But it is revealing to consider the "detailed rebuttal of National Treasury's affordability claims" in the replying affidavit, on which this dismissive approach to the Treasury's evidence appears to be based.[113] There, the applicants do not dispute the significant budget deficit described above. Rather, they do precisely what the Constitutional Court has said that they may not do – they advance a detailed ideological critique of government's choices in relation to resources. So, for instance, they criticise government for being slow to withdraw "gradually accumulating funds" from the Gold and Foreign Exchange Contingency Reserve Account and say that it is "inexplicable".[114] They refer to the "trenchant criticism" of "economists and policy experts" of what they describe as the Treasury's "austerity" fiscal policy.[115]

66 What requires special emphasis is the context in which the applicants advanced this criticism:

66.1 In its answering affidavit, the Treasury expressly took the point that the premise of this entire application was an impermissible desire to say to government, through this Court, that "we can identify areas in the budget where we believe that government should spend differently, and if our recommended

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111 Treasury AA at para 36 p 008-21
112 Applicants' HoA at para 234.5 p 014-115
113 See RA at paras 173-185 p 011-112 to p 011-122
114 RA at para 177.1 p 011-113
115 RA at para 176 p 011-113

changes to the budget were to be adopted, X or Y increases in social assistance could be afforded".[116]

66.2 What did the applicants do in reply? While repeatedly paying lip-service to the notion that they "are not asking this Court to direct Government to allocate resources in a particular way",[117] they did precisely the opposite. They put up a detailed critique, with reference to academic research, of government's desire to reduce the extreme budget deficit (which they describe as austerity). They put up an International Monetary Fund Report in an effort to dispute the notion that social grants are a drain on the economy. They rely on international studies which seek to show that increasing social assistance leads to increases in GDP.[118]

67 There is, in truth, no serious dispute that the government is facing severe budgetary constraints. Most of the applicants' critiques of government's approach to funding the SRD grant are based on ideological perspectives on how much tax may appropriately be imposed and how government should prioritise spending.

68 The applicants go further. They appear to interpret the Constitutional Court's socio-economic rights cases to have given licence to scrutinising claims of financial constraints in granular detail. They then accuse the Treasury of "back-of-the-envelope"

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116 Treasury AA at para 63.4 p 008-39

117 See, for example, RA para 223.5 p 011-142

118 See RA at paras 173-185 p 011-112 to p 011-122

calculations because, in their view, there is insufficient substantiation of the budgetary constraints.[119]

69 Again, it is notable that the applicants rely on *Blue Moonlight* (supra) as the basis of their arguments. They rely on the remarks of the Constitutional Court that it is not good enough for the state to say that it has not budgeted for something "if it should indeed have planned and budgeted for it in the fulfilment of its obligations". They do so, so they can argue that the state cannot make "bald assertions" about affordability and to argue that the state must present "relevant data" to support a claim of unaffordability.[120]

70 Self-evidently, the applicants conflate two, discrete issues. The first is whether the state can be criticised for failing to budget for something. For the reasons we have given above, this is not such a case. The second relates to the quality of evidence adduced by the state. In this regard, the applicants' criticisms are inconsistent with established principles:

70.1 In *Soobramoney*, the provincial government alleged in its answering affidavit that the health budget had been overspent for two consecutive financial years. For this reason, it said that there were insufficient funds available to provide Mr Soobramoney the access to dialysis which he wanted (see paragraph 11 above). The Constitutional Court took these allegations at face value, and conveyed no appetite to second-guess the decision of the Provincial government to allocate RX million to the health budget. In other words, the

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119 See Applicants' HoA at para 234 p 014-114 to p 014-117

120 See Applicants' HoA at para 234.4 p 014-115

Court assessed the reasonableness of the impugned measure with reference only to the health budget. It declined to enter into an assessment of whether the budget from other departments should have been diverted so that more funds for health would have been available.

70.2 In *Mazibuko* (supra), the Constitutional Court treated it as axiomatic that doing away with means testing for social assistance "would be costly and have the result that those who do not need social benefits would receive them" and that means testing served the laudable purpose of ensuring "that those most in need benefit from government services".[121]

70.3 In *Blue Moonlight*, on which the applicants place such emphasis, the Constitutional Court accepted the relevance of budgetary constraints. It held that it would be quite inappropriate for a court to order an organ of State to do something that is impossible, the more so in a young constitutional democracy", which required the City's claim of budgetary constraints to be given due consideration.[122] The case turned on the misunderstanding which the Court considered to have motivated the City to fail to budget for the needs of the respondents in emergency situations. Even in that context, the case turned in part on the failure of the City to give any evidence of its "overall financial position".[123] That is clearly not the case here.

71 It is therefore submitted that the assessment of compliance of the SRD Regulations with sections 27(1)(c) and 27(2) must be based on an acceptance that the Treasury has

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121 Mazibuko (supra) at para 101

122 Blue Moonlight (supra) at para 69

established that there are severe financial constraints preventing it from extending the SRD grant further.

Evidence of affordability

72 The applicants say that the Treasury should not be taken seriously when it says that the "current SRD grant is unaffordable, and that any enhancement of the grant is also unaffordable".[124] The reason why the applicants say that Treasury should not be taken seriously on this topic is that the Treasury's "sweeping declaration" of unaffordability was "promptly contradicted" when government increased the value of the SRD grant by R20.[125]

73 The applicants cannot make this allegation. The papers in this matter constitute both the evidence and the pleadings.[126] On 31 May 2024, the applicants filed a supplementary affidavit.[127] Its purpose, amongst others not relevant here, was to explain that, on 25 March 2024, the amended version of the SRD Regulations increased the value of the SRD grant from R350 to R370.[128]

74 In dealing with the amendment to the regulations to increase the value of the SRD grant in their supplementary affidavit, the applicants said only one thing: the "grant value remains arbitrary", and the increase of R20 does not cure the unconstitutionality of the

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123 Blue Moonlight (supra) at para 74
124 See Applicants' HoA at para 14.5 p 014-10 to p 014-11
125 See Applicants' HoA at para 14.6 p 014-11
126 Global Environmental Trust v Tendele Coal Mining (Pty) Ltd [2021] 2 All SA 1 (SCA) at para 95
127 See Caselines p 012-1
128 See Supplementary Affidavit at paras 10-11 p 012-5

SRD Regulations.[129] Not once in the supplementary affidavit did the applicants make the allegation that the increase of R20 shows that the Treasury's allegations about affordability in the answering affidavit are wrong.

75 This is not a mere technical point about proper pleading. As a matter of inherent fairness, a party cannot advance a factual allegation for the first time in heads of argument, without having made the allegation in the papers.[130] If the applicants had made the allegation now made in argument – ie, that the R20 increase shows that the Treasury was not being truthful in the answering affidavit – in the supplementary affidavit, then the Minister could have filed a further affidavit to respond.

76 In the replying affidavit (but not the supplementary affidavit, which is the document expressly introduced to address the amendments, including the R20 increase) it is stated that the R20 increase "did not arise from any change of circumstances or acquisition of new revenue, but simply a re-weighting of priorities aimed at meeting the state's constitutional obligations".[131] The applicants do not refer to this evidence in their heads of arguments. Their failure to do so is destructive of their argument on this issue.

77 No response to this, and other relevant evidence which the Treasury could have adduced, is before Court. This is solely because of the impermissible conduct of the applicants. As we have shown above, when discussing the approach of our courts to socio-economic rights, the issue of the affordability of the SRD grant is crucial to

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129 Supplementary Affidavit at para 14 p 012-7

130 See, for example, The Fonarun Naree: Afri Grain Marketing (Pty) Ltd v Trustees, Copenship Bulkers A/S (in liquidation) 2024 (1) SA 373 (SCA) at paras 43-4; President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC) at paras 61-4

determining whether the right has been breached (because the realisation of the right, progressively, has not been done in terms of a reasonable measure) and whether any limitation is reasonable and justified. The respondents were entitled to a fair opportunity to deal with this issue.

78 The Constitutional Court has repeatedly affirmed the application of the *Plascon-Evans* rule[132] in constitutional litigation.[133] As we show throughout these written submissions, the Treasury has adduced detailed facts to show that the SRD grant in its present form is unaffordable. This evidence cannot be dismissed or framed as being unserious. Especially on the basis of the applicants' argumentative assumption about the R20 increase, framed as a statement of fact (see paragraph 76 above), despite it necessarily being outside of the applicants' knowledge.

<u>The reasonable prioritisation of those most in need</u>

79 The Treasury has explained why a grant for working-age adults must necessarily be placed in a different category to other social grants. The goal is that recipients of the SRD grant should be economically active. There are, at the moment, more people who are unemployed than who contribute to the tax base. If the state does not prioritise investing in measures to ensure that more people in this category – ie, adults aged 18-

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131 See RA at para 180.2.2 p 011-116

132 The rule in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 633-4 is that where there are genuine disputes of fact in motion court, these must be decided on the respondents' version.

133 See Thint (Pty) Ltd v National Director of Public Prosecutions 2009 (1) SA 1 (CC) at paras 8-10. This was recently confirmed in Mamadi v Premier, Limpopo 2024 (1) SA 1 (CC) at paras 30-45. Even in judicial reviews under rule 53, disputes of fact will be decided on the respondents' version unless the applicant has applied for a referral to oral evidence. The Constitutional Court expressly drew a contrast with ordinary rule 6 applications, such as the present, where even in constitutional litigation the

60 – are employed, then it will create a vicious cycle. This is because the fewer people who are economically active, the smaller the tax base to fund social assistance.[134] This distinguishes a grant for working-age adults from other grants such as disability, old-age and child support grants. Those grants are premised on an understanding that the needs of the beneficiaries are immutable and of a far more long-term nature.[135]

80 The prioritisation of other grants must be understood in this context:

80.1 The state spends approximately R250 billion per year on social grants. This is 12.3% of the government's main budget expenditure. At the same time, the fiscal constraints facing the government require expenditure reductions of approximately R200 billion between now and 2026/27.[136] Government revenue is projected to drop by R66 billion in 2024/25 and R89.5 billion in 2025/26. By 2025/26, debt-servicing costs will be R425 billion. Economic growth "remains extremely subdued" and GDP is at levels below 2008 in real per capita terms.[137]

80.2 At the same time, the pool of social grant recipients is expanding. The best examples of this are that the old-age grant is growing at 3% per year, which at the moment reflects R6 billion extra needed (above inflationary increases, if any) per year; and the child-support grant is increasing by approximately

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application will be dismissed where a foreseeable dispute of fact precludes the applicant from obtaining the relief which it seeks.

134 Treasury AA at paras 23-5 p 008-16 to p 008-13

135 See Treasury AA at para 95 p 008-69 to p 008-70

136 Treasury AA at paras 38-9 p 008-22

137 Treasury AA at para 40 p 008-23 to p 008-24

200 000 recipients per year. This is all leaving aside the massive increase in grant recipients as a result of the SRD grant.[138]

80.3 Of course, social grants are but one of multiple areas requiring revenue.

81 These facts show why the SRD Regulations are a reasonable measure, as part of the progressive realisation of the right to social assistance:

81.1 A major component of the applicants' case is the flawed premise that SRD grant recipients should be treated in the same way as other grant recipients. As shown above, the Treasury expressly says that government "policy" as reflected in the Social Assistance Act and the SRD Regulations, is *not* to treat them in the same way.

81.2 It is therefore common cause that there is differentiation in this case. The differentiation is between working-age adults with insufficient means, and all other grant recipients. The differential treatment is precisely the type which the Constitutional Court upheld in *Soobramoney* (see paragraph 11 above) and *Mazibuko* (see paragraph 12 above). As in those cases, it is based on the reasonable need to differentiate to prioritise those most in need. Whatever the applicants may say, the clear evidence in this case is that extending the SRD grant any further will place the entire grant system in jeopardy. To protect the most vulnerable categories – who have benefited for years and have no alternative way to generate income – is entirely reasonable. In fact, it is required.

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138 Treasury AA at para 39 p 008-23

The reasonableness of making the SRD grant temporary

82 Section 27(1)(c) of the Constitution enshrines the right to "appropriate social assistance" for those "unable to support themselves and their dependants".

83 The Treasury has explained that there is a conflation underpinning this application. This conflation is between the temporary measure reflected in the SRD grant and the notion of permanent social assistance for working-age adults. The SRD grant was never intended to be the latter. It began as a measure with a short, and clearly-identified, end-point (October 2020), but has been extended on an ad hoc basis because of the lasting effect of the pandemic. But it does not form part of a broader policy framework for social grants and no permanent funding has been allocated to it. This is because the state's financial position has worsened because of Covid 19 and there is an urgent and unavoidable imperative to reduce the ever-expanding budget deficit.[139]

84 The applicants seek to make mileage from the acceptance by the Treasury that there is no unanimity within government about how to handle social assistance for working-age adults. They do this in order to argue that there is no evidence of a unified government policy in relation to social assistance. However, the Treasury has explained why there is no long-term policy yet. This is because there is no funding available for a permanent (or long-term) social grant for working-age adults. So, because each long-term proposal hits up against the wall of budgetary constraints, government has had to settle on a short-term approach of continuing the SRD grant on a year-to-year basis but only until

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[139] Treasury AA at para 20 p 008-13 to p 008-15

improved interventions may be enacted. It has adopted this in parallel with a policy of the incremental implementation of measures to encourage employment. It has explained that, if a policy decision were to be made to increase the SRD grant into the medium term, a clear funding source would have to be identified.[140]

85 But the applicants reject this too. They flippantly dismiss the contention that the SRD grant is funded by debt, on the basis that this could be said about "the provision or increase of absolutely anything by the state".[141]

86 This is true, but only in a limited sense. It overlooks the core proposition advanced by the Treasury – ie, that "further or continued expenditure on the SRD grant by definition must come at the expense of some other expenditure".[142] The projected cost of a long-term social grant for working age adults is between R76 billion and R139 billion depending on the value of the grant.[143] This has to be understood in a context in which the government already spends approximately R100 billion on labour market activation.[144] If a decision were to be made to include working-age adults as a new, permanent category of social grant recipients, then it would have to come at the expense of these and many other interventions. The retention of the SRD grant as a temporary measure means that, at this stage, the government has not made a policy

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140 Treasury AA at paras 30 to 32 p 008-19 to p 008-20
141 RA para 185.4 p 011-122
142 Treasury AA at para 37 p 008-22
143 Treasury AA at para 45.2 p 008-25
144 Treasury AA at para 44 p 008-25

decision that a Basic Income Grant or an unemployment grant should be adopted at the expense of other interventions better suited to solving unemployment.[145]

87 The simple position is that, were this Court to uphold almost all of the individual attacks on the SRD Regulations (we identify them in more detail below), it would necessarily require this Court to order the state to rearrange its budgetary priorities. We return again below to address the applicants' impermissible refrain when they repeatedly claim that they only seek modest relief in this case. The premise of the applicants' case – for instance, in its argument that the pool of beneficiaries of the SRD grant must be substantially expanded by reading-down the term "financial support" (see paragraphs 115 to 126 below) – is necessarily contingent on this Court telling the government that it must simply borrow more. This is entirely odds with all of the authorities discussed above.

The reasonable approach to budgeting

88 We have already explained that no policy decision has been made to create a new category of social grant for working-age adults. This is important in assessing the reasonableness of the Treasury's approach to budgeting for the SRD grant. We have already shown above that the applicants proceed from the incorrect premise. They start from the assumption that a certain number of people (ie, X million) are entitled to the SRD grant and that the SRD Regulations have then deliberately put hurdles in the way to allow those people from claiming the grant. However, budgeting is not approached in this way. The Treasury has explained that:

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145 Treasury AA at para 45.3 p 008-26

88.1 The SRD grant budget for each year is based on the budget for the previous year. Treasury uses uptake as a proxy for need, and budgets accordingly.

88.2 Because of the finite budget, additional safeguarding measures have been introduced, to ensure that the limited resources are spent on those most in need. This is used to make projections for the next budget. For example, bank verification was introduced to make means testing more precise. This in turn was used for budgeting purposes. Historical data about the impact of these safeguarding measures are also taken into account. The Treasury unashamedly explains that this process is adopted with the main aim of reducing waste and to minimise the budgetary implications of retaining the SRD grant.

88.3 The applicants have estimated that there are 18.5 million people out of work and have criticised the Treasury for what they see as woeful underbudgeting. But, this is not how the Treasury approaches, or responsibly could approach, budgeting in the constrained fiscal context described above. In 2022/23, R44 billion was budgeted for the SRD grant and only R30.3 billion was spent. This had to inform the budget for the next financial year to prevent waste. The applicants' approach underemphasises, dramatically, the extent to which the SRD grant competes with other expenditure. If budgeting were to be done without reference to actual uptake the previous year, it would amount to saying to all other departments: even though the budget allocation for other areas – like health and education – was too little the previous year, and the allocation for the SRD grant was too much, the budget for the SRD grant should be

increased the next year, at the expense of departments and programmes with insufficient funding available to them.[146]

88.4 The mistake which the applicants make is to assume that, because the budget was underspent in 2022/23,[147] the Treasury cannot claim that there is insufficient funding available to adopt the more expansive reading of the SRD Regulations they propose.[148] However, the Treasury has explained that the budget was only underspent in this way once, in 2022/23, and that was because of the introduction of more enhanced verification methods. Since, during the pandemic, means testing amounted to nothing much more than self-reporting of need, the pool of recipients was larger than it became when tighter verification was introduced. From then, budgets have been set with reference to actual uptake in the previous financial year.[149]

89 In the context of such severe resource constraints, this is a responsible, and therefore, reasonable approach to budgeting.

<u>The reasonable use of gatekeeping procedures</u>

90 As already shown, a major component of the applicants' case is their attack on the various procedural rules in the SRD Regulations. Their attack is squarely based on the premise that these procedures unfairly exclude qualifying recipients. At the level of principle, the parties are in agreement that it is "important to put in place safeguards to

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146 Treasury AA at para 51 p 008-28 to p 008-33
147 See Treasury AA at para 77.2 p 008-49
148 See Applicants' HoA at para 234.2 p 014-155

minimise the misuse of public funds".[150] It other words, it is common cause that it is legitimate for procedural requirements and safeguards to be used, as they are, for all grants in South Africa "because preventing waste, fraud erroneous payment and payment to persons outside of a particular beneficiary category are important ways to ensure that the budget is used appropriately."[151] The applicants take issue with the detail.

91 The approach of the Treasury, when it comes to procedural/gatekeeping mechanism, is self-consciously in favour of minimising over-inclusiveness. It has explained that means testing, and related procedural requirements, were inadequate during the pandemic. As restrictions eased, it was possible for the system to be tightened for more effective mechanisms to be used. The Treasury accepts the regrettable reality that, with the tighter mechanisms, some very needy, and worthy beneficiaries will inadvertently be excluded. However, by using the most reliable means testing, those who are approved will clearly satisfy the definition of being the neediest. This is a reasonable balance, to prevent the collapse of the system as a whole.[152]

92 It is instructive to consider how the Constitutional Court dealt with the issue of means testing in *Mazibuko* (supra). The context was slightly different – because, in that case, the applicants argued against any form of means testing to establish an entitlement to water. Nevertheless, the Court's remarks are apposite:

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149 See Treasury AA at para 77 p 008-49 to p 008-54
150 See RA at para 223.7 p 011-143
151 See Treasury AA at para 76.2 p 008-48
152 See Treasury AA at para 77 p 008-49 to p 008-54

> "Although a means-tested policy requires citizens to apply for benefits and so disclose that they are poor, to hold a means-tested policy to be constitutionally impermissible would deprive government of a key methodology for ensuring that government services target those most in need. Indeed, nearly all social security benefits afforded by the national government are based on means-testing. If means testing were to be found to be unconstitutional, government would only be permitted to afford social grants on a universal basis. Such a result would be costly and have the result that those who do not need social benefits would receive them. *Means testing may not be a perfect methodology because it is under-inclusive, as Mr Seedat acknowledged, and it may be that those who apply for means-tested benefits dislike doing so, but these considerations must yield to the indisputably laudable purpose served by means testing: it seeks to ensure that those most in need benefit from government service*s. In their affidavits, the applicants proposed no third way as an alternative to the provision of universal benefits or means-tested benefits. Nor did their counsel propose one in court."[153]

93 In addition to emphasising the reasonableness of means testing, this also explains why the applicants are wrong to frame the various new procedures, such as online applications and bank verification, as irrational measures which differentiate arbitrarily between SRD grant recipients and other grant recipients:

93.1 In the first place, the nature of procedural requirements and safeguarding methods evolves over time. Some of the new methods reflected in the SRD Regulations, especially those which are technology based, are intended to apply to other grants in the future.[154]

93.2 Secondly, given the temporary nature of the grant, and the budgetary pressures, it is entirely rational and reasonable to implement the most effective procedural safeguards in respect of the SRD grant, and to accept that it is not realistic to apply them to other grants immediately.[155]

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153 Mazibuko (supra) at para 101

154 See Treasury AA at para 80.1 p 008-55; Social Development AA at para 64 p 009-22

155 See Treasury AA at para 77.4 p 008-50

Summation – no limitation of the positive component of section 27(1)(c)

94 In the light of what we have said above, it is submitted that the SRD Regulations, and the policy reflected in them, strike an appropriate balance between (a) using available resources as effectively as possible, prioritising the neediest and (b) providing as much social assistance to working-age adults in need as reasonably can be offered. They are accordingly consistent with sections 27(1)(c) and 27(2) of the Constitution.

No infringement of the negative component of the right

95 Although not always flagging it expressly in these terms, the applicants frequently describe the SRD grant as retrogressive in a way which suggests that it violates the negative component of the right to social assistance. As noted above, this involves a prohibition against unjustifiably interfering with pre-existing access to one of the socio-economic rights.

96 In *Mazibuko*, residents of Phiri in Soweto had been allocated water on the basis that they paid a flat fee of R68.40 per month, regardless of actual consumption. This was replaced with a system in which residents were given a certain allocation (6000 litres) for free, but had to install prepaid meters (which carried the implication that, if the amount paid into the meter was insufficient to cover the month's needs, water would be cut off).

97 The Constitutional Court rejected an argument of the applicants that this measure violated the negative component of the right to water because it impaired existing

access to water.[156] The Court rejected the argument because "the new system for the first time provided a free water allowance to all residents. In so doing, it cannot be said that it interfered with the right of access to sufficient water."[157]

98 We submit that this reasoning applies equally to the present case. The Covid-19 grant, and its extension into the SRD grant, provided social assistance to working-age people for the first time. It cannot, as the reasoning in *Mazibuko* makes clear, be seen as an infringement of the negative component of the right to social assistance.

Any limitation is reasonable and justifiable

99 The applicants say that the SRD Regulations limits three constitutional rights. Since one of them – the right to administrative justice in terms of section 33 of the Constitution – does not concern the Treasury's interest in this case, we do not address it. That, therefore, leaves the right to social assistance in section 27(1)(c) and the right to equality in section 9(1) of the Constitution.[158]

100 The applicants blandly assert that the respondents have an "onus" to justify any limitations of rights established by the applicants. They do this, despite citing *NICRO* as authority for this proposition in the relevant footnote.[159] As we have shown above, the approach endorsed in *NICRO* is more nuanced than that (see paragraph 24 above).

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156 Mazibuko (supra) at paras 135-7
157 Mazibuko (supra) at para 136
158 See Applicants' HoA at para 242 p 014-123
159 See Applicants' HoA at para 243 p 014-123

101 In any event, the applicants argue that any limitation of the rights on which they rely cannot be justified in this case. This, according to their argument, is because:

101.1 The applicants say that the "exclusion from receiving the SRD grant trenches deeply on the right to social assistance". They rely on *Khosa* (supra) for this proposition.[160]

101.2 The applicants say that the limitations of the rights on which they rely have a "devastating impact on SRD grant applicants".[161]

101.3 The applicants say that the "procedural barriers" which they attack as unconstitutional are designed to suppress uptake, which is not a rational or legitimate purpose.[162]

101.4 The applicants say that the respondents prioritise preventing over-inclusion over preventing under-exclusion and this is "not a reasonable or justifiable trade-off". In essence, they criticise the respondents for failing to consider whether the advantages of preventing abuse (ie, preventing an over-inclusive approach where more people obtain the grant than are entitled) outweigh the disadvantage (ie, what the applicants frame as exposure to starvation).[163]

101.5 The applicants say that the "putative justifications" for the SRD Regulations are "inadequate, unpersuasive and disingenuous". This is a repeat of arguments which flow throughout the applicants' case to the effect that (a) having

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160 See Applicants' HoA at para 246.1 p 014-125
161 Applicants' HoA at paras 246.2 and 246.3 p 014-125
162 Applicants' HoA at para 246.4 p 014-126
163 See Applicants' HoA at para 246.5 p 014-126 to p 014-127

promised to provide social assistance to working-age adults, the state cannot justifiably fail to "fund the implementation of the" SRD Regulations, (b) the Treasury has not substantiated its "budgetary claims" and (c) there is no justification for treating SRD grant recipients inferiorly to other grant recipients.[164]

101.6 Lastly, the applicants say that there are a number of less restrictive means which could be implemented by the Department and SASSA which "do not result in arbitrary and unfair exclusion". These are, according to the applicants:

101.6.1 Making a hybrid application process available, rather than only an online process.

101.6.2 Interpreting "income" and "financial support" appropriately.

101.6.3 Using means currently used in other means-tested social grants, such as self-declarations, requiring documentary evidence of income and random checks.

101.6.4 Incrementally raising the value of the grant over time, rather than freezing it.[165]

102 In summing up their argument in relation to section 36, the applicants say that this case is like *Khosa* (supra) because "the importance of providing access to the SRD grant and

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164 Applicants' HoA at para 246.6 p 014-127 to p 014-128

165 Applicants' HoA at para 246.7 p 014-128

the impact upon life and dignity that a denial of such access has, far outweighs the unsubstantiated financial considerations on which the respondents rely".[166]

103 The bulk of these arguments have already been addressed. We therefore confine ourselves to saying the following:

103.1 The applicants' arguments summarised in paragraphs 101.1 to 101.5 above are all variations of the arguments addressed above. They are, with respect, all circular because they depend, for their conclusion, on a premise which is contested in this case – ie, that the Constitution requires an expansive approach to providing social assistance to working-age adults.

103.2 *Khosa* (supra) is manifestly distinguishable from the present case. In that case, the Constitutional Court rejected the exclusion of permanent residents from benefiting from certain social grants. It did this because the very small (relatively speaking) cost saving did not justify the extreme infringement of the dignity of permanent residents arising from excluding them from these benefits despite their deep ties to the country. The Court expressly embraced the notion of differentiating when allocating finite resources. Given the small cost, and the irrational discrimination against permanent residents, the differentiation in that case was not constitutionally acceptable. The very different basis for this differentiation to the present case, explains why. Most importantly of all, the state took a categorical view in *Khosa* that permanent residents were not

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166 See Applicants' HoA at para 247 p 014-129

entitled to social assistance, and did not try to justify the policy either in terms of section 27(2) or section 36 (see paragraph 9 above).

104 That, then, leaves the suggestion that less restrictive means are available (see paragraph 101.6 above). The applicants' arguments on less restrictive means suffer from the following defects:

104.1 None of these supposedly less-restrictive means was pleaded in the founding affidavit. This means that the respondents were not given an opportunity to respond to them.

104.2 The Constitutional Court has emphasised that the effectiveness of a measure must be assessed thoroughly, before it may be concluded that it constitutes a less restrictive mechanism of achieving the purpose of an impugned provision or rule.[167] This Court would have benefited from the respondents' evidence on the efficacy of these proposed less restrictive means. The applicants' failure to plead them, prevented that.

104.3 But, even on its own terms, the applicants' resort to less restrictive means is inherently unsustainable. This is because the applicants make the error of failing to identify the purpose of the limitation. They simply assert that less restrictive means are available without addressing the question: less restrictive means to achieve what purpose?

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[167] See, for instance, De Reuck v Director of Public Prosecutions, WLD 2004 (1) SA 406 (CC) at paras 81-83

104.4 The purpose of the limitation is, as the respondents have explained, to preserve finite resources for the neediest (both within the category covered by the SRD Regulations and across all categories of grant recipient). Once one identifies that purpose, one sees that the applicants' proposed less restrictive means cannot achieve that purpose. Their error seems to arise from their conflation of what they describe as the purpose of the SRD Regulations, rather than the purpose of the limitation as envisaged by section 36(1)(e) of the Constitution.

104.5 Even though these facts were not pleaded in the founding affidavit, it is possible to infer from the answering affidavits that not one of the supposed less restrictive means is capable of achieving the purpose of the limitation. The most glaring example is the startling suggestion that interpreting the terms "income" and "financial support" in the way suggested by the applicants "would actually serve the purpose of the means test in the SRD Regulations rather than subverting it".[168] The correct position (addressed again below) is that interpreting the terms as suggested by the applicants would expand the pool of recipients dramatically, and include even people without a regular wage but who receive, for instance, a R10 000 gift from a relative. Even if this is the applicants' preference, it self-evidently cannot achieve the purpose of conserving and prioritising resources for the sake of financial necessity.

105 It is therefore submitted that, to the extent that any limitation of section 27 is found, it is reasonable and justifiable as contemplated in section 36 of the Constitution.

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[168] Applicants' HoA at para 246.7.2 p 014-128

THE REVIEW HAS NO MERIT

106 We now proceed to address the review directly. In most cases, what we have said above also serves to explain why the review has no merit. We shall therefore avoid repetition by focusing only on evidence relevant to specific complaints arising from the attack on individual regulations.

The interaction between the review and the direct challenge

107 Before proceeding, we draw attention to the interaction between the review and the constitutional attack based on section 27 of the Constitution.

108 It is not in dispute that, if the applicants could establish that any of the impugned regulations constitutes an unjustifiable limitation of the rights to social assistance or equality, then it (or they) would have to be set aside. Whether this is done simply by setting them aside, or by holding them to be reviewable in terms of section 6(2)(i) of PAJA[169] and/or the doctrine of legality is, in our submission, immaterial. It is also not necessary in this case for this Court to resolve the interesting academic question of whether subordinate regulations are, in all cases, reviewable under PAJA.[170] The debate about whether PAJA or the doctrine of legality applies is most often important when determining whether a measure may be challenged as irrational (which, is available both in PAJA and legality reviews) and unreasonable (which is available only in PAJA

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169 Section 6(2)(i) of PAJA says that administrative action may be set aside if it is unlawful or unconstitutional.

170 See, for example, Esau v Minister of Co-Operative Governance and Traditional Affairs 2021 (3) SA 593 (SCA) at paras 77 to 84

reviews). Since the Treasury's case is that no violation of section 27(1)(c) has been established, it must necessarily show that the various regulations impugned by the applicants are reasonable. As we have demonstrated above, it has.

109 However, the review component of the case remains very important. This is because, even if the Treasury is correct that no unjustified limitation of the right to social assistance has been shown, the applicants impugn the SRD Regulations on various self-standing grounds in PAJA. If this Court agrees that no rights violations have been established, it will still be necessary to consider these attacks. It is vitally important that this Court may only uphold any review grounds as pleaded. We draw attention to this because, as we show below, there are significant instances where the applicants have sought to introduce attacks which were not pleaded. This is impermissible.[171] Furthermore, although it is not necessary to become bogged down in the PAJA/doctrine of legality debate, it is necessary, when considering the pleadings, to draw attention to the way in which the applicants have pleaded that the SRD Regulations are unreasonable. In cases where the applicants have relied solely on their argument based on section 27 of the Constitution to argue that a particular regulation is unreasonable, the dismissal of the constitutional attack necessarily requires the dismissal of that part of the review too.

110 With these principle in mind, we now assess the applicants' complaints in respect of the individual regulations impugned (or, in some cases, not impugned) in the applicants' notice of motion.

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171 See Tendele (supra) at paras 95-97

Online-only application process

111 The applicants challenge the decision of the Department of Social Development to allow applications for the SRD grant to be made only online. They say that the online-verification process is reviewable because:

111.1 It is designed to reduce uptake of the SRD grant and accordingly pursues an improper purpose.[172]

111.2 It breaches the state's obligation to realise the right to social assistance progressively because it is a retrogressive measure which limits access to the grant.[173]

112 The applicants have pleaded reliance on section 6(2)(e)(ii) of PAJA – which relates to administrative action taken for an "ulterior purpose or motive". The purpose of online verification has been shown by the respondents to be to minimise fraud and wastage and to ensure that only qualifying applicants are paid the SRD grant (see paragraphs 88.2 and 88.4 above). It is one thing to say, as the applicants also do, that this measure is irrational or unreasonable because it either does not achieve this purpose, or is under-inclusive. But it is hard to understand how the applicants can say that the measure has been enacted for a different, and improper, purpose to what the respondents have identified.

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172 See Applicants' HoA at para 125.1 p 014-65

173 Applicants' HoA at para 125.2 p 014-65

113 The respondents do not hide their acceptance that these measures may lead to less uptake. But this is not because they are designed to limit access, but rather to ensure that only truly qualifying applicants receive the grant. These explanations demonstrably negate any suggestion of an improper purpose. At the very best for the applicants, there is a dispute of fact on this issue, which would preclude them from making out this review ground.[174]

114 This, then, leaves their irrationality and unreasonableness review grounds. These appear to be duplications of the argument based on section 27(1)(c). For the reasons given above, they must fail. It may only be added that:

114.1 The efficacy of using an online application process has been explained in detail in the answering affidavit of the Minister of Social Development. There it is explained how the use of an online system has allowed the SRD grant to be rolled out much more quickly, and to a larger number of people, than any of the other grants.[175]

114.2 The applicants suggest that it would be more appropriate for a hybrid system to be used, as used with other grants, in which both online and in-person applications may be accommodated. The applicants say that using a hybrid system is more appropriate because the SRD grant will have wider reach – especially in respect of the rural poor who have no access to the internet.[176] Not only is this belied by the evidence of the Minister of Social Development but

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174 See, for example, McBride v Minister of Police 2016 JDR 0028 (GP) at para 5; See also the minority judgment of Unterhalter AJ in Eskom Holdings Soc Ltd v Vaal River Development Association (Pty) Ltd 2023 (4) SA 325 (CC) at paras 166-7

175 See Social Development AA at paras 68 to 91 p 009-23 to p 009-29

this overlooks the fact that there would be significant resource implications of introducing in-person applications for the SRD grant.[177] Devoting these resources to a temporary measure is not efficient or cost-effective.

The meaning of "income" and "financial support"

115 The two main requirements to qualify for an SRD grant are, in terms of regulation 2(1):

115.1 First, that the applicant is in need of temporary assistance; and

115.2 Secondly, that the applicant has insufficient means.

116 Regulation 2(2) then imposes a series of additional requirements which must be met before a person may be paid the SRD grant. As regulation 2(2) makes clear with the use of the term "in addition", these requirements do not relate to the definitions of "temporary assistance" and "insufficient means". In other words, even a person who satisfies these definitions must also meet the additional requirements. An example of these requirements is that the recipient must be between the ages of 18 and 60.[178]

117 Regulation 2(3) then deals with the mechanisms which SASSA may use to verify whether a person has "insufficient means".

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176 See Applicants' HoA at para 246.7.1 p 014-128

177 See Treasury AA at para 80.2 p 008-55

178 See regulation 2(2)(c) of the SRD Regulations

118 In regulation 1 of the SRD Regulations, "insufficient means" is defined to mean that "a person is not in receipt of income or financial support". The terms "income" and "financial support" are not defined. It is well-accepted that, where terms are not defined in legislation (including delegated legislation[179]), the dictionary definition will be applied.[180]

119 The applicants purport to rely on dictionary definitions to argue that the Department adopts interpretations of the terms "income" and "financial support" which are too broad.[181] But they quickly abandon the dictionary definitions:

119.1 They refer to the definition of "income" in two dictionaries to argue that the definition of income involves "regularity and a connection to labour or investments". They accordingly argue that it excludes "ad hoc payments or charity from others".[182]

119.2 They say that "financial support" encompasses assistance and aid in a monetary form. We agree.

119.3 But they then jettison these meanings to argue that a "constitutional and purposive" interpretation of both "income" and "financial support" requires

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179 See Els v Health Professions Council of South Africa 2024 JDR 2118 (WCC) at para 50

180 See, for example, Commissioner, South African Revenue Service v Coronation Investment Management SA (Pty) 2023 (3) SA 404 (SCA) at para 45; City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper 2018 (4) SA 71 (SCA) at paras 28-9

181 Applicants' HoA at paras 130 to 134 p 014-67 to p 014-68

182 Applicants' Ho A at para 137.1 p 014-69

them both to "cover payments that are regular and obligatory, and that are capable of enabling the recipient to support themselves".[183]

120 As a result, the applicants argue that:

120.1 Income should be defined to mean "money received on a regular basis from formal or informal employment (such as wages, or earnings from informal trade), business activities or investments".[184]

120.2 Financial support should be defined only to refer to "regular payments which benefit the recipient, that do not constitute income, and which the recipient has a legal right to receive". They argue that this would, for instance, include spousal maintenance, but would exclude ad hoc payments such as gifts.[185]

121 The applicants argue that an understanding of "financial support" which is intended "to give best effect to section 27(1) of the Constitution, must be understood as referring only to payments which afford a person the means to support themselves [sic], without the need to rely on the discretion or charity or another person".[186] They say that the respondents, to the extent that they adopt a narrower definition of the terms, adopt arguments which "conflict with settled principles of interpretation".[187]

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183 Applicants' HoA at para 137.3 p 014-69
184 Applicants' HoA at para 137.4.1 p 014-70
185 Applicants' HoA at para 137.4.2 p 014-71
186 See Applicants' HoA at para 138 p 014-71
187 See Applicants' HoA at para 142.1 p 014-72

122 This is incorrect. The parties seem to be in agreement that the proper approach to interpretation is to "start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution". And that this is a "unitary exercise" with neither the text, context nor purpose predominating over the others, but with the starting point always the language actually used.[188]

123 However, in reality, the notion that the applicants' interpretation gives "best" effect to section 27(1) of the Constitution does all of the work to reach their preferred interpretation. The stance of the applicants is perhaps best summed up in their statement that the "purpose of income verification" is to "determine whether applicants are unable to support themselves" and so it is "irrational and unreasonable to exclude applicants on the basis of money that does not enable them to support themselves."[189]

124 For the reasons given above, when we addressed the incorrect premises on which the entire application is based, the applicants' assumption of what "best" gives effect to section 27(1) is flawed. As the Constitutional Court explained in *Soobramoney*, a purposive interpretation does not always require expansiveness.

125 So, the task is to determine that proper meaning of the terms with reference to the text, context and purpose. On that approach:

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188 See Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa 2023 (2) SA 1 (CC) at para 36; University of Johannesburg v Auckland Park Theological Seminary 2021 (6) SA 1 (CC) at para 65; Diener NO v Minister of Justice and Correctional Services 2019 (4) SA 374 (CC) at para 37

189 See Applicants' HoA at para 144.1 p 014-74

125.1 There is no textual basis for limiting the term "financial support" to payments which are regular and obligatory (see paragraph 119.3 above). The applicants themselves say that financial support means "assistance and aid in a monetary form". The applicants are therefore compelled to add words to this definition, to include the elements of regularity and obligation. So, the applicants' proposed interpretation is not supported by the language.

125.2 The same applies to the applicants' argument that the payments must enable the recipient to support himself or herself. When they say this, the applicants mean permanently or at least on a long-term basis. This is why they criticise the month-by-month assessment of recipients' income and financial support.[190] But, this interpretation is inconsistent with the temporary nature of the grant and is therefore at odds with both the purpose and context.

125.3 The Treasury has explained the context in which the SRD Regulations and must be interpreted. The purposive approach to interpretation is designed to identify the mischief which the enactment seeks to address. The concept of using "context", which includes the task of reading a sentence, phrase or provision in the light of the document as whole, also encompasses having regard to "*the circumstances attendant upon its coming into existence*". These tools are essential components of the objective approach which serves as a proxy for determining the "intention of the drafter".[191]

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190 Applicants' HoA at para 172.6 p 014-84

191 Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraphs 18-25

125.4 The Treasury has explained the goals in implementing and retaining the SRD Regulations. It has pointed to the fact that adopting the applicants' interpretation would increase the value of the grant, even without accommodating for inflation, by up to R60 billion per year.[192] It has explained the absurdity – in the context of the goal of the SRD Regulations and the extremely limited resources – of interpreting "financial support" to exclude loans from friends and relatives and even gifts of, say, R10 000.[193] But that would be the implication of the applicants' interpretation. That is even leaving aside the fact that it would be impossible for SASSA officials to litigate every source of revenue, to weed out, for instance, loans from friends but keep in loans from third-party lenders.[194]

125.5 The most important consideration of all is the consideration identified by the Constitutional Court in *Soobramoney* (supra) and *Mazibuko* (supra). The interpretation favoured by the applicants will expand the pool of recipients so much that the sustainability of the entire grant will be destroyed. This will preclude the state from providing for those most in need. This is clearly not what section 27(1) requires.

125.6 There is, accordingly, no proper basis to read into the term "financial support" the multiple qualifications proposed by the applicants. They are entirely at odds with the text, context and purpose.

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192 See Treasury AA at para 83 p 008-59 to p 008-60

193 See Treasury AA at para 84 p 008-60

194 See Treasury AA at para 84.3 p 008-61

126 There is one outstanding issue on this topic. The applicants criticise SASSA in particular for interpreting "financial support" so strictly that even money held on behalf of others (who may not have a bank account) is taken into account.[195] As Treasury has explained, this does not flow from the interpretive debate about what "financial support" entails. It is not suggested by the respondents that money held on behalf of someone else is financial support – self-evidently the money cannot be used by the individual and should not be taken into account. Rather, the issue is the same as addressed in paragraph 91 above – ie, it engages the complex choice to favour under-inclusivity. It is the impossibility of designing a system in which, at least at first instance, errors of this nature are avoided entirely – it is easy to understand how money of this nature could be misidentified in an online process. But that some people could slip through the cracks, does not invalidate the system,[196] and is certainly not a justification for a court-ordered declarator ascribing a strained and unsustainable meaning to the terms "income" and "financial support". The appeals process is the mechanism to address this problem.[197]

Unlawful questions in the online application

127 A summary of the applicants' position regarding the questions in the online application is this: the questions asked of an applicant will elicit the disclosure of payments which are not "income" or "financial support". This, in turn, will (according to the argument)

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195 See Applicants' HoA at para 130.3 p 014-67

196 See Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) at paras 39-40

197 See Treasury AA at para 86 p 008-64

result in applicants being disqualified despite not receiving "income" and/or "financial support" exceeding, in total, R624.[198]

128 The premise of this argument is that the terms "income" and "financial support" must be given the meaning proposed by the applicants (see paragraphs 119 to 121 above). If, as contended by the Treasury, those terms should be interpreted differently, then the attack on the questions in the application process must necessarily fall away. In particular, the applicants' complaint is that the online application is designed to ensure that ad hoc support from family or friends, and gifts and donations, are taken into account when assessing a person's income and financial support.[199] If the Treasury is correct that gifts, donations and ad hoc support are properly taken into account to determine "insufficient means", then the applicants cannot complain that those seeking the SRD grant are asked about these forms of income and financial support. It follows that, for the reasons given in the previous section above, this attack on the SRD Regulations has no merit.

Bank and database verification

129 The applicants challenge the lawfulness of regulation 2(3) and its method of verifying whether a person has "insufficient means". Regulation 2(3) provides that SASSA may, for "the purpose of validating insufficient means", use:

129.1 A declaration from the applicant "attesting to such";

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198 See Applicants' HoA at paras 148 to 150 p 014-76 to p 014-77

199 See Applicants' HoA at para 146 p 014-76

129.2 A screening questionnaire; and

129.3 A proxy means of testing, consisting of:

129.3.1 Checks against databases that may indicate income or alternative financial assistance; and

129.3.2 Verification of insufficient means with banks.

130 As we understand the applicants' argument, it is that:

130.1 The use of database verification is inappropriate because there is a high degree of inaccuracy and errors.[200]

130.2 The use of bank verification is also prone to exclude eligible applicants.[201]

130.3 It would be open to SASSA to use methods of verification which it uses for other grants "including using self-declarations, requiring supporting documentary evidence of income and financial support, and random checks". These, according to the applicants, would constitute "less restrictive means of ensuring that the SRD grant is paid to persons with insufficient means".[202]

130.4 The respondents cannot justify using bank verification on the basis that reduces the cost of the grant. The only question is whether the methods used by SASSA are able to assess whether each applicant has "insufficient means". If the

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200 Applicants' HoA at para 158 p 014-79
201 Applicants' HoA at paras 163-4 p 014-80
202 Applicants' HoA at para 169 p 014-81

methods exclude persons who do have insufficient means, then the measures are irrational.[203]

130.5 To the extent that bank verification is now, given the enactment of regulation 6A,[204] compulsory, it is irrational and unreasonable because not all applicants have their own bank accounts or bank accounts at all.[205]

130.6 When listing the various ways in which they say that regulation 2(3) is reviewable, the applicants say that "an assessment of an applicant's income over a one-month period is unreasonable".[206]

130.7 The SRD Regulations impermissibly confer an unfettered discretion on SASSA to determine how to verify a person's means. The position adopted by the Department that bank verification overrides "information retrieved from database verification" is "nothing more than a practice that [the Department] and SASSA have developed in the exercise of their unfettered discretion".[207]

131 We have already addressed the permissibility of using bank verification. The uncontested evidence is that bank verification offers the most reliable means testing available. The applicants themselves cast doubt on the reliability of other methods.[208] The Treasury agrees, and has explained that bank verification has been a very

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203 Applicants' HoA at para 170 p 014-83

204 Regulation 6A has been introduced into the SRD Regulations (via an amendment on 1 April 2024, which may be found in Government Gazette 50369). In terms of regulation 6A(5), each applicant for an SRD grant must ensure that his or her correct banking details are provided, to enable bank verification and payment.

205 Applicants' HoA at para 173 p 014-85

206 Applicants' HoA at para 172.6 p 014-84

207 Applicants' HoA at para 176 p 014-86

208 See Applicants' HoA at para 158 p 014-79

successful replacement of the more unreliable methods which had to be used during the pandemic.

132 So, the only issue is whether the regulation is invalid because of the nature of the discretion which it confers. We submit not:

132.1 In *Dawood*,[209] on which the applicants rely, O'Regan J held that the conferral of a broad discretionary power would be permissible "where the factors to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance"; where the factors relevant to the exercise of the discretionary power are indisputably clear; and where "the decision-maker is possessed of expertise relevant to the decision to be made."[210]

132.2 Regulation 2(3) gives SASSA several options of sources to use for means testing. The mistake underlying the applicants' attack is to disregard the reality that reference to the widest possible sources of income and financial support is necessary for effective means-testing. They assume that regulation 2(3) requires SASSA to select, without guidance, between verification methods. Rather, regulation 2(3) permits SASSA to look as widely as possible, by considering all possible evidence of income and financial support. There is no serious dispute on the papers that the primary means of verification is now bank verification. At its heart, the applicants' complaint appears to be based on

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209 Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)

210 Dawood (supra) at para 53. Emphasis added.

its desire for all sources of financial support not to be taken into account. This is not a legally recognised basis to attack the regulations.

Arbitrary exclusion of qualifying applicants when finds are depleted

133 The applicants say that it is irrational and arbitrary for the SRD Regulations to make payment of the SRD grant subject to the budget allocation for 2024/25. This is because, according to their argument, the budget cap will lead to the "arbitrary exclusion of potentially millions of persons".[211] They consider it to be arbitrary for two persons both to qualify to receive the grant, but one of them not to be paid because he or she makes the application at a time when the budget for the grant has been depleted.[212]

134 The applicants' complaints are speculative because the budget has not been exceeded before, and no person has been turned away for lack of budget.[213] But, to the extent that this aspect of the SRD Regulations have the potential to exclude persons once the budget has been depleted, the Treasury has explained that all departmental expenditure is subject to a cap. It is common cause that the Treasury expressly referred to the cap when allocating funds to the Department of Social Development for use for the SRD grant. This was based on the reasonable need to ensure that sufficient administrative oversight was introduced into the SRD Regulations to ensure that the temporary measure did not endanger the whole grant system.[214]

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211 See Applicants' HoA at paras 195-6 p 014-94

212 See Applicants' HoA at paras 198-9 p 014-95 to p 014-96

Irrational and retrogressive grant value and income threshold

135 The applicants attack both the value of the grants[215] and the income threshold.[216] Since their attacks suffer from the same defect, it is convenient to deal with them together.

136 The applicants refer to the recent increase in the value of the SRD grant – ie, the increase of R20 to R370 – and say two things:

136.1 First, that the Treasury's credibility when it says that an increase is unaffordable has been undermined because of this "volte face".

136.2 Secondly, that the increase of R20 "does not cure Government's breach of its obligation to take steps to progressively realise access to social assistance". This, according to the argument, is because:[217]

136.2.1 The real value of the grant has decreased since it was first introduced.

136.2.2 The respondents have not said that they have a plan in place to "reverse this retrogression". Rather, they simply made this "single increase, mid-stream during the year" without going on affidavit to explain the increase.

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213 Treasury AA at para 93 p 008-69

214 Treasury AA at para 53 p 008-34. See also Van Heerden (supra) at para 39

215 See Applicants' HoA at paras 201 to 210 p 014-96 to p 014-101

136.2.3 The value of the grant is arbitrary and irrational because it is "not linked to the [Food Poverty Line] or any other objective measure of income poverty and hunger".

137 The applicants advance similar arguments regarding the income threshold – ie, that a person whose income and/or financial support exceeds R624 does not qualify for the SRD grant. Their substantive complaint is that the threshold is retrogressive because, in real terms, a person who qualifies for the SRD grant today must "be poorer than persons who qualified to receive the SRD grant in August 2022".[218] The applicants say that the income threshold is unlawful because:[219]

137.1 It is not based on an objective measure of "income poverty" and need and so is irrational and arbitrary.

137.2 It gives rise to irrational differentiation between SRD grant beneficiaries and beneficiaries of other grants.

137.3 Because the threshold is retrogressive, it is a breach of section 27(1)(c) – ie, both the negative and positive component.

138 Remarkably, having made these arguments, the applicants then submit that:

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216 See Applicants' HoA at paras 211 to 216 p 014-101 to p 014-104
217 Applicants' heads of argument at para 208 p 014-98 to p 014-101
218 See Applicants' HoA at para 213.1 p 014-102
219 See Applicants' HoA at para 215 p 014-102 to p 014-103

138.1 Regulation 5(1) is unconstitutional and inconsistent with PAJA "to the extent that it prescribes a monthly grant value of R370";[220] and

138.2 Regulation 2(5) is unconstitutional and inconsistent with PAJA "to the extent that it prescribes an income threshold of R624 per person per month".[221]

139 What is remarkable about these submissions is that the applicants have not sought to amend their notice of motion to attack either regulation 5(1) or regulation 2(5) on these grounds. They are introduced for the first time in argument.

140 We have already addressed the incompetent attempt of the applicants to turn their failure to allege that the Treasury made the supposed "volte face" into a virtue. If one now considers the new attacks on regulations 5(1) and 2(5), it is apparent that the applicants have adopted an unacceptable approach to litigation by:

140.1 Taking the effort of filing a supplementary affidavit after the R20 increase was announced.

140.2 Despite that, not once mentioning that they intended to attempt, in argument, to persuade this Court to draw an inference from the R20 increase that the Treasury is, effectively, lying when it says that the SRD grant is unaffordable.

140.3 Despite filing the supplementary affidavit, also not once mentioning that they intended to attempt, in argument, to persuade this Court to draw an inference

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220 Applicants' HoA at para 210 p 014-101

221 See Applicants' HoA at para 216 p 014-104

from the R20 increase that government intended to "deflect criticism" of the "retrogression in access to social security".[222]

140.4 Despite filing the supplementary affidavit, also not mentioning that they intended to attempt, in argument, to persuade this Court to draw some sort of inference from the fact that no notice was given or prior announcement made of the intended increase.[223]

140.5 Despite, as a result, being aware of the R20 and even filing a further affidavit to deal with it, not seeking to amend their notice of motion to introduce an entirely new attack on regulations 5(1) and 2(5).

141 It is not necessary to elaborate on why the approach summarised in paragraph 140 above is impermissible. That is self-evident. Because of the applicants' conduct we cannot make any fact-based submissions on the specific issue of the R20 increase. As for the argument that the measure is retrogressive: we are aware of no authority, and the applicants have cited none, for the proposition that a failure to increase grants by a certain amount – whether inflation-based or otherwise – is unconstitutional. The Treasury has explained the prospect, which it faced, of not making inflation-based increases to any of the social grants. This has not been ruled out for the forthcoming financial years.[224]

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222 See Applicants' HoA at para 207 p 014-98

223 See Applicants' HoA at para 201 p 014-96 and para 205 p 014-98

224 See Treasury AA at para 39 p 008-22

142 As already explained, further increases to the SRD grant are simply unaffordable. In *Mazibuko*, the applicants also argued that a measure was retrogressive. In that case, the applicants had been charged R68.40 a flat rate for water, based on the assumption that they consumed 20 kilolitres per month. In reality, their average consumption was 67 kilolitres per month, which means that many in fact paid R68.40 for 60 or more kilolitres per month. The applicants were moved onto a system – which was the subject of the litigation – in which they were compelled to use prepaid meters, and would receive 20 kilolitres of water for R75.70 per month, plus a free allocation of 6 kilolitres. The Constitutional Court said that, although the change would require the applicants to pay slightly more to receive less water, the measure was not retrogressive. This was because the City was supplying the water to the residents at "well below cost".

143 Although the facts are different, *Mazibuko* demonstrates that it is simplistic to frame any measure which results in less access to a socio-economic right such as water (or social assistance) as retrogressive. Even though the residents received less, the measure was still reasonable because it was based on the realties of the economics of supplying water in a resource-constrained environment.

144 It is also wrong for the applicants to say that the income threshold of R624 is arbitrary. It is common cause that it was set with reference to the Food Poverty Line in 2021.[225] The income threshold was therefore self-evidently not arbitrary when enacted. The failure to increase it has been explained because of the lack of funding. This is the precise opposite of arbitrary – it was set with reference to an objective measure and the

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[225] See AA at para 97 p 008-71

reason for not increasing it is explained and coherent. The premise of not increasing the threshold is to avoid collapsing the whole system. If that is the premise, then it is reasonable to prioritise those with an income threshold of R624, as opposed to those with a threshold of R1488 (the 2023 Upper Bound Poverty Line) because the former are needier than the latter.[226]

Summation – no basis for the review

145 It follows from what we have said above that, in our submission, the applicants have not established any basis to set aside the parts of the SRD Regulations impugned in their notice of motion.

REMEDY

146 The applicants' notice of motion takes the following form:

146.1 Various prayers seek declarations of invalidity of the specific regulations discussed above. In some cases, these proposed declarations of invalidity are not coupled with a proposed remedy. Prayers 6[227] (which effectively asks this court to declare certain questions posed as part of the application process unconstitutional), 7[228] (relating to the use of databases for income verification), 8[229] (which relates to bank verification), 10[230] (relating to the supposed failure of regulation 2(3) to determine how SASSA is to resolve a conflict between the

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226 See Treasury AA at para 98 p 008-71
227 See NOM p 001-4
228 See NOM p 001-4
229 See NOM p 001-4

various verification methods), and 13[231] (relating to the cap when the budget is depleted) fall into this category.

146.2 Various prayers suggest remedies which are designed to read words into the SRD Regulations to cure what are said to be the defects underpinning the proposed declaration of invalidity. This applies to: a reading in of words to facilitate applications for SRD grants both at SASSA offices and online (prayer 2),[232] and the reading in of words to provide for adducing further evidence on appeal (prayer 12).[233]

146.3 Two prayers (3 and 4) seek declarators to support the applicants' proposed interpretation of "income" and "financial support". Prayer 5 is simply an alternative mechanism to achieve the same outcome.[234]

146.4 Various forms of a structural interdict to require SASSA to remedy certain defects are sought (see prayers 9.2,[235] 14,[236] 15[237] and 16[238]).

146.5 The declaratory/structural relief in prayers 18 to 21,[239] which ask this Court to declare that the "government" is required to "devise and implement a plan to redress the retrogression in the value of the SRD grant and income threshold, and progressively increase the value of the SRD grant".

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230 See NOM p 001-5
231 See NOM p 001-6
232 See NOM p 001-3
233 See NOM p 001-5
234 See NOM p 001-3
235 See NOM p 001-4 to 001-5
236 See NOM p 001-6
237 See NOM p 001-6
238 See NOM p 001-6
239 See NOM p 001-6 to 001-7

147 The reason why the Treasury opposes certain of these prayers flows from its arguments on the merits above. We do not intend to repeat them here. For present purposes, we make the assumption (which, of course, we submit is wrong) that the applicants have established their claims on the merits. Here, we address the inappropriateness of the relief sought by the applicants, even assuming that the various impugned regulations are invalid.

148 To address this, we deal with the following topics:

148.1 The improper attempt to disregard the Treasury's evidence and submissions.

148.2 The false premise that the plan sought by the applicants is "modest" and non-interventionist.

148.3 What Treasury says would be appropriate relief in this case. In doing so, we briefly address the principles relating to just and equitable relief.

Treasury's standing to suggest appropriate relief

149 The applicants try to diminish the extent to which the Treasury may make submissions on remedy, on the premise that only the other respondents can address the practical implications of the orders sought.[240] They criticise the Treasury for "wading into matters" which it says are for the other respondents to deal with, such as the Treasury's opposition to invalidating bank verification.[241]

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240 Applicants' HoA at para 256 p 014-132

241 Applicants' HoA at para 257 p 014-133

150 One of the main purposes of the National Treasury, as envisaged in the Constitution itself, is "expenditure control in each sphere of government".[242] The Public Finance Management Act 1 of 1999 ("**the PFMA**") established the Treasury.[243] One of its powers is to "exercise control over the implementation of the annual national budget".[244] Another is to "promote and enforce transparency and effective management in respect of . . . expenditure".[245]

151 Almost all of the orders sought by the applicants have been shown in the answering affidavit to have significant budgetary implications – in the order of billions of rand. The applicants try to avoid this by casting the relief as narrowly tailored to address specific problems in the application of the SRD Regulations. But the SRD Regulations, and the relief sought, are different to regulations where remedies with budgetary implications are a by-product of relief, rather than its main purpose. In this case, the applicants want this Court to intervene to change a collection of rules which are all aimed at minimising waste and keeping the payment of the SRD grants within budget. Treasury's opposition to the relief sought, and its explanation of the budgetary implications, is self-evidently relevant.

The sixth incorrect premise – modest relief

152 We have discussed, above, five incorrect premises of the applicants' case. The sixth relates to the relief sought. On many occasions, the applicants try to downplay the

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242 See section 216(1) of the Constitution
243 See section 5 of the PFMA
244 See section 6(1)(d) of the PFMA
245 See section 6(1)(g) of the PFMA

scope of their application by implying, or saying expressly, that the relief which they seek is "uncontroversial" and modest.[246] This manifests itself in the section on relief, in which the applicants express surprise at the Treasury's objection to the remedy sought in prayer 18 – ie, the formulation of a plan – on the basis, as they frame it, that the duty to formulate a plan cannot turn on affordability concerns.[247]

153 But what appears to escape the applicants is that the premise of the plan which they wish this Court to order "government"[248] to make is far from modest. The premise is that the plan must not only "redress the retrogression in the value of the SRD grant" but also "progressively increase the value of the SRD grant.[249] It is true, as far as it goes, that government could try to manage questions of affordability as part of the assessment of how the increase would happen "progressively" (perhaps a better word, in this context, is "incrementally"). But that is why the focus must be on the premise of what the applicants seek. The premise is that government is bound to retain and increase the SRD grant. Flowing from this premise, the only question, according to the applicants, is how this must be achieved.

154 But the premise is flawed. The Treasury has explained that there are various options available to government as the basis for a policy to deal with the fact that many working-age people are unable to support themselves. Several of these options would involve replacing the SRD grant with something else entirely.[250] Regardless whether any sort of remedy is warranted in this case, it has to be accepted that the plan sought in

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246 See, for example, Applicants' HoA at paras 15 and 16 p 014-11; para 17 p 014-12
247 See Applicants' HoA at para 230 p 014-112
248 See paragraph 18 of the NoM at p 001-6
249 See paragraph 18 of the NoM at p 001-6 to p 001-7

prayers 18 to 21 requires this Court to make the prior determination that the SRD grant must be retained, and progressively increase in value. So, while there might be some flexibility as to the content of the plan, there is none in relation to its premise. A decision of this Court that government is forced to retain the SRD grant and increase its value would be unprecedented. It certainly cannot be described as "modest", on the purported basis that the plan is not prescriptive.

Just and equitable relief on the facts of this case

155 The applicants deride the Treasury for exaggerating the separation of powers concerns relating to the relief sought by the applicants on the basis that, as goes the argument, the relief is "narrowly tailored" and nothing more than a requirement that government devises a plan to address retrogression.[251] They also dismiss the reference to affordability. Without dealing specifically with the direct remedies with profound budgetary implications which they seek, they say that "affordability is not a reason to refuse the applicants relief" and also no reason to allow government to "take years" to comply with supervisory relief because all that relief requires is for government to devise a plan.[252] They also attack the timeframe suggested by the Treasury for compliance with supervisory relief as "manifestly unreasonable and unsubstantiated".[253]

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250 See Treasury AA at paras 18 to 22 p 008-10 to p 008-16
251 See Applicants' HoA at para 258 p 014-133 to p 014-134
252 See Applicants' HoA at para 260.2 p 014-135
253 See Applicants' HoA at para 261 p 014-135

156 It does not appear to be in dispute that this Court has very wide powers when deciding what just and equitable relief to grant in a case such as this.[254] For relief to be appropriate, it must take into account all interests, and strike an appropriate balance between them.[255]

157 The irony of the applicants' approach is that they seek both to (a) exploit their faulty premise that the current respondents cannot speak for the "whole of government" and (b) to limit all of the relief sought to imposing a series of obligations on the Minister of Social Development only. The Treasury submits that the suspension of any declaration of invalidity made by this Court would enable the approach to the SRD grant to be reformulated in a manner which is most affordable. It is not seriously in dispute that, if the Court were to embark on the reading-in required by the applicants, the cost would be significant. The applicants simply say that this is not a reason not to do it. If one leaves that facile stance aside, then one realises that they are asking this Court to make a series of sweeping changes to the SRD Regulations without having a precise view of the implications. A suspension of the declaration of invalidity will avoid this, and allow the respondents to consider a range of possible alternatives to the SRD Regulations in their current form.

158 As to the plan in prayers 18 to 21:

158.1 The first problem is that it, as framed in the notice of motion, is an obligation imposed simply on the Minister of Social Development – even though prayer

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254 State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) at para 53

255 See, for example, Residents, Industry House v Minister of Police 2023 (3) SA 329 (CC) at para 115

18 refers to "government", prayer 19 imposes the obligation to formulate the plan on the Minister of Social Development only. This is self-evidently inappropriate. At least the Minister of Finance has to be involved, given that his concurrence is necessary when it comes, amongst other things, to the value of the grant.

158.2 The second problem is that the timeframes envisaged by the applicants in prayer 20 of the notice of motion are manifestly unreasonable and unjust.

158.3 The third problem is that the details of the envisaged plan, in prayer 19 of the notice of motion in particular, are far too prescriptive.

159 The Treasury submits that, even if rights violations have been found by this Court to have been established, it is inappropriate for this Court to order government to go away and formulate a plan as envisaged in prayers 18 to 20 of the notice of motion. It would be more appropriate, in our submission, for this Court simply to declare the SRD Regulations invalid to the extent of any invalidity established by the applicants and suspend the entire order for a period of no less than 18 months. That would allow the respondents, with possible engagement with other governmental departments, to adopt an approach which gives effect to the Court's judgment, without unleashing a series of unanticipated profound financial consequences.

CONCLUSION

160 In the light of everything said above, it is submitted that the entire application falls to be dismissed. Mindful of the trite approach to costs flowing from *Biowatch*,[256] we do not ask this Court to make a costs order in the Treasury's favour.

Gilbert Marcus SC
Adrian Friedman

Counsel for the third respondent
2 September 2024

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256 Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC)