RIGHTS TO REALITY - THE RIGHT TO SOCIAL SECURITY, WITH PARTICULAR EMPHASIS ON THE LEGAL RESOURCES CENTRE'S WELFARE PROJECT IN THE EASTERN CAPE

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ABSTRACT

This research addresses the question of whether the courts have been used effectively to enforce the right to social security in the Eastern Cape. The nature of the right to social security is discussed and placed in the context of constitutional developments in South Africa and South Africa's obligations in terms of international law. The enforcement of socio-economic rights and legislation regarding social assistance is also discussed in detail, along with the problems associated with the social security system such as the gaps in the system, the impact of HIV/AIDS and the problems created by the amalgamation of various administrations.

The history of the Legal Resources Centre, a non-governmental organisation which has been involved in public interest law for twenty four years, is detailed. The Grahamstown office's litigation campaign against the Eastern Cape Department of Welfare is then discussed and six landmark cases are analysed in detail. A discussion of the jurisprudential significance and impact of each case on the development of South African administrative and constitutional law follows.

A series of stories reported in the press illustrate the human aspect of the campaign and balance the legal argument. These stories may suggest that the Constitution's commitment to social justice and the government's commitment to the principles of *Batho Pele* are merely noble ideals for many people in the province, but it is argued that the LRC's campaign has made a vast contribution towards making these ideals a reality on the ground.

The expert opinions of various groups interviewed during the course of this research regarding the impact of the LRC's litigation campaign are discussed, and the conclusion is drawn that it has indeed had a positive effect. They include paralegals at Advice Offices around the province, legal practitioners from the LRC, a private legal practitioner, several representatives of the Black Sash, a former MEC for Health and Welfare in the Eastern Cape Provincial Government, an official from the Department, and a leader of the Anglican Church in the province.

In conclusion it is submitted that, but for the LRC's litigation campaign, the situation in the Eastern Cape would not have improved to the extent it has and may even have deteriorated further. Furthermore, it is submitted that as a result of the litigation campaign, the right to social security, and particularly the right to social assistance, is more accessible and more of a reality on the ground.

PREFACE

During the course of this research, I have had cause to be grateful to many people who have willingly rendered their assistance.

Firstly, I would like to acknowledge the help of my supervisor, Professor Clive Plasket. It was he who suggested that the Legal Resources Centre's Welfare Project might be an interesting topic and during the course of this research he has provided me with piles of court papers, annual and quarterly reports, suggestions regarding articles and cases I should read, and names of people to whom he thought I should speak. His vast knowledge in the field of administrative and constitutional law has been extremely helpful and his personal involvement in the initial stages of the Legal Resource Centre's Welfare Project has provided invaluable input. I would like to thank him for the time he has spent supervising this research and insights he has offered into the topic.

One of the most important parts of this research has been the interviews. I would like to convey my gratitude to all of those who gave of their time and their knowledge and allowed me to interview them. Everyone whom I interviewed was, without exception, helpful, friendly and encouraging and for this I am most grateful. I would especially like to thank David Holness and Mr Sibongile Mkumatela of the Rhodes University Legal Aid Clinic. They both allowed me to join them as they travelled the surrounds of Grahamstown on their circuit of the various Advice Offices which the clinic services. I am particularly grateful that they patiently allowed me to interview people while they waited, often when they had no reason to be there themselves. I am very grateful for their time and company on these trips.

I would also like to thank Sarah Driver. Over the course of this research, she has been a great source of support and kindness. She spent many an hour on St Peter's lawns with me, giving me advice and encouragement and she has always been willing to help me find books and articles in the library, both while I was in Grahamstown and later, while I was in Durban and unable to go to the library myself. I am especially grateful for her friendship and kindness, without which I would never have managed

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Finishing this thesis has been difficult for me and I would not have survived without the constant encouragement and support of my friends. In particular, I would like to thank Kelly-Jean Lees for her countless 'pep talks', the unending moral support she has given me throughout the year and her friendship. I would also like to thank Bronwen de Fin, Helen Wilsenach and Jacques Bouwer for their friendship and encouragement during the year I spent in Grahamstown.

Most importantly, I owe a great debt of gratitude to my parents. Throughout our lives they have fostered an appreciation of education and scholarship in my three sisters and me and for this I am very grateful. They have been unwaveringly encouraging and supportive of all of my academic endeavours and I will always be grateful for the opportunity they have given me to further my studies over the past seven years of my university career. I am grateful for their encouragement and support during countless tearful phone calls, the many cups of tea which revived my flagging spirits as I sat in front of my computer hour after hour and their calming reason when I threatened to give up. I am especially indebted to them for the many times they have read and reread the innumerable drafts of various chapters and offered suggestions and advice on what I had written or was going to write. I would not have been able to complete this research without them. I would also like to thank my three sisters for their encouragement and support at various times. I am particularly grateful for the insights and ideas Aislinn offered.

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CHAPTER ONE

Introduction to Socio-economic Rights and the Right to Social Security

Introduction

This research deals with whether the courts have been used effectively to enforce the right to social security in the Eastern Cape in circumstances in which large numbers of people have been denied their rights by a provincial department of welfare that has been described by the Supreme Court of Appeal as acting as though it was at war with its own people.[1]

In the first chapter, the nature of the right to social security is discussed and it is placed in the context of constitutional developments in South Africa since 1994. South Africa's obligations in terms of international law, specifically the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights is also discussed. The chapter goes on to deal with the enforcement of socio-economic rights and a number of Constitutional Court decisions regarding the justiciability of such rights. South African legislation regarding social assistance, in particular the Social Assistance Act 59 of 1992, is discussed in detail, with the requirements for eligibility for social assistance being set out. Various problems associated with the South African social security system are mentioned, such as the gaps in the system and the impact of the HIV/AIDS pandemic. Finally, this chapter deals with the restructuring and re-organisation of government since 1994 and the problems which the amalgamation of the various provincial administrations and those of the former homelands has created within the social security system.

The second chapter details the history of the Legal Resources Centre ('LRC'), a public interest law non-governmental organisation of some stature, which has been involved in public interest law for more than twenty years. The recent history of the LRC's regional offices' involvement in social assistance matters is discussed briefly and then the background to the Grahamstown office's litigation

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[1] In Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others 2001 (10) BCLR 1039 (SCA), Cameron JA held that it appeared from the Respondents' conduct as if they were at war with their own people, those people who were the most vulnerable (paragraph 15).

campaign against the Eastern Cape Department of Welfare ('the Department') is discussed. A brief outline of six landmark cases in this campaign is given, as well as a brief discussion of three other important and related applications against the Department.

In the third chapter, the six landmark cases which were outlined in the previous chapter are discussed and analysed in detail. The background to each case is outlined and then the main arguments made by both the Applicants and the Respondents are set out, followed by the decision made by the court in each matter. The chapter concludes with a discussion of the jurisprudential significance and impact of each case on the development of South African administrative and constitutional law.

To balance this legal argument, the fourth chapter deals with the human aspect of the campaign. The chapter illustrates the immense hardship and suffering of those whose lives have been adversely affected by the inefficiency, incompetence and uncaring attitudes of Department officials in the province. A series of stories that have been reported in the press are related, as well as the stories of the Applicants in the cases discussed in the third chapter. The point is made that, although these stories may appear to suggest that the Constitution's commitment to social justice, the protection and advancement of human rights and the improvement of the quality of life of all citizens may seem to be merely a noble ideal, the LRC's litigation campaign has played a significant role in narrowing the gap between reality and the promise of the Constitution. The disjuncture between the way that the Department has gone about providing social assistance and the promise of the Constitution, along with the principles of *Batho Pele*, is noted and the conclusion is drawn that the Department needs to be reminded of what the Constitution demands of it.

The fifth chapter deals with the information gathered during interviews with various groups of people during the course of this research. These groups included paralegals at various Advice Offices in areas around the province, legal practitioners from the LRC, a private legal practitioner who was drawn into social assistance litigation, several representatives of the Black Sash, a former MEC for Health and Welfare in the Eastern Cape Provincial Government, an official from the Department, and a leader of the Anglican Church in the Eastern Cape who has been involved in pension matters for many

years. The expert opinions of these people regarding the impact of the LRC's litigation campaign are discussed and the conclusion is drawn that the litigation has indeed had a positive effect.

Finally, the conclusions drawn in each of the chapters are drawn together and the LRC's litigation campaign is evaluated. What is sought to be established from this research is whether in fact the right to social security, and particularly the right to social assistance, has become more of a reality and more accessible on the ground in the Eastern Cape as a result of the LRC's litigation campaign.

Social Security

It has been said that 'the idea of social security is that of using social means to prevent deprivation and vulnerability'.[2]

There are two components to social security: social insurance and social assistance[3] and there is a rigid distinction between the two in the South African social security system. Social insurance is financed by contributions made by employees and employers and aims at maintaining the income of those who are, or have been, in formal employment and are vulnerable to contingencies that threaten their income earning capacities, such as pregnancy, illness, old age,[4] retrenchment and dismissal. Social assistance, on the other hand, is financed from the general revenue of the country, rather than individual contributions. It aims at ensuring that the poor at least have access to a minimum income to satisfy their basic needs.[5] Social assistance is limited in coverage since it is based on a categorical,

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[2] JP Drèze & AK Sen 'Hunger and Public action' Clarendon Press, Oxford, 1989 15 cited in M Olivier, Okpaluba, Smit and Thompson (eds) *Social Security Law - General Principles* Butterworths Publishers (Pty) Ltd, Durban, 1999 21 footnote 1 (hereafter referred to as *Social Security Law*)

[3] D Pieters *Introduction into the Basic Principles of Social Security* Kluwer Law International, Boston, 1993 5 cited in Olivier et al *Social Security Law* 23 footnote 21

[4] Olivier et al *Social Security Law* 23

[5] S Liebenberg and A Tilley *Poverty and Inequality Hearings Social Security Theme* Background Paper for South African National Non-Governmental Organisation Coalition, the South African Human Rights Commission and the Commission for Gender Equality, 28 April 1998 3 cited in Olivier et al *Social Security Law* 23 footnote 24

means-tested approach[6] and is generally poverty relief and normally covers the elderly, the sick, invalids, survivors,[7] and those unable to support themselves. In South Africa, the right of access to social security, including social assistance, is protected in terms of the Constitution of the Republic of South Africa ('the Constitution'),[8] legislation such as the Social Assistance Act ('the Act'),[9] and international law.[10]

Socio-economic rights in the South African Constitution

It has been argued that bills of rights often arise out of times of struggle, with the object of preventing those conditions which led to the struggle from ever being allowed to occur again.[11] This can be said of the Bill of Rights contained in South Africa's Constitution because its 'emphasis on substantive equality, the role assigned to dignity, the limitations on freedom of expression and...the uniquely important position which socio-economic rights occupy'[12] can be seen as an attempt to redress the injustices of the past.[13]

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[6] Olivier et al *Social Security Law* 5

[7] Ibid 448

[8] Act 108 of 1996

[9] Act 59 of 1992

[10] Several international instruments will be discussed below.

[11] D Brand and C Heyns 'Introduction to Socio-economic Rights in the South African Constitution' in G Bekker (ed) *A Compilation of Essential Documents on Economic and Social Rights* Economic and Social Rights Series Volume 1 Centre for Human Rights, University of Pretoria, 1999 1 (hereafter referred to as Brand and Heyns 'Introduction to Socio-economic Rights')

[12] Ibid

[13] This has been recognized by the courts on numerous occasions. For instance, in his judgment in S v Makwanyane 1995 (3) SA 391 (CC), Mahomed J wrote that "The South African Constitution...retains from the past only what is defensible and represents a break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution...What the Constitution expressly aspires to do is provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting 'future that is founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all

During the drafting of the Constitution, there was a great deal of debate regarding the inclusion of socio-economic rights in the Bill of Rights. The argument for the inclusion of socio-economic rights was that it was pointless to protect the civil and political rights of people if their most basic needs, those which would be protected as socio-economic rights, were not met. On the other hand, it was argued that by including socio-economic rights in the Constitution, there was a risk that too much would be promised and that the government would be unable to live up to the expectations raised by their inclusion. On the basis of these arguments, both sides argued that the legitimacy of the Constitution would be threatened.[14]

Eventually it was agreed that socio-economic rights would be included in the Constitution and that they would be placed on a equal footing with civil and political rights, although many of them would be subject to certain internal limitations.[15] These limitations were aimed at lessening the burden which such rights would place on the State. Those socio-economic rights which are not subject to such internal limitations[16] place a more immediate obligation on the State which is comparable with the

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South Africans, irrespective of colour, race, class, belief or sex'" (paragraph 262). In Bel Porto School Governing Body and Others v The Premier Of The Province, Western Cape 2002 (3) SA 265 (CC), Chaskalson CJ held that '[i]n 1994 when the interim Constitution came into force ours was a grossly unequal society. The interim Constitution was designed to create a new order "in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms". This commitment to the transformation of our society was affirmed and reinforced when the Constitution adopted by the elected Constitutional Assembly in 1996 came into force. The preamble to the Constitution "recognises the injustices of our past" and makes a commitment to establishing a society "based on democratic values, social justice and fundamental human rights". The society is to be built on the foundation of the values entrenched in the first section of the Constitution. These values include "human dignity, the achievement of equality and the advancement of human rights and freedoms" and a "multi-party system of democratic government, to ensure accountability, responsiveness and openness"' (paragraph 6).

[14] Brand and Heyns 'Introduction to Socio-economic Rights' 2

[15] Such limitations typically take the form of provisions which provide for 'access' to the right, which must be provided 'subject to available resources' and which require 'reasonable legislative and other measures' to be taken towards the 'progressive realization' of such rights. On the meaning of these terms see Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) paragraphs 35-46 and 94. See too Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC) paragraph 43.

[16] Such as the rights to education, property and fair labour practices contained in sections 29, 25 and 23 respectively.

obligations imposed on the State by civil and political rights.[17] All socio-economic rights, along with civil and political rights, are also subject to the general limitation clause contained in section 36.[18]

The right to social security is specifically protected in terms of section 27 of the Constitution. It reads:

'(1) Everyone has the right to have access to -

(a) ...

(b) ...

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

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

It can also be argued that this right is indirectly protected by the Constitution in terms of the right to dignity, the right to life, and the right to equality, since living in extreme poverty, as millions of South Africans do, can impinge on the enjoyment of these rights.[19]

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[17] Brand and Heyns 'Introduction to Socio-economic Rights' 9

[18] In terms of section 7(3), 'the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill'.

[19] The right to dignity is protected in terms of section 10 of the Constitution. When he delivered the Third Bram Fischer Lecture, the President of the Constitutional Court spoke of human dignity as a founding value of the Constitution which must 'inform all aspects of our legal order' (A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193 195). He said that 'as an abstract value,...dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony (Ibid 204). He pointed out that social and economic rights 'are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or...without appropriate assistance?' He did, however, go on to say that social and economic policies are 'pre-eminently policy matters that are the concern of government' and that in formulating such policies, government must consider the right of individuals to live with dignity as well as the general interests of the community concerning the application of resources. He said that 'individualised justice may have to give way here to the general interests of the community.' (Ibid) He also said that 'dignity, equality and freedom will only be achieved when the socio-economic conditions [of many South Africans] are transformed to make this possible. This will take time. In the meantime, government must give effect to its obligations under the Constitution to show respect and concern for those whose basic needs have to be met' (Ibid). The right to life is protected in terms of section 11. In Soobramoney *supra*, this right was

International law context

Socio-economic rights, and specifically the right to social security, are protected in various international instruments. The primary United Nations human rights instrument which deals with the right to social security is the Universal Declaration on Human Rights of 1948 ('the Declaration').[20] The Declaration "is not in itself a legally-binding document [but] it has enormous stature not only as 'a common standard of achievement for all peoples and all nations'[21] but also as an authoritative guide to the interpretation of the human rights provisions in the Charter [of the United Nations]. Moreover, a number of the rights in the Declaration have attained the status of customary international law."[22] In terms of article 22 of the Declaration, everyone has the right to social security and is entitled to

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discussed. In his judgment, Chaskalson P wrote that in the South African Constitution the right to medical treatment did not have to be inferred from the right to life which section 11 guarantees because it is dealt with directly in section 27 (paragraph 19). The same can be said of the right to social security, since it is dealt with directly in section 27(1)(c). However, it is possible that one could argue that by violating a person's right to social security, one would indirectly violate the right to life if the consequences of the first violation resulted in the person's death. The right to equality is protected in terms of section 9. It is arguable that social assistance would help towards giving the poorest of the poor economic equality. In Soobramoney, Chaskalson P wrote: 'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom, and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring' (paragraph 8).

[20] When the Declaration was approved by the General Assembly of the United Nations on 10 December 1948 in terms of Resolution 217A(III), South Africa, under the National Party government, abstained from voting. In 1994, Dugard wrote: 'Now that the laws of apartheid have been repealed, the Declaration is destined to play a more constructive role: as an inspiration to the drafters of the South African Bill of Rights and as a guide to municipal courts in their interpretation of laws affecting human rights. As an authoritative statement of the international community, several of whose provisions have acquired the force of customary law, it is eminently suited for such role. Courts in other jurisdictions have not hesitated to invoke the Universal Declaration for this purpose. If South African courts are serious about their commitment to human rights, they should do likewise' (J Dugard *International Law: A South African Perspective* Juta & Co. Ltd , Cape Town, 1994 205-206).

[21] UN General Assembly Resolution 217A(III) of 10 December 1948, UN Doc A/811

[22] S Liebenberg, 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359 360 (hereafter referred to as Liebenberg 'The International Covenant').

realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality, and article 25(1) states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. The International Covenant on Economic, Social and Cultural Rights ('ICESCR') of 1966[23] was drafted to give effect to the socio-economic rights contained in the Declaration and the right to social security is explicitly protected in terms of article 9, in which it is stated that 'the States Parties to the present Covenant recognise the right of everyone to social security, including social insurance'.

The right to social security is also recognised in article 24 of the Convention Relating to the Status of Refugees, article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 27 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 13(1) of the European Social Charter, and articles 16, 18(4) and 29 of the African Charter on Human and Peoples' Rights.[24] The Social Security (Minimum Standards) Convention of 1952 (No.102) lists nine specific branches of social security. It is argued that, because of the protection of the right to social security in all of these international instruments, the right to social security, and particularly to social assistance, has become a 'genuine human right'[25] and is being recognized internationally as such and not just as a moral duty of the family.

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[23] South Africa became a signatory to this instrument on 3 October 1994, but has yet to ratify the ICESCR (http://www.unhchr.ch/pdf/report.pdf). In its Fifth Annual Report for January 2000-March 2001, the South African Human Rights Commission stated that it 'urges' the ratification of the ICESCR (http://www.sahrc.org.za/chapter_1_to_10.PDF page 27).

[24] There is no single article in the African Charter which protects the right to social security, but these articles provide for the right to health, the right of the aged and the disabled to special measures of protection, and the individual's duties towards society respectively.

[25] M Scheinin 'The Right to Social Security' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights - A Textbook* Martinus Nijhoff Publishers, Dordrecht, 1995 159 163

Under the ICESCR, the United Nations Economic and Social Council was tasked with the responsibility of ensuring state parties' compliance with their obligations.[26] This council was replaced by the UN Committee on Economic, Social and Cultural Rights ('the Committee') which has issued several influential General Comments on the ICESCR which aid in the interpretation of socio-economic rights, and several bodies of experts have also written influential guidelines to the interpretation of socio-economic rights, including the Limburg Principles of 1986, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997 and the Bangalore Declaration and Plan of Action of 1995.

The Committee supervises the compliance of state parties through a system of periodic reporting by state parties on the measures they have adopted to bring about the realization of socio-economic rights in their respective countries.[27] Non-governmental organisations in various countries have also come to submit alternative or 'shadow' reports which are considered along with the state parties' reports.[28] These reports may also indicate the difficulties and other factors affecting the degree of realization of socio-economic rights by the state party.[29] The Committee examines the reports at a public meeting where representatives of the state parties answer questions and debate the content of the reports with members of the Committee. After consideration of state parties' reports, the Committee may submit a report containing recommendations and a summary of the information received from state parties to the General Assembly and it may also bring matters to the attention of the specialised agencies of the United Nations such as the Food and Agricultural Organisation (FAO) or the World Health Organisation (WHO) to enable appropriate technical assistance to be furnished to needy state parties.[30]

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[26] Part IV

[27] Liebenberg 'The International Covenant' 369. The system of reporting is that each state party must submit an initial report within two years of ratifying the Covenant, and thereafter to report at five-year intervals.

[28] Brand and Heyns 'Introduction to Socio-economic Rights' 4

[29] Liebenberg 'The International Covenant' 369

[30] Ibid

This kind of review of state parties' compliance with their obligations under the ICESCR assists parties in the addressing of institutional and structural obstacles to the realization of socio-economic rights and helps to prevent violations of parties' obligations through the timeous adoption of appropriate policies and legislation. It has been argued that such review '...is vital to promoting accountability, deterring future violations, and fostering the perception of social rights as rights, and not simply desirable policy objectives.'[31] It cannot, however, provide effective redress to individual victims of violations.

Enforcement of Socio-economic rights

As a signatory to the ICESCR, South Africa is obliged to refrain from 'acts which would defeat the object and purpose of the treaty'.[32] Once South Africa ratifies the covenant, it will be obliged to comply with its reporting requirements. Both the courts and the South African Human Rights Commission ('SAHRC') were given roles in enforcing socio-economic rights in South Africa in terms of the Constitution. The courts offer protection to such rights by means of binding decisions,[33] while the SAHRC provides protection through the monitoring of the realization of these rights,[34] although its decisions are not legally binding. It is submitted that, once the ICESCR is ratified, it will be useful for the SAHRC to submit 'shadow' reports to the Committee regarding the state's progress in bringing about the progressive realization of socio-economic rights in South Africa.[35]

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[31] Ibid 371

[32] In terms of article 18 of the Vienna Convention on the Law of Treaties of 1969, 'a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed'.

[33] Section 165

[34] Section 184

[35] It is further submitted that the litigation discussed in this research highlights the difficulties affecting the degree of realization of socio-economic rights in South Africa and clarifies the issues that affect the State's ability to fulfil its obligations under the Covenant and which need to be dealt with. This will aid

In Government of the Republic of South Africa v Grootboom,[36] Yacoob J held that '[w]hile the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment'.[37] On this basis, he therefore held that 'the question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case,'[38] since section 38 of the Constitution empowers the courts to grant appropriate relief for the infringement of any right entrenched in the Bill of Rights.[39]

The justiciability of socio-economic rights inevitably entails the courts becoming more involved in 'policy choices and budgetary priorities'.[40] This has led to some conflict and it can be argued that the there is a danger of courts losing 'the distinctiveness of the judicial process, namely dealing with individuals rather than general cases' and that they might become 'too much like the government' in performing the work of government,[41] that is, that the doctrine of the separation of powers may be breached. In response it has been argued that 'the legal regulation of separation of powers requires

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the State in preparing reports for the Committee once the covenant is ratified. The litigation probably also highlights the need for non-governmental organisations to monitor state compliance with the ICESCR and report to the Committee in due course.

[36] *Supra*, paragraph 20

[37] Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744, where the court held that 'Socio-economic rights are, at least to some extent, justiciable...The fact that socio-economic rights will almost inevitably give rise to [budgetary] implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion' (paragraph 78).

[38] Paragraph 20

[39] Ibid, footnote 21

[40] S Liebenberg 'Socio-economic Rights' in M Chaskalson et al (eds) *Constitutional Law of South Africa* Juta & Co. Ltd, Cape Town, 1996 41-6 (hereafter referred to as Chaskalson et al *Constitutional Law*)

[41] A J Rycroft 'The Protection of Socio-economic Rights' in H Corder (ed) *Essays on Law and Social Practice in South Africa* Juta and Co. Ltd, Cape Town, 1988 267 278

a continuing process of mutual action and interaction'.[42]

In Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996,[43] the inclusion of socio-economic rights in the Constitution was objected to on the basis that it was inconsistent with the separation of powers required by Constitutional Principle VI because the judiciary 'would have to encroach upon the proper terrain of the Legislature and Executive'.[44] In particular, it was argued that the inclusion would result in the courts 'dictating to the government how the budget should be allocated'.[45] The court held that, although it was true that the inclusion of these rights may result in the courts making orders which would have direct implications for budgetary matters, where courts enforced civil and political rights such as equality, freedom of speech, and the right to a fair trial, such orders often had such implications.[46] It was therefore held that, 'it [could] not be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers'.[47]

In Minister of Health and Others v Treatment Action Campaign and Others (No 2),[48] the issue of the separation of powers was raised and it was held that the courts are 'ill-suited to adjudicate upon

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[42] M Minow *Making All the Difference: Inclusion, Exclusion and American Law* Cornell University Press, Ithaca, 1990 361 cited in Chaskalson et al *Constitutional Law* 41-8. Professor Craig Scott was cited by S Liebenberg in her editorial in (1999) 1 ESR Review as arguing that there is a need to move away from formalistic conceptions of the doctrine of separation of powers in order to promote a 'co-operative dialogue' between the different public institutions. This would pave the way for creative and effective remedies to deal with violations of socio-economic rights without one branch of government usurping the powers and functions of another (http://www.communitylawcentre.org.za/ser/ esr1999/ 1999march_ editorial.php).

[43] *Supra*

[44] Paragraph 77

[45] Ibid

[46] Ibid

[47] Ibid

[48] 2002 (5) SA 721 (CC)

issues where court orders could have multiple social and economic consequences for the community', but that 'the Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation'. It was further held that such determinations of reasonableness may have budgetary implications, but that they are not in themselves directed at rearranging budgets, and in this way 'the judicial, legislative and executive functions achieve appropriate constitutional balance'.[49]

Another objection to the enforcement of socio-economic rights by the courts is the 'institutional competence of the judiciary and the limits of processes of adjudication'.[50] Since judges are usually not economists or public policy experts, it has been argued that they are not in a position to make policy decisions. Furthermore, the process of adjudication involves the placing of a 'limited range of facts that are relevant to the dispute between the parties to the litigation'[51] before the court and this is not desirable where the decisions of the court may have far-reaching social and economic implications. Chaskalson argues that the mere fact that such decisions may have far-reaching implications 'should not imply the total abdication by the judiciary of its primary responsibility of upholding the norms and values of the Constitution',[52] but that it should be a relevant factor 'informing the degree of judicial deference afforded the other branches of government'.[53]

The problem with attempting to enforce qualified socio-economic rights such as the right to social security is that the internal limitation of such rights provides the State with a legitimate justification for failing to provide these rights to people, that is, a lack of 'available resources'. However, in article 2 of the ICESCR, it is stated that the state parties to the covenant undertake to take steps,

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[49] Paragraph 38

[50] Chaskalson et al *Constitutional Law* 41-10

[51] Ibid

[52] Ibid 41-11

[53] Ibid

individually and through international assistance and co-operation, to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in the covenant by all appropriate means. It is argued that since South Africa is a signatory to the ICESCR, the state has a duty to realise the right to social security 'to the maximum of its available resources' and that in terms of the Constitution, the state is obliged to realise the right of access to social security 'within its available resources'. Although these two qualifying phrases recognise the reality that the full realization of the right of access to social security is dependant on the state's resources, it has been argued that this 'in no way diminishes the state's obligations',[54] and that the state is under an obligation to prove that it has made every attempt to ensure the protection of the right within the constraints of its available resources.[55] It has further been argued that the 'available resources' of a country refers to the 'real resources' of a country and not the budgetary appropriations of government.[56]

Furthermore, a state party to the ICESCR is under a 'minimum core obligation' to satisfy certain basic needs and minimum standards for a 'dignified human existence' and a failure to do so would 'prima facie amount to a breach of the Covenant's obligations'.[57]

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[54] Liebenberg 'The International Covenant' 366

[55] Ibid

[56] Ibid

[57] Ibid. But see Grootboom *supra* in which Yacoob J appeared to reject the idea of a minimum core content of socio-economic rights. He stated that 'minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question' (paragraph 31). Because of the diverse needs of South Africans in the context of housing, Yacoob J found that the determination of the minimum core content of the right to access to housing presented difficult questions. He found that the task of determining the minimum core obligation for the progressive realization of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right was a complex one (paragraph 32) and therefore he found that the court could not determine what would comprise the minimum core obligation in the context of the South African Constitution (paragraph 33). On this basis, it is argued that this would also be the case with regard to the right to access to social security in terms of section 27(1)(c). In Minister of Health and Others v Treatment Action Campaign and Others *supra*, the minimum core approach was rejected in no uncertain terms. The court held that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2), those being the state's available resources. It was therefore

The Constitution provides that a court, tribunal or forum must consider international law when interpreting the Bill of Rights.[58] Because of this provision and because of the fact that South Africa is bound by various international instruments, particularly the ICESCR, it is argued that these instruments are important for the protection of socio-economic rights, and specifically the right to social security, in South Africa.

South African legislation

'Welfare is a national competency of the Department of Welfare delegated to provincial governments. While national government must legislate on welfare, provincial governments must administer and implement the legislation'.[59] The principal piece of legislation that regulates social assistance in South Africa is the Social Assistance Act and its Regulations. The administration of the Act was assigned to the provinces by Proclamation R7 in Government Gazette 16992 of 23 February 1996. The Act provides for various categories of social assistance, namely, social grants which are granted to aged persons, disabled persons and war veterans,[60] grants-in-aid which are paid to or on behalf of any person who is entitled to a social grant who is in such a physical or mental condition that he or she

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held that sections 27(1) and (2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to respect, protect, promote and fulfil such rights. It was concluded that the rights conferred by sections 26(1) and 27(1) are to have *access* (my emphasis) to the services that the state is obliged to provide in terms of sections 26(2) and 27(2) (paragraph 39).

[58] Section 39(1)(b). See Grootboom *supra* for an example of this. In that case, international law was considered and found to be of limited assistance (paragraphs 26-33).

[59] S Sealey (ed) 'HRC Quarterly Review *Social and Economic Rights*' Human Rights Committee of South Africa, Braamfontein, October 1999 55

[60] Section 2(a)

requires full-time attendance by another person,[61] supplementary grants to war veterans,[62] child-support grants which are paid to primary care-givers of children under the age of seven,[63] foster child grants which are granted to foster parents,[64] and care-dependency grants which are paid to parents or foster parents in respect of care-dependant children.[65] All of these grants are non-contributory and means-tested.[66] A person in need of temporary material assistance may apply for 'social relief of distress' and social welfare organisations may apply for financial awards in terms of the Act.[67]

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[61] Section 2(b). Regulation 7 provides that an application for a grant-in-aid may be made on a form determined by the Director-General for an amount determined by the Minister. The Director-General shall, on the conditions and from a date he or she determines, award a grant-in-aid, provided that such grant shall not be payable where a subsidy is payable by the State for the housing and care of such beneficiary at any home for the aged or other similar institution.

[62] Section 2(c). In addition to this grant, provision is made in terms of the Special Pensions Act 69 of 1996 for the payment of pensions to those involved in the struggle for democracy and freedom in South Africa. Section 1(1) of the Act provides: 'A person who made sacrifices or served the public interest in establishing a non-racial, democratic constitutional order and who is a citizen, or entitled to be a citizen, of the Republic of South Africa, has the right to a pension in terms of this Act if that person-
(a) was at least 35 years of age on the commencement date; and
(b) was prevented from providing for a pension because, for a total or combined period of at least five years prior to 2 February 1990, one or more of the following circumstances applied:
(i) That person was engaged full-time in the service of a political organisation.
(ii) That person was prevented from leaving a particular place or area within the Republic, or from being at a particular place or in a particular area within the Republic, as a result of an order issued in terms of a law mentioned in Schedule 1(3) of this Act.
(iii) That person was imprisoned or detained in terms of any law or for any crime mentioned in Schedule 1 of this Act, or that person was imprisoned for any offence committed with a political objective.'
According to an article in the Daily Dispatch in August 1998, the Special Pensions Board which was constituted in terms of the Special Pensions Act of 1996 and was appointed by the Minister of Finance in consultation with the President, was dissolved in March 1998 for its alleged failure to carry out its mandate of considering 25 000 pension applications during its two-year tenure. The Board's work was taken over by a 'private sector task team on secondment, in an attempt to rectify the mistakes and complement the work of its forerunners' ('Setbacks for struggle pensions applicants' *Daily Dispatch* 15 August 1998).

[63] Section 2(d)

[64] Section 2(e) as substituted by section 3 of the Welfare Laws Amendment Act 106 of 1997. This provision has yet to be put into operation by proclamation.

[65] Section 2(g)

[66] Olivier et al *Social Security Law* 87. Except for the supplementary grants to war veterans.

[67] Regulations 26-29 and 30-36 deal with social relief of distress and financial awards respectively.

In terms of section 6 of the Act, there are certain prescribed procedures for applying for these grants.[68] Persons who wish to apply for social assistance must apply in writing to the Director-General of Welfare for such assistance, providing the prescribed information and such information as the Director-General[69] may require.[70] In considering an application, the Director-General may conduct such investigations as he or she may deem necessary in respect of the applicant concerned.[71] If the Director-General is of the opinion that the applicant is entitled to the social assistance applied for, he or she may authorize the provision of the relevant assistance.[72] The Director-General shall inform the applicant in writing of his or her approval of the application and the date on which approval was granted.[73] Where the Director-General refuses an application, he or she shall inform the applicant in writing of his or her reasons for such refusal and of the applicant's right of appeal to the Minister in terms of section 10 of the Act.[74]

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[68] Regulation 8 sets out the prescribed procedures for application for grants.

[69] In terms of Proclamation R7in Government Gazette 16992 of 23 February 1996, the proclamation which assigned the administration of the Social Assistance Act to the provinces, the term "'Director-General', in so far as a provision of this Act is applied in or with reference to a particular province, means the officer who is the head of the component which is charged with welfare matters in the provincial administration of that province," that is the Permanent Secretary of a provincial department, and the term "'Minister', in so far as a provision of this Act is applied in or with reference to a particular province, means the competent authority to whom the administration of this Act has under section 235(8) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), been assigned in that province," that is, the MEC of a provincial department. As the Act is applied by the provinces, the decision is taken by the Permanent Secretary (or his delegate) and an appeal lies to the MEC.

[70] Section 6(1)

[71] Section 6(2)

[72] Section 6(3)

[73] Regulation 25(1)

[74] Regulation 25(2). In terms of section 10, if an applicant is aggrieved by a decision of the Director-General in the administration of the Act, such applicant may within 90 days after the date on which he or she was notified of the decision, appeal in writing against such decision to the Minister, who may confirm, vary or set aside that decision. The Minister may at any time reconsider and vary his or her decision.

To be eligible for a social grant, a person must satisfy the Director-General that he or she is an aged or disabled person or a war veteran, is resident in the Republic of South Africa at the time of the application for the grant, is a South African citizen, and complies with the prescribed conditions.[75] These conditions are that the applicant or his or her spouse passes the means test,[76] that he or she does not already receive a social grant, and that he or she is not maintained in one of the listed institutions run by the State.[77] An application for a social grant must be accompanied by an official identity document of the applicant and, where applicable, of his or her spouse, issued in the Republic of South Africa, proof of marital status where applicable, and proof of assets and income of the applicant and his or her spouse.[78]

Old age pensions form an important part of the social assistance component of social security in South Africa. These pensions play a crucial role in the alleviation of poverty since many pensioners would otherwise be amongst the 'poorest of the poor'[79] because the income of each pensioner receiving an old age grant sustains, on average, five other people in black households[80] and because pension money circulates widely in many poor communities.[81] Persons become eligible for old age pensions once they attain the age of 60 (women) or 65 (men).[82]

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[75] Section 3 of the Act. These conditions are listed in Regulation 2(1).

[76] The means test is prescribed in Regulation 12 which deals with the determination of the amount of social grants according a formula.

[77] Namely, a prison, a state psychiatric hospital, a state home for the aged, a care and treatment centre, or a treatment centre for drug dependants. (Regulation 2(1)(c))

[78] Regulation 9(2)

[79] Olivier et al *Social Security Law* 107

[80] 'White Paper for Social Welfare' (hereafter referred to as the White Paper) Government Notice 1108 in Government Gazette 18166, 8 August 1997, Chapter 7, point 7 (at http:/www.gov.za/whitepaper/1997/soswel97.htm).

[81] S van der Berg 'Issues in South African Social Security' (incomplete working paper) University of Stellenbosch, July 2001 31

[82] Regulation 2(2)

Although 1,6 percent of the total population of South Africa receives a disability grant, this number is much lower than the actual number of people who suffer disabilities.[83] In terms of the Act, provision is made for the payment of social grants to the disabled.[84] A disabled person is defined as 'any person who has attained the prescribed age [18 years] and is, owing to his or her physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance'.[85]

To be eligible for a disability grant, a person must meet requirements additional to those for social grants.[86] He or she must have attained the age of 18 years and his or her disability must be confirmed by the medical report of a medical officer which is subsequently approved by a pensions medical officer. Such report must reflect whether, according to the prognosis of the medical officer and the assessment of the medical officer, the disability is permanent or temporary. The degree of his or her disability must be such that it makes him or her incapable of entering a labour market and he or she must not refuse to accept employment which is within his or her capabilities and from which he or she can generate income to provide partially or fully for his or her maintenance. He or she must not refuse without good reason to undergo the necessary medical or other treatment recommended by a medical officer, a medical pensions officer, medical practitioner, or psychiatrist. Refusal to undergo treatment which is or may be life threatening shall be accepted by the Director-General as adequate

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[83] White Paper, Chapter 7, point 8. In the Department of Social Development's briefing to the National Council of Provinces' Select Committee on problems of access to social grants in the Eastern Cape (11 September 2001), it was stated that 'The Department of Social Development is responsible for the payment of social grants to children, the elderly and people with disabilities. Each month provincial Social Development departments distribute approximately R1,7 billion to almost 3.8 million beneficiaries...The Eastern Cape province is currently paying grants to about 769 970 beneficiaries. The number of beneficiaries per grant type are (sic) indicated as follows: Old Age Pension (397 511), War Veterans (836), Disability (147 836), Care Dependency Grants (6 849), Foster Care Grant (12 228) and Child Support Grant (199 720). Despite some significant increases in social grant beneficiaries, evidence shows that the current number of beneficiaries is a small fraction of the total number of eligible individuals. According to current estimates, the number of potential child support grant recipients is 792 981'.

[84] Section 2(a)

[85] Section 1

[86] Regulation 2(3)

reason for not undergoing such treatment. He or she must not already receive a social grant. An application for a disability grant must be accompanied by the relevant medical report from a medical officer.[87]

A problem with the welfare system regarding disabled people is that the means test used may serve as a disincentive to work, because grant recipients forfeit their state medical benefits if they earn small amounts of money, and it also penalizes and demotivates those who take up generally lower paid work, which often lasts only temporarily, and people with private savings.[88] This disincentive to work may create a dependency on social assistance.

A war veteran is defined in the Act as 'any person who has attained the age of 60 years or who is, owing to any physical or mental disability, unable to provide for his or her maintenance, and who performed any naval, military or air force service during the Great War of 1914-1918 as a member of any Union or British Force or who was a member of the protesting burgher forces during the period September 1914 to February 1915; or who performed any naval, military or air force service during the war which commenced on 6 September 1939 as a member of the Union Defence Forces or, in the case of a Union national, as a member of any British or Dominion Force or any force of a government which was allied to the Government of the Union during that war; or who, while he or she was not a Union national, performed any naval, military or air force service during such last-mentioned war as a member of any British or Dominion Force and who is a South African citizen on the date on which he or she applies for a veteran's pension; or who, while he or she was a member of the Union Defence Forces, signed an undertaking to serve in connection with the hostilities in Korea and who during such hostilities performed any naval, military or air force service on or after the date on which he or she had been detailed for duty in connection therewith'.[89] In the case of war veterans, an application for a social grant must be accompanied by proof of service as specified in the

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[87] Regulation 9(2)(b)

[88] White Paper, Chapter 7, points 8(c) and (d).

[89] Section 1

Act.[90] A supplementary amount shall be paid to a war veteran in addition to a social grant.[91]

According to the Act, any person is entitled to a child-support grant if he or she satisfies the Director-General that he or she is the primary care-giver of a child and that he or she and that child are resident in the Republic of South Africa at the time of the application, are South African citizens, and comply with the prescribed conditions.[92] For the purpose of the Act, a primary care-giver in relation to a child is defined as 'a person, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child', but this excludes a person who receives remuneration, or an institution which receives an award, for taking care of the child, or a person who does not have the implied or express consent of a parent, guardian or custodian of the child.[93]

In terms of the Regulations, a person is eligible for a child-support grant in respect of all of his or her own children. Where some or all of the children in respect of whom the application for the grant is made are not his or her biological children, he or she is entitled to such grant in respect of a maximum of six children.[94] A person is eligible for a child-support grant if he or she is the primary care-giver of the child concerned, he or she satisfies the financial criteria set out in Regulation 16(2),[95] he or she does not receive remuneration for the care of the child concerned, the child concerned is not in an institution referred to in the Child Care Act,[96] or a similar institution whether registered under any law or not, he or she or any other person is not already in receipt of a grant in respect of the child

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[90] Regulation 9(2)(c)

[91] Regulation 6

[92] Section 4

[93] Section 1

[94] Regulation 3(1)

[95] 'A primary care-giver shall qualify for the amount referred to in subregulation (1) if the household income of which the primary care-giver is a member is below R9 600 per annum, or R13 200 per annum and the child concerned and his or her primary care-giver either live in a rural area or live in an informal dwelling.'

[96] Act 74 of 1983

concerned, he or she does not without good reason refuse to assume employment or participate in any development programme aimed at improving his or her income, he or she has made an effort to secure maintenance for the child concerned from the parent or parents of the child, where applicable, he or she ensures that the child concerned is immunised where such a service is available without charge, and the child in respect of whom the application is made is under the age of seven years or such higher age as the Minister may from time to time determine.[97]

An application for a child-support grant must be accompanied by an identity document or birth certificate bearing the 13-digit identity number of each child in respect of whom the application is made, [98] proof of the income of the household of which the primary care-giver is a member,[99] proof that the applicant is the primary care-giver of the child concerned in terms of the Act, proof of immunisation where such services are available, proof of efforts made by the primary care-giver to obtain maintenance from the parent of the child concerned where he or she is not the parent of the child, and proof of efforts to secure employment or to join a development programme where such opportunities are available.[100]

Any person is entitled to a foster child grant if that person satisfies the Director-General that he or she is the foster parent of a child, and that he or she and that child are resident in the Republic of South Africa at the time of the application and comply with the prescribed conditions.[101] In terms of section 1 of the Act, a foster parent is defined as 'any person, except a parent of the child concerned,

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[97] Regulation 3(2). There are further special conditions regarding child-support grants which the primary care-giver who is in receipt of such a grant must comply with. (Regulation 20)

[98] Regulation 9(1)(b)

[99] Regulation 14 deals with the determination of 'income' in respect of child-support grants.

[100] Regulation 9(3)

[101] Section 4A of the Act as inserted by the Welfare Laws Amendment Act (this provision has yet to be put into operation by proclamation). In terms of the Regulations, a foster parent who is in receipt of a foster child grant must comply with further special conditions. (Regulation 21)

in whose custody a foster child has been placed under the Child Care Act[102] or the Criminal Procedure Act'.[103] If the income of the child exceeds twice the annual amount of a foster child grant, such grant is not payable. The income of the foster parents of a foster child is not taken into consideration.[104]

An application for a foster child grant must be accompanied by an identity document or birth certificate bearing the 13-digit identity number of each child in respect of whom the application is made, [105] proof of income of the foster child in respect of whom the application is made,[106] proof of regular school attendance where the child is of school-going age or proof that the child is on a waiting list for admission to a school, unless he or she has been exempted from compulsory education, and an order of the children's court.[107]

With regard to care-dependency grants, any person is entitled to such grant if he or she satisfies the Director-General that he or she is the parent or foster parent of a care-dependant child,[108] that he or she and that child are resident in the Republic of South Africa at the time of the application for the grant,[109] and comply with the prescribed conditions.[110] These prescribed conditions are set out in Regulation 5 which provides that a parent or parents or a foster parent or foster parents are eligible

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[102] Chapter 3 or 6 of the Act

[103] Section 290 of Act 51 of 1977

[104] Regulation 4

[105] Regulation 9(1)(b). Where a foster child is not a South African citizen, an official identity document of the country of origin may be accepted.

[106] Regulation 14 deals with the determination of 'income' in respect of foster child grants.

[107] Regulation 9(4)

[108] A care-dependant child is defined as 'a child between the ages of one and 18 years who requires and receives permanent home care due to his or her severe mental or physical disability' (section 1 of the Act).

[109] In the case of the parent and child, he or she and the child must be South African citizens (section 4B(b)(ii)).

[110] Section 4B as inserted by the Welfare Laws Amendment Act (this provision has yet to be put into operation by proclamation). A parent or foster parent who is in receipt of a care-dependency grant must also comply with further special conditions prescribed in Regulation 22.

for a care-dependency grant in respect of a care-dependant child for a maximum amount per annum provided that the medical report from a medical officer which has been approved by a medical pensions officer confirms that the child is a care-dependant child and the combined annual income of the family, after all permissible deductions,[111] does not exceed R48 000 or such higher amount as the Minister may determine. Notwithstanding this requirement, the income of a foster parent or foster parents of a care-dependant child shall not be taken into account. An application for a care-dependency grant must also be accompanied by a copy of the identity document or birth certificate bearing the 13-digit identity number of each care-dependant child in respect of whom the application is made, proof of income of the family,[112] and a medical report from a medical officer in respect of the care-dependant child.

In terms of the Act, the Director-General may inquire into any matter concerning the rendering of social assistance and has certain powers for such purpose.[113] In terms of section 16 of the Act, the Minister may delegate to any officer of the Department of Welfare and to the Member of the Executive Council responsible for welfare matters in the province any power conferred upon the Minister by the Act, except the power to make regulations under section 19, and may authorise any such officer to perform any duty imposed on the Minister by the Act.[114] The MEC responsible for welfare matters in the province may in turn delegate to any officer of the provincial administration any power delegated to the MEC and may authorise such officer to perform any duty which that MEC is authorized to perform.[115]

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[111] Regulation 15 deals with permissible deductions when calculating means.

[112] Regulation 14 deals with determining income in respect of care-dependency grants.

[113] Section 14 contains the powers of the Director-General in respect of investigation.

[114] In the case of an MEC, there is the proviso that the province must have the necessary administrative capacity to exercise that power or that duty, as the case may be.

[115] Section 16 (3)

The Director-General may delegate to any other officer of the Department of Welfare and to the provincial Director-General of a provincial administration any power conferred upon the Director-General by the Act and authorise any such officer to perform any duty imposed upon the Director-General by the Act.[116] A provincial Director-General may in turn delegate to any other officer of the provincial administration any power delegated to him or her and authorize any such officer to perform any duty he or she is authorized to perform under the Act.[117] Such delegation of power or authorization to perform a duty must be done in writing[118] and any person to whom a power has been delegated or who has been authorised to perform a duty under the Act must exercise that power or perform that duty subject to the conditions the person who effected the delegation or granted the authorization considers necessary.[119] Such delegation of a power or authorization to perform a duty does not prevent the person who effected the delegation or authorization from exercising that power or performing that duty and any delegation of a power or authorization to perform a duty may be withdrawn in writing at any time by that person.[120]

Provision is made in the Regulations for the variation or suspension of the amount of grants on review.[121] The Director-General shall review grants at times and at intervals determined by him or her and, taking the circumstances of each case into consideration, increase, decrease, or suspend a grant from a date which he or she determines, including a date in the past, and inform the beneficiary of his or her reasons in writing and inform him or her of the 90-day period in which an application for the restoration of the grant may be made.[122] On application, the Director-General may restore the

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[116] Section 16(4) and (5). In the case of the provincial Director-General of a provincial administration, the proviso that the province has the necessary administrative capacity to exercise that power or duty, as the case may be, applies.

[117] Section 16(6)

[118] Section 16(8)

[119] Section 16(7)

[120] Section 16(9)

[121] Regulation 23

[122] Regulation 23(2)

grant from the date on which it was suspended.[123] In terms of Regulation 24, a grant will lapse if the beneficiary dies or the child in respect of whom the grant is received attains the age of 18. A grant will also lapse if the beneficiary does not claim the grant for a period of three consecutive months. However, if the Director-General is satisfied that the failure to claim the grant was due to circumstances over which the beneficiary had no control, he or she shall direct that the grant be restored from the date on which it was last claimed.[124]

The South African social security system

One of the main problems with the South African social security system in general is that South Africa has a large population with a relatively small tax base and, as a result, the government has to spread a limited tax income over a large number of people.[125] This results in the state's available resources being limited and the more people the state has to support, the greater the burden on the limited available resources. The greater the burden on the available resources becomes, the greater the possibility that the state will be compelled to increase taxes to increase its income.[126]

According to the White Paper for Social Welfare,[127] about seven percent of people in South Africa receive some kind of social assistance from the state, with 11,8 percent of the total beneficiaries being in the Eastern Cape.[128] On the basis of these figures, it is clear that social assistance plays a crucial role in poverty alleviation and is the very means of existence for millions of people who are unable

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[123] Regulation 23(6)

[124] Regulation 24(5)

[125] Olivier et al *Social Security Law* 122

[126] Ibid

[127] Chapter 7, point 4

[128] According to the Department of Social Development's Progress Report in March 2002, in January 2002, the Eastern Cape had 841 236 grant beneficiaries. This amounts to 19.3% of the total number of beneficiaries in South Africa, second only to KwaZulu-Natal which has 22.3% of the total (Department of Social Development: Progress Report March 2002 6).

to support themselves. However, probably less than a quarter of those who need social assistance actually benefit from the social security system.[129]

Gaps in the social security system include poor children over seven years whom the child support grant does not target,[130] children who are living on the streets, abandoned or orphaned children, members of child-headed households,[131] and persons with chronic illnesses or moderate disabilities who do not meet the strict requirements for care-dependency or disability grants.[132] Apart from these gaps within the system, there are large numbers of people who live in poverty who are excluded from the social security system altogether. These include the structurally unemployed[133] and the informally employed. Since they are not in formal employment, they are not covered by social insurance schemes, and they often do not qualify for social assistance either, unless they meet the requirements for the various social grants.[134] Those who fall outside of the statutory definitions of beneficiaries are also excluded from the system, namely, the self-employed and other atypically employed categories, and non-citizens.[135] Because of their exclusion, these people have no means to escape from poverty. The assistance provided by the existing social assistance programmes in South Africa therefore does not guarantee a minimum standard of living for large numbers of poor in the country.[136]

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[129] D Van der Merwe 'Social Transformation in South Africa by Means of Social Assistance: A Legal Perspective' Goethe Institute Johannesburg (4 November 1998) 21 cited in Olivier et al *Social Security Law* 17 footnote 47

[130] In terms of the Regulations, only children under the age of seven are provided for by means of the child support grant (Regulation 3(2)(i)(aa).

[131] These children do not have a primary caregiver to apply for a grant on their behalf.

[132] S Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 17 *SAJHR* 232 247 (hereafter referred to as Liebenberg 'The Right to Social Assistance')

[133] The structurally unemployed are those who are unemployed because production changes over time as new products are introduced and as a result, some workers' job skills are outdated and no longer in demand (http://www.oneonta.edu/faculty/beckei/E11ORChp24solutions.html).

[134] Olivier et al *Social Security Law* 4

[135] Ibid

[136] Liebenberg 'The Right to Social Assistance' 248

Several proposals have been made as to how to address these gaps in the social security system, including the extension of the child support grant to children up to the age of 18 years, the payment of an unemployment benefit for those affected by structural unemployment, and the Basic Income Grant.[137] A basic income grant was proposed by the Congress of South African Trade Unions (COSATU) in its submissions to the Committee of Inquiry into a Comprehensive Social Security System. This proposal has been endorsed by a number of organisations organised under the Coalition of South Africans for a Basic Income Grant.[138] The coalition has proposed the introduction of a universal Basic Income Grant 'as a key intervention to alleviate the conditions in which the majority of South Africans live'.[139] This grant would be a universal grant of R100 per person per month which would be paid out to all citizens regardless of their age or status. Recipients of the grant would not be subject to a means test and the grant would be 'cross-subsidised' by wealthier South Africans through a 'solidarity tax'. The Coalition claims that according to research commissioned since 1998, a basic income grant is 'both economically viable as well as financially sustainable'.[140]

There have been strong arguments made against the creation of a such a grant, including the argument that the global context is not conducive to the expansion of social assistance and that the trend in many countries is to restrict access to social assistance benefits; that the government's macro-economic policy places tight constraints on social spending; and that there has been a profound paradigm shift in the Department of Social Development away from the tradition of helping the poor through 'hand-outs' towards the social development approach which seeks to empower the poor to

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[137] Ibid

[138] Organisations such as the Alliance for Children's Entitlement to Social Security (ACESS); the Black Sash; the Child Health Policy Institute; COSATU; the Development Resources Centre; the Ecumenical Service for Socio-Economic Transformation (ESSET); the Gender Advocacy Programme; the Socio-Economic Rights Project - Community Law Centre, University of the Western Cape; the South African Council of Churches; the South African National NGO Coalition (SANGOCO); the Southern African Catholic Bishops' Conference; and the Treatment Action Campaign (http://www.drc.org.za/docs/Joint_ Media_Statement.doc).

[139] http://www.drc.org.za/docs/Joint_ Media_Statement.doc

[140] Ibid

be self-reliant.[141]

Another factor which has a great impact on poverty in South Africa is the HIV/AIDS pandemic. It has been estimated that by 2011, over 50 percent of South Africa's population will be 'members of households affected by at least one HIV infection, someone who has developed AIDS, or an AIDS related death'.[142] The implications of this situation include 'increased health costs, a fall in productivity due to the demands on household members to care for ill members, the illness and death of breadwinners, and an increase in the number of AIDS orphans'.[143] This pandemic will create a group of people who will need social assistance as a means of survival and the social security system needs to be developed to provide for the needs of such people.

Constitutional development

In 1994, the first democratic government of South Africa inherited a social security system that was 'fundamentally flawed'.[144] It was constructed and managed in such a way as to control, regulate and constrain the population, and worked against the empowerment and development of communities.[145] The welfare system in South Africa was based on a traditional welfarist and paternalistic dependency approach that emphasised charity and 'hand-outs' instead of self-reliance and sustainability.[146] The

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[141] Liebenberg 'The Right to Social Assistance' 249-50

[142] C Haarmann *Social Assistance in South Africa: Its Potential Impact on Poverty* (2000) unpublished University of the Western Cape PhD thesis 105 cited in Liebenberg 'The Right to Social Assistance' 235

[143] Liebenberg 'The Right to Social Assistance' 235

[144] F Lund 'State Social Benefits in South Africa' (1993) *International Social Security Review* 46(1) 21

[145] Olivier et al *Social Security Law* 63-4.

[146] G Fraser-Moleketi 'The Welfare System for South Africa' in D Barnard and Y Terreblanche (eds) *Prodder: The Southern African Development Directory 1998/9* HSRC Pretoria 13. In the Eastern Cape Provincial Government Policy Speech: 2001/2002 by the MEC for Welfare on 7 March 2000, it was stated that 'We do not encourage a handout approach to social welfare provision because it does not address the root causes of social problems...It is within this context that the White Paper on Welfare propagates a shift from the rather archaic therapeutic forms of social intervention in dealing with socio-economically based human challenges towards a social developmental approach'.

Minister has claimed that there has been a shift in the Department of Welfare and Population Development's approach from the traditional welfarist approach to a developmental approach to service delivery to achieve sustainable human development,[147] but it is submitted that very few of the fundamentals of the welfare system have in fact changed.

One of the biggest challenges for the new government was to initiate a process of re-organisation of the country from a unitary state to a federal state. The Constitution of the Republic of South Africa, 1993[148] (the 'Interim Constitution') created South Africa's particular brand of federalism in that it provided for a democratically elected Government of National Unity led by a political coalition and for a five-year transition, during which the final Constitution would be drafted by the Constitutional Assembly, a transitional, bicameral Parliament consisting of the combined Senate and National Assembly.[149]

The Interim Constitution proclaimed the supremacy of the Constitution[150] and assigned authority in each of the provinces to a provincial executive[151] and a legislative assembly.[152] In the provincial legislatures, as in the National Assembly, there was proportional representation of political parties, so voters elected political parties as representatives, rather than specific individuals. Individual legislators were chosen on the basis of proportional representation from lists of party representatives.[153]

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[147] Ibid

[148] Act 200 of 1993

[149] Sections 36 and 68. http://memory.loc.gov/cgi-bin/query/r?frd/cstudy:@field(DOCID+za0102

[150] Section 4(1)

[151] Section 144

[152] Sections 125 and 126

[153] Section 127, Schedule 2 and the Electoral Act 202 of 1993 (http://memory.loc.gov/cgi-bin/query/r?frd/cstudy:@field(DOCID+za0105)

One of the most important features of the Interim Constitution was that it included a justiciable Bill of Rights,[154] that is, when any right contained in the Bill of Rights was infringed or threatened, any person alleging such infringement or threat was entitled to apply to a competent court for appropriate relief, which could include a declaration of rights.[155] Of particular importance to this research, in terms of this Bill of Rights, the right to administrative justice was entrenched for the first time and every person had the right to lawful administrative action and procedurally fair administrative action where any of his or her rights or interests was affected or threatened, to written reasons for administrative action which affected any of his or her rights or interests unless the reasons for such action had been made public, and to administrative action which was justifiable in relation to the reasons given for it where any of his or her rights or interests was affected or threatened.[156]

The Final Constitution replaced the Government of National Unity with a majoritarian government and instead of requiring political parties to share executive power as the Interim Constitution required, it enabled the majority party to appoint Cabinet members and other officials without necessarily consulting with minority parties represented in the National Assembly.[157]

In terms of the Final Constitution, there are three spheres of government, namely, national, provincial and local levels of government which are 'distinctive, interdependent and interrelated'.[158] The Republic of South Africa is divided into nine provinces and each province has its own provincial

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[154] Contained in Chapter Three.

[155] Section 7(4)(a). Such relief could be sought by a person acting in his or her own interest, an association acting in the interests of its members, a person acting on behalf of another person who was not in a position to seek such relief in his or her own name, a person acting as a member of or in the interest of a group or class or persons, or a person acting in the public interest (section 7(4)(b)).

[156] Section 24

[157] http://memory.loc.gov/cgi-bin/query/r?frd/cstudy:@field(DOCID+za0106. See section 4 of Annexure B to Schedule 6 regarding the Transitional Arrangements which were in force until 30 April 1999, read with section 91 of the Constitution.

[158] Section 40(1) of the Constitution

legislature which derives its powers and functions from the Constitution.[159] However, the country's legislative structure in the national sphere was changed in terms of the Final Constitution. The National Assembly continued to be the only directly elected house of Parliament, but the Senate was replaced by the National Council of Provinces ('NCOP'). The NCOP consists of ten representatives from each province to ensure that the provinces are represented in the national legislative process.[160] The legislative authority of each of the provinces is vested in its provincial legislature, and confers on the provincial legislatures the right to pass legislation for its province with regard to any matter within a functional area listed in Schedules 4 and 5, any matter that is expressly assigned to the province by national legislation and any matter for which a provision of the Constitution envisages the enactment of provincial legislation.[161] Provincial legislatures may pass their own constitutions and are bound only by the Constitution of the Republic of South Africa and, if a provincial constitution has been passed, by that constitution.[162] Local government consists of municipalities, the purpose of which are to provide democratic and accountable government for local communities, to ensure the provision of services to communities and to promote social and economic development.[163] The Constitution also makes provision for the establishment of Houses of Traditional Leaders and for the establishment of a Council of Traditional Leaders.[164] This ensures that there is a role for traditional leaders as an institution at local level on matters affecting local communities.[165]

The process of re-organisation also involved the establishment of new national and provincial departments with the amalgamation and restructuring of the former administrations of the tricameral

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[159] Sections 104 to 124 deal with Provincial Legislatures and section 104 deals specifically with the legislative authority of the provinces.

[160] Sections 42(4) and 60

[161] Section 104(1)(b)

[162] Section 142 and 104(3)

[163] Sections 151(1) and 152(1). http://www.kwazulu.net/Legislature/guide%20to%20kzn%20leg/ index. htm##3

[164] Chapter 12, and specifically section 212.

[165] Section 212(1)

parliamentary system,[166] the various provinces and homelands.[167] Despite the re-organisation of the structures of government and the dissolution of the former administrations, according to the White Paper, the new national government is too structurally fragmented, with too many departments with too narrow a focus, and this results in poor co-ordination between departments and the various levels of government.[168] The result is that 'the aggregate of government is weakened, if not threatened by both structural and functional defects'.[169] The integration and rationalization of the former administrations of the Republic of South Africa and the independent and self-governing homelands resulted in each administration bringing with it its own accounting and financial systems, distinct levels of job grading, skills and experience, and even different work ethics.[170] These problems, along with corruption, plague the social security system and as a result, there is an 'ineptitude to implement national programmes and a subsequent failure to deliver essential services'.[171]

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[166] This tricameral Parliament consisted of the (white) House of Assembly, the (coloured) House of Representatives, and the (Indian) House of Delegates and was created in terms of the Constitution of the Republic of South Africa Act 110 of 1983 which came into effect on 22 September 1984.

[167] Until 1994, South Africa was divided into four provinces, namely, the Cape Province, Natal Province, the Transvaal, and the Orange Free State; six 'self-governing' homelands, namely, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and QwaQwa; and four 'independent' homelands, namely, Transkei, Bophuthatswana, Venda and Ciskei. In 1994, after considering written and oral reports, the Commission on the Demarcation of States/Provinces/Regions recommended the formation of the present-day nine provinces. These recommendations were incorporated into the Interim Constitution and the homelands were officially dissolved on 27 April 1994 (http://memory.loc.gov/cgi-bin/query/r?frd/cstudy:@field(DOCID+za0105).

[168] In Chapter 1, it is stated that '15. The welfare system was administered by 14 different departments for the different population groups and homelands. This resulted in fragmentation, duplication, inefficiency and ineffectiveness in meeting needs. Each of these departments had their own procedures, styles of work, approaches and priorities. There is a lack of inter-sectoral collaboration and of a holistic approach. This fragmentation is also reflected in social welfare legislation'.

[169] Olivier et al *Social Security Law* 64

[170] Ibid 66

[171] Presentation on an Investigation into the Social Security Services: A Report of the Presidential Review Commission on The Reform and Transformation of the Public Service in South Africa, presented to the President of South Africa (27 February 1998) 2.4.1.1 cited in Olivier et al *Social Security Law* 67 footnote 51

Another problem in relation to the amalgamation of the former welfare administrations in the Eastern Cape and other parts of the national territory where homeland administrations functioned, is that in terms of section 229 of the Interim Constitution, 'all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area' subject to their compatibility with the Constitution and until their amendment or repeal by the competent authority.[172] Item 2 of Schedule 6 of the 1996 Constitution is to much the same effect. In respect of the provision of social assistance, most, if not all of the former homelands - whether self-governing or constitutionally independent - had their own legislation, and the Social Assistance Act (which came into force in 1996) and its predecessors only applied in those parts of the national territory which were not part of one or other of the former homelands. The Welfare Laws Amendment Act is meant to rationalise this chaotic state of affairs, that being the operation of several different statues in the Eastern Cape at the same time, but the appropriate provisions, having been passed by Parliament, have as yet not been brought into operation.[173]

Other factors which have constituted obstacles to access to social assistance include[174] the inadequate dissemination of information to communities regarding social grants and the requirements for eligibility, a lack of administrative justice in the process of re-registration of grant beneficiaries brought about by the practices of at least some provincial welfare departments, serious backlogs and delays in the processing of grant applications and the payment of grants, and a lack of adequate

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[172] C Plasket 'Standing, Welfare Rights and Administrative Justice: Maluleke v Member of the Executive Council, Health and Welfare, Northern Province 1999 (4) SA 367 (T)' (2000) 117 *SALJ* 647 648-9

[173] Section 20(2) of the Social Assistance Act as amended by the Welfare Laws Amendment Act states that 'no social assistance shall be paid to any person in terms of any provision of- ...(b) any law referred to in the Schedule; [or] (c) any other law in force in that part of the Republic which constituted the territory of any former entity known as Transkei, Bophuthatswana, Venda, Ciskei, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa or QwaQwa, other than the social assistance provided for in this Act, except on the authority of an Act of Parliament'. The Social Pensions Act 4 of 1978 (Transkei) and the Ciskeian Social Pensions Act 9 of 1976 are listed in the Schedule of repealed Acts. This provision has yet to be put into operation by proclamation.

[174] As listed in Liebenberg 'The Right to Social Assistance' 243-244

infrastructure.[175] There are serious consequences to the inadequate implementation of social assistance, the most extreme of these being the death of persons unable to survive without the such assistance.

The Department of Social Development has undertaken to implement various initiatives in an attempt to improve delivery in social security programmes, including the introduction of assessment panels where district surgeons are not available to assess the disabilities of disability grant applicants,[176] the reinstatement of beneficiaries incorrectly removed from the social security system during the various provincial departments' re-registration processes,[177] the establishment of mobile units in the rural areas to enable people to obtain the necessary identity documents to apply for social grants, conditional grants to improve the technological infrastructure in the Eastern Cape and KwaZulu-Natal, the strengthening of monitoring and evaluation capacity at national level, the development of comprehensive norms and standards for the payment of social grants, and an improvement in communication and information technology of the provincial departments.[178]

In terms of section 27(2) of the Constitution, the state is obliged to take reasonable legislative and other measures to achieve the progressive realization of the right of access to social security. It has

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[175] This is the case particularly in the Eastern Cape, but KwaZulu-Natal, Northern Province, North West Province and Mpumalanga are also affected, some of them as badly as the Eastern Cape.

[176] This initiative is progressing very slowly in the Eastern Cape. According to a recent article in the Daily Dispatch, it was hoped that assessment and appeal panels which would consist of a social worker, a nurse, a disabled person and an administrative worker and which would be deployed in all 24 social development districts in the province, could be introduced by December 2001. However, to date these panels have not been introduced because 'bureaucratic hiccups have meant that the department ha[s] been unable to access the required funding' (A Carlisle 'Unlawful grant letter still in use say experts' *Daily Dispatch* 18 September 2002). This failure to introduce the panels was 'slammed' by Jonathan Walton, the Regional Director of the Black Sash in Grahamstown, who said that the new regulations to the Social Assistance Act requiring their establishment had been promulgated in 2001 and that 'the panels were precisely proposed to expedite applications and to resolve disputes arising out of administrative decisions'. The MEC, Ncumisa Kondlo was quoted as saying that it was hoped that by 1 November 2002, the Department could introduce six pilot assessment and appeal panels in six provincial municipalities. (Ibid)

[177] This process in particular is progressing very slowly in the Eastern Cape. See Chapter Three for further details.

[178] As listed in Liebenberg 'The Right to Social Assistance' 246.

been argued that 'unless measurable progress is made to improve the implementation of social assistance programmes, national and provincial departments of social development will be vulnerable to constitutional challenge',[179] that is, unless there is clear evidence of the progressive realization of the right of access to social security, the state may be accused of not meeting its constitutional obligations in terms of section 27(1)(c).

[179] Ibid

CHAPTER TWO

The Legal Resources Centre

During the late 1970s, various legal practitioners felt there was a need to find new ways to make legal assistance available to those who were ignorant of their rights and who often had difficulty gaining access to legal assistance due to the lack of resources. By 1976, the University of the Witwatersrand ('Wits') had established several law clinics at which students who were registered for Practical Legal Studies, an LLB credit course, worked and gained practical experience and insight into the practice of law. These clinics also offered a valuable service to the public, but this was limited by the fact that students did not have the right to appear in court and those legal practitioners who volunteered their services at the clinics could not take the clinics' cases to court and did not have the time to provide the follow-through that was necessary. As a result, the idea of employing qualified legal practitioners on a full-time basis both to work at the clinics and to supervise the students came about.

The director of the Practical Legal Studies course at the time, Felicia Kentridge, prepared a memorandum at the end of 1976 in which she suggested that a law foundation be established to provide alternative forms of legal aid and to work in legal education. She suggested that law centres be set up at which qualified legal practitioners would be entitled to work on a full-time basis and to advise and represent people in certain fields of civil law. This memorandum was submitted to the Johannesburg Bar Council and in May 1977 it was decided that the Council would support the establishment of such law centres.

Consequently, a firm proposal was formulated to set up a pilot scheme for the establishment of a law centre in Johannesburg and it was submitted to the Johannesburg Bar Council and the Transvaal Law Society. By the end of 1978, both bodies consented to the establishment of the Legal Resources Centre ('the LRC').

In January 1979, the LRC was constituted as a non-profit making association and its first office was opened in Johannesburg. Mr Arthur Chaskalson SC (as he was then) was appointed by the trustees as the first director of the LRC in a full-time capacity. Two advocates and two attorneys were also employed on a full-time basis. The LRC was funded by the Legal Resources Trust, the

trustees of which were Mr C Cilliers, who was chairman, Mr C Geach, Mr J Kriegler SC, Mr S Kentridge SC, Mr I Mohamed SC and Mr B Wunsh. Mr Chaskalson was also an *ex officio* trustee. The LRC was also supported by a number of companies and charitable foundations which helped ensure that it could employ legal practitioners on a full-time basis.

The LRC's aims were to perform a community service through the supervision of law clinics and the handling of cases, and to assist in the training of legal practitioners, both through the instruction of students and by employing recently graduated law students. In this way it hoped to offer a bridge between university and private practice.

By January 1980, employees of the LRC were supervising students at four law clinics which had been established by Wits, as well as at one clinic which it had itself established and which was staffed by students from the University of South Africa (Unisa). The LRC had also established links with other universities to which it offered its services in the setting up of clinics. Employees of the LRC also conducted seminars at which they instructed students on interviewing techniques, the conduct of cases, ethics and the practical side of law in general.

Apart from teaching students and supervising them at the clinics, the LRC sought to take on cases of particular community interest and of particular interest in relation to the work done at the clinics. The LRC did not deal directly with the public but rather took on cases which the clinics or other legal aid agencies referred to it. At the time, the clinics dealt mainly with problems relating to consumer protection and labour law and it was envisaged that a substantial portion of the LRC's work would be in these areas, although it was also expected that the LRC would deal with issues of housing, influx control and other complaints of exploitation. Although the LRC handled litigation through its full-time employees, it acknowledged that there would be times where it might need the assistance of attorneys in private practice or members of the Bar and therefore sought a co-operative relationship between itself and the private profession.

It was hoped that the work which the students and the legal practitioners did through the clinics and the LRC would demonstrate to the public how the legal profession could assist all sections of the population and not only the rich. It was also hoped that the experience would help to

create an awareness within the legal profession regarding the problems of the poor and an awareness on the part of the poor that these problems could be resolved through the legal system.[1]

In 1984, Lawrence Baxter noted in his textbook on administrative law that '[t]here is no doubt that considerable developments in administrative law have been achieved through the action of organizations, such as the legal resources centres (*sic*), established to defend human rights. A number of leading cases in modern South African administrative law were litigated under their auspices'.[2]

By 1989, the LRC had six regional offices[3] and employed 30 legal practitioners (both advocates and attorneys) on a full-time basis, as well as 14 interns who spent a year at the LRC before going into private practice. Because of these increased resources, the LRC was able to offer a valuable service in the public interest to people and communities unable to afford legal services.[4]

The LRC marked its tenth anniversary in 1989 by holding a conference entitled 'Law in a Changing Society'. The stated purpose of the conference was to examine the role of law and legal practitioners in the process of change in South Africa and in the development of a just and democratic country. Arthur Chaskalson presented a paper at the conference in his capacity as National Director of the LRC in which he stated that the LRC was created at a 'propitious time', that is, at a time when the legal profession was 're-examining its own structures and its own role in society' and therefore welcomed the LRC in a way it might not have done some fifteen or twenty years before.[5]

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[1] The information above was taken from an article by Arthur Chaskalson SC: 'The Legal Resources Centre: Why it was established and what it hopes to achieve' (January 1980) *De Rebus* 19

[2] L Baxter *Administrative Law* Juta & Co. Ltd, Cape Town, 1984 70

[3] These offices were situated in Cape Town, Durban, Johannesburg, Grahamstown, Pretoria and Port Elizabeth. The Port Elizabeth office closed in about 1996.

[4] G Budlender Editorial Comment on a series of papers from 'Law in a Changing Society' (1989) 5 *SAJHR* 293 v

[5] A Chaskalson SC 'The Past Ten Years: A Balance Sheet and Some Indicators for the Future' 1989 *SAJHR* 293 (hereafter referred to as Chaskalson 'The Past Ten Years')

During the ten years of its existence, a number of significant changes had occurred in the South African legal system: a considerable amount of 'race' legislation was repealed or amended; administrative law had grown and matured as academics and judges became more skilled in finding ways of imposing legal control over the exercise of executive power; a significant number of lawyers had begun working in the fields of civil liberties, human rights and public interest law; and a large number of paralegal advice offices had been established in areas accessible to those most in need of legal advice - these advice offices made (and still make) a major contribution in providing services to vast numbers of people.[6]

During this time, the LRC dealt with issues of race and poverty in its everyday work and as a result, its legal practitioners came to recognise that the law played a significant role in creating, perpetuating and, at times, alleviating the suffering of those who were the victims of race and poverty.[7] It also saw an increasing awareness of the important role that the legal profession played in demanding that rights be defined and protected.[8] During the early 1980s, the LRC was involved in landmark cases such as Rikhoto[9] and Komani[10] which challenged the influx control laws and started the process which led to the eventual repeal of those laws.[11] By the LRC's tenth anniversary, there was an active human rights bar and a growing interest in public interest law in South Africa. The practice of human rights and public interest law was made possible by leaders of the legal profession helping to create space for and giving their support to these forms of legal practice. As a result, increasing numbers of young legal practitioners were drawn into these areas of practice.[12]

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[6] G Budlender Editorial Comment v

[7] Chaskalson 'The Past Ten Years' 293

[8] Ibid 295

[9] Oos-randse Administrasieraad en 'n Ander v Rikhoto 1983 (3) SA 595 (A) and Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W)

[10] Komani NO v Bantu Affairs Administration Board, Peninsula Area 1979 (1) SA 508 (C) and Komani NO v Bantu Affairs Administration Board, Peninsula Area 1980 (4) SA 448 (A)

[11] Chaskalson 'The Past Ten Years' 296

[12] Ibid 300

At the LRC's tenth anniversary conference, Guy Stringer of Oxfam commented that 'the dispossessed - victims of earthquakes, floods, drought and war - show an extraordinary amount of courage. If we are to help them effectively, we must match that with our courage, commitment and skill. In my view the LRC shows these characteristics admirably, and it is for this reason that I for one support them and commend them'.[13]

In his concluding remarks at the conference, Sydney Kentridge SC (as he was then) called the cases of Rikhoto and Komani 'two of the most signal successes of the [LRC]'.[14] He said that these two cases did not 'just happen', but that they were the result of 'creative lawyering', that is, they were the result of 'seeing in a statute or a mass of regulations the possibility of a new interpretation in favour of the class of individuals affected', of 'picking the right case to take to court', of 'meticulous researching of the facts and law' and then 'presenting a thoroughly professional and not a merely sentimental argument'.[15] In his opinion, both the main purpose and the main achievement of the LRC throughout its first ten years of existence had been to teach people that 'whatever it has been in the past, law in this country should not be seen as merely an instrument of subjection and control and oppression, [but] that [it] can be seen as an instrument of protection and justice'.[16]

For more than 20 years, the LRC has provided legal assistance to the poor and vulnerable in South Africa. It has made significant contributions to the development of a human rights jurisprudence since the adoption of an entrenched Bill of Rights in the Constitution. The present National Director of the LRC, Bongani Majola, regards the LRC as a 'leading public interest law centre' which has 'helped define and give meaning to some of our new constitutional rights' through many of the cases in which it has been involved.[17] He has stated that the LRC aims to

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[13] G Stringer 'Working with the Poor for Justice' (1989) 5 *SAJHR* 301 302

[14] S Kentridge SC 'Concluding remarks' (1989) 5 *SAJHR* 355 358

[15] Ibid

[16] Ibid 359-360

[17] B Majola ' At least 21 reasons to celebrate the LRC's 21st birthday' (August 2001) *Advocate* 27

make a contribution to the reversal of the effects of apartheid and to improve the quality of life for the poor.[18]

In the third Bram Fischer Lecture,[19] Arthur Chaskalson CJ spoke of South Africans as having temporarily lost their way in realising the Constitution's vision of 'a society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we all live together in harmony, showing respect and concern for one another'.[20] He said that '[w]e are capable of realising this vision but are in danger of not doing so...Too many of us are concerned about what we can get from the new society, too few with what is needed for the realisation of the goals of the Constitution. What is lacking is the energy, the commitment and the sense of community that was harnessed in the struggle for freedom. The Legal Resources Centre has not lost that energy, commitment and sense of community...They deserve our support and encouragement'.[21]

The LRC's work is now defined under two broad programmes: Constitutional Rights and Land Reform. The projects that fall under these programmes focus on different aspects of these broad fields although there is inevitably overlap.[22] In order to carry out work in these fields, the LRC has built and maintains a network of partnerships with a variety of organisations throughout the country. Through these partnerships, the organisation is able to intervene in a wide variety of

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[18] Ibid 31

[19] Arthur Chaskalson CJ 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193

[20] Ibid 205

[21] Ibid

[22] Projects which the LRC runs include the access to justice project, the social welfare project, the equality project, the Non-Profit Organisation legal support project, the women's rights project, the housing project, the children's project, the farmworkers' eviction project, the education project, the land tenure project, the health rights project, the environmental justice project, the restitution project, the refugee project, the redistribution project, and the criminal justice project (http://www.lrc.org.za/projects.asp).

matters, drawing on the expertise, the experience and the participation of other bodies with similar interests and commitment.[23]

The National Director regards litigation as a 'key means of assisting people whose rights or interests are not adequately recognised' and although a major part of its work involves litigation and giving legal advice, the LRC is also involved in lobbying for and the drafting of appropriate legislation and regulations. Members of the LRC also serve on a wide variety of bodies and boards working in the public interest.[24]

An extremely important area of the organisation's work is education and training. Through a number of its projects, it has published manuals and booklets for use by Advice Offices and other organisations. It is involved in key training programmes, with a strong focus on both community awareness and the training of civil servants engaged in work at various stages of the state legal system.[25]

The LRC also contributes to the development and transformation of the legal profession, both by playing a prominent role within its various structures and by providing for internships and training for candidate attorneys.[26]

As Chairperson of the Legal Resources Trust,[27] Mr Justice B Wunsh wrote that the LRC's 'continued success has been built on its ability to adapt and respond to the demands of the social

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[23] Legal Resources Centre Annual Report 1999-2000 - National Director's Report 3 (http://www.lrc.org.za/4Pub/1999-2000.PDF)

[24] Ibid

[25] Ibid

[26] Ibid

[27] Current trustees of the LRC include Richard Rosenthal (Acting Chairperson), Lee Bozalek, Justice Yusuf Ebrahim, Gadija Kahn, Lady Felicia Kentridge, Jody Kollapen, Bongani Majola (*ex officio*), Norman Moabi, Justice Lex Mpati, Justice Mahomed Navsa, Derric Reid and Justice Basil Wunsh. Patrons of the LRC are Mr Charles Cilliers, Sir Sydney W. Kentridge QC, Mr David Sampson, Justice Jan Steyn, Justice John Trengrove and The Most Reverend Desmond M. Tutu Archbishop Emeritus. Overseas partners of the LRC are the Southern African Legal Services and Legal Education Project, Inc (SALSLEP) in the United Kingdom, the Legal Assistance Trust (LAT) in the United States and the Canadian Bar Association. (Ibid)

and political environment in which it operates'.[28] This was evident in the 1980s when it played an important role in acting against and intervening in areas of substantial injustice by the apartheid state, in the early 1990s when it operated within an environment of rapid change and considerable violence, culminating in the first democratic elections in April 1994, and since 1994, in that it has focused on making real the new constitutional rights entrenched in the Bill of Rights.[29]

He wrote that the LRC has had to adapt its role to the demands of the new environment and it has done this through careful strategy, self-reflection and a willingness to adapt its projects and approaches as the times and circumstances require. Its survival and strengthening owes much to its capacity to address these questions and to its continued relevance as an instrument for justice and human rights.[30]

Recent history of regional offices' social assistance work

KwaZulu-Natal has had its share of social welfare problems. In a report on the LRC's Durban office it was written that, of the cases which the office dealt with in 1996, 'a substantial proportion addressed issues of administrative justice in areas of employment law, consumer protection and social welfare and pensions. Since the Durban LRC's inception, the processing and payment of pensions and other welfare grants, particularly maintenance grants, have been areas in which government has failed to deliver an appropriate service. Despite assurances from the Minister of Welfare and Pensions that the problem will be addressed, there has been little or no improvement in the situation, and in an effort to remedy the lack of responsiveness and to enforce accountability by officials, the Durban office has made this ongoing problem in KwaZulu-Natal a focal area of work'.[31]

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[28] LRC Annual Report 1999-2000 - Legal Resources Trust: Chairperson's Report 2 (Ibid)

[29] Ibid

[30] Ibid

[31] Legal Resources Centre Annual Report 1 April 1996 to 31 March 1997 'Report on the Durban Office' 9

At the same time, a report on the LRC's Advice Office Programme stated that 'the LRC is representing a large number of old age pensioners who have had their pensions suspended arbitrarily on the basis that they are 'deceased', when in fact they are still alive. The Department of Welfare has been unable to state on what evidence they have based their decision[s]. Representations have been made to the Department to reinstate their suspended pensions, some of which were suspended as far back as 1995'.[32]

During 1997 and 1998, the LRC's Constitutional Litigation Unit conducted full-day seminars in the regional offices on the justiciability and enforcement of socio-economic rights, and was involved in litigation on the rights to water, education and social services. In a report on the unit, it was written that 'the development and promotion of socio-economic rights is crucial to the achievement of substantive equality and has been prioritized by the unit' and that 'the internal limitation in these rights clauses, particularly the qualification in regard to the state's "available resources", necessitates careful and well-researched strategic litigation. The unit has been consulting extensively with non-governmental organisations in order to embark on test case litigation aimed at determining and enforcing the state's obligations in promoting and fulfilling their core minimum content'.[33]

In 1998, the LRC had over 230 pension files open in its regional offices.[34] The Johannesburg office dealt with 60 cases of pensioners whose pensions had been stopped - several applications were brought in the High Court to obtain the reinstatement of pensions and practically all of them were settled in negotiations.[35]

In his report in 1999, the National Director of the LRC wrote that one of the biggest challenges facing South Africa, the LRC and other human rights organisations in 1999 was the enforcement

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[32] Ibid 'Report on the Advice Office Programme' 22

[33] Legal Resources Centre Annual Report 1 April 1997 to 31 March 1998 'Constitutional Litigation Report' 20

[34] LRC Review - Newsletter of the Legal Resources Centre 'Pensions Saga Continues' May 1998 5

[35] Legal Resources Centre Annual Report 1 April 1997 to 31 March 1998 'Report on the Johannesburg Office' 17

of socio-economic rights.[36] He argued that the progressive realization of the rights of access to sufficient food and water, health care services and social security was 'one of the key factors in the fight against poverty'.[37] He felt that the LRC and other organisations that work in the area of socio-economic rights in South Africa had 'not [yet] made any major break-throughs in enforcing social and economic rights', but stated that 'together with its partners, the LRC continues to look for ways of enforcing these rights, including judicial enforcement and other forms of compliance'.[38] He mentioned that during 1998, the LRC and the Community Law Centre of the University of the Western Cape had co-hosted a conference on the enforcement of socio-economic rights and that the two organisations were collaborating to produce a book on the enforcement of socio-economic rights.[39]

The National Director also mentioned that during 1998, the LRC had undertaken a 'tremendous amount of work in th[e] area [of social welfare] and has already registered a number of successes for the aged and disabled poor.' He said that in a small way, this had motivated some government departments to deal with welfare matters in a more humane manner and that it had also served as an educational tool through which both government officials and members of the community had learnt about human rights and the Constitution.[40]

In a report on the LRC's Constitutional Rights Programme, it was stated that 'tens of thousands of pensioners have not been receiving their state pension[s] regularly'.[41] According to the report, this was happening in both the Northern and Eastern Cape provinces and 'cases enforcing welfare rights continue in both the Pretoria and Grahamstown LRC offices, and will be a central part of

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[36] Legal Resources Centre Annual Report 1 April 1998 to 31 March 1999 'National Director's Report, 1998-1999' 6. It is submitted that this is still the case.

[37] Ibid

[38] Ibid

[39] Ibid

[40] Ibid 5

[41] Ibid 'Equality under the law' 9

their practices during the 1999/2000 year'.[42] In the Northern Province, the LRC had challenged a decision taken by the Department of Social Welfare to stop or suspend the payment of social assistance grants to approximately 92 000 beneficiaries. The Department's decision was held to be unlawful and invalid by the High Court in Pretoria,[43] but unfortunately relief was only granted to the Applicant and not to the other thousands of beneficiaries who had been similarly disadvantaged by the suspension of their pensions and on whose behalf the Applicants claimed standing to litigate. The decision on standing was attributed to 'inadequate information to justify such far-reaching results'.[44] On the merits, however, the case 'established an important precedent for the administrative resolution of these cases'.[45]

Subsequent to Maluleke,[46] a key precedent was set in the case of Rangani v Superintendent-General, Department of Health and Welfare, Northern Province[47] in which it was held that a person is entitled to be heard before his or her disability grant is taken away.[48] The LRC Pretoria office launched approximately 40 review applications to overturn the cancellations of individual pensions and issued nearly 100 summonses in the Magistrate's Court for payment of arrears and interest on cancelled pensions. This intensive litigation campaign resulted in the State finally agreeing to settle all such cases, with the exclusion of those where fraud was suspected.[49] After a series of meetings between the LRC and national and provincial welfare officials 'all but 9 000 of the 92 000 suspended welfare grants in the Northern Province were reinstated administratively'.[50]

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[42] Ibid

[43] In the matter of Maluleke v MEC, Health and Welfare, Northern Province 1999 (4) SA 367 (T).

[44] LRC Annual Report 1998-1999 'The right to just administrative action' 18

[45] Ibid

[46] *Supra*

[47] 1999 (4) SA 385 (T).

[48] LRC Annual Report 1998-1999 'The right to just administrative action' 18.

[49] It is submitted that this indicates that one case can give impetus to moves to settle many others. In this situation this was possibly because the Department was told by the court what the law was regarding the cancellation of grants.

[50] LRC Annual Report 1998-1999 'The right to just administrative action' 18

In the LRC's 2000/1 Annual Report, the National Director wrote that the LRC had decided to shift the focus of the report from the organisation, its cases and its staff to its clients, their issues and their stories. The report discussed the stories of people such as Irene Grootboom, who initiated the litigation which led to the Constitutional Court's landmark decision regarding the right to access to housing,[51] as 'exemplary of the social problems facing our young democracy - and the challenges confronting a dynamic public interest law centre like the LRC'. He concluded by saying that 'from Soobramoney to Grootboom, we have indeed come a long way. But as the pages of this report illustrate, there is still much, much more to be done in bringing about the progressive realisation of social and economic rights for all South Africa's people'.[52]

Background to the Grahamstown Office's Welfare Project

Socio-economic factors, most notably the migrant labour system, have resulted in the creation of a large pool of very poor people in South Africa's rural areas, particularly in the former homelands.[53] Many of these people have limited or no skills and no access to resources. This 'hampers their attempts at any kind of self-help or community-driven upliftment scheme'.[54] Not only are they dependant on state welfare for their very survival but, often, so are a large number of their dependants. As a result, the welfare system provides the 'backbone of the rural economy in South Africa'.[55] This is especially so in the Eastern Cape, which now incorporates the former homelands of Transkei and Ciskei.

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[51] In the matter of Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

[52] LRC Annual Report 2000-2001 - National Director's Report (http://www.lrc.org.za/ annual%20 report%20 2000-2001.htm)

[53] By the early 1990s, 44 percent of the total population of South Africa resided in the ten homelands, and according to a 1992 study by the Urban Foundation, this high population density - several hundred persons per square kilometre in some areas - greatly exacerbated socio-economic and political problems in the homelands (http://memory.loc.gov/cgi-bin/query/r?frd/cstudy:@field (DOCID+za0105).

[54] Legal Resources Centre (Grahamstown) Social Welfare Project Quarterly Report April-June 2000 5

[55] Ibid

Inordinate delays in the processing of applications for social grants have plagued the Eastern Cape for many years. These backlogs have been due firstly to the inefficient and corrupt bureaucracies of the former homelands, and secondly to the less than smooth integration of these bureaucracies into the Eastern Cape welfare system. In many instances, both in the past and at present, applications for social grants have been lost without trace and never processed,[56] grants have been cancelled for no apparent reason, decision-making on applications has been delayed for unreasonably long periods of time, and in some particularly tragic cases, applicants have even died before a decision regarding their application has been made by the Department.[57] The LRC received many complaints regarding the failure of Department officials to take administrative decisions regarding grant applications. Applicants could wait for years after applying for a social grant for a response from the Department, to no avail.[58] Applicants ultimately had to approach the court to seek orders compelling the Department to make decisions,[59] but even when such

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[56] It has been alleged that one third of all queries referred by Advice Offices to the LRC have been lost without trace by the Department and never processed (LRC Annual Report 1998-1999 'The right to just administrative action' 19).

[57] Ibid

[58] In Ndevu v MEC for Welfare, Eastern Cape Provincial Government and Permanent Secretary for Welfare, Eastern Cape Province SECLD Case no. 597/02 (unreported), the application was one of 27 on the roll in which the applicants sought relief in the form of a social grant. The applicants had all applied for benefits, but had either received no response or unsatisfactory response from the department. In his judgment, Erasmus J said that 'the fact that they have found it necessary to turn to the court for assistance, would indicate that the respondents and the public servants under their control have failed to perform their administrative duties properly and timeously' (paragraph 1). He also said that 'it would be unrealistic...to think that this is the end of the sorry saga: there are 34 similar matters on the roll for this coming motion court, and no doubt many more in the pipeline. In addition there must be many people out their who for some reason do not have access to legal assistance. The matters that do come to court are probably but the tip of the iceberg. This raises the disturbing likelihood that many persons in this province at this moment are suffering real hardship through the ineffectiveness of the public service at provincial level' (paragraph 2). In a recent article in the *Mail and Guardian*, it was reported that 'about 120 people a week are bringing high court claims against Ncumisa Kondlo, the Eastern Cape MEC for Welfare, for failing to pay grants. This week 28 people brought applications against the MEC in the Port Elizabeth High Court, bringing the total of similar cases in the past four weeks to 113 in that court alone. Similar cases are being heard in courts in Bisho, Umtata and Grahamstown' (P Van Niekerk, 'Judge slams E Cape welfare MEC' Mail & Guardian 6 September 2002).

[59] For example, Budaza v MEC for Welfare, Eastern Cape Provincial Government ECD Case no. 1658/97 (unreported) in which the Applicant sought an order to compel the Respondent to consider and decide upon his application for a disability grant which was made in November 1994, two years and nine months prior to the application being launched.

orders were obtained, the Department often failed to comply with them.[60]

In order for South Africa's first democratic government to integrate and amalgamate the previously fragmented welfare systems into a single unified national system, a unified national database known as the SOCPEN 5 system was created to replace the previously fragmented databases and the necessary infrastructure was installed both at national level and in all the provincial administrations by the beginning of 1996. The welfare system was also to be governed by one Act, namely the Social Assistance Act, instead of the many pieces of legislation that applied in the former homelands and pre-1994 South Africa.[61]

At the time of integration and amalgamation, the original databases from which information was drawn contained information which was not accurate or up to date in many cases, so the National Department of Welfare issued instructions to the provincial departments to review and re-register every grant beneficiary on the system. This was in order to eliminate 'ghost' beneficiaries and dubious records from the system. The National Department alleged that thousands of people were receiving grants fraudulently and costing the state millions of rands each year.[62]

Consequently, in complying with the National Department's instructions, more than 150 000 people's grants were suspended nation-wide.[63] They were suspended without notice or hearings and the affected beneficiaries were required to re-apply for their grants. In most cases, the beneficiaries were not given pertinent reasons for the cancellation or suspension of their grants. The onus was placed on the beneficiaries to prove that they were entitled to their grants and to ensure that the Department received complete and accurate information with their applications.

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[60] In Somyani v MEC for Welfare, Eastern Cape and D-G, Department of Welfare, Eastern Cape SECLD Case No. 1144/2001 (unreported), the Applicant applied for an order to compel the Respondents to comply with the court order made against them six months previously which ordered them to consider and decide upon his application for a social grant. The court said that it 'should be a source of shame to the Respondents that these people have to turn to the courts to help them' (paragraph 4).

[61] As mentioned in the Chapter One, this rationalisation of welfare legislation has as yet not been achieved through the bringing into operation of section 20(2) of the Act.

[62] Legal Resources Centre (Grahamstown) Social Welfare Project Quarterly Report April-June 2000 6

[63] LRC Annual Report 1998-1999 'The right to just administrative action' 17

Where a form was incorrectly or incompletely filled in by a District Surgeon or where the form was lost or not processed, this was held against the beneficiary and the grant was summarily cancelled. The penalty for not complying with Department requirements or for ignorance was also removal from the system. The beneficiaries were not paid arrears for the grants which they had lost in the process of re-registration.[64]

As a result, thousands of legitimate beneficiaries were removed from the system and this exacerbated existing backlogs in the processing of applications. The fact that applicants had to travel long distances to fill in many forms and wait in endless queues to see District Surgeons and welfare officials further aggravated the problem. As a consequence, thousands of people who were entitled to social grants did not receive them because of 'administrative carelessness and inefficiency'.[65] 'They failed to differentiate between the fraudulent and undeserving and unentitled on the one hand, and on the other the truly [deserving]. These latter were manifestly not ghosts, and the mechanism employed left them destitute'.[66]

Despite the integration of the social security system and the new legislation governing it, obstacles still stand in the way of service delivery to those who most need social assistance. The longstanding problem of delays, coupled with the unlawful suspension and cancellation of grants has caused immense suffering, great poverty and hardship for the most destitute and vulnerable people in South Africa.

From as early as 1995, but particularly during 1997 and 1998, the Grahamstown office of the LRC was inundated with thousands of requests and complaints from welfare beneficiaries seeking legal relief because of problems such as those mentioned above. These people had been referred to the LRC for assistance by many of the approximately 40 Advice Offices throughout the Eastern Cape with which the LRC had contact. These advice offices played in important role in the litigation campaign that developed by providing the LRC with information regarding the numbers

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[64] Ibid

[65] Legal Resources Centre (Grahamstown) Social Welfare Project Quarterly Report April-June 2000 6

[66] Cameron JA in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others 2001 (10) BCLR 1039 (SCA), paragraph 7.

of people affected by cancellations and suspensions and with the details of their cases. After many attempts to resolve clients' problems, endless meetings, broken promises, unfulfilled undertakings, and unanswered correspondence with the Department, there was still no improvement in the situation and the LRC had to re-examine its 'three-pronged strategy' of litigation in appropriate cases, referrals to the Public Protector in other matters,[67] and negotiations with Department officials at local level.[68] It became clear to the LRC that, although litigation on behalf of individual clients against the MEC for Welfare was successful, there was no resultant improvement in the system over all. The LRC therefore decided to try a 'saturation litigation' approach with the aim of 'forcing an improvement in a system which causes suffering to some of the most disadvantaged and vulnerable people in society'.[69]

The Grahamstown Office's Litigation Campaign

The litigation campaign began with the filing of 60 applications in the High Court against the MEC for Welfare in the Eastern Cape, seeking mandatory relief on behalf of welfare applicants entitled to decisions regarding or payment of social assistance grants. Between December 1997 and April 1998, the LRC was successful in obtaining court orders in favour of 43 of these applicants, compelling the MEC to either pay the applicants' grants or to decide on the applications within 14 days.

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[67] In an affidavit filed in reply to the Answering Affidavit of Mark Rasmussen (Deputy Director of the Department for Social Security) in the matter of Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another 2001 (2) SA 609 (E), Clive Plasket detailed both his attempts in his capacity as former Regional Director of the LRC in Grahamstown until the end of 1997 and the attempts of Rosemary Smith and Jonathan Walton of the Black Sash to obtain the assistance of the Public Protector's office to resolve problems within the administration of social assistance in the Eastern Cape. He detailed their correspondence with the office which elicited either no response at all, or excuses for delays such as a lack of resources or lack of information from government officials and agencies it relied on and the fact that the office was inundated with complaints and enquiries such as theirs. Plasket concluded that in both the LRC's and the Black Sash's experience, the Public Protector's office failed to adequately respond to any queries dealing with social welfare pensions addressed to it. On this basis, he submitted that the class of people whose grants had been unlawfully cancelled by the Department would not receive effective relief if it had to rely on the Public Protector's office to take up each individual's case.

[68] LRC Annual Report 1996-1997 'Report on the Grahamstown Office' 12

[69] LRC Annual Report 1996-1997 'Report on the Grahamstown Office' 12

One such application was that of Bacela v MEC for Welfare (Eastern Cape Provincial Government)[70] in which the LRC challenged the decision of the MEC for Welfare to place a moratorium, due to budgetary constraints, on the payment of arrears to successful applicants. The outcome was that the court held that the non-payment of arrears was unlawful and of no force and effect and that the MEC had not acted in terms of the powers vested in her by the Act and the Regulations. The importance of this case lies in the fact that it clarified important boundaries of the MEC's powers.

There was a suspension of the litigation campaign after the Bacela matter when the MEC at the time, Ms Marasha, undertook to address the issues. She did not do so and the litigation was therefore resumed. It was at this point that the Permanent Secretary intervened because of the adverse publicity that the litigation was attracting to the Department and the LRC agreed to suspend the campaign on the basis of several undertakings by the Permanent Secretary on behalf of the Department.[71] However, despite these undertakings, none of the issues between the

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[70] [1998] 1 All SA 525 (E). See Chapter Three for further details.

[71] These undertakings were recorded in a letter from the LRC to the Respondents' attorneys dated 9 April 1998 which was later called the 'Makalima minute' in the papers filed in Booi and Others v MEC for Welfare, Eastern Cape Provincial Government and Others ECD Case no. 431and 433 (unreported) (Founding Affidavit, paragraph 9). In terms of the minute, Professor Makalima, the Permanent Secretary, undertook that the Department would make decisions in three urgent cases and comply with all outstanding obligations in terms of the court orders obtained against the MEC for Welfare by clients of the LRC on or before Friday 17 April 1998; that with regard to the costs orders obtained against the MEC in all those cases, these matters would be settled on an agreed figure which would cover the disbursements incurred by the LRC in the matters; that the Department would finalise the cases pending in the High Court on or before Friday 17 April 1998; that the Department would implement a system to which it would allocate as many staff as possible to attend to the capture of information required in order to place persons on the pension payment system; that the Department would advise the LRC as to when it envisaged this process to be completed, including estimates of how many applications would be processed each week; that the LRC would assist in establishing direct channels of communication between the Department and the various Advice Offices which had referred complaints to the LRC so that the outstanding information which the Department might require in order to process applications might be obtained and so that the completion of the data capturing process might be ensured; that the Department would ensure regular feedback to the LRC advising of progress made in the process; that the LRC would be provided with the name and telephone number of a senior official who might be contacted with any problems or complaints encountered in the process; that any other information required by the Department which was not provided by the LRC would be copied for the Department at its cost; and that the Department would issue a circular to all applicable officials containing the following policy directives: that the moratorium on backdating payment of social security from the date of application had been lifted, that 'lindelas' (proof of receipt of completed applications in the prescribed form) must be issued to all applicants, that there would be no cancellations or suspensions of social grants for any reason not sanctioned by the Social Assistance Act or the Regulations and that in the event of the Department

Department and the LRC's clients were satisfactorily resolved and the Department failed to comply with the many court orders against. The LRC advised its clients to lay criminal complaints of contempt of court with the Attorney-General against the MEC for the Department's lack of compliance with the court orders, but this was met with a lack of co-operation and enthusiasm on the part of the Attorney-General's office.[72]

After warning the Department on three occasions that its clients had no other alternative if it continued to ignore the court orders, the LRC launched contempt proceedings against the MEC, her Permanent Secretary, her legal advisor and one other official.[73] The LRC succeeded in having all those applicants who had outstanding orders against the MEC joined in the proceedings and the officials finally complied with the orders in June 1999.

In 1999, Mr Ngayithini Bushula and three other applicants launched an application against the Permanent Secretary for Welfare.[74] The matter was settled with all of the applicants except with Mr Bushula. The application dealt with the unlawful cancellation of their disability grants and was used by the LRC to test the procedures used by the Department when cancelling grants. The Department accepted that it had to act in a procedurally fair manner, so the issue in this case was whether or not it had done so. Since no notice, hearings or reasons were afforded to the Applicants, the Department's procedures for the cancellation of grants were found to fall short of what the Social Assistance Act and the Constitution required of administrative decision-makers. The decision to cancel the Applicant's disability grant was held to be a nullity since it was not made in compliance with Regulation 21(2) of the Social Assistance Regulations.[75] The

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wishing to exercise its rights to cancel any social grant, that it would be done in accordance with the requirements for fair and proper administrative action contained in the Constitution, and that applicants who received their payments in person would only be required to acknowledge receipt thereof after they had received their money.

[72] Legal Resources Centre (Grahamstown) Annual Report 1 April 1998 to 31 March 1999 21

[73] Booi and Others v MEC for Welfare, Eastern Cape Provincial Government *supra*. See Chapter Three for more details.

[74] Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (2) SA 849 (E). See Chapter Three for more details.

[75] Regulation 21(2) provides that 'The Director-General shall review a grant annually and, taking the circumstances of each case into consideration, increase, decrease or suspend a grant from a date

fact that the court found that the procedures followed by the Department for all cancellations were not procedurally fair was an important step towards the LRC's goal of improving the administration of welfare in the province.

After Bushula, the Department accepted that it had to give notice, hearings and reasons for the cancellation, suspension or refusal of a grant. In Nomala v Permanent Secretary, Department of Welfare, EC Provincial Government and Another,[76] the LRC challenged the validity of the standard form 'reasons' given for the refusal of applications and the cancellation or suspension of grants, arguing that what the Department said were reasons were not, in law, reasons. Because of this, it was argued that the Department had failed to comply with the requirement in terms of the Regulations that it give a beneficiary reasons for the cancellation, suspension or refusal of a grant.[77] The court accepted this argument and held that the standard form 'reasons' were insufficient and invalid in law. This was a landmark decision since the court clarified what constituted reasons in law and therefore what information the Department is required to give unsuccessful applicants, or grant recipients whose grants are suspended or cancelled.

In February 2000, the matter of Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another[78] was launched, in which the Applicants alleged that their disability grants had been unlawfully cancelled because they had been cancelled without notice and without the opportunity of a hearing or reasons for the decision being reached being given and that so had those of thousands of other similarly situated beneficiaries. Therefore, they not only brought the application on their own behalf, but also sought to act in a representative capacity on behalf of this large class of people, in terms of sections 38(b), (c) and (d) of the Constitution. In the court *a quo*, the Applicants were granted

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which he or she determines including a date in the past and inform the beneficiary of his or her reasons in writing and inform him or her of the 90 day period referred to in subregulation (6) for the application for the restoration of the grant.' Subregulation (6) provided that 'If an application is made for the restoration of a grant, the Director-General may restore the grant with effect from the date on which the grant was suspended: Provided that the application for restoration is made within 90 days of suspension.'

[76] 2001 (8) BCLR 844 (E). See Chapter Three.

[77] Regulation 23(2)

[78] *Supra*. See Chapter Three.

standing to represent the class under sections 38(b), 38(c) and 38(d) and the cancellations of their grants were held to be invalid. The court ordered the Applicants to give notice of the proceedings to the members of the class on whose behalf they would act, and to file affidavits indicating how they intended to comply with the order and under which subsection they intended to proceed in the matter. The Respondents were ordered to supply the Applicants with information relating to the members of the class. The Respondents took the matter on appeal to the Supreme Court of Appeal in Bloemfontein, but the appeal was dismissed with costs.[79] The decision in the matter is a landmark one since it affects a large number of people in the Eastern Cape and has set a precedent with regard to the institution of class actions in South Africa.

The class action was the high water mark of the litigation campaign and the matter has subsequently been settled. In terms of the settlement, which was made an order of court, the Department was obliged to report to the court in April 2002 regarding its progress in implementing the plan agreed to in terms of the settlement to reinstate thousands of people onto the social security system.[80]

The six landmark cases in the LRC's litigation campaign which have been briefly discussed above will be dealt with more thoroughly in the next chapter.

Other related litigation

At the same time as the LRC's litigation campaign, three other important applications were launched against the Department of Welfare by other parties.[81] These cases also had a significant impact in the field of social assistance law.

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[79] Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others *supra*

[80] See Chapter 3 for further details regarding the settlement agreement.

[81] Part of the strategy of the litigation campaign was to draw attorneys in private practice into litigating welfare cases by providing them with precedents and introducing them to Advice Offices that could supply them with clients. While not many responded positively, some did. They have made a significant contribution to the enforcement of the right to social assistance.

The issue of back pay (arrears) was dealt with definitively in two cases in the Eastern Cape, namely, Mahambehlala v MEC for Welfare, Eastern Cape, and Another[82] and Mbanga v MEC for Welfare, Eastern Cape, and Another.[83] In March 1998, the Minister for Welfare and Population Development published regulations relating to the requirements or conditions to be complied with by a person in order to be entitled to a grant, the manner in which applications for grants were to be made, the requirements for the approval or refusal of any application for a grant, and the date of accrual of a grant if approved.[84] The most contentious of these regulations was Regulation 11, in terms of which the date of accrual of grants was the date on which the application was approved. This regulation was subject to the proviso that 'a grant shall not accrue for a period exceeding three months from the date of approval of the grant'.[85] This proviso was the cause of contention since previously, grants were payable from the date of application, regardless of when approved.

In Mahambehlala, Leach J held that the proviso to Regulation 11 was 'nothing more than gibberish'[86] since the regulation 'provides for a social grant to accrue on a specific date (the date of its approval) and [the] proviso thereto...states that it should not accrue for a period exceeding three months from that date.'[87] He held that although it was 'impossible to ascribe a meaning to the proviso, the balance of the sub-regulation has a clear meaning, namely, that a social grant shall accrue on the date on which it is approved.'[88] Applying the test of severability,[89] Leach J held that

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[82] 2002 (1) SA 342 (SE)

[83] 2002 (1) SA 359 (SE)

[84] This was done in terms of section 19(1) of the Regulations which provides that 'the Minister may make regulations as to-

...

(i) the date of accrual of any grant...'

[85] Regulation 11(1)

[86] At 349G

[87] At 349A

[88] At 350C

[89] The test of severability in regard to subordinate legislation was laid down in Johannesburg City Council v Chesterfield House (Pty) Ltd 1952 (2) SA 809 (A) at 822 and restated in S v Prefabricated Housing Corporation (Pty) Ltd and Another 1974 (1) SA 535 (A) at 539. In terms of the test, 'where

there was no reason not to sever the proviso from the balance of the sub-regulation and concluded that the date of accrual of social grants was to be determined solely by reference to the first sentence in Regulation 11(1) and by disregarding the proviso.[90]

Another important outcome of the matters of Mahambehlala and Mbanga was that the court held that the right to lawful and reasonable administrative action[91] would have been infringed by a failure to process a grant application within a reasonable time, particularly where a grant is ultimately approved.[92] The court held that a period of three months would normally be more than sufficient to take an administrative decision.[93] Since the court found that the Permanent Secretary of Welfare's[94] failure to approve the Applicants' grants within a reasonable time constituted an infringement of the right to just administrative action,[95] it granted the Applicants constitutional relief in terms of section 172(1) of the Constitution which provides that when deciding a constitutional matter within its power, a court may make an order that is 'just and equitable'. Leach J held that 'it seems to me that it would be just and equitable for an aggrieved person in the position of the applicant to be placed in the same position in which she would have been had her fundamental right to lawful and reasonable administrative action not been unreasonably delayed'.[96] The court therefore ordered that the Respondents were to pay arrears to the Applicants in both cases as if their grants had been approved 3 months from the date of their applications and furthermore that they were to pay interest on the arrears owed at the prescribed rate of 15.5% per annum.[97]

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it is possible to separate the good from the bad in subordinate legislation, and where the good is not dependant on the bad, then that part of the statute which is good should be given effect to, provided that what remains carries out the main object of the statute' (Mahambehlala at 350E).

[90] At 350F-G

[91] Protected in terms of section 33(1) of the Constitution.

[92] At 353C-D

[93] At 351I

[94] The Second Respondent in the matter.

[95] At 353D-E

[96] At 356C-D

[97] Mahambehlala at 358E-G; Mbanga at 371D-F.

After receiving many complaints about the issue of Regulation 11, the Black Sash decided to challenge the regulation. This matter was initially dealt with by the LRC in Grahamstown, but was ultimately heard in the Transvaal Provincial Division, where it was declared that Regulation 11 was invalid and set aside, and that the repeal of Regulation 10 was also invalid and set aside.[98] This was an important decision since it meant that Regulation 10 was reinstated and it provided that grants accrue to applicants on the date of application and that therefore arrears are due from this date. This meant that long delays in the processing of grants had negative results for the Department because they would entail large amounts having to be paid out in arrears. This created an incentive for grants to be processed more quickly. This decision paved the way for potentially thousands of people to claim backpay.[99]

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[98] Trustees of the Black Sash Trust v Minister for Social Development TPD September 2000, Case no. 30368/2000 (unreported). This order was made by consent.

[99] As a result of this decision, President Thabo Mbeki made an announcement in Parliament in February 2002 that an additional R2 billion would be set aside for back payments to pensioners (Legal Resources Centre Briefs Volume 1 Number 10 February 2002 (www.lrc.org.za/3News.asp#briefs)). According to an article in the Daily Dispatch, 'the Eastern Cape is likely to get a large chunk of the R2 billion set aside by government to provide for back payments to pensioners who failed to get what was due to them because of an invalid regulation'. A spokesperson for the Minister of Social Development said that he could not say exactly how much each province would get, but it would definitely be used to cover money owed to disabled persons identified in the welfare class action in the Eastern Cape. The article said that 'most of the money will go towards paying outstanding back pay owed to pensioners following a ruling by the Transvaal Division of the High Court last year invalidating a 1998 national regulation that limited back pay to three months' (A Carlisle 'R2bn cash boost for pensioners' Friday 15 February 2002).

CHAPTER THREE

An Examination of Six Landmark Cases

In the previous chapter, an overview of the Grahamstown office of the LRC's Welfare Project was given. Mention was made of the more important cases and events in the unfolding of the project. In this chapter, six landmark cases in the LRC's litigation campaign will be discussed in detail because of the significant impact they have had both on the lives of the Applicants involved and on the fields of constitutional and administrative law. They are Bacela v MEC for Welfare (Eastern Cape Provincial Government),[1] Booi and Others v Jajula and Another,[2] Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government,[3] Nomala v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another,[4] Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another[5] and Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others.[6] After these cases have been discussed in detail, this chapter will conclude with a discussion of their significance and impact.

Bacela v MEC for Welfare (Eastern Cape Provincial Government)

Nikiwe Bacela applied for her old age pension ('OAP') in May 1996 at the age of 60. She received an official letter eleven months later which stated that her pension had been approved with effect from the date of application and that she would be paid the arrears which were due to her in a month's time. This money was never paid to her despite the fact that she visited the allocated pay point on

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[1] [1998] 1 All SA 525 (E)

[2] ECD Case No. 431 and 433 (unreported)

[3] 2001 (2) SA 849 (E)

[4] 2001 (8) BCLR 844 (E)

[5] 2001 (2) SA 609 (E)

[6] 2001 (10) BCLR 1039 (SCA)

numerous occasions over the next six months in the hopes of collecting her pension.[7]
Consequently, Ms Bacela approached the Port Elizabeth Black Sash Advice Office in August 1997. The office made enquiries with the Department on her behalf and was told that her OAP had lapsed since it had not been collected for three consecutive months. In a letter to the Department, the LRC argued that this was incorrect, that Ms Bacela's pension had never lapsed and that the Department was still liable to pay it and therefore demanded payment of her OAP. Two months later, the LRC was informed that the Department had allocated a number other than her identity number as the reference for her file and as a result, when her identity number was entered into the system, it was reflected that there was no money due to Ms Bacela.[8]

A Department official suggested that she reapply for her OAP and stated that she would not be paid the arrears owed to her, despite the Department's previous undertaking and the terms of the Social Assistance Regulations,[9] because, in the time between the Applicant's grant being approved and the LRC's taking up of the matter, the MEC for Welfare had, by means of an internal circular,[10] placed a moratorium on the payment of arrears to successful applicants, due to financial constraints.[11] She had stated that the payment of arrears would recommence 'when funds are available'.[12] In response to the LRC's demand for an undertaking to pay the Applicant's OAP and arrears, the Department tendered an apology for the erroneous removal of the Applicant's name from the pension pay-out system, but did not offer any such undertaking.[13]

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[7] Founding Affidavit, paragraphs 6-8

[8] Ibid, paragraph 10-13

[9] According to Regulation 10, successful applicants were entitled to arrears from the date of application.

[10] Circular No. 22 of 1997 which was addressed to all regional directors was entitled 'Non-processing of new applications and non-payment of backlogs' and dated 26 September 1997.

[11] Founding Affidavit, paragraph 16

[12] Circular No. 22 of 1997, *supra*

[13] Founding Affidavit, paragraph 18

The matter was set down for argument in November 1997 and Melunsky J granted an order by consent in terms of which the Respondent was ordered to pay the Applicant her monthly OAP for that month and to continue paying her OAP for as long as she qualified for it thereafter. The matter was postponed for the remaining issues to be determined and after initially opposing the application, the Respondent withdrew her opposition at the last minute because counsel had advised that the argument that the Department was unable to pay arrears due to a lack of resources and the legacy of apartheid did not constitute a defence.[14] The LRC therefore moved the application to have the MEC's decision to cease the payment of arrears declared unconstitutional and invalid unopposed.

The two issues to be decided by the court were the question of urgency, and whether the Applicant would be paid arrears to the date of her original application for an OAP. With regard to the first issue, the Applicant claimed that there was no reason why she should not be paid immediately since the Respondent had ascertained that she had not been paid and was entitled to be paid.[15] The Applicant submitted that her right to payment arose from her right of access to social security in the form of appropriate social assistance in terms of section 27(1)(c) of the Constitution and she argued that the failure or refusal of the Department to pay her without delay infringed this right.[16]

The Applicant went on to argue that the obligation on the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights' in terms of section 7(2) had been infringed by the Department's unwillingness to pay the Applicant with haste and to ensure that, as a result of the prejudice she suffered from the Department's error, she be paid speedily. She submitted that in fact her right to social assistance had been undermined rather than respected, protected, promoted or fulfilled. It was also argued that the obligation placed on the Respondent and her officials to perform their constitutional duties 'diligently and without delay' in terms of section 237 had been infringed by the Department's refusal to rectify its error by paying the Applicant's pension except in the normal

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[14] LRC Review - Newsletter of the Legal Resources Centre 'Pensions Saga Continues' May 1998 4

[15] Founding Affidavit, paragraph 20

[16] Ibid, paragraph 21

course. The Applicant argued that the duty to pay her pension had not been performed diligently, nor had it been performed without delay, since the Department took no special steps to ensure that her right to social assistance was complied with after discovering its mistake.[17] The Applicant argued that the Department was notorious for its failure or inability to pay eligible persons within a reasonable time and she feared that, if the relief she claimed in the application was not granted, she would become one of the thousands of pensioners who were told every month to return the following month and wait patiently for their grants to eventually be paid.[18]

The Applicant submitted that the matter was urgent because of the prejudice she and thousands of other people affected by the Respondent's decision suffered due to not being paid arrears. She stated that she suffered personal hardship because of not being able to support herself without the arrears owed to her and that this was the case for many thousands of other similarly affected people in the Eastern Cape. She also said that it was important that the application be dealt with urgently because it involved the infringement of fundamental rights on a large scale.[19]

With regard to the second issue, the Applicant argued that her right to arrears was created in terms of the Regulations[20] and that she was entitled to arrears because of the MEC's undertaking to pay such arrears in April 1997. She submitted that this right to arrears vested before the Respondent decided to cease payment of arrears to successful grant applicants due to financial constraints.[21]

The Applicant submitted that the Respondent's decision to suspend the payment of arrears indefinitely

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[17] Ibid, paragraphs 22 and 23

[18] Ibid, paragraph 24

[19] Ibid, paragraph 35

[20] Regulation 9(1) read with Regulation 10(1). Regulation 9(1) stated that 'The date upon which an application for a grant is signed in the presence of an attesting officer shall be deemed the date on which the application was made' and Regulation 10(1) stated that 'Subject to the provisions of the Act, a grant, excluding a foster child grant, shall accrue from the date of attestation: Provided that the applicant qualifies from such date.'

[21] Founding Affidavit, paragraphs 25 and 26

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was unconstitutional and invalid on five grounds. The decision sought to limit the fundamental right to social assistance by means other than law of general application: an internal circular did not qualify as a law and could not amend a regulation; it conflicted with the Applicant's right to lawful administrative action because the Respondent and her officials did not have the lawful authority to amend the Regulations by means of an internal circular; it infringed the Applicant's right to procedurally fair administrative action because no notice of any intention to suspend the payment of arrears was given so that comments and objections could be made by those affected, potentially affected or interested in the issue; it amounted to unjustifiable administrative action because it was motivated by the belief that the fundamental right to social assistance could be limited by circumstances, specifically by the fact that the Social Security budget was overdrawn: this was an incorrect application of the law and the effect of the decision was disproportionate, unreasonable and irrational; and it was *ultra vires* at common law for want of lawfulness, procedural fairness and reasonableness.[22] The Applicant submitted that she had standing to act in her own interest both at common law and in terms of section 38(a) of the Constitution.[23]

The Applicant also claimed standing to act in the public interest in terms of section 38(d) of the Constitution a number of grounds. Firstly, the MEC's decision to suspend the payment of arrears

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[22] Founding Affidavit, paragraph 32. It was common practice at the time for parties to plead their cases on the basis of the common law as an alternative to their constitutional grounds (or *vice versa* in some cases). The Supreme Court of Appeal had drawn this distinction in The Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight 1999 (3) SA 771 (SCA), where Hefer JA held that 'Judicial review under the Constitution and under the common law are different concepts. In the field of administrative law constitutional review is concerned with the constitutional legality of administrative action, the question in each case being whether it is or is not consistent with the Constitution, and the only criterion being the Constitution itself. Judicial review under the common law is essentially also concerned with the legality of administrative action but the question in each case is whether the action under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice. The enquiry in this regard is not governed by a single criterion' (paragraph 20). At a later stage, in Pharmaceutical Manufacturers Association of SA and Others; In re: Ex Parte President of the RSA 2000 (2) SA 674 (CC), Chaskalson P held that 'the common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts' (paragraph 33), and therefore that the Container Logistics *supra* case was wrong.

[23] Ibid, paragraph 33

affected a large number of people in the Eastern Cape and would continue to do so as long as the decision stood and, secondly, those people who were affected were people who qualified for social assistance and their fundamental rights in terms of section 27(1)(c) had been infringed. It was argued that because these people qualified for social assistance, they were by definition old or disabled or indigent parents or foster parents and that they were thus the most marginalised, powerless and indigent people in the province. As a result, it was unlikely that these people would be in a position to vindicate their rights to claim arrears because they would generally not know that their rights had been infringed and not have access to legal assistance if they did know this. It was argued that large numbers of grant recipients live in rural areas and since these areas are generally far from legal, paralegal and other resources, these people were in a far more vulnerable position than urban dwellers. It was further argued that since the issue in this case would be identical to that in every other case regarding the non-payment of arrears, the demands of the public interest were met by the fact that the order sought by the Applicant would benefit many thousands of people similarly affected by the decision. It would also serve the public interest by being a cost effective use of judicial resources since it would determine a major issue of public concern through one application.[24]

In his judgment, Mpati J did not decide on the constitutionality of the Respondent's decision since the matter could be decided without dealing with the constitutional issues. After examining the powers of the Respondent under the Act and its Regulations, he held that the Respondent was responsible for the administration of the Act[25] and was not authorised in terms thereof to suspend the payment of pensions.[26] In answering the question of whether the Respondent could take a decision in terms of which the Applicant was deprived of her pension from the date it accrued to her, to whatever other date was convenient to her and her department to start paying her pension, Mpati J

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[24] Ibid, paragraph 34

[25] At 528e

[26] At 529e-f

quoted Thirion J in Sibiya v The District Pension Officer, Umlazi and Another[27] where he held that the Minister was bound in his administrative capacity to act in terms of the Regulations and to make payments for which the Regulations provided and that so were the officials of his department. Mpati J agreed with Thirion J in that the Respondent was similarly bound in her administrative capacity to act in terms of the Social Assistance Regulations and to make payments for which the Regulations provided.[28] On this basis, he held that the decision to suspend such payments was unlawful and of no force and effect and therefore that the Applicant was entitled to be paid the arrears owed to the her.[29]

Significantly, Mpati J quoted Thirion J where he held that 'if the monies which had been appropriated for pensions for the...financial year were inadequate for that purpose, an additional or supplementary appropriation should have been obtained from the legislative assembly or else amending legislation should have been passed to deal with the situation. The matter could not be dealt with administratively in a manner not authorised by law.'[30] This was directly relevant to the fact that the MEC had attempted to limit the right to social assistance in terms of an internal circular, rather than by a law of general application as required by the Constitution.[31]

With regard to the issue of urgency, the court held the application was indeed urgent because of the 'untold suffering' that the Applicant had suffered 'through no fault of her own' and therefore ordered that the Respondent pay her OAP with effect from the date of application and to do so within 14 days.[32]

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[27] DCLD Case No. 5486/84 (unreported) 5. This matter was brought by the Durban office of the LRC. It is illustrative of the fact that the LRC has been involved in social assistance work for a long time.

[28] At 529e

[29] At 529g

[30] At 529f-g

[31] Section 36(1) provides that ' the rights in the Bill of Rights may be limited only in terms of a law of general application...'

[32] At 529j-530b

Booi and Others v Jajula and Another

As mentioned in the previous chapter, the LRC's litigation campaign began with the filing of 60 applications in the High Court against the MEC for Welfare in the Eastern Cape, seeking mandatory relief on behalf of welfare applicants who were entitled to receive social grants or who were entitled to decisions on their applications for social grants. Between December 1997 and April 1998, the LRC obtained 43 orders in the High Court against the MEC.

The LRC found that a disturbing feature which emerged from this litigation strategy was that, pleading poverty, the provincial government ignored court orders and made no effort to obtain the money it owed from the National Treasury.[33] Because of this lack of compliance with the court orders, the LRC advised it clients to lay criminal charges with the Attorney-General[34] and these complaints were accompanied by seven affidavits by the judgment creditors. However, the Attorney-General was 'completely unhelpful' and made various excuses for not dealing with the complaints, such as: that the matter had to be investigated by the economic offences bureau of the South African Police Services and would take months, that the LRC should bring civil proceedings for contempt instead, and that the Department's lack of funds seemed to be a full defence to the Attorney-General.[35] Despite the fact that the LRC alerted the press to the Attorney-General's response, nothing was done about the Department's 'flagrant contempt for the High Court's orders'[36] and the Attorney-General's 'total lack of enthusiasm...[for] pursuing the MEC in the criminal courts'.[37]

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[33] LRC Review - Newsletter of the Legal Resources Centre 'Pensions Saga Continues' May 1998 5

[34] Now known as the Director of Public Prosecutions.

[35] LRC Review - Newsletter of the Legal Resources Centre 'Pensions Saga Continues' May 1998 5

[36] Ibid

[37] Legal Resources Centre (Grahamstown) Annual Report 1 April 1998 to 31 March 1999 21

At this point the Permanent Secretary for Welfare,[38] Professor Makalima, intervened and requested a halt to the litigation campaign because of the adverse publicity that it had attracted to the Department.[39] At what appeared to be a promising meeting, Professor Makalima promised to build a co-operative relationship between the Department and the LRC to improve the system for all[40] and, in particular, he gave an undertaking that the Department would comply with the terms set out in all of the Notices of Motion in all of the cases against the MEC pending in the High Court, without the necessity of obtaining court orders to that effect.[41] He also undertook that the Department would make decisions in three urgent cases and comply with all outstanding obligations in terms of the court orders obtained against the MEC for Welfare by clients of the LRC and that, with regard to the costs orders obtained against the MEC in all those cases, these matters would be settled on an agreed figure which would cover the disbursements incurred by the LRC in the matters.[42]

The LRC therefore suspended the campaign, but the Permanent Secretary's promises rang hollow when, at the end of 1998, the Department had only complied with one court order in full.[43] Most of the orders for payment had been complied with, but not completely, and two of the judgment creditors who should have been paid both arrears and their monthly grants, had received no payment at all. Of those orders which required a decision to be taken regarding applications, the majority had been rejected without written reasons being furnished as required by the Regulations.[44]

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[38] The administrative head of a department in the Eastern Cape Provincial Government is usually referred to as the Permanent Secretary. This position is equivalent to a Director-General in the national sphere of government.

[39] LRC (Grahamstown) Annual Report 1998-1999 21

[40] Ibid

[41] Legal Resources Centre Annual Report 1 April 1998 to 31 March 1999 19

[42] These undertakings were recorded in letter from the LRC to the Respondents' attorneys dated 9 April 1998 which was later called the 'Makalima minute' in the papers filed in the Booi application (Founding Affidavit, paragraph 9).

[43] Ibid

[44] LRC Annual Report 1998-1999 19

After warning the Department on three occasions that if it continued to ignore the court orders, their clients had no other alternative but to launch contempt proceedings against the Department officials, the LRC did so in January 1999 on behalf of two applicants who had received nothing in terms of the orders for payment.[45] The major effect of launching the application was achieved when, the week before the hearing, the Department suddenly found the capacity to deliver 15 cheques to the LRC offices with the promise of more to be delivered on the next pension pay date.[46]

In terms of the application, the Applicants sought an order permitting the matter to be brought as one of urgency; issuing a rule *nisi* calling upon the Respondents to show cause why orders should not be made against them convicting the First Respondent (the MEC for Welfare) of contempt of court for her wilful disobedience of the orders made against her;[47] convicting the Second (the Permanent Secretary), Third (legal advisor in the Welfare Department) and Fourth Respondents (Department official) of contempt of court for their wilful disobedience of the orders made against the First Respondent or alternatively, convicting them of being accomplices to the First Respondent's commission of contempt of court; sentencing those of the Respondents found guilty of these charges to such punishment as the court deemed meet; and ordering the Respondents, in their personal capacities, to be jointly and severally liable for all of the State's costs incurred in opposing the application.[48]

The Applicants sought a rule *nisi* because, they argued, the Respondents were not automatically entitled to be heard in the matter since they had, at the time of the launching of the application, done nothing towards complying with the orders, and in order to be heard, they would have to show good

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[45] LRC (Grahamstown) Quarterly Report July-September 1999 26

[46] LRC (Grahamstown) Annual Report 1998-1999 30

[47] On 2 April 1998 in ECD Case no.s 1340/97 and 1999/97 (unreported) in which the First Respondent had been ordered to pay the Applicants their social assistance grants and to continue to do so on a monthly basis thereafter. She had failed to comply with the orders.

[48] Notice of Motion

cause, preferably by purging their contempt.[49] The Applicants also argued that contempt proceedings were the only means available to them to secure compliance with the court orders even when the non-compliance related to a money debt because, in terms section 3 of the State Liability Act,[50] the Applicants were precluded from executing or attaching any property of the State in satisfaction of the orders made in their favour.[51] In response to the Respondent's argument that the application was no longer necessary since they had tendered payment of the arrears owed in terms of the orders, the Applicants argued, firstly, that the amount tendered to the Second Applicant was incorrect, and secondly, that there was no guarantee by the Respondents that they would continue to pay the Applicants' grants on a monthly basis for as long as they continued to qualify for such grants under the Act.[52]

The Applicants pointed out the evidence which the court had before it of the Respondents' poor performance in 39 similar matters over a lengthy period of time, and their flagrant disregard of orders made by the court, submitting that this should be of grave concern to the court.[53] It was further submitted that the appropriate punishment should take this state of affairs into account.[54]

At the first hearing, the LRC notified the Respondents' counsel that it would join further applicants if all outstanding matters were not attended to. In an order made by consent, the MEC undertook to effect payment or make a decision in respect of all orders of the High Court made against her. The LRC undertook to withdraw the applications if the MEC complied with this undertaking in full, but if she did not comply, the MEC was to explain her disobedience at the following hearing.[55]

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[49] Applicants' Short Heads of Argument, paragraph 13

[50] Act 20 of 1957

[51] Applicants' Short Heads of Argument, paragraph 17

[52] Ibid, paragraphs 18-20

[53] Ibid, paragraphs 21 and 22

[54] Ibid, paragraph 23

[55] Order dated 26 March 1999

A month later, the Applicants submitted that the Respondents had failed to purge their contempt since the last hearing and it appeared that it was admitted that they remained in contempt.[56] Further, it was submitted that the Respondents' contempt of court was particularly serious because of their flagrant disregard for and undermining of various constitutional provisions,[57] particularly those which obliged them to assist and protect the independence, impartiality, dignity, accessibility and effectiveness of the courts.[58] It was argued that it was important to remember that the Respondents' contempt had lasted for over a year, that they had disregarded undertakings that they themselves had given, and that they had ignored more than one court order.[59]

The Applicants had sought an order declaring the Respondents jointly and severally liable in their personal capacities for all of the State's costs incurred in opposing the application for their committal for contempt of court on the basis that the public interest demanded a punitive costs order; that the State, and ultimately the taxpayer, ought not to be rendered liable for the *male fide* conduct of the Respondents; and that such an order was justified in the exercise of the court's wide discretion to protect its dignity and effectiveness.[60] It was further argued that it was a well known principle that officials may be ordered to pay costs *de bonis propriis* when they act in bad faith and that the Respondents' conduct *in casu* was such that a finding that they acted *mala fides* was 'inescapable'.[61] It was pointed out that the Respondents had not seen fit to offer an explanation to contradict the Applicants' contentions in this regard.[62]

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[56] Applicants' Supplementary Heads of Argument, paragraph 3

[57] Sections 1, 2, 7(2), 165, 125(6), 133(3), 135, 195(1), and 237 and Schedule 2 were cited.

[58] Entrenched in section 65 of the Constitution.

[59] Applicants' Supplementary Heads of Argument, paragraphs 2-8

[60] Ibid, paragraphs 9 and 10

[61] See Regional Magistrate Du Preez v Walker 1976 (4) SA 849 (A) and Moeca v Addisionele Kommissaris, Bloemfontein 1981 (2) SA 357 (O) as examples of where costs *de bonis propriis* were ordered against officials.

[62] Applicants' Supplementary Heads of Argument, paragraph 14

The Respondents submitted that they had complied with all of the outstanding orders against them and argued that, since the Applicants had agreed to withdraw the applications if the Respondents complied with them, the Applicants could not apply for an order of contempt of court against them.[63] The Respondents further submitted that the Applicants had not proved beyond a reasonable doubt that they were in contempt of court and that accordingly, the application should be dismissed.[64] With regard to costs, the Respondents argued that for a court to make an order of costs *de bonis propriis*, there must be good reasons for such an order, such as a lack of *bona fides*. It was submitted that the Applicants had failed to prove that the Respondents' conduct was *mala fide* and that therefore the application should be dismissed.[65] It was further submitted that, if the court found that the original two Applicants were to some extent justified in making the application, the Respondents should be ordered to pay the costs of only those two Applicants and to do so in their official capacities, rather than their personal capacities.[66]

It took four more hearings and four more months before the officials finally complied with the orders in question and the contempt was eventually purged. This was a full 14 months after the orders were granted. Those orders should have been complied with within 14 days.[67] The proceedings were postponed finally to August 1999 for the determination of the Applicants' prayer regarding costs.[68]

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[63] Respondents' Supplementary Heads of Argument, paragraphs 2 and 3

[64] Ibid, paragraph 5

[65] Ibid, paragraphs 7 and 8

[66] Ibid, paragraph 10.2

[67] LRC (Grahamstown) Quarterly Report July-September 1999 27

[68] Counsel relied on the case of Re West Nissouri Continuation Board (1917) 38 Ontario Law Reports 207 in which the members of a municipal council refused to appoint persons to vacant positions on the board of trustees of a school, an obligation they had in terms of statute. After a mandamus was issued to compel the council to make the appointments, instead of complying, the councillors appealed on the single, narrow ground that no demand for them to comply had been made before the application had been launched. The appeal was dismissed and after some confusion over the issue of costs, in his final judgment, Riddell J stated that 'the whole trouble has been caused by the foolish...conduct of members of the township council, who seem to have imagined that their silly evasion of the order of the court would be accepted as an honest attempt to obey it', that they were personally to blame and that they should therefore 'suffer the legitimate consequences of their folly.' As a result, he gave a punitive costs

Prior to the commencement of the hearing, the Respondents' counsel tendered all of the LRC's clients' costs incurred in the proceedings to date and gave notice that they would do so again in open court, even though the LRC had not asked for the Applicants' costs in the matter.[69] It appears that the threat of holding public officials personally liable for the costs of litigation was sufficient to make the Department settle the matter quickly. The LRC decided to accept the offer since it was concerned that the court would hold that it had no further interest in the proceedings as the individual litigants

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order against the council and said that they had acted wrongly and had abused their positions. He held that 'nor can they be allowed to use public money to pay for the results of their own misconduct....the Legislature defines objects upon which money raised from the people by taxes can be spent - and so far not one of these can fairly be said to include paying for disobedience to a lawful order' (paragraphs 215-16). On this basis, Riddell J ordered that 'The individual members of the council will indemnify the township against all costs, repaying to the township all costs, between solicitor and client, and all costs the township is obliged to pay. The Respondents are to have all their costs payable by these individuals' (paragraph 216). See too C Plasket 'Protecting the Public Purse: Appropriate Relief and Costs Orders Against Officials' (2000) *SALJ* 151 158 where he argues that 'South African courts probably have inherent jurisdiction to issue costs orders similar to the one issued in Re West Nissouri Continuation Board, although none has done so. This type of costs order is, however, probably best suited to, and more easily justifiable for, the vindication of constitutional rights where the public interest in relief such as this is often obvious and apparent: such an order may amount to appropriate relief for the purposes of [section] 38 of the Constitution when unconstitutional administrative conduct is of such an order of bad faith that it does not only harm the individual against whom it is primarily directed, but also 'impedes the fuller realisation of our constitutional promise' (Fose v Minister of Safety and Security 1997 (7) BCLR 851 (CC), paragraph 95)'. The Respondents *in casu* argued that since the proceedings for contempt were launched after the contempt had already been purged in several of the matters, the proceedings were thereby rendered ineffective (Further Heads of Argument for the Respondents, paragraph 13). Counsel also argued that since the orders in question were judgments *ad pecuniam solvendam* (that is, where the payment of a sum of money resolves the matter), and since such orders cannot be enforced by committal for contempt, the Applicants seeking committal for want of payment in terms of the orders failed on this ground and accordingly could not have their costs (paragraphs 14-18). It was argued that the application was defective against all but the First Respondent since the Second, Third and Fourth Respondents had not been Respondents in the proceedings resulting in the orders in question (paragraph 20). It was denied that the Respondents had demonstrated the wilfulness or *mala fides* necessary for an order of contempt to be granted (paragraph 23). The Respondents argued that no basis had been made either in fact or law for the order of costs sought against them in their personal capacities. It was submitted that in the proper case, the court would order company directors, liquidators, administrators and even insolvents to pay costs *de bonis propriis*, but that this did not extend to Ministers, government officials or employees acting in their personal capacities (paragraphs 24 and 25). It was submitted that not only was a proper case not made out for a costs order *de bonis propriis*, but that one could not in any event be made against officials of the State in their personal capacities (paragraph 26). Since it was submitted that 'not only are the applications in this matter fatally defective as pointed out above, there is in any event, no basis for the costs order sought', it was argued that the application should be dismissed (paragraphs 29 and 30).

[69] LRC (Grahamstown) Quarterly Report July-September 1999 27

had now achieved more than they set out to in the Notice of Motion. The question of the State's costs was solely one in the public interest.[70]

Subsequently, the Permanent Secretary made a public apology to all pensioners who had been affected by the Department's failure to comply with the court orders. The Applicants accepted his apology and finally received payment.[71]

Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government

This application arose out the LRC's Advice Office visits to Molteno. It concerned the cancellation of the disability grants received by the Applicants until the Department's re-registration procedure at the end of 1997 and beginning of 1998. There appeared to be no discernable pattern amongst the recipients whose grants were cancelled that gave any indication as to why they were cancelled: none of them were revealed to be 'malingerers' on investigation and the District Surgeon's records showed that they all suffered from varying degrees of permanent disability. None of the recipients were notified that the Department was considering cancelling their grants, supplied with the information on which the decision to cancel their grants was based, or given any opportunity to make representations as to why their grants ought not to be cancelled.[72] Letters of enquiry to the Department from both the Molteno Advice Office and the LRC received no response. Even when an Advice Office worker arranged for two of the most desperate cases (those who were unable to walk) to be examined by the Regional Medical Officer personally, no response was forthcoming.[73]

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[70] Ibid 27-8

[71] LRC Annual Report 1998-1999 19-20

[72] LRC (Grahamstown) Quarterly Report July-September 1999 28-9

[73] Ibid 29

Because of this lack of response, the LRC decided to launch two applications against the Permanent Secretary and the MEC on both procedural and substantive administrative justice grounds. The individual cases were divided between the two applications depending on when the grants were cancelled. The applications were launched in order to test both the Department's procedures for the cancellation of social grants, as well as the rationality of the decisions to cancel them. The LRC was of the view that both fell short of the requirements of the Act and Regulations, as well as section 33 of the Constitution.[74]

After the applications were launched, the Supervising Regional Doctor who had made the decision to cancel the grants visited Molteno with the Respondents' attorneys to examine the Applicants personally. He had not examined the Applicants before deciding to cancel their grants, and although the only information which he had before him when he took the decisions was the District Surgeon's report which favoured the continuation of all of the grants, he had irrationally rejected it. Subsequent to the visit, the Respondents unconditionally and retrospectively reinstated all of the Applicants' grants, with the exception of that of Mr Bushula. The Department chose to oppose his case, even though the procedural grounds were the same as those for all of the other Applicants, since the Department felt that Mr Bushula had never been deserving of a grant and that his grant had been legitimately cancelled.[75]

Mr Bushula was a 50 year old man who was both disabled and illiterate. He supported a wife and two children and was left destitute on the cancellation of his disability grant. He had lost three fingers on his right hand in an accident involving a threshing machine on a farm and consequently had never been able to find any permanent or regular manual employment such as to provide him with the means to maintain himself and his dependants. He applied for a disability grant in 1991 and began receiving it four months later. In June 1997 when he went to collect his monthly grant, he was verbally

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[74] Ibid

[75] Ibid

informed by a welfare clerk that his grant had been cancelled.[76] He had not been given notice, nor an opportunity to make representations as to why his grant ought not to be cancelled, nor reasons for such cancellation prior to being informed of the decision to cancel his grant, and none of these rights were later afforded to him.[77] Subsequently, the decision to cancel Mr Bushula's disability grant was justified by the argument that many people who have lost not only the first phalanges of three fingers but an entire hand and/or arm or other limb, were in permanent and regular manual employment.[78] The decision was taken in ignorance of Mr Bushula's educational qualifications, employment history, and skills, as well as the prevailing employment opportunities in Molteno or any information beyond the medical reports.[79]

An Advice Office worker in Molteno advised Mr Bushula to wait for six months and then to reapply for his grant which he did. He received no response to this application from the Department and despite being interviewed by the Welfare Department's District officials, any attempt to have his grant reinstated proved to be fruitless.[80] It was at this point that the LRC launched the application on Mr Bushula's behalf.

The Applicant sought an order declaring the decision of the First Respondent (the Permanent Secretary), or his delegate, to cancel or suspend the Applicant's disability grant unlawful, invalid and of no force and effect; declaring the Applicant entitled to payment of his grant from the date of cancellation or suspension; compelling the First Respondent, alternatively the Second Respondent (the MEC), to reinstate the Applicant's grant with effect from the date of cancellation or suspension; and compelling the Respondents, jointly and severally, to pay the Applicant arrears.[81]

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[76] Founding Affidavit, paragraphs 12-14

[77] Ibid, paragraph 15

[78] Respondents' Opposing Affidavit, paragraph 16.7(i)

[79] First Applicant's Heads of Argument, paragraph 4.11

[80] Founding Affidavit, paragraph 16

[81] Notice of Motion

The Applicant submitted that, in taking the decision to cancel or suspend his disability grant, the Permanent Secretary had acted beyond his powers to suspend or cancel welfare grants in terms of the Act and Regulations; that the Applicant's right of access to social security, including social assistance, in terms of section 27(1)(c) of the Constitution had been infringed since he was destitute as a result of his disability and unable to support himself or his dependents; and that his right to human dignity in terms of section 10 of the Constitution had been infringed since the cancellation of his grant had forced him into a hand-to-mouth existence. The Applicant argued that the case rested squarely on the right to just administrative action in terms of section 33 of the Constitution read with item 23(2)(b) of Schedule 6, and that the Respondent had breached every one of the four components of this right, each of which was able to sustain the relief sought on its own.[82] It was submitted that his right to lawful administrative action had been infringed because his grant was cancelled without a lawful statutory basis, because the Permanent Secretary could not have applied his mind properly, if at all, to the facts and circumstances of the case, and because the decision-maker must have been influenced by improper or irrelevant considerations and could not have afforded any, or adequate, weight to the factual circumstances deposed to and the infringements of rights which flowed from the cancellation or suspension of his grant;[83] that his right to procedurally fair administrative action had been infringed since no notice of the Department's intention to cancel or suspend his grant, no opportunity to make representations as to why it should not be cancelled and no notice of any changes in the policy of the Department which would prejudicially affect the Applicant were given; that his right to be furnished with reasons in writing for administrative action which affected his rights or interests had been

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[82] First Applicant's Heads of Argument, paragraph 3. Section 33(1) of the Constitution provides that everyone has the right to just administrative action that is lawful, reasonable and procedurally fair. Section 33(2) provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Item 23(2) (b) of Schedule 6 made provision for the right to just administrative action until the legislation envisaged by section 33(3) was passed. It was, in essence, a re-statement of section 24 of the Interim Constitution which provided: 'Every person shall have the right to- (a) lawful administrative action where any of his or her rights or interests is affected or threatened; (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened; (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened'.

[83] Founding Affidavit, paragraph 18

infringed since he had not been furnished with reasons for the cancellation of his disability grant; that his right to administrative action which is justifiable in relation to the reasons given for it had been infringed since the cancellation or suspension of his grant flew in the face of the District Surgeon's observations and opinions and was irrational and unreasonable[84] and the cancellation or suspension of the grant in the circumstances was only explicable on the basis that the decision-maker acted arbitrarily or capriciously because the Applicant had been consistently found to be disabled and had not recovered from his disability since first being diagnosed as disabled; and that his common law rights to lawful, procedurally fair and reasonable administrative action had been infringed for the reason set out above.[85] On this basis, the Applicant submitted that the decision to suspend or cancel his disability grant was *ultra vires* the Permanent Secretary's powers in terms of the Act and Regulations, unlawful, in conflict with the requirements of the Constitution, and invalid.[86]

The Respondents admitted that the facts of the matter were not in dispute and stated that the issue for decision was whether they had given the Applicant a hearing that complied with the requirements of natural justice.[87] They argued that it could not be seriously suggested that the decision to cancel the Applicant's grant was not justifiable or did not satisfy the test of reasonableness;[88] that the completion of the review application and the medical examinations of the District Surgeon and the Supervising Regional Doctor[89] constituted a hearing that was just and right and fair in the

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[84] Ibid, paragraph 20.1 and First Applicant's Heads of Argument, paragraph A3

[85] Ibid, paragraphs 19-21

[86] Ibid, paragraph 22

[87] Respondents' Heads of Argument, paragraphs B1(a) and (b)

[88] In the case of Kruse v Johnson [1898] 2 QB 91, 'unreasonableness' was described as meaning 'partial', 'unequal', 'manifestly unjust', 'disclosing bad faith', 'oppressive' or 'constituting gratuitous interference with rights' (at 99-100).

[89] The review procedure which was followed by the Department generally, and in the case of the Applicant, was set out in the Opposing Affidavit of the Assistant Director of Social Security, as follows:
'(i) a medical officer (usually a district surgeon or medical practitioner employed at a State hospital) had to medically assess the beneficiary and complete a medical report;
(ii) thereafter the beneficiary had to complete the prescribed application form - not to apply for a grant, but for purposes of review;

circumstances;[90] and that the Applicant's reliance on the Department's failure to have due regard to the scarcity of employment in the district was an afterthought which was not mentioned in the founding papers. The Respondents argued that the case which they were required to meet was that the Applicant's grant had been cancelled with no notice, no opportunity to make representations, and no reasons being given to him prior to being informed of the decision to cancel his disability grant;

(iii) thereafter the completed medical form as well as the application form would be forwarded to the medical pensions officer for assessment. The medical pensions officer would record his assessment on the same medical form which was completed by the first medical officer;
(iv) thereafter the completed medical form and the application form would be forwarded to the person with delegated powers to review grants;
(v) and while a beneficiary's grant was being reviewed he continued receiving the grant'
(Opposing Affidavit, paragraph 8).

[90] In Van Huyssteen v Minister of Environmental Affairs and Tourism 1996 (1) SA 283 (A) at 305B-F, Farlam J stated that the classical formulation of the common law *audi alteram partem* and *nemo iudex in sua causa* rules included the 'principles and procedures which, in the particular situation or set of circumstances, are right and just and fair' and that this was the correct test under section 24(b) of the Interim Constitution. There have subsequently been a number of SCA decisions of note which dealt with the issue of procedural fairness and which cited the English case of Doody v Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92 (HL) with approval. In Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A), Corbett CJ cited Lord Mustill's comments in the matter with approval where he said that, in answering the question of what the duty to act fairly demands of the public official or body concerned, "useful guidance may be derived from some of the English cases on the subject. In Doody v Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92 (HL) Lord Mustill stated the following in a speech concurred in by the remaining members of the Court (at 106d-h): 'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the Courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in the application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have the opportunity to make representations on his own behalf either before the decision is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'...Though Lord Mustill was dealing with the power of the Secretary of State to release on licence prisoners who had received mandatory sentences of life imprisonment, I understand his statement to be of general application' (at 231H-232D). This passage of Lord Mustill's was also cited in Chairman, Board of Tariffs and Trade, and Others v Brenco Inc and Others 2001 (4) SA 511 (SCA), paragraph 13.

and that none of these rights been afforded to him subsequently,[91] which case was not made out or supported by uncontested evidence.[92]

In his judgment, Van Rensburg J held that once a disability grant was granted, it conferred on the beneficiary the right to receive the grant until it was lawfully terminated in terms of the Act and the Regulations. He held that this could not be done without the right to procedurally fair administrative action, including the right to be heard, being observed. On this basis, he found that the Applicant was entitled to a hearing before his grant was cancelled.[93] He held that the completion of the application form and medical report could not be regarded as affording the Applicant the right to be heard in an inquiry concerning his right to continue receiving his grant.[94]

Van Rensburg J held that the Applicant should have been given proper notice of the Department's intention to review his grant before so drastic a step as the cancellation of his grant could be considered.[95] Proper notice required adequate steps to be taken to ensure that the Applicant received such notice and the Applicant was entitled to individual notice, giving him the relevant information on which the Department would base the decision and where and when he would be given an opportunity to be heard on the matter.[96] It was held that the generalized notice procedure could not be considered as sufficient to constitute proper notice of the possible cancellation of his grant. The court held that the Respondents' argument that the large number of grants which the Department had to review made it impractical for it to give each beneficiary individual notice had no merit, since the Department could have included individual notice in each of the beneficiaries' pay packets.[97]

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[91] Founding Affidavit, paragraph 9

[92] Respondents' Heads of Argument, paragraphs B3(a) and (b)

[93] At 854D-F

[94] At 855D

[95] At 855F-G

[96] At 855G-I

[97] At 855I-856B

The Respondent had also failed to comply with the requirements of Regulation 21(2) of the Regulations in force at the time which required written reasons for the decision to cancel a grant. It required that when a decision adverse to an applicant was reached, the Respondent was required to suspend the grant and furnish the applicant with reasons for the suspension of the grant as well as a statement informing the Applicant of his right to apply for the restoration of the grant within 90 days of the date of the suspension thereof. Only once the Respondent had complied with the procedures laid out in Regulation 21(2) and in the event of any application for the restoration of the grant being unsuccessful, could the Respondent cancel the grant.

Because of the fact that the Applicant was not given proper notice of the Department's intended review and cancellation of his grant; the fact that he was not given the opportunity of a hearing, let alone a fair one; and the fact that the decision to cancel or suspend his grant was taken summarily and unilaterally, the court found that the decision had to be set aside.[98] The Respondent's failure to comply with the provisions of Regulation 21(2) rendered the decision to cancel the Applicant's grant invalid and for this reason to, it had to be set aside.[99] On this basis, the Applicant was found to be entitled to the relief he sought.[100]

The judgment did not deal with the right to reasonable administrative action, even though the Applicant argued that the administrative action in this case was unreasonable. Van Rensburg J found it unnecessary to decide this issue since he had already come to the conclusion that the Applicant was entitled to the relief he sought.[101]

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[98] At 856 D-E

[99] At 856 E-I

[100] At 857A-B

[101] At 857B-C

Nomala v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another

In Bushula's case,[102] it was made clear that for a decision to suspend a grant to be valid, written notice of the decision and reasons for such decision, along with a statement to the effect that the applicant could apply for the restoration of the grant within 90 days, had to be supplied to the applicant.

This requirement had been long ignored by the Department and beneficiaries were often told at pay points that there was no money for them or that they were 'able to work' and so would not receive payment. The Department later took to providing beneficiaries with standard form letters which purported to give reasons as to why their grants had been cancelled or suspended. This letter stated that the beneficiary's grant had been 'rejected' and listed five grounds for the rejection. Next to each of these reasons was a square bracket and a mark was placed in the appropriate square bracket to indicate the ground on which the particular grant had been rejected. The five grounds listed were: 'not disabled', 'condition is treatable', 'specialist's report required', 'medical form incomplete', and 'not enough objective medical information'.[103]

Norentji Nomala was an unemployed woman who lived with her unemployed husband and her grandchild. She never attended school and was therefore unable to read or write. She could speak only Xhosa. She worked as a domestic worker from 1961 until 1995 when she was no longer able to work because of her disability. This was the only type of work she has ever done and she was neither trained nor otherwise equipped to do any other work.[104]

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[102] *Supra*

[103] Founding Affidavit, paragraphs 42-44

[104] Ibid, paragraphs 10-13

In 1989, Ms Nomala began to display symptoms of rheumatoid arthritis and her condition grew steadily worse until by 1995, she was no longer physically able to continue working as a domestic worker. Her condition was so bad that she could not stand up without help,[105] and she therefore applied for a disability grant. Her application was successful and she began receiving her grant which was paid into her bank account monthly. This grant was her only income and her former employer paid for her medication.[106]

Early in November 1998, Ms Nomala received a letter from the Permanent Secretary of Welfare informing her that her 'temporary grant' had expired and that payment thereof would cease at the end of January 1999. It also stated that if she felt she qualified for a further temporary disability grant, she should reapply without delay. When Ms Nomala went to withdraw her grant later in November, she discovered that it had not been paid into her account and that the last time she had been paid was in October.[107]

She reapplied for her grant in January 1999 and after receiving no response from the Department, she consulted an attorney at the LRC in June 2000. In a letter to the Department, her attorney stated that Ms Nomala had been unaware that her grant had been temporary and that the Regulations applicable to her did not make provision for such a type of grant. The letter further stated that Ms Nomala's medical condition was severe and had not changed since she originally applied for a disability grant and that she was entitled to a permanent disability grant. It also stated that she should have been given notice of the cancellation of her grant and an opportunity to be heard as well as reasons for the decision to cancel her grant. The letter requested that her grant be reinstated from the date of its cancellation.[108]

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[105] Ibid, paragraph 14

[106] Ibid, paragraphs 15 and 18-20

[107] Ibid, paragraphs 21 and 22

[108] Ibid, paragraphs 23-25

This letter elicited no response from the Department, so the LRC re-sent it and a month later, Ms Nomala received a reply from the Department which stated that her grant had been reviewed and that she had been found to be 'not disabled'. It was alleged that a letter had been posted to her in May 2000, informing her that she was entitled to appeal against this decision. In fact Ms Nomala received the letter in September 2000 and it stated that her grant had been 'rejected' on the ground that she was 'not disabled'. It also stated that if Ms Nomala wished to appeal against the decision to 'reject' her grant, 'it must be done in writing within 90 days of notification'.[109]

The LRC launched an application on behalf of Ms Nomala against the Permanent Secretary and the MEC in October 2000 seeking an order declaring the decision to suspend or cancel her grant unconstitutional, unlawful and invalid; directing the Respondents to reinstate her grant, to pay her arrears and to pay interest on the arrears at the prescribed legal rate; declaring that the grounds listed by the Respondents for the cancellation or suspension of disability grants and set out in the standard form letter did not constitute reasons as required by Regulation 23(2) of the relevant Regulations; alternatively, declaring that the ground upon which the Respondents purported to suspend or cancel her grant, namely that she was 'not disabled', did not constitute a reason as required by Regulation 23(2); and declaring that the third, fourth and fifth grounds listed by the Respondents for the suspension or cancellation of disability grants did not constitute lawful reasons for the suspension or cancellation of disability grants.[110]

The Applicant submitted that the two letters that she received from the Department which had stated that her grant had been cancelled on the ground that she was 'not disabled' constituted a bad faith attempt to justify the unlawful cancellation or suspension of her disability grant in November 1998. The initial letter she had received from the Department clearly and unequivocally informed her that her grant was temporary and that it was to expire. It said nothing about the review of her grant and did not constitute notice of the review of her grant. No mention was made of the allegation that she

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[109] Ibid, paragraphs 26-28

[110] Notice of Motion

was not disabled.[111]

She also submitted that the decision to cancel or suspend her disability grant in the circumstances constituted a serious assault on her dignity, protected in terms of section 10 of the Constitution; it infringed her right to lawful, procedurally fair, and reasonable administrative action in terms of section 33 of the Constitution, her right to be free from arbitrary deprivation of property in terms of section 25(1) of the Constitution and her right of access to social security, including social assistance, in terms of section 27(1)(c) of the Constitution; and it conflicted with the principle of legality which flowed from the founding values of supremacy of the Constitution and the rule of law entrenched in section 1(c) of the Constitution.[112]

The issue of the retrospective reinstatement of the payment of the Applicant's disability grant was settled and an order was issued by consent, declaring that the decision to cancel or suspend her disability grant was unconstitutional, unlawful and invalid; and directing the Respondents to reinstate her grant and to pay her arrears from the date of cancellation of her grant.[113] The matter was postponed for the outstanding issues to be dealt with. They were identified by the Applicant as her standing to seek the declarators set out in the Notice of Motion,[114] the legal validity of the standard form reasons used by the Department officials responsible to justify decisions taken to withhold or reject payment of statutorily regulated welfare grants[115] and the question of her entitlement to interest.

It was submitted by the Applicant that she had standing to act in her own interest under section 38(a) of the Constitution to seek a declaratory order that the ground relied on by the Respondent, namely that the Applicant was 'not disabled', was not a reason for the suspension of a disability grant as

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[111] Founding Affidavit, paragraph 29

[112] Ibid, paragraph 30 and 31

[113] Applicant's Heads of Argument, paragraph 2

[114] Ibid, paragraph 6.1

[115] Ibid, paragraph 3

contemplated by Regulation 23(2)[116] since this was the ground on which her grant had purportedly been cancelled.[117] The Applicant also submitted that she had standing under section 38(d) of the Constitution to act in the public interest to seek a declaratory order that this ground and the other grounds listed in the standard form letter were not reasons for the purposes of Regulation 23(2) and that the third, fourth and fifth reasons were not lawful reasons for the purposes of suspending or cancelling the grants of beneficiaries.[118]

The Applicant argued that she had standing to act in the public interest on ten grounds. She argued that over a period of three or four years, the number of social grant recipients in the Eastern Cape had been reduced by tens of thousands and that the processes, procedures and requirements for cancellation or suspension affected and were of importance to a large number of people. She submitted that there was no reason to believe that the suspension or cancellation of social grants on a large scale would not continue.[119] The Applicant also argued that the Respondent had only recently made any attempt to comply with Regulation 23(2) and that it and its predecessor had been 'flouted for some time'. She submitted that it was therefore in the public interest that the Department be corrected by the Court when it had misconstrued the law and its obligations in attempting to comply with the Regulation.[120]

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[116] Regulation 23(2) provided that 'The Director-General shall review a grant at times...and...increase, decrease or suspend a grant...and inform the beneficiary of his or her reasons in writing...'

[117] In terms of section 38, 'anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief...The persons who may approach the court are-
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons; and
(d) anyone acting in the public interest.'

[118] Founding Affidavit, paragraph 39

[119] Ibid, paragraph 40.1

[120] Ibid, paragraph 40.2

She argued that the failure to give proper reasons had a wide impact in that every beneficiary whose rights were affected by a decision as contemplated by Regulation 23(2) would have been subjected to unlawful administrative action. Those people would also have been denied the means to utilise the appeal mechanism provided for by the Act and Regulations[121] and therefore would have been subjected to procedurally unfair administrative action.[122]

She submitted that all of those affected by the Department's failure to provide proper reasons for its decisions to suspend or cancel their grants had certain common characteristics, namely, all of them had been held to qualify for social assistance in terms of the Act and to therefore have vested rights to the continuation of payment of their grants; all of them were poor and as a group, probably constituted the most marginalised, powerless and indigent people in the province; all of them were unable to vindicate their rights as a result of their poverty, in that they were unable to pay for the services of lawyers; all of them were unable to obtain legal aid because of the 'virtual collapse' of the legal aid system and because 'its prime focus, to the extent that it still functions, is on criminal justice'; and all of them were probably unaware that their rights had been infringed when they received the standard form letter.[123]

The Applicant argued further that large numbers of the affected beneficiaries lived in rural areas and because they were further away from the limited means of assistance that might be available to urban dwellers, they were even more vulnerable to unlawful and procedurally unfair administrative action.[124] The Applicant submitted that there was no other more effective or practical way to resolve the matter than by litigation, given the poverty and the other disadvantages of the affected beneficiaries. She

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[121] Regulation 23(2) provides that 'The Director-General shall...inform the beneficiary of...the 90-day period referred to in subregulation (6) for an application for the restoration of the grant' and Regulation 23(6) provides that 'If an application is made for the restoration of a grant, the Director-General may restore the grant from the date on which the grant was suspended: Provided that the application for restoration shall be made within 90 days of suspension.'

[122] Founding Affidavit, paragraph 40.3

[123] Ibid, paragraph 40.4

[124] Ibid, paragraph 40.5

submitted that the denial of public interest standing in the circumstances would amount to denying the rights of all those who would be notified of the cancellation or suspension of their grants by way of the standard form letter.[125] She also submitted that it was appropriate that she be afforded standing in the matter, particularly since the relief she sought in the public interest was declaratory and for this reason general and prospective in nature.[126]

The Applicant argued that the issue in dispute, namely the constitutionality and lawfulness of the standard form grounds for the suspension or cancellation of grants, would be identical in the case of every person whose grant was suspended or cancelled and that the only difference between cases would be the block marked on the letters.[127] For this reason, she argued that the resolution of the dispute in the form of a representative action would be a cost effective utilisation of judicial resources since it would determine a major issue of public concern and public interest in one application.[128] Finally, the Applicant submitted that it was unlikely that the beneficiaries who would be affected by the decision in the matter would, practically speaking, be able to apply to become parties to the matter, so there was no other practical way of proceeding other than by her acting in a representative capacity and furthermore, she submitted that their rights would be adequately catered for.[129]

With regard to her submission that the five grounds listed by the Respondents did not constitute reasons as contemplated by Regulation 23(2), the Applicant argued that the standard form reasons were merely repetitions of the conclusions reached by the responsible officials, but did not convey any information regarding the reasoning process leading to the decision being taken. The very purpose of giving reasons for such decisions was to hold public officials accountable for their decisions which affected the livelihood of those unable to support themselves, to improve the

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[125] Ibid, paragraph 40.7

[126] Ibid, paragraph 40.8

[127] Ibid, paragraph 40.6

[128] Ibid, paragraph 40.9

[129] Ibid, paragraph 40.10

rationality of the decisions made, and to instil confidence in the beneficiary that the matter was properly and justly decided[130] and this was not being done.

The Respondents averred that the standard form reasons fulfilled the requirements of the Regulations and of the Constitution and their only articulated defence to the declaratory relief sought was that the standard from reasons were supplied in the context of the rejection of re-applications for cancelled disability grants and not as justification for the initial cancellation of disability grants. The Respondents contended that this made the adjudication of the lawfulness of the standard form reasons in the context of the initial cancellation of grants 'inappropriate'.[131] On this basis, the Respondents argued that the Applicant sought standing on the wrong premise, that being that her grant had been cancelled. It was submitted that this was not supported by the facts since it was clear that the letter the Applicant had received which stated that her grant had been 'rejected' because she was 'not disabled', was written as a response to all of her applications. Further, the Respondents argued that there was no evidence to the effect that this was used for the suspension of the disability grants of other people. On this basis, it was submitted that the court should refuse the Applicant standing under section 38(d) of the Constitution to act in the public interest.[132]

With regard to the question whether the reasons contained in the standard form letter constituted proper reasons for the rejection of applications for disability grants, the Respondent argued that it was clear from the requirements of section 3 of the Act[133] and from the Regulations that an application could be refused if an applicant did not meet the requirements contained therein. It was argued that

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[130] Applicant's Heads of Argument, paragraph 3

[131] Ibid, paragraph 4

[132] Respondents' Heads of Argument, paragraphs 5-7

[133] Section 3 provides that 'Subject to the provisions of this Act, any person shall be entitled to the appropriate social grant if he satisfies the Director-General that he-
(a) is an aged or disabled person or a war veteran;
(b) is resident in the Republic of at the time of the application in question;
(c) is a South African citizen; and
(d) complies with the prescribed conditions.'

all of the grounds listed in the letter were grounds on which an application could be validly rejected - in particular, the ground 'not disabled' referred to the fundamental requirement of the Act that a person be disabled in order to receive a disability grant and therefore this constituted a valid reason for the cancellation of a grant. The Respondent submitted that the reasons which were sufficient in any particular case depended on the facts of the case; that they could not be regarded as deficient merely because every process of reasoning was not set out; and that 'the reasons act as a road sign indicating the reasoning of the decision maker.'[134]

In his judgment, Pillay AJ noted that the Applicant had argued that she had standing to act in her own interest because the standard form letter had been used, *in casu*, in the context of the cancellation of a disability grant, while the Respondents argued that it had been used in the context of the rejection of a re-application for a disability grant and not a cancellation and that therefore the declarator sought by the Applicant was 'academic'.[135] Pillay AJ held that it was not a requirement for a litigant acting in her own interest that she be the person in whom the fundamental right at issue vests and therefore that the Applicant was entitled to act in her own interest under section 38(a) of the Constitution in the determination of whether these reasons did in fact justify the cancellation of a disability grant.[136]

With regard to the question of the Applicant's standing to act in the public interest under section 38(d) of the Constitution, Pillay AJ stated that a full bench of the Eastern Cape Division of the High Court had held that the issue of whether a litigant will be accorded public interest standing, regardless of their own interest in the matter, depended solely on whether the matter was of purely academic interest or not.[137] He pointed out that the Respondents appeared to concede that the matter was one of public interest since they had not taken issue with any of the allegations made in this regard by the

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[134] Ibid, paragraphs 9-11

[135] At 852A-B

[136] At 853D-F

[137] At 853G. This was held in Port Elizabeth Municipality v Prut NO and Another 1996 (4) SA 318 (E) at 324F-326B.

Applicant. He was of the opinion that the issue of public interest standing was ultimately a question of justiciability and quoted Melunsky J in Port Elizabeth Municipality v Prut NO and Another where he held that 'it is...not only a person whose rights are infringed or threatened who may apply for appropriate relief: it is sufficient if there is an allegation of an infringement of or a threat to a right'.[138] On this basis, he held that the Applicant did have standing to act in the public interest.[139]

With regard to the question of the legal validity of the reasons used by the Department, Pillay AJ held that the first two reasons contained in the standard form letter, namely that the applicant was 'not disabled' or that his or her 'condition is treatable', disclosed nothing of the Department's reasoning process or of the information on which the decision was based and therefore, a rejected beneficiary whose grant had been cancelled would be in no better position attempting to exercise their right to appeal against the decision than they would have been were they applying for the grant for the first time.[140] He held that the third, fourth and fifth reasons, that there was insufficient information for a proper decision to be taken, constituted grounds for judicial review. Even at common law, a failure to take relevant information into account before taking a decision adverse to a person's livelihood constituted a ground for judicial review.[141] Furthermore, he found that these reasons did not educate the applicant or beneficiary about what to address in an appeal or a new application. They were found not to instil confidence in the process and to have failed to improve the rational quality of the decisions arrived at. Pillay AJ held, therefore, that the Department's continued use of these reasons was doing the administration of welfare in the Eastern Cape a disservice and that it did not matter whether these reasons were used to justify a decision to cancel or suspend a grant in terms of Regulation 23(2) or a decision to reject an application in terms of Regulation 25(2). On this basis,

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[138] *Supra*, at 325I. He also referred to Pickering J's remarks in this regard in Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa 1996 (3) SA 1095 (Tk) at 1105, especially A-B.

[139] At 854A

[140] At 856D-E

[141] At 856E-F. See In re Duma 1983 (4) SA 469 (N) and Lek v Estate Agents Board 1978 (3) SA 160 (C) paragraphs 172-173, confirmed by Estate Agents Board v Lek 1979 (3) SA 1048 (A).

the court held that the reasons were insufficient and invalid in law.[142]

Finally, the court granted the Applicant her claim for interest on the arrears owed to her. Although the court was satisfied that the Prescribed Rate of Interest Act[143] was not applicable in the matter, it was equally satisfied that justice and equity demanded that the Applicant be granted interest as 'constitutional relief'.[144] The court was empowered to grant such relief in terms of section 172(1)(b) of the Constitution[145] and did so because the Applicant had received no money from the Department for approximately two years and had therefore suffered immense hardship.[146]

Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another

This application was brought by four people to challenge the lawfulness of the cancellation of their disability grants and also to act on behalf of everyone whose disability grants had similarly been cancelled in the Eastern Cape between 1 March 1996 and 28 September 2000. It contained detailed information regarding the workings of the welfare system and a decision on the matter had the potential to affect thousands of people in the Eastern Cape.

During the course of the amalgamation and unification of the welfare system in the Eastern Cape, social grant beneficiaries were required to reapply and re-register for their grants. This procedure was called a 'review' or 're-registration' process, but appeared to be indistinguishable from the

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[142] At 856G-H

[143] Act 55 of 1975

[144] As in Mahambehlala v MEC for Welfare, Eastern Cape, and Another 2002 (1) SA 342 (SE) discussed in the previous chapter.

[145] Section 172(1)(b) states that 'When deciding a constitutional matter within its power, a court-
...
(b) may make an order that is just and equitable...

[146] At 857D-858C

process followed for first-time applications.[147] At the conclusion of the amalgamation process, the total number of social welfare recipients listed in the Eastern Cape was 630 574 people.[148] The first review process was initiated by the Permanent Secretary during March 1996 and by August 1998, the Director of Social Security had disclosed that the Department was paying social grants to a total of 536 000 welfare beneficiaries. It was submitted by the Applicants in the Ngxuza matter that, since the Department must have processed and approved thousands of applications between March 1996 and August 1997, more than 100 000 beneficiaries had been eliminated from the welfare system as a result of the review and re-registration process.[149]

The 'review' procedure followed generally by the Department was outlined in Bushula's case in which it had been held that the Department's procedures that it followed in the cancellation of social assistance grants were unlawful. Following this judgment, the LRC found that there was no discernible change in the Department's procedures and therefore used the description of the procedures outlined in the Answering Affidavit filed in the matter as the basis of the class action it

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[147] Founding Affidavit, paragraph 23. In a media statement which was issued on 23 November 1999 by Mamkeli Ngam, Communications Officer for the Department regarding 'The true meaning and purpose of the Eastern Cape re-registration process,' it was argued that the re-registration exercise was not about removing people from the system, but rather about purifying its systems to ensure that it paid the right people, the rights amounts, at the right place and at the right time and to ensure clean administration and the auditing of beneficiary records. It was stated that the exercise was based on the National Department's decision to re-register social grant beneficiaries in all nine provinces for the purpose of enhancing the accuracy, currency, validity, legal compliance and overall integrity of its national database and it excluded disability grant beneficiaries. Mr Ngam argued that the initiative should be seen as a genuine attempt to audit its records regarding social grant beneficiaries. He stated that the Department did not share the view that it was crying fraud and corruption to 'whittle down the number of beneficiaries' as some critics claimed, but said that it undertook to investigate each case individually before any decision was taken about the suspension or cancellation of the grant concerned. He said that there were benefits that would derive from the implementation of the process for both the Department and citizen beneficiaries. Key amongst these were the following: the right amounts would be made to the right people, at the right time and at the right place; the inadequacies of the current database, particularly with regard to addressing information details concerning beneficiaries (*sic*), frustrated the process of engaging in constant communication with beneficiaries thus compromising the Department's service delivery commitment; the re-registration exercise would also enable the Department to introduce the new Welfare Payment Information System on a clean slate in the following financial year; and business decisions in respect of the social security function would be made at strategic levels within the Welfare sector.

[148] Founding Affidavit, paragraph 21

[149] Ibid, paragraph 27

launched against the Department.[150]

Mr Ngxuza's circumstances were typical of the disability grant recipients whose grants were cancelled or suspended during the review process detailed above. He was a mine worker in Gauteng between 1960 and 1961 and was involved in an accident at work in 1961 which resulted in the amputation of four of the fingers of his left hand. Because of the resultant disability which he suffered, and since he never attended school and was illiterate, Mr Ngxuza had been unemployed and unable to support himself since then. He therefore applied for a disability grant in Grahamstown during 1974 and began receiving his grant approximately four months later.[151]

In March 1998, he was told by a district welfare official that his grant had been cancelled. The official was unable to give reasons for the cancellation and he did not suggest that Mr Ngxuza make any representations regarding the cancellation of his grant, nor did he advise him that this was possible. Mr Ngxuza had been given no notice that the Department had been considering cancelling or suspending his grant and he was told that the only thing he could do would be to reapply for his grant, which he subsequently did on four occasions to no avail. He was later told that one of his applications had been rejected for want of adequate information to warrant the award of a disability grant.[152]

Mr Ngxuza and the three other Applicants in this matter, together with their legal representatives, tried to resolve the matter by holding meetings with the MEC, but when the Department failed to implement the measures agreed to at these meetings,[153] the Applicants launched the proceedings against the Department in February 2000,[154] alleging that their grants had been unlawfully cancelled and claiming relief on their own behalf and on the behalf of others ('the members of the class') whose

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[150] Legal Resources Centre (Grahamstown) Social Welfare Annual Project Report 1999/2000 4-3

[151] Founding Affidavit, paragraphs 13 and 14

[152] Ibid, paragraphs 15 and 16

[153] Founding Affidavit, paragraphs 59-66

[154] Legal Resources Centre (Grahamstown) Social Welfare Quarterly Project Report April-June 2000 2

disability grants were similarly cancelled between March 1996 and September 2000.

The Applicants sought an order declaring that the First Respondent's decisions to cancel or suspend their disability grants were unlawful, invalid and of no force and effect, declaring that they and the members of the class were entitled to the payment of their disability grants, and compelling the Respondents to reinstate their grants and those of all of the members of the class as well as pay the arrears and interest owed to them. They sought an order directing the Respondents to provide the LRC with a list of the names and identity numbers of all the disability grant recipients whose grants had been cancelled between March 1996 and September 2000, as well as those of the recipients who had subsequently been reinstated onto the system. They also sought an the order that directed the Applicants to give notice of the class action to the members of the class through the media and the Respondents to display the lists at district welfare offices and pay points and to pay the costs of the publication of the notice.[155]

The Applicants stated that it was not the rationality or the justifiability of the decisions to cancel or suspend their grants that was being challenged, but rather the very procedure that the Department had employed when making these decisions. The Applicants' main contention was that they could not and did not attempt to argue that everyone whom they sought to have reinstated was in fact deserving of a disability grant. Rather, they argued that unless and until everyone in the class was reinstated and properly assessed, no one would be in a position to know who was deserving of a disability grant and who was not. Evidence was placed before the court which established that no one in the class had been afforded the basic requirements of procedural fairness, namely pertinent notice, the opportunity of a hearing, and reasons for the decision taken.[156] Therefore, it was argued that the procedure followed by the Department was uniformly unlawful and that it would be sensible for one application to be made in the interests of expediency and convenience.[157] They submitted that the application was

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[155] Notice of Motion, paragraphs 1-11

[156] Applicants' Heads of Argument, paragraph 6

[157] Founding Affidavit, paragraph 18.7

brought as a last resort after a variety of steps which were taken in an attempt to persuade officials to rectify deficiencies in their procedures failed to achieve substantive justice for the deserving.[158]

The two main issues to be determined in the matter were whether the Applicants had standing in terms of section 38 of the Constitution to litigate on their own behalf as well as on behalf of the defined class of erstwhile welfare beneficiaries and in the public interest,[159] and whether the procedure which the Department followed when cancelling or suspending disability grants between March 1996 and September 2000 complied with the requirements of the Act and Regulations and certain provisions of the Constitution.[160]

It was common cause that the Applicants had standing under section 38(a) to act in their own interest since their grants had been cancelled in terms of the procedure at issue.[161] The Applicants also claimed standing under sections 38(b) and (c) to act on behalf of all welfare recipients whose disability grants were cancelled on the authority of the Permanent Secretary between 1 March 1996 and September 2000 following a similar procedure, as well as standing under section 38(d) to act in the public interest.

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[158] Applicants' Heads of Argument, paragraph 7

[159] Section 38 provides that 'anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened...The persons who may approach a court are-
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

[160] Namely, sections 10 (the right to human dignity), 27(1)(c) (the right to access to social security), and 33 read with item 23(2)(b) of Schedule 6 to the Constitution (the right to just administrative action). (Applicants' Heads of Argument, paragraphs 26-29)

[161] Applicants' Heads of Argument, paragraph 62 and confirmed in Respondents' Answering Affidavit, paragraph 4.5(i)(a).

The Applicants claimed standing to act in terms of section 38(b) and (c) on several grounds. Firstly, the cancellation of the disability grants of welfare recipients in circumstances similar to the Applicants' affected a large and significant number of people in the Eastern Cape.[162] Secondly, the Department was in a position to provide a complete list of those people, since it had operated with fully computerised records during the review process and where the Department did not respond to requests for information, it was able to provide computer-generated print-outs of the beneficiaries' details, payments made and received, and the date of cancellation.[163] The Applicants argued that the people affected by these decisions were those who were, at least *prima facie*, unable to support themselves as a result of physical or mental disability since this was a requirement in terms of the Act and they had once been awarded disability grants. They argued that such people were now without what was once their only means of support and that therefore the members of the class were, by definition, the poorest and most marginalised members of society.[164] The Applicants also argued that the lack of education and skills of the affected beneficiaries,[165] the difficulties which the Applicants and the LRC encountered when dealing with Department officials, the very few other avenues open to typical disability grant recipients to obtain redress for their complaints,[166] the collapse of the legal aid system and the inaccessibility of attorneys and counsel to erstwhile disability grant beneficiaries were obstacles to the members of the class being able to seek redress for their complaints.[167] Finally, the Applicants argued that the essential issues of law and fact which arose in the application were the same as those which would arise were each member of the class able to launch individual applications on their own behalf. They submitted that it was a matter of judicial convenience and the cost-effective use of resources for the issue to be determined in a single application such as the

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[162] Founding Affidavit, paragraph 18.1

[163] Ibid, paragraph 18.2

[164] Ibid, paragraph 18.3

[165] Ibid, paragraph 18.4

[166] Ibid, paragraph 18.5

[167] Ibid, paragraph 18.6

present.[168]

The Applicants claimed standing to act under section 38(d) on the grounds that the substantive issues in dispute involved fundamental rights;[169] that because the people affected were the poorest in the province, in addition to being disabled, they were all deserving of a public hearing by which their plight might be fairly adjudicated, notwithstanding their individual inability to achieve this; and that the significant numbers of persons whose grants had in all probability been terminated in the manner described in the papers, together with the wide-spread concern for their plight demonstrated by the supporting affidavits and the press coverage the issue had attracted, further demonstrated the manifest public interest which they submitted existed in the matter.[170]

The Respondents opposed the application on the issue of standing alone and offered no argument regarding the compliance of its procedures with the requirements of the Act and the Regulations and those of the Constitution whatsoever. The Respondents conceded that the individual Applicants were entitled to the relief they sought in their personal capacities, but argued that the Applicants did not have standing to act in a representative capacity.[171] They contended that the Applicants could not litigate in terms of section 38(b) without identifying by name all those on whose behalf they sought to act[172] and that each such identified person was required to '...make a positive allegations (*sic*) supported by facts that a right in the Bill of Rights has been infringed or threatened, that each member of the class would have made the application himself or herself if it had been in his or her power to do so and why such person is not before the court personally'.[173] The Respondents argued that the

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[168] Ibid, paragraph 18.7

[169] Namely, the right to social assistance in terms of section 27(1)(c) of the Constitution, the right to human dignity in terms of section 10, and the right to procedurally fair administrative action contained in item 23(2)(b) of Schedule 6.

[170] Ibid, paragraphs 19.1-3

[171] Applicants' Heads of Argument, paragraph 30

[172] Respondents' Answering Affidavit, paragraphs 4.2(ii) and 4.5(b)

[173] Ibid, paragraph 4.2(iii)

Applicants did not have standing under section 38(c) because the class was not adequately defined and homogeneous.[174] Their objection to the Applicants acting under section 38(d) was that each affected beneficiary should have brought his or her own application, preferably to the Human Rights Commission or the Public Protector, or if it was necessary to approach the court, that this be done with the assistance of either of these bodies. This was because the Respondents contended that it was not in the public interest to deal with the relevant issues *en masse* and that each 'erstwhile beneficiary' should be considered separately and individually as different facts and different legal considerations applied to each one of them and because the affected beneficiaries could obtain 'sufficient adequate (*sic*) redress from these and other State institutions'.[175]

In order for the court to grant the Applicants the relief they sought, they had to show that it was justiciable, that is, not merely academic or premature, and capable of judicial determination; and that the court would not be granting the Applicants extended standing without a prospect of them being found to be entitled to the relief sought.[176] It was submitted that if the court found that the person to whom the First Respondent had delegated his powers had breached any of the separate components of the right to just administrative action, the result in all cases would be that the decision must be declared to be a nullity; this would also be the result if the common law rules of natural justice[177] or any constitutional provisions[178] were breached.[179] This was the case in both Rangani[180]

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[174] Ibid, paragraphs 4.5(c) and 4.6

[175] Ibid, paragraphs 4.2(iv), 4.5(i)(d) and 4.16

[176] M Chaskalson et al *Constitutional Law of South Africa* Juta & Co. Ltd, Cape Town, 1996 8-2 cited in Applicants' Heads of Argument, paragraph 129

[177] See Traub v Administrator, Transvaal 1989 (1) SA 397 (W) at 403 D-E.

[178] See Premier of Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal 1999 (2) BCLR 151 (CC) at 169 A - 170 C.

[179] Applicants' Heads of Argument, paragraphs 130-132

[180] Rangani v Superintendent-General, Department of Health and Welfare, Northern Province 1999 (4) SA 385 (T) at 386 J-387B and 395 D-E.

and Bushula[181] and as a result, the court in those matters granted the retrospective reinstatement of the Applicants' disability grants. On this basis, the Applicants *in casu* submitted that the same relief should be accorded to the members of the class.[182]

In his judgment, Froneman J commented that the matter raised 'novel and contentious issues about standing and the courts' role in the enforcement of socio-economic rights'.[183] He said that the facts of the matter outlined in the founding papers constituted the immediate factual context in which the issues of standing and remedies had to be determined, but that there was a broader social context within which the matter had to be decided: where the social context is familiar and the law to be applied is not new, that social context is often assumed and not articulated, but in this case, this was not so as the applicable law was new and the social setting had changed.[184]

According to Froneman J, section 38 of the Constitution 'is new and introduces far-reaching changes to our common law of standing'.[185] He found that there was no cogent reason for a restrictive interpretation of section 38 simply because of the narrow content given to standing under the common law,[186] and particularly in public law litigation.[187] Froneman J acknowledged that there were problems associated with representative standing, such as those associated with ensuring that only those who wish to be involved in the case are involved; that those who wish to be involved are given a chance to make any representations they may wish to make; and that the party representing the group or class adequately represents future interests. He found that these problems did not militate

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[181] At 857 G-J.

[182] Applicants' Heads of Argument, paragraph 133

[183] At 615A-B

[184] At 618C-D

[185] At 618I-619A. Cameron J made similar remarks about the corresponding provision in the Interim Constitution in Beukes v Krugersdorp Transitional Local Council 1996 (3) SA 467 (W) at 473C.

[186] At 619A-B. Compare Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC).

[187] At 619B-C

against a broad view of standing, but at most required safeguards to ensure the broadest and most effective representation in and presentation of such litigation.[188] Froneman J held that the many practical difficulties associated with representative and class actions could not justify the denial of such an action where the Constitution makes specific provision for it in section 38.[189]

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[188] At 619 E-F

[189] At 623B-C. Froneman J listed five practical objections to the granting of the kind of relief sought in representative or class actions, namely the 'floodgates' argument that the courts would be engulfed by interfering busybodies rushing to court without good reason; the 'classification' difficulty that often the common interest of the applicants and the those whom they seek to represent will be broad and vague; the 'different circumstances' argument that, seen from the Respondents' side, the persons seeking relief must be treated differently; the '*res judicata*' difficulty that some members of the group may not wish to associate themselves with the representative litigation; and the 'practical impossibility' argument that it is impossible for the courts to deal with cases involving thousands of people and that it would adversely affect the public administration if scarce resources have to be used to defend such cases in court (at 623H-624A). Froneman J found that the 'floodgates' argument was met by the improbability of it happening. He held that it was dealt with by Pickering J in Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa *supra* at 1106 D-G where he held that he was not persuaded that, given the high cost of High Court litigation, 'cranks and busybodies' would indeed flood the courts with vexatious or frivolous applications if representative actions were allowed. He was of the opinion that, if people were tempted to launch frivolous or vexatious proceedings, appropriate costs orders against them would inhibit their 'litigious ardour'. Froneman J also found that unjustified litigation could be curtailed by making it a procedural requirement that leave must be sought from the High Court to proceed on a representative basis prior to actually proceeding in such a manner (at 624A-E). Froneman J held that the 'classification' difficulty could similarly be addressed at a preliminary stage. He was of the opinion that the determination of a common interest sufficient to justify class or representative actions would depend on the facts of each case and that such common interest must relate to the alleged infringement of a fundamental right as required in terms of section 38. He held that the Applicants *in casu* and those whom they sought to represent had in common the discontinuance of their social grants by the same unlawful decision, taken by the same Respondents and that this had been established on the papers (at 624F-G). Froneman J was of the view that the 'different circumstances' argument was not really an objection that impinged on standing, but that it related to the merits of the representative claim. He held that, it was open to the Respondents to raise possibly differing defences to the claims of the Applicants, on the assumption that a sufficiently clear common interest relating to the infringement of a fundamental right had been established by the Applicants, but that this should not preclude the bringing of a representative action (at 624H-I, he referred to Irish Shipping Ltd v Commercial Assurance Co plc [1989] 3 All ER 853 (CA).) He pointed out that it was not a requirement relating to standing of persons initiating such a claim that the defence to a representative action must be uniform (at 624G-I). The '*res judicata*' difficulty was another that Froneman J was of the opinion could be minimized by procedural requirements. These requirements would be to ensure as far as possible that only those members of the group who wish to associate themselves with the representative litigation do so. He suggested that it be a requirement that sufficient notice be given to all those affected by the litigation so that they may associate or disassociate themselves from the proposed litigation (at 624I-J). The 'practical impossibility' argument was one that 'really beg[ged] the question of standing' (at 625A). Froneman J held that where there was a clearly defined class of people who had been wronged in the manner required by section 38, it was not an adequate answer to say that it would be difficult to give them redress. He said that 'if it means that courts will have to act in new and innovative ways to accommodate

He found that section 38 is not self-explanatory in a single and unambiguous way, but that it can be interpreted and applied in different ways and therefore it can have enormously varied consequences. This did not mean that the court could interpret the section in whichever way it liked, but that it had to be done within the constraints of legal reasoning and the all-important principle of precedent.[190] Froneman J found that there was no formally binding precedent of the Eastern Cape Division of the High Court as far as the interpretation of the section was concerned. He said that in the absence of binding precedent, a judge had to look at the Constitution as a whole and ascertain what changes it had wrought to the social context in which section 38 was to be applied.[191]

He quoted Mohlomi v Minister of Defence[192] where Didcott J took judicial notice of 'the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons...are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial and geographical reasons'.[193] On this basis, Froneman J found that the evidence presented *in casu* 'confirmed, to a large extent, the correctness of the situation sketched by Didcott J.'[194] He held that it is against this background that the issues of standing, rights and remedies should be determined.[195]

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them, then so be it.' He also said that if the public administration ensured that it acted within the principle of legality, it would be unlikely that it would be faced with the kind of litigation that arose *in casu* (at 625A-C).

[190] At 620B

[191] At 620F

[192] 1997 (1) SA 124 (CC)

[193] Paragraph 14

[194] At 621E-G

[195] At 621H-I

The Applicants had submitted that they had standing to act under section 38(b), (c) and (d), while the Respondents had argued, largely on the basis of Maluleke v MEC, Health and Welfare, Northern Province,[196] that the Applicants had no representative standing on any of the bases advanced in the papers. In Maluleke, Southwood J had found that the suspension of the Applicant's grant was unlawful and invalid since no provision of the applicable legislation authorised the suspension of her grant and he made a declaratory order to this effect.[197] He also issued a mandamus to compel the Respondent to pay interest on the amounts of her pension from the date it was withheld to the date it was reinstated.[198] However, he refused to find that the Applicant was entitled to act in a representative capacity in terms of section 38 on three bases. Firstly, he held that it was a prerequisite for section 38 to operate that the Applicant must allege that a fundamental right had been infringed or threatened, that this had not been clearly alleged in the founding papers and that it was 'difficult to imagine' how the suspension of a grant payable in terms of legislation could constitute an infringement of a right. He also held that there was no evidence to identify any of the members of the class, let alone any evidence that they could not act in their own names. He found that the members of the class constituted a group in only the broadest and vaguest sense, that being that their grants were suspended, and that it was not clear whether this was the only similarity or common feature. He also found that it did not appear that the members of the class were aware of the litigation being conducted on their behalf and that they were willing to be bound by the outcome or any costs order made regarding the litigation. Finally, he held that the facts showed that it would not be in the public interest to deal with the relevant issues *en masse*. The fact that there might be different facts and legal considerations in each case made it impossible, in his view, to deal with the rights of thousands of people as if their rights were the same as those of the Applicant.[199]

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[196] 1999 (4) SA 367 (T)

[197] At 373D

[198] At 374H-I

[199] At 374A-E. In 'Standing, Welfare Rights and Administrative Justice: Maluleke v Member of the Executive Council, Health and Welfare, Northern Province 1999 (4) SA 367 (T)' ((2000) 117 *SALJ* 647), Professor Clive Plasket argued that Southwood J erred in holding that a fundamental right had not been infringed or threatened when the Applicant's grant was withheld and therefore that the extended standing provisions did not come into play in this case, and secondly that even if a fundamental right had been

Froneman J found that it was not clear why Southwood J found it 'difficult to imagine' how the suspension of payment of a grant could constitute an infringement of a fundamental right. Southwood J had found that the suspension of the applicants grant was unlawful and that in itself appeared to Froneman J to be an infringement of the right to just administrative action enshrined in section 33 of the Constitution. He held that the evidence *in casu* clearly established that the

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infringed or threatened, the extended standing provisions still did not apply (at 647). Plasket argued that Southwood J's finding that suspension of the Applicant's grant was unlawful and invalid since it was not authorised in terms of the applicable legislation was the same as finding that the Applicant's right to just administrative action had been infringed (at 651-652). He also argued that it was obvious that when grants are cancelled without lawful authority, the right of access to social security in terms of section 27(1)(c) of the Constitution is infringed (at 652). Plasket pointed out that the Applicant had clearly alleged which of her rights had been infringed or threatened in the papers, these being her rights to just administrative action and of access to social security (at 652). With regard to Southwood J's finding that there was no evidence that the members of the class could not act in their own names, Plasket argued that he approached the interpretation of section 38(b) too narrowly and that it was fair to assume that none of the members of the class would be able to approach the court for relief individually because of their poverty (at 655). Plasket also argued that Southwood J's approach to the interpretation of section 38(c) was too narrow since the Constitution does not require that the group or class must be close-knit or have more than one defining characteristic and that *in casu*, the common feature was that all of the members of the class had suffered a similar infringement of their fundamental rights by the same Respondent and as a result of the same decision (at 655). With regard to Southwood J's concern that different statutes and legal considerations might apply to different members of the class, Plasket suggested that this problem was more apparent than real. He argued that despite the profusion of legislation applicable in the Eastern Cape, it would have been relatively easy to peruse the applicable statutes to determine whether any of them authorised the suspension of grant on the basis in question and that if any of the statutes did, Southwood J could have issued an order excluding from its reach those whose grants were regulated in terms of these statutes and that since none of the members of the class had been given a hearing before their grants were suspended and since the denial of a hearing is a fatal irregularity (Traub v Administrator, Transvaal *supra* at 403D-E), their individual circumstances were irrelevant in these circumstances (at 656-657). With regard to Southwood J's problem with the fact that the members of the class had not been given notice of the litigation, Plasket argued that this problem was not of the Applicant's making, since no legislation had been passed to regulate class actions and, as a result, no procedural measures were in place to provide for notice to members of a class. He argued that the fact that the Applicant had not manufactured a notice procedure ought not to have meant that the application be dismissed on this basis and that Southwood J could have stepped in and made an order postponing the matter and ordering the Respondent to publish lists of names in newspapers giving notice of the proceedings (at 657-658). Finally, regarding Southwood J's rejection of the Applicant's entitlement to act in the public interest under section 38(d), Plasket argued that he should have found that the Applicant had standing to litigate in the public interest since, by denying the Applicant standing, he effectively denied the members of the class of the only opportunity that they had of redress because of their inability to litigate individually, and that even if they could do so, thousands of applications dealing with the same issues of law could hardly be regarded as a more cost-effective utilisation of judicial resources than one action which disposed of the issues once and for all. He also argued that when the means of livelihood of such a large number of poor people is affected, the economic effects on their communities would be severe and that this attested particularly forcefully the public interest nature of the litigation (at 659-660).

Applicants, and probably all those whose grants had been suspended since March 1996, had had their grants suspended without a hearing. Froneman J expressed his full agreement with Van Rensburg J's finding in Bushula that the Applicant's right to a proper hearing had been infringed and that the applicable regulations neither excluded the right to a proper hearing nor did they adequately provide for such a hearing. He held that that necessarily implied that the Applicants' constitutional rights under section 33 had been infringed.[200] He also held that the cancellation or suspension of existing social benefits might also infringe the right of access to social security protected by section 27(1)(c).[201]

Froneman J held that the evidence *in casu* was sufficient to distinguish it from Maluleke's case since there was evidence that many people in similar circumstances to the Applicants were unable to individually pursue their claims because they were poor, had no access to legal assistance and would have difficulty obtaining legal aid and on this basis, it was clear that they could not act in their own names; and although the members of the class had not been named, this information was known to the Respondents[202] and it would be surprising if they did not know whose grants they had suspended during the time in question.[203] He therefore held that the Applicants had standing to sue the

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[200] He also referred to Pharmaceutical Manufacturers Association of SA and Others; In re: Ex Parte President of the RSA *supra*, in which Chaskalson P held that 'We now have a detailed written Constitution. It expressly rejects the doctrine of the supremacy of Parliament, but incorporates other common law constitutional principles, and gives them greater substance than they previously had. The rule of law is specifically declared to be one of the foundational values of the constitutional order , fundamental rights are identified and entrenched, and provision is made for the control of public power including judicial review of all legislation and conduct inconsistent with the Constitution' (paragraph 44). He held that 'What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action," "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law' (paragraph 50).

[201] At 622F-I

[202] This had been admitted in the papers.

[203] At 622J-623B

Respondents in terms of section 38(b).[204]

Froneman J held that the present case was 'easy' as far as the enforcement of socio-economic rights was concerned because the court was not concerned with the nature of the rights and to what extent it should force the State to give effect to such rights at this stage in the proceedings and that it was not a case where the courts should intrude upon the terrain of a democratically elected legislature where the electorate could, by voting, give better expression to the demands of democracy than the courts. What was at stake was the lack of accountability of the unelected bureaucracy of the State.[205] He held that the unlawful deprivation of rights could not be allowed by way of 'administrative stealth' since the Constitution forbid it and made the courts the 'democratic guardians' to prevent it happening.[206]

After finding that the Applicants had standing to sue on their own behalf and on behalf of the class, that it had been shown on the papers that their grants had been unlawfully discontinued in contravention of section 33 and that the infringement of this right made it a justiciable issue, the court turned to the issue of the relief to which the Applicants were entitled.[207]

The Respondents conceded that the Applicants were entitled to an order declaring that their grants had been unlawfully suspended or cancelled and to the retrospective payment and reinstatement of their grants.[208] The Respondents had argued, however, that the disclosure order that the Applicants sought[209] amounted to a final mandatory order for which a case had not been made out in the

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[204] At 625C-D

[205] At 626B-E

[206] At 626E-F

[207] At 627B-C

[208] At 627D-E

[209] The Applicants sought an order that the Respondents disclose the names of all those whose grants had been discontinued since March 1996.

founding papers. In response, the Applicants had argued that the order was dependant on them showing that they had standing to act on behalf of the class and that if they were found not to have standing, that they would not be entitled to the information and *vice versa*.[210] The court held that it was clear that the order was dependant on its acceptance of the Applicants' standing and that it was not in dispute that the information was within the knowledge of the Respondents. Consequently, it was held that there was no just and equitable reason why the Respondents should not provide the information sought, and that this was a practicable and just way to expedite the finalisation of the matter.[211]

Regarding the issue of the large number of members of the class residing outside the area of jurisdiction of the court, Froneman J held that all of the members of the class were recipients of grants paid out in the Eastern Cape. The area of jurisdiction of the court formed part of the Eastern Cape. The different High Courts in the province were due to be rationalised into one division in the future but the court did not know when that would be. Froneman J intended to make an order in which the opportunity would be given to those who wished to be excluded from the litigation to do so and those who lived outside of the court's area of jurisdiction would also be allowed to do so. He had 'little sympathy' for the Respondents' objection since it 'smacks of the worst kind of opportunism imaginable' if they did not intend to honour their obligation to the whole class because of where members of the class resided.[212]

The court found that it had jurisdiction over the Respondents on common law principles in respect of the First, Second and Fourth Applicants[213] and that once it was clear which members of the class had chosen not to be excluded from the action, any judgment made in the matter would be binding

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[210] At 627H-I

[211] At 627J and 628C

[212] At 628D-F

[213] It was agreed by both parties that the Third Applicant was not entitled to the relief sought as a named party to the proceedings because there was no jurisdictional reason on the basis of which an order in his favour could be granted against the Respondents (at 627D-F).

on them wherever they resided in South Africa. Froneman J held that 'in a certain sense they would have become "parties" to the cause', and that even if those residing outside the area of jurisdiction of the court were not parties to the action in the strict sense of the word in terms of the Supreme Court Act,[214] they might still be regarded as members of the class in the action in the court. He held that the *ratio jurisdictionis* connecting them to the case was the class action itself and that if his finding was regarded as a development of the common law, he was of the view that it was justified and permissible by virtue of sections 172(1) and 173 of the Constitution.[215]

In conclusion, Froneman J said that the common law was the poorer for not allowing the development of representative or class actions. Section 38 of the Constitution sought to rectify this deficiency and there was no reason to interpret that provision in a narrow and restricted manner, but rather, a flexible approach was required. The court recognized that there are practical problems associated with representative and class actions which must be addressed in court orders such as that *in casu* until uniform procedures are laid down, but that the novelty of such proceedings should not be a bar to courts finding ways to regulate such proceedings in a practical manner to ensure their expeditious finalisation.[216]

Froneman J declared that the decisions taken by or on behalf of the First Respondent to cancel or suspend the disability grants of the Applicants be unlawful and invalid;[217] that the Applicants were entitled to the payment of their disability grants from the date of cancellation or suspension; and

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[214] Act 59 of 1959. See section 19(1)(b).

[215] At 628G-629A. Section 172(1) of the Constitution provides: 'When deciding a constitutional matter within its power, a court- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including- (c)(i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect' and section 173 provides: 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'.

[216] At 629G-H

[217] The matter was settled with the Third Applicant.

ordered that the Respondents were to give effect to these declaratory orders by reinstating the Applicants' grants from the date of cancellation or suspension, and by paying the outstanding arrears, together with interest at the prescribed legal rate.[218]

He granted the Applicants leave to act as representatives to seek the same relief as that granted to them on behalf of all people in the Eastern Cape whose disability grants had been cancelled or suspended between March 1996 and September 2000. This was subject to the conditions that notice be given to all members of the class, setting out the details of the class action and who it would affect, and that the Applicants file affidavits indicating how they intended to comply with the order.[219] Alternatively, the Applicants were granted leave to litigate in the public interest but only for declaratory relief in respect of the members of the class, in which event, the order would not be binding on the members of the class.[220]

The Respondents were ordered to provide the Applicants' attorneys with a list of the personal details of the members of the class and the personal details of those members whom they alleged did not fall within the ambit of the order that declared that the decisions taken to cancel or suspend the Applicants' disability grants were unlawful and invalid; to give their reasons for such exclusion; to provide the Applicants' attorneys with a list of personal details of the members of the class whom the Respondents alleged were not entitled to the payment of their disability grants from date of cancellation or suspension, the reinstatement of their grants, the payment of outstanding arrears, together with interest, and reasons for such allegation; to identify a person who would be responsible on behalf of the Respondents for compliance with the order; and to file affidavits indicating how they intended to comply with the order.[221] The matter was postponed for consideration of the parties'

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[218] At 629I-630C

[219] At 630C-G

[220] At 630H-I

[221] At 630J-631D

responses to the various orders and for directions on the further conduct of the matter.[222]

Subsequent to this order being granted, the Applicants drafted a notice which they intended to distribute, containing an addition to the requirements set out in the original order: that individuals whose names did not appear on the Department's list might also take steps to join the action if they had proof that their disability grant was cancelled or suspended during the period in question. The court accepted that this addition was necessary.[223]

The Applicants also indicated that they intended to proceed with the class action rather than with the public interest action.[224] They sought an order that the Respondents bear the cost relating to the publication, broadcasting and distribution of the proposed notice, relying on section 7(2) of the Constitution[225] and Indian case law. The court held that this could not be upheld since the State did provide legal aid in certain circumstances and the fact that it was badly administered and insufficient for many deserving cases was not a problem that the court could resolve. It was further held that the order sought might further exacerbate the problem by placing a further financial burden on the State, and would prejudge the outcome of the case. The court held that it would be better if the question of costs was determined at the conclusion of the main action.[226]

During this time, the Respondents had practical problems in providing the list of details of beneficiaries whose grants had been cancelled between March 1996 and September 2000. They could only provide a computer-generated list of names without the details which the order required, as well as 'hard files' for some of the individuals whose names appeared on the list. It would also have taken

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[222] At 631D

[223] At 632D-E

[224] At 632E

[225] Section 7(2) provides that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

[226] At 632F-H

time to categorise the listed people by the pay point where they received their grant. The court held that it would be futile to grant an order which the Respondents would have difficulty complying with or which would take time to comply with and therefore held that it was necessary to make a new order replacing the previous one.[227]

In the new order, the Respondents were ordered to provide the LRC with the names of, and information relating to, the members of the class on their computerized database; access to all existing physical or 'hard' files of the members of the class in their possession; the particulars of the pay points where members of the class last received payment of their disability grants; and assistance in complying with the order to distribute provided by the LRC.[228]

The Applicants were ordered to publish the notice informing the public about the class action in four different local languages in four local newspapers; to have the notice read in these languages on three local radio stations; and to place the notice in prominent positions at all pay points and departmental welfare offices throughout the province; to distribute the notice to all Advice Offices and through the churches and NGOs in the province known to the LRC.[229]

The Respondents were ordered to report on their compliance with the order by way of an affidavit or affidavits to which the Applicants were entitled to reply.[230] The Applicants were ordered to report on their compliance with the order in the same manner and the Respondents were entitled to reply to such report. It was ordered that any party might by notice to the Registrar request a hearing in Chambers to deal with any issues arising from such reports and replies.[231]

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[227] At 632I-633B

[228] At 633E-G

[229] At 633G-634B

[230] At 634B-C

[231] At 634C-D

The Respondents were granted leave to appeal to the Supreme Court of Appeal against the judgment and orders granted in paragraphs 3 and 4 of the order.[232] They undertook not to seek any costs order against the Applicants on appeal and, in terms of section 20(5) of Supreme Court Act, this undertaking was made a condition of the order granting them leave.[233] An order was also made that the Respondents had to comply with certain aspects of the order pending the appeal.[234]

Even before the matter was heard, the LRC noted with concern the approach of the Department. Prior to the matter being heard, the Department attempted to use its old ploy of tendering the reinstatement of the individual Applicants with back pay in full and final settlement of the whole case, to which the LRC replied that it would accept the offer in full and final settlement of the Applicants'

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[232] In paragraph 3, the Applicants, assisted by the LRC, were granted leave to act as representatives on behalf of anyone in the Eastern Cape whose existing disability grants were cancelled or suspended by or on behalf of the Respondents between 1 March 1996 and 28 September 2000 in the further conduct of the proceedings for the same declaratory relief in respect of members of the class as was granted to them, that is, an order declaring that the decisions to cancel their disability grants were unlawful and invalid. In paragraph 4, the Respondents were ordered to provide the LRC with the names of, and information relating to, the members of the class on their computerized database; access to all existing physical or 'hard' files of the members of the class in their possession; the particulars of the pay points where members of the class last received payment of their disability grants; and assistance in complying with the order to distribute notices by placing such notices provided by the LRC in prominent positions at the pay points and advice offices.

[233] At 635E

[234] In terms of Rule 49(11) of the Uniform Rules of Court, 'where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.' *In casu*, the Applicants applied, under this rule, for an order that the operation and execution of the court's orders remain in force until an appeal court directed otherwise. Froneman J was of the opinion that the present case was one in which such an application should be granted. He found that 'the potential irreparable harm or prejudice to the Respondents' if the application was granted was 'minimal'. All that was required of the Respondents in terms of the order was to provide lists and files to the Applicants and to assist in getting the notices displayed at pay points and welfare offices. He held that whatever the outcome of the appeal was, there would be 'no real harm to the Respondents'. On the other hand, Froneman J was of the view that individual members of the class would 'suffer from any delay in finalising the matter'. He did not think that it was unrealistic to assume that the 'payment of their disability grants [was] vital to many of them. In the weighing up of the balance of hardship there is simply no contest.' He said a further factor in his granting of the application was the Respondents' prospect of success on appeal and for what purpose they sought leave to appeal. He said that 'I must confess that the reason for the Respondent's opposition to this particular application is difficult to fathom' (at 635F-636B).

individual claims, but not of the class as a whole since individual applicants cannot settle a class action.[235] The Department refused to allow the Applicants to accept payment on this basis and thereafter sent the returned cheques directly to the Applicants 'in full and final settlement of the entire application'.[236] The Applicants instructed the LRC that they would not accept the cheques on that basis and when the LRC informed the Respondents' attorneys of this, the Department accused the LRC of acting without instructions, of ignoring the wishes of its clients, and of launching the action for its own purposes rather than in the interests of the class. The Department repeated these allegations in an article in the Daily Dispatch[237] which were 'clearly false and defamatory of the LRC'.[238] The LRC issued a statement to the press and the Department's attorneys putting the record straight, but the defamation was later repeated in the press and in a letter to the Judge President of the Eastern Cape Division.[239]

During the period leading up to the matter being heard, the Second Applicant, Ms Meltafa, reported to the LRC that she had been harassed by local ANC officials who accused her of disloyalty and lack of patriotism and insisted that she accept the Department's cheque and withdraw from the proceedings. The LRC had warned their clients that such things might occur; these incidents seemed, however, to further strengthen their determination to obtain justice for the class.[240]

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[235] Sheila Barse v Union Government (1986) ASC 1732; (1988) ASC 2211

[236] LRC (Grahamstown) Social Welfare Quarterly Project Report April-June 2000 3

[237] Published on 19 July 2000.

[238] LRC (Grahamstown) Social Welfare Quarterly Project Report April-June 2000 3

[239] Dated 20 July 2000. See LRC (Grahamstown) Social Welfare Quarterly Project Report April-June 2000 3.

[240] Ibid 4. The Respondents' conduct in this case was severely criticised by the Supreme Court of Appeal. In his judgment in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others *supra*, Cameron JA criticized the Respondents for their obstructive behaviour during the case saying that 'the province's approach to these proceedings was contradictory, cynical, expedient and obstructionist' (paragraph 15). He said that 'it conducted the case as though it was at war with its own citizens, the more shamefully because those it was combating were...the least in its sphere' (Ibid) and that it had had a 'filibustering approach' to the litigation as a whole (Ibid, paragraph 27).

Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others

The appeal against Froneman J's judgment was heard by the Supreme Court of Appeal in August 2001. In his judgment, Cameron JA said that the central issue was whether the Respondents were entitled to secure the reinstatement of the disability grants of tens of thousands of people under sections 38(b),(c) and (d) of the Constitution.[241]

Cameron JA described the essence of the case as comprising of the 'unlawful conduct by a party against a disparate body of claimants lacking access to individualised legal services, with small claims unsuitable for if not incapable of enforcement in isolation'.[242] He held that these circumstances should have led the Appellants to the conclusion that the Respondents' assertion of standing to institute class action proceedings was unassailable. However, he pointed out, the Appellants did indeed assail the Respondents' claim with 'every stratagem and device and obstruction, every legal argument and non-argument that it thought lay to hand'.[243] Cameron JA noted that the Appellants had tendered no evidence to refute the masses of information and evidence which the Respondents placed before the court to establish their standing, but had argued that the evidence was inadmissible hearsay; and that they had obstructed the class's entitlement to be spared from physical destitution, while at the same time, using the Respondents' right to privacy to argue that the order regarding disclosure of the members of the class's details to the LRC should not have been granted.[244]

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[241] Paragraph 1

[242] Paragraph 14

[243] Ibid

[244] Paragraph 14

Cameron JA noted too that the Appellants had not hesitated to deride the First Applicant in making out their case.[245] He regarded this as an indication of the Appellants' 'contempt for people and process' that did not 'befit an organ of government under our constitutional dispensation'.[246] He stated that '[i]t is not the function of the courts to criticise government's decisions in the area of social policy',[247] but that it is the courts' responsibility to safeguard the Constitution and ensure that the mechanisms of law are not misused. He found the Appellants' conduct in the matter to be 'contradictory, cynical, expedient and obstructionist' and said that it appeared from their conduct as if they were at war with their own people, those people who were the most vulnerable.[248] His response to the Appellants' argument that undeserving claimants cost the Department R65 million a month was that that was not the point. The point of the class action was the cost which the Department's solution had 'exacted in untold human suffering' on the deserving in the process.[249] The court held that this sum did not justify unlawful action against the deserving.[250]

The Appellants attacked the grant of leave to institute the class action made by Froneman J as well as the order directing them to provide the LRC with the details of the members of the class in their possession. Cameron JA noted that this attack was initially made in far-ranging terms, but that at the hearing, counsel for the Appellants prudently refrained from making submissions in support of them, although counsel did state that he had not been instructed to abandon all of the original grounds of attack.[251] The Appellants' arguments were that the order of the court *a quo* did not adequately define

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[245] He stated that the deponent to the Appellants' Answering Affidavit 'thought fit to record his doubt that Mr Ngxuza had read the media articles appended to the papers (a claim the first applicant did not make), while the written argument stated that it "boggles the mind" that "a man who never attended school and is presently illiterate" is able to make "learned submissions"' (paragraph 14).

[246] Paragraph 16

[247] Ibid

[248] Ibid

[249] Ibid

[250] Ibid

[251] Paragraph 3

the class in question and that 'the order wrongly and without jurisdictional warrant included in the class people who resided in the Eastern Cape Province outside the domain of the Eastern Cape Division of the High Court'.[252]

The court held that neither of these arguments had any substance.[253] It was held that there could be no complaint about the clarity of the definition of the class since it was beyond dispute that there were so many members of the class that it would be impractical to join all of them to the proceedings individually, there were questions of law and fact which were common to all of the members of the class, the claims of the Respondents representing the class were typical of the claims of the rest of the members, and the Respondents would protect the interests of the class fairly and adequately through the LRC.[254] He went on to say that '[f]rom the point of view of practical definition, it is beyond dispute that (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class. The quintessential requisites for a class action are therefore present'.[255]

Regarding the Appellants' contention that the evidence which the Respondents had tendered to define the class was inadmissible hearsay, the court held that it was inevitable that the Respondents would rely on hearsay to some extent since, if direct evidence could be obtained from all of the members of the class, all of the members could just as easily be joined in the matter and there would be no need for the Respondents to act in a representative capacity. Cameron JA held that even if some evidence was indeed inadmissible, enough admissible evidence had been tendered by the Respondents to define

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[252] Ibid

[253] Paragraph 16

[254] Ibid

[255] Paragraph 17

the class.[256]

With regard to the Appellants' complaint about 'extra-jurisdictional applicants' being included in the application,[257] Cameron JA said that the Applicants were entitled to sue the province in the Eastern Cape Division since they received their disability grants within the domain of that court.[258] He found that 'such intra-jurisdictional receipt of a pension' created a similar jurisdictional tie or *ratio jurisdictionis* between a significant portion of the envisaged class and the provincial government. He pointed out that, ordinarily, people who were not residents of the Eastern Cape Division's jurisdictional area could not have sued the provincial government in that division 'since the seat of government is at Bisho, within the jurisdiction of the Ciskei High Court.' On this basis, there was no jurisdictional tie between such non-residents and the Eastern Cape Division.[259]

Cameron JA observed that the Appellants' objection was itself 'a relic of the pre-transitional past, in which High Courts situated in Grahamstown, Bisho and Umtata still [had] jurisdiction over fragmented portions of the Eastern Cape Province'.[260] In terms of the Constitution, all courts were empowered to continue to function with their existing jurisdiction, subject to amendment or repeal of the relevant legislation, and to consistency with the Constitution.[261] However, the Constitution also required that 'all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the

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[256] Paragraph 17

[257] Paragraph 20

[258] Ibid

[259] Ibid

[260] Paragraph 21

[261] Schedule 6, item 16(1) states that 'every court...existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it...subject to (a) any amendment or repeal of that legislation; and (b) consistency with the Constitution'.

requirements of the new Constitution' as soon as possible.[262] The situation in the Eastern Cape, where three different High Courts have jurisdiction over fragmented portions of the province, was exactly the sort of anomaly that these provisions sought to eliminate. Cameron JA held that neither the Respondents nor the class they represented could be blamed for the fact that the necessary rationalisation of the courts had not yet occurred in the province and the fact that the Appellants exploited this situation was a 'further miserable reflection on the way [they] conducted [themselves] in this litigation'.[263]

Furthermore, the court held that the class action was no ordinary litigation and that the Constitution expressly provided for it as well as the development of the common law.[264] Relying on Roberts Construction Co. Ltd v Willcox Bros (Pty) Ltd,[265] in which the court held that 'where one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause',[266] Cameron JA held that the present matter appeared to be one which justified the further development of this rule.[267] He held further that, even if the court were to take a strict approach with regard to the inclusion of 'extra-jurisdictional applicants', it was clear that the Constitution required the development of the applicable rules to ensure the efficacy of the class action mechanism and that the fact that such people were sought to be included in the class could not hinder the action.[268] On this basis, the court found that there was enough reason in terms of both the Constitution and the common law for the Eastern Cape Division of the High Court to have assumed jurisdiction in respect of all members of the class.[269]

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[262] Schedule 6, item 16(6)(a)

[263] Paragraph 21

[264] Paragraph 22. This is provided for in section 38 read with section 8(3).

[265] 1962 (4) SA 326 (A)

[266] At 336D-E

[267] Paragraph 22

[268] Paragraphs 23 and 24

[269] Paragraph 25

The court also pointed out that the Supreme Court Act provided for the relocation of a matter to another division of the High Court if it would be more convenient or more appropriate to be heard elsewhere.[270] The Appellants had made no attempt to use this provision and it was held that their objection regarding the jurisdiction of the court was 'of a piece with the rest of its filibustering approach to the litigation as a whole, and as devoid of substance'.[271] The appeal was accordingly dismissed.

Settlement

After the appeal was dismissed, the parties met to attempt to settle the case. It was agreed that instead of the Department filing an answering affidavit, the parties would first attempt to find a solution to the dispute. As a result, the parties agreed on a course of action that was to be followed by the Respondents. They further agreed that an affidavit would be filed to inform the court of the process that was to be followed by the Respondents and that they would file bi-monthly progress reports.[272]

The process to which the parties agreed entailed the Respondents issuing notices through print and electronic media, constituency offices, welfare offices, Advice Offices, traditional leaders and pay points which would invite all persons who were removed from the welfare system between March 1996 and September 2000 and who had not yet been reinstated to present themselves at different pay points to be physically examined and interviewed. The notices would make it clear that if a person did not appear, it would be assumed that he or she was deceased or did not qualify for the grant. It was agreed that this process would take place between November 2001 and January 2002.[273]

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[270] Section 9(1)

[271] Paragraph 27

[272] Affidavit of Namhla Dekeda, an Acting Permanent Secretary for the Department of Welfare of the Eastern Cape, dated and filed 22 November 2001 (paragraphs 2-3).

[273] Ibid, paragraph 4.1

These visits to pay points were to be conducted by Department officials accompanied by doctors who would conduct the examinations. Once an individual appeared and presented him- or herself, it would first be established whether he or she was on the system and the reason for the cancellation of his or her grant. Depending on the reason, the doctors might have to examine him or her to establish his or her current condition. If it was found that the recipient was wrongly removed from the system and that he or she should have continued to receive the grant, he or she would be reinstated on to the system and paid arrears.[274]

However, if it was established that, despite the fact that the recipient was removed from the system following an unlawful procedure, the recipient should not have been receiving the grant in question, the recipient would not be reinstated on to the system. Rather, his or her particulars and the Department's reasons for not reinstating him or her would be noted and furnished to the LRC and the individual concerned. The Department was of the opinion that in such circumstances it would not be fair and equitable that such persons be reinstated and paid arrears for the unlawful cancellation of the grant which they had been receiving unlawfully.[275]

In the situation where an individual's name did not appear on the system at all, a file was to be reconstructed. New forms would be completed by the doctors accompanying the Department officials and the reconstructed files would be captured onto the system. If the individual qualified to remain on the system, he or she would be reinstated and paid arrears.[276]

Those individuals identified by the officials as deceased or as having failed to collect their grant for three months were to be reinstated with full back pay immediately if their names appeared on the list

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[274] Ibid, paragraphs 4.2-4.4

[275] Ibid, paragraph 4.5

[276] Ibid, paragraph 4.6

provided by the LRC.[277] Similarly, any individual who, by their mere presence at the interview, demonstrated the falsity of the reasons supplied[278] would be reinstated with full backpay.[279]

Where the Department made a decision not to reinstate an individual on the basis that the grant was a temporary one, the period of the temporary grant and the date on which it was alleged to have started or ended, would be specified and such details furnished to the LRC and the individual involved.[280]

In the event that an individual was found not to be disabled, the Department would give full reasons for this conclusion and refer the individual to the social workers in his or her district office for alternative assistance. Where an individual was found not to be entitled to a grant on the basis that his or her condition was treatable, the Department would instruct the doctors accompanying the officials to indicate the nature of the medical condition and the treatment that could be administered, and the individual would be referred to the relevant health institution.[281]

Where the Department decided not to reinstate any member of the class, full reasons would be furnished to the LRC and the member of the class in question. The nature and content of all written reasons supplied would be given in accordance with the guidance given by the High Court in the matter of Nomala v Permanent Secretary, Department of Welfare and Another.[282]

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[277] This list was to have been compiled from the responses received to the advertisements issued in January 2001.

[278] Those being that they were deceased or had not collected their grant for three months.

[279] Affidavit of Namhla Dekeda, paragraph 4.7

[280] Ibid, paragraph 4.8

[281] Ibid, paragraph 4.9-10

[282] *Supra.* Ibid, paragraph 4.11

It was agreed that the Respondents should be directed to submit bi-monthly progress reports to both the Court and the LRC. Where there were issues in such reports which raised a dispute between the parties, both parties would have the right to set the matter down for determination by the Court. Where no dispute arose during the course of the process agreed to, the Department was to file a further affidavit setting out the results of the exercise by the end of February 2002 and the parties would approach the Court for an appropriate order.[283]

It was also agreed that it would be cost effective if the Applicants' application was at that stage postponed *sine die* until the finalisation of the process agreed to.[284]

The agreement reached between the LRC and the Department was made an order of court in March 2002. In terms of the order, the Department was directed to report to the Court and the LRC in April 2002 on the progress made with the implementation of the agreed process.

Subsequently, the Department did file a report to which the LRC filed a reply in which several problems regarding the Department's implementation of the agreed process were indicated. Johan Roos of the LRC later stated[285] that the Department's report was so poor that it was difficult to be precise in the reply which the LRC filed. However, based on what was stated in the report, the LRC was able to raise several potential problems which could result from the Department's implementation of the agreed process.[286] At that point, the LRC was writing the situation up and finalising the relief

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[283] Ibid, paragraph 5

[284] Ibid, paragraph 6

[285] The following information was gathered in an interview with Johan Roos (Regional Director of the Grahamstown LRC) on 20 September 2002 regarding the progress of the Department in implementing the agreed process.

[286] For example, the report stated that people receiving a certain category of grants (possibly temporary grants - he could not remember which category offhand) had been reinstated, but the Department had not yet had an opportunity to inform those affected. The LRC was not able to confirm this, but said in its reply that if that had indeed happened, there was a potential problem since these people did not know they had been reinstated and because they would therefore not know to start collecting their grants again. This was even more of a problem because of the fact that one of the grounds to cancel a grant is that it has failed to be collected for three months. The LRC argued that if the recipients were not informed that their grants

it would ask the court for at the next hearing. Johan Roos said that the office's first reaction to the Department's report was that the settlement agreement was not working and that it should revert back to the terms of the original order granted by the court, but that the problem with doing so was that the reason the settlement had been agreed upon was that the LRC was not in a position where it could monitor the Department's compliance with the terms of the original order. Another possible option for the LRC would be to meet with Department officials again and to tell them to complete the agreed process again, while setting out exactly what problems the Department needed to address and how exactly that could be done. Since September 2002, the LRC has set the matter down for January 2003 to have the order amended and to try to compel proper compliance by the Department.

Conclusion

It is submitted that the six landmark cases which were discussed above are of great significance, both for the impact they have had on the lives of the individual applicants in the matters, but perhaps more importantly, because of their jurisprudential significance and the role they have played both in the development of the 'new' administrative law under the Constitution and of general administrative law.

The above cases are of jurisprudential significance because, prior to the LRC's litigation campaign, very little had been written about social assistance law and no cases dealing with social assistance legislation had been reported. It is significant that Bacela was the first case which dealt with social assistance legislation and in particular, the provisions of the Social Assistance Act 59 of 1992, to be reported, since it illustrates the fact that this area of law had been marginalised prior to the LRC's litigation campaign. On this basis, it is submitted that Bacela was the starting point of the development of what may be described as 'social assistance law' and that it spawned a series of significant cases, particularly those discussed above, as well as others not directly linked with the

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had been reinstated, they would not go and collect them and therefore there was the risk that they would be cancelled again because of not being collected for three months. On this basis, the LRC argued that it was not enough that the Department reported that these people's grants had been reinstated, but rather that it must ensure that these people be informed that they have been reinstated.

LRC's campaign, such as Maluleke,[287] Rangani,[288] Mahambehlala,[289] Mbanga,[290] and the Trustees of the Black Sash[291] case.

The six landmark cases discussed in this research played an important role in the development of the 'new' administrative law under the Constitution. The right to just administrative action is protected in terms of section 33 of the Constitution. Section 33(1) provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and section 33(2) provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Because the state's obligation to achieve the progressive realisation of the right of access to social security is qualified by the phrase 'within its available resources',[292] it would have been difficult to base the litigation directly on the applicants' right to social security, since the Department could have argued that it did not have the available necessary to pay the amounts owed to the applicants in each matter. Instead, the LRC used the right to just administrative action to enforce the negative obligation on the State not to interfere with the right of access to social

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[287] Maluleke v Member of the Executive Council, Health and Welfare, Northern Province 1999 (4) SA 367 (T)

[288] Rangani v Superintendent-General, Department of Health and Welfare, Northern Province 1999 (4) SA 385 (T)

[289] Mahambehlala v MEC for Welfare, Eastern Cape, and Another 2002 (1) SA 342 (SE)

[290] Mbanga v MEC for Welfare, Eastern Cape, and Another 2002 (1) SA 359 (SE)

[291] Trustees of the Black Sash Trust v Minister for Social Development TPD September 2000, Case no. 30368/2000 (unreported)

[292] Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC), the court held that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2), those being the state's available resources. It was therefore held that sections 27(1) and (2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to respect, protect, promote and fulfil such rights. It was concluded that the rights conferred by sections 26(1) and 27(1) are to have *access* (my emphasis) to the services that the state is obliged to provide in terms of sections 26(2) and 27(2) (paragraph 39).

assistance and to 'respect, protect, promote and fulfill'[293] this right. The LRC also used the requirements for just administrative action to protect the right of access to social security and in this way obtained the reinstatement of the various applicants' grants which had been unlawfully cancelled or suspended and the payment of the arrears owed to them. These cases therefore played an important role in the development of the 'new' administrative law under the Constitution as governed by section 33.

These cases also played a significant role in the development of the particular administrative law, so-called 'social assistance law'. Baxter describes particular administrative law as comprising of 'the legislation governing, and legal principles and policies developed in respect of, specific areas of administration'.[294] The six landmark cases clarified the interpretation of the Social Assistance Act since it was an area of law that had not be litigated on previously, particularly since the Act only came into force in 1996. These cases had the effect of fleshing out the provisions of the Act and of giving effect to it. In particular, Bacela clarified the boundaries of the MEC's powers regarding the payment of arrears and Nomala clarified what was required of administrators of the Act with regard to the furnishing of reasons for the cancellation or suspension of social grants, while Bushula clarified what was required of such administrators regarding the giving of notice and hearings when cancelling or suspending grants.

The role that these cases played in the development of general administrative law was also significant. Baxter describes general administrative law as comprising of 'the general principles of law which regulate the organization of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction'.[295]

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[293] Section 7(2) of the Constitution states: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

[294] L Baxter *Administrative Law* Juta & Co. Ltd, Cape Town, 1984 2

[295] Ibid

Bacela illustrated the effect of failure to comply with the constitutional requirement that administrative action must be lawful. In this case, the administrative action of the Respondent was found to have been beyond her powers in terms of the social assistance regulations and therefore to be unlawful and invalid. Although the matter was not decided on constitutional grounds, it is submitted that the Respondent's actions could have been found to have been unlawful and invalid on the basis of section 33, as in fact was argued by the Applicant.

The Booi matter was important because it dealt with the enforcement of court orders and the remedies available where court orders are not complied with by state officials. This case was the first case to focus on Department officials' failure to do their jobs properly and ignoring of court orders. Although the matter was settled and no judgment was handed down in the matter, it had the effect of focusing the public's attention on the situation. The possibility of holding officials liable in their personal capacities for the state's costs in defending their actions 'when they act in defiance of the Constitution by failing to comply with court orders and are not able to supply a satisfactory explanation for their failure'[296] was explored in Booi, although the matter was settled before the court made a finding on the issue. In this case the difficulty in enforcing judgments against the State, given the strictures of the State Liability Act,[297] was also highlighted.[298]

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[296] C Plasket 'Enforcing Judgments Against the State' (unpublished paper) 13.

[297] Act 20 of 1957. In terms of section 3 of the Act, 'no execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the state, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be'. Plasket points out that 'If an organ of state is committed for contempt, another organ of state is required to give effect to the order of committal and may not be willing to do so' (C Plasket 'Enforcing Judgments Against the State' (unpublished paper) 5).

[298] In an unpublished article entitled 'Enforcing Judgments Against the State', Plasket discussed three complementary means by which it may be possible to compel recalcitrant officials to comply with court orders since he argues that the courts need to 'stamp out the abuse before it becomes more common-place than it already is' (Ibid 11). His first suggestion is that officials who ignore court orders must be held politically accountable if they are political office bearers and, if they are members of the public administration, they must be subjected to employment discipline (Ibid). The second means he suggests is the making of orders of costs *de bonis propriis* against officials to indicate that lack of compliance with court orders will not be countenanced by the courts. He also suggests that the courts go even further and order that such officials pay the costs of the state incurred in defending their actions (Ibid 13). The third

In Nomala, the importance of the right to reasons was illustrated. Prior to the entrenchment of the right to reasons in section 33(2) of the Constitution, this right was not explicitly recognised by the common law.[299] In terms of section 33(2), everyone whose rights have been adversely affected by administrative action now has the right to be furnished with written reasons. This right is important for the fostering of openness, transparency and accountability of the public administration as required in terms of section 195 of the Constitution[300] and even for the protection of the right to equality.[301] In Transnet Ltd v Goodman Brothers (Pty) Ltd,[302] Olivier JA held that '[o]ne of the most fundamental rights guaranteed in our Bill of Rights appears in section 9. It is the right to equality'.[303] He held: 'One need hardly look further for a more obvious fundamental right which justifies the application of section 33 of the Constitution to the present case. The right to equal treatment pervades the whole

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method he suggests is the committal of officials for contempt of court when such officials are found to have 'wilfully and in bad faith failed or neglected to obey the order in question' (Ibid 15). Plasket suggests that the punishment in such cases could be a fine, a suspended sentence of imprisonment or direct imprisonment. He argues that although the courts are 'often loath to confront the executive or the legislature too squarely, exercising "self-restraint in order to preserve the balance of government, as judges perceive this balance to be" (Baxter *Administrative Law Cape* Town, Juta & Co. Ltd, 1984 328)... the situation, particularly in the Eastern Cape, has reached such proportions that, if the courts are to perform their constitutional duties of serving as the bulwark between the governed and those who govern and as guardians of the Constitution, they must act decisively before it is too late' (Ibid).

[299] Ibid 741

[300] Section 195(1)(f) provides: 'Public administration must be accountable' and section 195(1)(g) provides: 'Transparency must be fostered by providing the public with timely, accessible and accurate information'.

[301] Section 9 of the Constitution provides: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair'.

[302] 2001 (1) SA 853 (SCA)

[303] Paragraph 41

field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner. How can such right be protected other than by insisting that reasons be given for an adverse decision? It is cynical to say to an individual: you have a constitutional right to equal treatment, but you are not allowed to know whether you have been treated equally. The right to be furnished with reasons for an administrative decision is the bulwark of the right to just administrative action'.[304] In their note on Moletsane v The Premier of the Free State,[305] Plasket and Khoza warn of the dangers of this right being 'watered down' or becoming meaningless. They argued that, because what Hancke J held to be reasons were not reasons but a ground on which the decision in question was made, 'the purpose of s 24(*c*) of the interim Constitution, the values that underpin it and the right which it created, were undermined rather than advanced'.[306] Another important aspect of Nomala was that in his judgment, Pillay AJ applied decisions made regarding reasons such as Sachs v Minister of Justice.[307] In this matter, Stratford ACJ approved of the finding of Tindall J in the court *a quo* that what is required are 'the reasons for the conclusion that the person is promoting feelings of hostility,' that 'a mere repetition of the finding that the person is promoting feelings of hostility would not be sufficient to constitute reasons' and that 'the reasons must state the general effect of the Minister's findings in regard to the person's acts'.[308] He also applied the finding which Rabie CJ made in Nkondo v Minister of Law and Order,[309] where he held that the 'mere repetition of one of the three statutory grounds authorised by the Act for the detention of people was insufficient to constitute the giving of reasons'.[310]

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[304] Paragraph 42

[305] C Plasket and F Khoza 'The Fundamental Right to reasons for Administrative Action: *Moletsane v The Premier of the Free State* (1996) 17 *ILJ* 251 (O)' (2001) 22 *ILJ* 52

[306] Ibid 55. Section 24(c) of the Interim Constitution provided that every person had the right to 'be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public'.

[307] 1934 AD 11

[308] At 40. Pillay quoted these findings at 854I-J of his judgment.

[309] 1986 (2) SA 756 (A)

[310] At 772I-773B and at 855B of Pillay AJ's judgment.

The Bushula matter illustrated the effect of administrators' failure to give reasons for administrative action when reasons are a mandatory precondition for the lawful exercise of power. In this case, because the Regulations required that written reasons be furnished for the suspension or cancellation of a grant, the Respondent's failure to do so rendered his administrative action invalid for want of reasons. Although this finding was made on the basis of the requirements of the Social Assistance Regulations and not to the requirements of the Constitution under section 33(2), the argument can be made that the failure to furnish reasons for an administrative action which adversely affects a person's rights would entitle an applicant to seek an mandamus to compel the Respondent to furnish reasons for the decision in order to meet the constitutional requirements of section 33(2).

Bushula was also important because it was in this matter that the Department set out the procedures it followed in the cancellation or suspension of disability grants under oath and that such procedures were found to be procedurally unfair because the Applicant had not been given proper notice of the intended cancellation of his grant and had not been afforded a hearing of any kind. On this basis, the court held that the decision was taken unilaterally and summarily and therefore had to be set aside.[311] This case therefore clarified the requirements of procedural fairness and it was on the basis of the Department's admitted procedures that the LRC was able to challenge procedural fairness of the cancellation or suspension of the disability grants of thousands of people in the Ngxuza matter. What is significant about Bushula was that the correctness of the decision was never questioned by Froneman J in Ngxuza, nor was it questioned by Cameron AJ in the appeal.[312]

Nomala was important because it dealt with the issue of public interest standing as provided for in section 38(d) of the Constitution. Nomala built on the decision in Port Elizabeth Municipality v Prut

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[311] At 856B-C and E

[312] In fact Cameron JA stated: 'That the method the province chose to verify and update its pensioner records was not just undifferentiatingly harsh, but also unlawful, was undisputed in these proceedings. That much was established by *Bushula and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* (2000 (2) SA 849 (E) (van Rensburg J))' (Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others 2001 (10) BCLR 1039 (SCA), paragraph 40).

NO and Another,[313] in which the court held that the issue of whether a litigant would be accorded public interest standing, regardless of their own interest in the matter, depended solely on whether the matter was of purely academic interest or not.[314] In Nomala, Pillay AJ held that it seemed that the issue of public interest was ultimately a question of justiciability and on this basis he held that the Applicant was entitled to act in the public interest. In the context of social assistance, public interest standing is particularly important since large numbers of people are affected by the Department's actions and also because these people are often the most vulnerable members of society who have limited access legal assistance and very limited resources. It is therefore important that litigants can act in the public interest, regardless of their own interest in the matter in question, in matters dealing with social assistance and therefore affecting large numbers of poor people dependent on social assistance.

Ngxuza played perhaps the most important role in the development of constitutional law in South Africa in that it was in this matter and the subsequent appeal that the issue of standing under sections 38(b), (c) and (d) was dealt with. Although the Constitutional Court held in Ferreira v Levin NO[315] that a broad approach should be adopted to the issue standing,[316] the requirements for representative standing had yet to be clearly set out. Prior to Ngxuza, Southwood J had refused to grant representative standing to Ms Maluleke who sought to seek relief on behalf of thousands of grant beneficiaries who had had their grants cancelled or suspended by the Department of Welfare in the Northern Province because of various practical difficulties. Southwood J held that the fact that a right in the Bill of Rights had been infringed or threatened had not been clearly alleged in the founding papers, that there was no evidence to identify any of the beneficiaries on whose behalf the Applicant sought to act, let alone to show that they could not act in their own names, that the affected beneficiaries only constituted a group or class in only the vaguest and broadest sense in that their

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[313] 1996 (4) SA 318 (E)

[314] At 324F-326B

[315] 1996 (1) SA 984 (CC)

[316] Paragraph 165

grants had been suspended, that it was not clear whether this was the only common feature that existed and it was possible that different facts and acts applied to the various beneficiaries, that it did not appear that the people were aware that the litigation was being conducted on their behalf and that they were willing to be bound by the results of the litigation and any costs order that might be made. Finally, he held that the facts showed that it would not be in the public interest to deal with the relevant issues *en masse* since there might be different facts and legal considerations which might make it impossible to deal with all of the beneficiaries' rights as if they were the same as the Applicant's.[317] In Ngxuza, although he recognised the 'practical difficulties associated with group litigation' and the novelty of representative actions in South African law,[318] Froneman J held that 'the novelty of these proceedings should, however, not be a bar to Courts finding ways to regulate these proceedings in a practical manner in order to ensure that they are expeditiously finalised'.[319] This is consistent with the broad approach to standing advocated in Ferreira v Levin NO, particularly by O'Regan J who held that 'this expanded approach to standing is quite appropriate for constitutional litigation'.[320]

Another important aspect of Ngxuza was the original order that was granted by Froneman J.[321] In terms of this order, the Respondents were required to file affidavits indicating how they intended to comply with his order that they supply the Applicants with lists of the details of the members of the class.[322] This is an example of a structural interdict or supervisory jurisdiction of the court. This

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[317] Maluleke v MEC, Health and Welfare, Northern Province 1999 (4) SA 367 (T) at 373J-374E.

[318] At 629A

[319] At 629H

[320] At paragraph 229

[321] Dated 28 September 2000, at 629I-631D

[322] The Applicants in Ngxuza filed their affidavits in time, but the Respondents did not. Eventually, the Respondents filed an affidavit in terms of the court order, further affidavits attempting to explain their non-compliance with the order and an application for leave to appeal against the order. In response, the Applicants filed a notice the oppose the application for leave to appeal. The Respondents' application for leave to appeal was granted and the Applicants sought a further order that the operation and execution of the original order should not be suspended pending the outcome of the appeal. As a result, Froneman J

remedy is a fairly 'new' one which was accepted by the Constitutional Court in Pretoria City Council v Walker[323] and Minister of Health and Others v Treatment Action Campaign and Others (No 2).[324] In Minister of Health v Treatment Action Campaign, the court held that 'the power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order in implemented. In Pretoria City Council v Walker [*supra*, paragraph 96], Langa DP said "[T]he Respondent could, for instance, have applied to an appropriate court for a declaration of rights or a mandamus in order to vindicate the breach of his s 8 right. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to the Court in question. The Court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order."' (Paragraph 104). In considering the relief to be granted, the court held that 'The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the court to enable it to satisfy itself that the policy was consistent with the Constitution. In Pretoria City Council...this court recognised that courts have such powers. In appropriate cases they should exercise such power if it is necessary to secure compliance with a court order. That many be because of a failure to heed declaratory orders or other relief granted by a court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary'.[325] On the basis that it was indeed necessary, such relief was sought in Ngxuza.[326] This kind of order was important in that it ensured that the Department's compliance could be monitored, particularly since

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reconsidered his original order (at 632D-633B) and made a new one dated 27 October 2000 (at 633C-634E). This order was also an example of a structural interdict in that the Respondents were ordered to report their compliance with the order by way of affidavit, as were the Applicants (at 634C-D).

[323] 1998 (2) SA 363 (CC)

[324] 2002 (5) SA 721 (CC).

[325] Paragraph 129

[326] Notice of Motion

the Department had a history of non-compliance.[327]

Another important aspect of Froneman J's judgment was that he set out various procedural rules to regulate representative litigation. Froneman J held that the possibility of unjustified litigation could be curtailed by making it a procedural requirement that leave must be sought from the High Court to proceed on a representative basis prior to actually embarking on that road[328] and he held that the 'classification' problem, that is, the difficulty that often the common interest of the applicants and those they seek to represent will be broad and vague, could be addressed in the same manner at a preliminary stage.[329] He also held that the problem of *res judicata*, that is, that some members of the group may not wish to associate themselves with the representative litigation, could be minimised by procedural requirements. Froneman J held that this could be done by requiring the representing party to give sufficient notice to all affected that they may associate or disassociate themselves from the proposed litigation.[330] This is an example of a court using its inherent jurisdiction to develop the common law to give effect to a constitutional provision in terms of section 8(3)(a) of the Constitution.[331]

Cameron JA's judgment in the appeal against Froneman J's judgment in Ngxuza was of vast significance because it set out the 'quintessential requisites' for a class action. Cameron JA held that

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[327] As it turned out, the Respondents failed to comply with the order timeously (see footnote 322). According to senior counsel for the Respondents, the non-compliance was as a result of advice given to the Respondents by one of his juniors. Froneman J held that this advice was wrong and that 'Court orders should be complied with (even if they may be wrong) until competently set aside or suspended by operation of law' (at 631I-J). He held that neither exception applied in the present case (at 631J-632A) and that 'Compliance with Court orders is fundamental to any constitutional democracy of the kind we aspire to. It is the duty of all concerned with the administration of justice that we do not inadvertently stumble into situations where that fundamental tenet of our society is undermined' (at 632B).

[328] At 624D-E

[329] At 624E

[330] At 624I-J

[331] Section 8(3)(a) provides that, when applying a provision of the Bill of Rights and in order to give effect to the right, a court must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right.

'[f]rom the point of view of practical definition, it is beyond dispute that (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class. The quintessential requisites for a class action are therefore present'.[332]

Finally, the influence which these six landmark cases have had on the ground cannot be overlooked. Bacela had the effect of compelling the Department to pay Ms Bacela the arrears owed to her, but perhaps more importantly, it opened the door to thousands of other similar cases and put a stop to the Department's unlawful practice of failing to pay arrears to those who were entitled to them. Booi had the ultimate effect of compelling the Department to comply with various court orders which had been ignored by Department officials, while at the same time the interest of the press placed some pressure on the Department to comply with other outstanding orders. As a result of the Nomala matter, Ms Nomala's grant was reinstated because the 'reason' which the Department had furnished for the cancellation thereof was found to be insufficient in law. This paved the way for many people whose grants had been unlawfully cancelled for similar 'reasons' to make applications for their grants to be reinstated and has had the effect that the Department no longer uses its standard form letter containing its five 'grounds' for the cancellation or suspension of grants as much as in the past.[333] Both the Bushula and the Ngxuza matters had the important outcome of the reinstatement of the various applicants onto the social security system because the procedures followed by the Department were found to be procedurally unfair by Van Rensburg J in Bushula. Many people whose grants had been cancelled or suspended in terms of the procedure outlined on the papers in the matter were now able to claim reinstatement on the basis of Bushula. Ngxuza was most important because the outcome affected literally thousands of people who fell into the ambit of the 'class' as defined in the proceedings. Because of this case, thousands of people are now able to claim reinstatement of their

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[332] Paragraph 17

[333] See Chapter Five, 'Changes' section for more details.

grants and arrears for the time period during which they did not receive payment. This will result in millions of rands having to be paid out to beneficiaries by the Department.[334]

It is for the above reasons that these six cases are regarded as worthy of discussion in this research. They have had an enormous impact on the field of administrative and constitutional law by adding to the development thereof and they are of great jurisprudential significance since they have led to the development of the particular area of administrative law that can be described as 'social assistance law'. So too have these cases been of importance both to the applicants directly affected by the decisions in the matters, as well as to those social assistance beneficiaries who may be affected as a result of the Department improving its procedures and administration of the Social Assistance Act as a result of the litigation.

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[334] Although this process is a slow one, the effects of this landmark decision is beginning to be felt on the ground. See Chapter Five for further details. The class action has had the effect that the Department would have to pay out millions of rands in outstanding arrears to grant recipients. According to an article in the Daily Dispatch, 'The Eastern Cape Social Development Department has already paid over R45million in pension arrears to more than 3 500 disabled beneficiaries in terms of a court class action...At a media briefing here yesterday, the new Social Development MEC, Neo Moerane, said her department had reinstated 3535 class action beneficiaries and offered them (*sic*) a backpay of R45m. A further R11m in interest is to be paid to them' (Eric Naki 'R45m in disability grant arrears paid' *Daily Dispatch* 10 December 2002).

CHAPTER FOUR

The Human Aspect of the Crisis

Human aspect

The Department of Welfare's 'review process' which was discussed in the previous chapter did not only have legal implications. It also had social implications. The process affected the lives of all of the Applicants involved in the litigation against the Department, as well as the lives of thousands of others living in the Eastern Cape. However, it is not only the review process that is the problem. It is part of a bigger problem of an uncaring and incompetent bureaucracy that has been allowed by those in positions of power to get away with incompetence.[1] This chapter will attempt to illustrate the devastating impact which the unlawful cancellation or suspension of welfare grants as well as the inordinate delays in the processing of applications and the incompetence of Department officials has had on the lives of people in the province.[2]

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[1] The courts have commented on the uncaring approach of administrators and on their incompetence in a growing number of matters. In Mbanga v MEC for Welfare, Eastern Cape, and Another 2002 (1) SA 359 (SE), Leach J found that 'Substantial sums are being paid from the public purse, solely by reason of the inefficiency of public servants. Not only are there the cases which have already been brought to Court, but the applicant's attorney stated (in the *Mahambehlala* case) that he has been instructed "to launch hundreds of similar applications". From this one must presume that as long as administrative inefficiency continues to plague this province, public funds are going to continue to be wasted solely because public officials do not do the work which they are being paid to do. This is an intolerable state of affairs. Public servants are, as their very name implies, there to serve the public: not to sit inert and immobile, doing little apart from drawing their salaries and pensions. It is truly a disgrace that public servants in the employ of the Department of Welfare of this province are daily guilty of the widespread abuse of human rights of others, rights enshrined in the Constitution which should zealously be protected and enforced. After all, they are charged by s 195(1)(e) of the Constitution to respond to people's needs' (at 369H-370B). In January v MEC for Welfare, Eastern Cape, and Another SECLD 20 September 2002 Case no. 2294/99 (unreported), Chetty J pointed out that the administration of the Social Assistance Act by the Eastern Cape Provincial Department of Welfare 'has unfortunately, from the outset, been beset by gross ineptitude on the part of its officials and has resulted in a veritable avalanche of applications being brought by thousands of applicants against the respondents to compel them to comply with their statutory obligations' (paragraph 1).

[2] Much of the information in this chapter was taken from selected articles from the Grahamstown LRC's collection of press clippings relating to social welfare between the years of 1997 and 2002.

Cancellations

In his judgment in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others,[3] when discussing the Department's review procedure in terms of which thousands of disability grants where cancelled, Cameron JA stated that '...the method the authorities chose to deal with the situation was extreme, and the consequences for large numbers of people savage'.[4] He regarded those people whose grants had been cancelled in terms of the review procedure as 'victims of official excess, bureaucratic misdirection and unlawful administrative methods'[5] and found that 'the province's methods were causing widespread misery and injustice'.[6] In Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another,[7] Froneman J stated that the affidavits filed in the matter told 'a tale of lamentable failure on the part of officials of the [D]epartment, at virtually all levels, to give proper attention and effort to rectifying and alleviating this intolerable state of affairs'.[8]

Ms Bacela's story was typical of those who were affected by the Department's review process. While her grant was not being paid, she had no source of income and she had to rely on the kindness of family and friends 'just to keep body and soul together'. Every day that her grant was not paid, she was pushed further into debt and poverty. She stated that she would be able to pay the debts that she had incurred while waiting for her pension to be paid as soon as she was paid arrears. This 'debt trap' which Ms Bacela found herself in created immense worry and anxiety for her.[9] In his judgment in

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[3] 2001 (10) BCLR 1039 (SCA)

[4] Paragraph 7

[5] Paragraph 11

[6] Paragraph 17

[7] 2001 (2) SA 609 (E)

[8] At 617I-J

[9] Founding Affidavit, paragraph 35.1-3

Bacela v MEC for Welfare (Eastern cape Provincial Government),[10] Mpati J said that the Applicant had 'suffered untold suffering through no fault of her own'.[11] Many grant recipients use their grants to support entire households[12] and often, even if their cancelled grants are reinstated, many people are unable to escape the 'debt trap' into which they fall while they were not receiving their grants, particularly if they do not receive the arrears owed to them.

Mr Bushula had a wife and two minor children to support during the two years he did not receive his disability grant after it was cancelled. He and his family were reliant on the generosity of his sister for food and they were left virtually destitute with the cancellation of his disability grant.[13] Mr Futshani, the Second Applicant in the Bushula matter, had to rely completely on his cousin for his only form of income when his disability grant was cancelled. His cousin gave him R40 per month and provided him with food.[14] Ms Sethunya, the Third Applicant in Bushula, was divorced and received no support from her ex-husband. She had to support her youngest child who was still at school and dependent on her. She relied on her brother, who provided her with R50 per month for their support.[15] The Fourth Applicant in the matter, Mr Yekani, was a widower whose children were all grown up. He relied on his sister who provided him with food and he said that this was his only means of survival.[16] All three of these applicants said that the cancellation of their disability grants had left them 'utterly destitute'.[17]

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[10] [1998] 1 All SA 525 (E)

[11] At 529j

[12] See Chapter One, page 18.

[13] Founding Affidavit, paragraph 17

[14] Affidavit of Second Applicant, paragraph 7

[15] Affidavit of Third Applicant, paragraph 6

[16] Affidavit of Fourth Applicant, paragraph 6

[17] Affidavit of Second Applicant, paragraph 7; Affidavit of Third Applicant, paragraph 6; Affidavit of Fourth Applicant, paragraph 6.

Ms Nomala and her husband were both unemployed when her disability grant was unlawfully cancelled. Her grant was the only income she had to support herself, her husband and her grandchild. Once her grant was cancelled, she had to rely on handouts from her son and daughter, whenever they were able to give her money, and from her former employer who donated R200 a month to her. She was required to take medication for her disability,[18] but even when she was receiving her grant she was unable to afford it, so she relied on her former employer to supply it to her, at the former employer's own cost, every month.[19]

At the time of the launching of the class action, Mr Ngxuza was 58 years of age and still reliant on his father, who was himself an old age pensioner, for his support.[20] He was left 'utterly destitute' by the cancellation of his disability grant.[21] He stated in his affidavit that the people affected by the unlawful cancellation of social grants by the Department were generally those who were unable to support themselves as a result of old age or physical or mental disability. When their social grants were cancelled, they were without their only means of support and they were the poorest and most marginalised members of South African society.[22]

Forty nine year old Mr Magwa of Alice had suffered from severe tuberculosis since 1995 and relied on his monthly disability grant to support his children and extended family of 14. When his grant stopped without notice in May 1996, he and his family lived in squalor for more than 18 months. He had to rely on the R300 a month pension of his mother who lived with him to support himself and the members of his family. Another of his relatives managed to provided R110 each month to assist them.

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[18] Ms Nomala had suffered from rheumatoid arthritis since 1989. Her condition had grown steadily worse since then and at the time of the writing of the Founding Affidavit, she was unable to stand up without assistance, if sitting in a chair.

[19] Founding Affidavit, paragraphs 14-20

[20] This is not atypical. It is common for those who receive social grants to use them to maintain a number of others, usually relatives. See Chapter One, page 18.

[21] Founding Affidavit, paragraph 17

[22] Ibid, paragraph 18.3

His family lived a hand-to-mouth existence, eating a staple diet of samp and beans and he never knew when their next meal would come. He also had no money to send his four children to school. A minister from Alice said that the condition of the family's house was shocking and that he was afraid it would collapse. He said rain had got inside the house and had affected the floor and walls.[23]

In East London, Mr Sitwayi, a 33-year old father of three hanged himself in protest at the Department's failure to pay his disability grant. He had been disabled for more than 15 years and had been receiving a disability grant since he became paralysed on his right side after sustaining a stab wound to his spinal cord. His grant was cancelled in December 1997 and in April 1998, when he went to check at his local pay point for his grant, he was told to go and find work because he 'looked fit'. He worried about his children whom he had been unable to maintain because he had no income after his grant had been cancelled. Mr Sitwayi's wife was unemployed and did not know where she would get the money to bury her husband.[24]

Mr Sangati suffered from sporadic epileptic fits which became frequent when he did not have adequate nutrition. When his disability grant was stopped in February 1998, apparently without reason, his fits became frequent and he had to take medication on an empty stomach. His vision was severely affected by the epilepsy and it deteriorated to the point where he could barely see, despite thick glasses. His sister, who was also impoverished, could only afford to give him meal a day. She also supported Mr Sangati's wife and two children, as well as her own eight children, on her own small grant. Mr Sangati first applied for a disability grant in 1995 and waited two years before his application was processed and approved. He had barely begun to rely on his monthly grant when it was stopped without explanation.[25]

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[23] 'No grant, so family of 14 live in squalor' *Daily Dispatch* 19 February 1998

[24] L Mati 'Wife: no grant so man hanged himself' *Daily Dispatch* 18 April 1998

[25] A Carlisle 'Poor tell sorry tales of welfare neglect' *Daily Dispatch* 24 May 1998

Mrs Lottering, a 44-year old woman disabled by cancer and the amputation of one leg, died a pauper in April 1999 after battling for more than a year to get her disability grant reinstated. Her grant was cancelled in February 1998 and from then she frequently travelled to and from the East London welfare office on her daughter's back to try to find out the reason for this. A Department spokesperson said that the Department had no records of Mrs Lottering ever being a grant recipient. An acquaintance of Mrs Lottering said she befriended her in June 1998 when Mrs Lottering 'belly-crawled' across the street to her caravan to beg for bread. No one in her home worked and she survived on the goodwill of people who sometimes gave her soup or tea. Other times she lived on glucose water. After being sent from pay point to pay point, Mrs Lottering was told she was considered able to work.[26]

Fifty three year old Mr Kaspers of Bedford who was severely mentally disabled, died penniless after a massive epileptic fit in May 1999. His disability grant was cancelled in November 1998 after he was medically reassessed and found to be 100 percent disabled by the district surgeon who examined him. The provincial medical panel overturned this decision and found he was able to work. A Bedford psychiatric clinic nurse said that Mr Kaspers had regular psychotic episodes and that he was clearly unable to work. He lived with his unemployed sister and they were without money for nearly a year.[27]

Fifty four year old Mr April of Buffalo Flats was removed from the social security system in April 1998. He reapplied for his disability grant in April 1999, and although he was told that it had been approved by the Department, by June 1999 he still had not received a cent. He was sent back and forth between various welfare offices and pay points when attempting to collect his grant, but still received nothing. He suffered from severe epileptic fits. A Department spokesman said that the Department 'could not find any information on him and [would] get in touch with [the] East London offices'.[28]

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[26] A Carlisle 'EL victim of indifference, cancer dies' *Daily Dispatch* 29 April 1999

[27] A Carlisle 'Disabled man dies penniless, without grant' *Daily Dispatch* 13 May 1999

[28] N Wilson 'Welfare applicant still waiting' *Daily Dispatch* 10 June 1999

An 18-year old mentally retarded youth from Kei Road died following several months of hardship after the care dependency grant on which he and his mother relied as the sole source of income to pay for his food and medication was withdrawn by the Department. Despite the intervention of an Anglican priest on his behalf, the Department was 'unable' to reinstate his grant. His mother had applied to have the grant paid out in Kei Road rather than King William's Town, but they received their last payment in November 1998 and were unable to establish whether the grant had been moved to another pay point other than King William's Town or Kei Road. The Department finally informed the priest that the youth's mother had incorrectly indicated on the form that she wanted the grant to be paid out in Ginsberg and not Kei Road. It was subsequently established that the grant was not paid out in Ginsberg either. The priest said that it was 'difficult not to draw the conclusion' that the withdrawal of the grant had contributed to the youth's 'untimely death'.[29]

In August 1999, Mr Nzwanana died after nearly two years without receiving his disability grant. His grant was stopped in September 1997 without reason and he reapplied for it in the same year. He was told to check for his money in January 1998, but received nothing. He was certified 70 percent permanently disabled with epilepsy and mental retardation and had to walk with the aid of a stick. He was one of five others who died before receiving their disability grants.[30] Mr Sigidi from Daliwe Advice Centre wrote to the Daily Dispatch saying that 'there are a large number of people awaiting their grants, but when they pass away without receiving their grants, due to the long delay on the [D]epartment's side, the funeral expenses rest on the famil[ies]' shoulders as the government has also stopped assistance for pauper funerals'.[31]

An East London father of five, Mr Engelbrecht, received a disability grant for 12 years because his lungs were so badly damaged by tuberculosis. It was cancelled by a Department assessment committee in April 1998. A Department official said that the reason it was cancelled was because Mr Engelbrecht did not voluntarily have a lung function test. He underwent the test at the Department's

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[29] A Carlisle 'Disabled youth dies after grant life-line severed' *Daily Dispatch* 3 September 1999

[30] See 'Delays' below.

[31] K Sigidi 'Disabled will die before their grants arrive' *Daily Dispatch* 27 September 1999

instruction and his grant was reinstated in October 1999. During the 18 months in which he did not receive his grant, he was in such dire financial straits that he was forced to take his 17-year old daughter out of school because he could not afford the fees. After the lengthy battle to get his grant reinstated, Mr Engelbrecht died in hospital when he was admitted for tests. The outstanding amount which was owed to him had still not been paid to him by the time of his death in January 2000. The family was told that the amount would be paid out 'soon' if they brought his death certificate to the Department.[32]

Mr Marshall of Quigney in East London said that 'life was really hard' when his disability grant was cancelled without notification in February 1998. When he went to collect his grant at his regular pay point, he was told that he was 'not on the computer'. He was without his grant for two years and had to do 'small jobs for people and got a little money' during this time. He was diagnosed with cerebral palsy at the age of nine. His grant was reinstated after two years and he expected to be paid his back pay in a lump sum in May 2001.[33]

In April 1999, Operation Hunger warned of a 'frightening scenario' which was developing in the Eastern Cape and other regions where thousands of desperate people had had their state grants stopped. The national manager said that an increased incidence of tuberculosis, child prostitution, suicide, crime and other 'ailments typical of a sick society' would be the direct result of the increasing poverty which was an inevitable result of legitimate grants being stopped. She said that the organisation had received about two thousand letters from the Eastern Cape alone 'begging for assistance, often for retarded children, disabled friends, or epileptics being evicted'.[34]

In March 2000, Karin Claydon, a leading campaigner for the disabled, was quoted as saying that 179 000 people previously classified as disabled whose grants had been cancelled might now starve along with their families and that, with one grant feeding at least five mouths and with extended

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[32] M Zuzile 'Welfare undertakes to pay Engelbrecht family 'in full'' *Daily Dispatch* January 2000 and N Wilson 'Stofile sympathises with Engelbrechts' *Daily Dispatch* 1 February 2000

[33] C Jefferay 'City judge, attorneys and LRC bring joy' *Grocott's Mail* 12 April 2001

[34] A Carlisle 'Grant stoppages lead to desperation' *Daily Dispatch* 7 April 1999

families already stretched to the limit through unemployment, almost one million rural Eastern Cape people were being left without. She said: 'This is a silent, passive condemnation to death, the genocide of the Eastern Cape's disabled people'.[35]

These few stories illustrate the immense hardship, suffering and poverty which the Department's review process has inflicted on thousands of people in the Eastern Cape who were entitled to social assistance both in terms of the Constitution and the Act.

Delays

Delays due to inefficiency, incompetence and the uncaring attitudes of welfare officials have caused immense hardship for grant beneficiaries in the Eastern Cape.[36] Below are a few stories which are typical of those people whose applications for grants had not been processed at all or whose applications took inordinate lengths of time to be processed due to backlogs in the system and the 'administrative sloth and inefficiency which...bedevils the Department of Welfare of the Eastern Cape'.[37]

Mrs Mahambehlala applied for a disability grant in March 2000 when she was unable to get a job. An operation which she had had for high blood pressure in 1993 had gone wrong and had left her without the use of her hands. During the seven months before she launched proceedings against the

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[35] P Dickson 'Landmark R1bn grant case' *Mail & Guardian* March 10 to 16 2000

[36] Such people have a remedy in terms of the Promotion of Administrative Justice Act 3 of 2000. Section 6(2)(g) provides that a court or tribunal has the power to judicially review an administrative action if the action concerned consists of a failure to take a decision. Section 6(3)(a)(i) provides that any person who relies on this ground of review may in respect of a failure to take a decision, where an administrator has a duty to take a decision, there is no law that prescribes a period within which the administrator is required to take that decision, and the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision. So too can a person relying on section 6(2)(g), where an administrator has a duty to take a decision, a law prescribes a period within which the administrator is required to take that decision and the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.

[37] Mahambehlala v MEC for Welfare, Eastern Cape, and Another 2002 (1) SA 342 (SE), at 352 B

Department to compel officials to make a decision regarding her application, she had to take three of her six grandchildren out of school because she could not afford the fees any more and she was supported by her sister in the Ciskei. She was unable to pay the rent on her house and was barely able to pay the rates.[38] As a result of the litigation on her behalf, she eventually received both arrears and interest on the amount owed to her from the Department.[39] In his judgment in the matter, Leach J stated that it was 'unconscionable for the applicant not to receive her grant within a reasonable time of applying for it. It is also unconscionable for the respondents not to pay her a grant for a period from when it should have been approved in June 2000 until when it was finally approved in November 2000, particularly as the delay was due to negligence on the part of their department'.[40]

Mr Mbanga was the father of ten and sometimes went without food for days at a time while his application for a disability grant was processed. For two and a half years while he waited for a response from the Department, Mr Mbanga and his family had to rely on handouts from family and friends. He said none of his children were able to find jobs and he was in 'serious payment arrears on his house'. He was also unable to afford lights and water.[41] Also a result of litigation on his behalf, he eventually received payment of the arrears and interest owed to him by the Department.[42] In his judgment in the matter, Leach J held that 'it was wholly unreasonable for the second respondent to have taken thirty two months to approve an application which he should have approved within three, and that his failure to take a decision thereon when he should have done, which rendered the applicant bereft of his social grant ('old age pension') to which he was entitled for some two and a half years, constituted a gross infringement of his constitutional right to lawful and administrative action'.[43] He also said that 'although patience is a virtue, I venture to suggest that even the patience of Job would

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[38] '...set to make legal history. Disability won't stop her from suing for grant.' *Daily Dispatch* 2000

[39] 'Welfare pays social grants' *Daily Dispatch* 13 June 2001. Mahambehlala v MEC for Welfare, Eastern Cape, and Another *supra*.

[40] At 354I

[41] '...set to make legal history. Disability won't stop her from suing for grant.' *Daily Dispatch* 2000

[42] 'Welfare pays social grants' *Daily Dispatch* 13 June 2001. Mbanga v MEC for Welfare, Eastern Cape, and Another 2002 (1) SA 359 (SE).

[43] At 369E-F

have been tested by the inefficiency of officialdom in this case'.[44] He went on to say that 'it is truly a disgrace that public servants in the employ of the Department of Welfare of this province are daily guilty of widespread abuse of the human rights of others, rights enshrined in the Constitution which should be zealously protected and enforced'.[45]

In February 1998, ten starving pensioners in the Alice district had to wait for two weeks while their case against the Department for non-payment of their pensions or disability grants was postponed to allow the Department to prepare its answering papers to their affidavits. One of the pensioners was a paraplegic who had to continue to live on nothing for the two weeks. A church heard of their plight and took over feeding them. Five of the pensioners had been receiving disability grants that had been cancelled without notice or explanation the previous year.[46] This case was an example of the Department's delaying tactics and shows that even when it was taken to court for delay, the Department delayed even more and failed to file its papers timeously, necessitating a postponement.

According to Daliwe Advice Centre co-ordinator, Kenneth Sigidi, at least four disabled Cathcart people died in the four months between April and August 1998 while waiting for their applications for disability grants to be processed. He said that Ms Mpiko, Ms Jama, Mr Mgqamqho and Mr Sigila had made their applications between one and four years ago, but that none of them had been processed by the time they had died. All four of the deceased had been declared 100 percent disabled by district surgeons. Mr Mgqamqho applied for his grant in August 1994, but his file was misplaced and he died while waiting for an appointment to have a new medical report form filled in. Mr Sigila was mentally impaired and applied for his grant in 1995, while Ms Mpiko had applied in 1997. Ms Jama had had both of her legs amputated and had applied for her grant in 1996.[47]

Mr Ncapayi, who suffered from terminal throat cancer, uncontrollable epilepsy, severe eczema and hypertension and who had been hospitalized on several occasions with limb-threatening cellulitis,

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[44] At 362G-H

[45] At 370A-B

[46] 'Alice pensioners' court case postponed' *Daily Dispatch* 18 February 1998

[47] A Carlisle '4 disabled people die without grants' *Daily Dispatch* 25 August 1998

struggled unsuccessfully since 1997 to get a disability grant. He was turned down twice and applied for a third time in March 1999, but had still not heard anything by the time he applied to the High Court for an order to compel the Department to pay his grant. At the time of the application, he had to live on the charity of his unemployed sister. The Permanent Secretary eventually consented to pay Mr Ncapayi the amount he was owed in arrears and a monthly disability grant until he died. Mr Ncapayi died before any attempt was made to deliver the cheque to the LRC's offices. The LRC represented him in the application.[48]

In June 1999, after two years of not receiving her disability grant, 52-year old Ms Diko from Duncan Village who suffered from a serious heart condition and was therefore unfit to work, was told by the Department to 'get a job'. She applied for a disability grant when she was first diagnosed and when she enquired about her money, she was told that the cheques needed to be cleared. Two years later, she was told that there was no money available for her. Ms Diko relied on her 89-year old mother's pension to survive and her two daughters had to give up their studies because of the lack of funds.[49]

In East London in August 2000, about 200 Buffalo Flats and Duncan Village residents expressed their discontent over the provincial government's delays in processing their disability grant applications. They said that they had not received their R250 food vouchers, which they usually got every two weeks, for three consecutive weeks. The vouchers were intended to assist the most destitute whose grants were terminated by the Department and who had been told to reapply for their grants. A Duncan Village old age pensioner, Mr Fifa, said that he had been in dire straits since his old age pension was cancelled four years previously.[50]

It was reported in October 2000 that, in Fort Beaufort, seven mothers with disabled children had waited for five years before they began to receive the grants they had applied for. The families lived in 'grinding poverty' and had received no explanation for their lengthy wait from the Department. One of the mothers, Kholeka Mwawa and her disabled daughter, Nozipiwu, aged 8, finally received

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[48] A Carlisle 'Destitute man dies before receiving grant' *Daily Dispatch* 17 June 1999

[49] 'Get a job, Welfare tells grant recipient, 52' *Daily Dispatch* 30 June 1999

[50] Z Feni '200 residents fail to get food vouchers' *Daily Dispatch* 21 August 2000

a grant from the Department in October 2000 after repeatedly applying for a care-dependency grant since 1996. She said that the family had been living 'from hand-to-mouth' since the child's grandmother had died in 1999 as the entire family had survived on her pension. The mother was unable to find work because her child needed constant care.[51]

In Ndevu v MEC for Welfare, Eastern Cape Provincial Government and Another,[52] Nontombi Ndevu brought an application against the Department when she received no response from it regarding her application for a disability grant three months previously. Erasmus J stated that in cases such as hers, 'the applicants are and have been in dire need of the modest benefits to which they are entitled under the Act. The delays in the processing of their applications must have caused them severe privation'[53] and that although many such cases did come to court, these matters were probably but the tip of the iceberg. This, he said, 'raises the disturbing likelihood that many persons in this province at this moment are suffering real hardship through the ineffectiveness of the public service at provincial level'.[54]

'Living dead'

Another problem which grant recipients in the Eastern Cape have had to face is that they have been recorded on the Department's computer system as deceased and so are told at pay points that they will no longer receive their grants, despite the fact that their very presence at the pay points demonstrates the falsity of the assertion that they are deceased. Several examples of this occurrence are discussed below.

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[51] 'Disabled children await grants' *Daily Dispatch* 14 October 2000

[52] SECLD Case no. 597/02 (unreported)

[53] Paragraph 2

[54] Ibid. Another matter which was of concern to him was that the respondents *in casu* had initially opposed the matter, but had later withdrawn their opposition nearly three months later and the Applicant was informed that her application had been refused. Erasmus J was of the opinion that 'it would seem that the opposition was merely a maneuver designed to allow the respondents time to process the claim...' (paragraph 6). He was concerned that this was but one example for the 'millions of rand in taxpayers' money [has] been wasted in unnecessary legal costs occasioned by indolence and/or incompetence on the part of public servants' (paragraph 7). See Chapter Five regarding several means which could be used to discourage officials from wasting taxpayers' money in this way.

Ms Mrawuzeli applied for her old age pension after she turned 60 years of age in 1972 and began to receive it on a regular basis soon thereafter.[55] In January 1997, she discovered that her pension had not been paid into her bank account as it had been previously.[56] When Ms Mrawuzeli and her daughter made enquiries at the Department offices in New Brighton, they were informed that her pension had been cancelled because the Department's computer said she was dead and she was advised to furnish the Department of Home Affairs with an affidavit stating that she was still alive.[57] At the New Brighton Police Station, Ms Mrawuzeli duly deposed to an affidavit to the effect that she was still alive.[58] She delivered the affidavit to the Department of Home Affairs in Port Elizabeth and requested that the Department's computer records be amended to indicate that she was still alive, after which her fingerprints were taken by a Department official who told her that she would receive a letter informing her that the matter had been attended to and that she should take this letter to the Welfare Department.[59] After she did not receive such a letter, she consulted with a paralegal worker at the Black Sash Advice Office in Port Elizabeth, who telephoned the Department of Welfare. The Department official advised to her to return to the Department of Home Affairs for a letter confirming that she was still alive.[60] Ms Mrawuzeli did so and after receiving such a letter, she delivered it to the Department of Welfare, at which time she was made to fill in forms for an application for the reinstatement of her pension.[61] Ms Mrawuzeli heard nothing more from the Department regarding her pension and after more than seven months, it had still not been reinstated.[62] It was at this point that she instituted an application against the Department for the reinstatement of her pension or,

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[55] Mrawuzeli v MEC for Welfare, Eastern Cape Provincial Government ECD Case no. 1302 (unreported), Founding Affidavit, paragraph 6

[56] Ibid, paragraphs 7 and 8

[57] Ibid, paragraphs 9 and 10

[58] Ibid, paragraph 11

[59] Ibid, paragraphs 12 and 13

[60] Ibid, paragraphs 13 and 14

[61] Ibid, paragraphs 15, 16 and 17

[62] Ibid, paragraph 19

alternatively, the consideration of her application for the reinstatement of her pension.[63]

Mr Nelo was carried into the LRC's Grahamstown office in January 1995 on his son's back. He had received a disability grant for a number of years, but because of his lack of mobility, his wife had been authorised, by power of attorney, to collect his grant for him. When she went to collect his grant in October 1994, she was told that her husband was dead and although she assured the clerk that this was not correct, he told her that no money could be paid to her because the computer said that Mr Nelo was dead. Mrs Nelo took her husband to a doctor who examined him and certified that he was alive. His report was delivered to the Department, but the computer rejected it, as it rejected a second doctor's report certifying Mr Nelo as being alive. Mr Nelo had been without his pension for two months by the time he was brought to the LRC. Mr Plasket of the LRC threatened an urgent application against the Ministry of Health in Pretoria and was promptly referred to the Provincial Department of Health and Welfare in Bisho, which in turn referred him to the Department of Social Services in Port Elizabeth. This office proved to be 'singularly unhelpful' and after being referred from 'pillar to post over a protracted period of time', on 10 March 1995, Mr Nelo received a cheque for the pension payments which he had been denied and his pension was also reinstated prospectively.[64]

After months of enquiries after her old age pension was stopped, Mrs Plaatjies was told that her pension had been stopped because she was dead. In an interview on SABC One's talk show 'Two Way' in October 1998, she said that while she was not receiving her grant, she had battled to make ends meet.[65]

In April 1999, 89-year old Mr Pingololo of Mdantsane was shocked when he went to collect his pension at his regular pay point when he was told that he had died in March. He had been told the

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[63] Notice of Motion, paragraphs 2 and 3

[64] C Plasket 'Accessibility Through Public Interest Litigation' in H Corder and T Maluwa (eds) *Administrative Justice in Southern Africa* Department of Public Law, University of Cape Town, 1997 119 120-121

[65] A Carlisle '"Dead" pensioner alive and well on TV1 talk show' *Daily Dispatch* 22 October 1998

same thing in November 1998 when he went to the pay point, but was later paid his grant.[66]

Twenty year old Sizakele Ngesi's care-dependency grant was wrongly stopped in 1996 when he was mistakenly listed as dead by the Department of Welfare. He was born mentally and physically disabled and his primary caregiver was therefore entitled to a care-dependency grant until he reached the age of 18, when he would be entitled to a disability grant. His primary caregiver was his grandmother who was herself an old age pensioner. During the second week in February 2002, a spokesperson for the Department confirmed that the outstanding back pay would be handed over to the Ngesi family the following month after a six year wait.[67]

Problems at pay points

Various problems are faced by grant beneficiaries when they queue at pay points to collect their grants. One of the most frustrating of these is the fact that, after long waits, many people are told that there is no money for them or that they will not receive payment, often without reasons being given. Grant recipients also have to suffer poor conditions while waiting in endless queues for their money, such as high temperatures, lack of shelter and seating, and long hours of waiting. Below are a few stories to illustrate the hardships many people suffer while queueing at pay points.

In January 1997, after waiting for three days in long queues at their pay point in temperatures of over 30 degrees, hundreds of Mdantsane pensioners and disabled residents had still not received their pensions and disability grants. Elderly people had arrived at the pay point as early as 5am, while others had slept in the outside corridor of the hospital which was used as a pay point. Sixty eight year old Mrs Sizeka had arrived at the pay point at 4am and after spending more than eight hours in the queue, she had still not received her cheque. Mrs Nodwaza could barely speak as she leaned against the wall waiting in the queue. She had been waiting for two days and had still not been given her cheque or any assistance. Mrs Monco said that she had received a letter from a social worker stating that she was disabled, but that when she had finally reached the pay-out table, she had misplaced the

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[66] W Mdoda 'Pensioner told he had "died"' *Daily Dispatch* 29 April 1999

[67] L Feni 'Grant is paid - after six-year wait' *Daily Dispatch* 15 February 2002

letter and was turned away. She had only one leg.[68] By the fourth day of waiting in long queues, two elderly people from Mdantsane had died while waiting to be paid their pensions.[69]

In March 1997, more than 500 pensioners gathered at the magistrate's offices in Umtata after Department officials had failed to pay their grants for the second consecutive month without explanation. Some of the pensioners who had travelled more than 60 kilometres to Umtata had been waiting for two months to receive their grants. They vowed to sleep at the offices until they got their grants.[70]

In October 1998, scores of pensioners left a welfare pay point in Mdantsane after they did not receive their social grants after waiting in long queues for two days. Some of them vowed to sleep outside the pay point rather than go home empty-handed as they needed their grants desperately. The pensioners complained that they were forced to collect their grants kilometres away from their homes and that they had to wait in poor weather conditions with no shelter and some were ill.[71]

In January 1999, long queues, fights and queue-jumping were still prevalent at pension pay points in Mdantsane despite the new payment system meant to minimize the long waiting and other problems. Pensioners complained that they were pushed around by young people sent to queue for their parents. Many pensioners slept in the grass and many were confused, angry and frustrated. Some of them had spent the previous night at the pay point and other had arrived in the early hours of the morning. A fight had nearly broken out between the pensioners in the disabled and old age queues because able-bodied people were jumping over the barbed wire fence into the disabled people's queue and being let in by officials. Mrs Soga, a mother of three, applied for her grant in 1996 and it was approved the same year. When she went to the pay point, she was told that her name did not appear on the roll. She asked why she had been given a number if her name was not there and the following month, her name was still not on the roll. An angry Ndevana woman who had been 'pushed from pillar to post'

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[68] S Piliso 'Pension payout chaos, delays' *Daily Dispatch* 9 January 1997

[69] S Piliso 'Further delays at pension pay points' *Daily Dispatch* 10 January 1997

[70] S Xako 'Abandoned pensioners vow not to leave until grants paid' *Daily Dispatch* 13 March 1997

[71] W Mdoda and L Mati 'Pension payments delayed' *Daily Dispatch* 10 October 1998

by the Department for nearly three years said she had lost hope of ever receiving her disability grant.[72]

In June 2000 in East London, pensioners had 'a tough and long wait' for their pensions after it was decided to pay all of the area's pensioners on the same day instead of over several days. This attempt to save costs because of the small number of pensioners in the area led to delays which affected the health of some ailing pensioners. Forty nine year old Angie Jacobs suffered an asthma attack at noon after she had been waiting since 5am. Another woman fainted as she could not endure sitting in the poorly ventilated hall for hours.[73]

In June 2000, a 67-year old man from Machibini village who suffered from severe asthma died at the Welfare offices in Queenstown. He and his family members were at the offices in order to sign documents to allow the family to receive his pension money on his behalf as his health was not improving. He struggled to get out of the family vehicle and died while waiting in a chair in the Welfare offices.[74]

Conclusion

An important point to note regarding the above 'horror stories' is that these cases are 'but the tip of the iceberg', as described by Erasmus J in his judgment is Ndevu v MEC for Welfare, Eastern Cape Provincial Government and Another.[75] The stories recounted in this chapter are a small selection taken from the LRC's collection of press clippings relating to social welfare in the Eastern Cape. They are by no means all of the stories that have been written about in the press and even then, there are thousands of similar ones that have not caught the attention of the press. There are thousands of people, both in the Eastern Cape and other provinces, who live in similar poverty and who have suffered similar hardships as those people's whose stories are recounted above, but theirs may never be told. These few have been told to serve as an illustration of the immense suffering and hardship

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[72] B Siqoko 'Pay-out problems persist say pensioners' *Daily Dispatch* 15 January 1999

[73] Z Feni 'Pensioners in long, tough wait for payouts' *Daily Dispatch* 10 June 2000

[74] M Titi 'Man dies at pension offices' *Daily Dispatch* 20 June 2000

[75] *Supra*

thousands of people have endured because of the incompetence, inefficiency and uncaring attitudes of Department officials. This is the reality for many who 'are unable to support themselves and their dependents,' rather than the ideal of social assistance that is promised by section 27(1)(c) of the Constitution.

Another significant point is that these stories range over a long period of time. The first was reported in March 1997, while the last one was reported in February 2002. They cover a period of five years during which people have suffered because of the incompetence, inefficiency and uncaring attitudes of Department officials in the Eastern Cape. It is submitted that this suffering has in fact gone on for longer than this length of time since it was the litigation campaign of the LRC which drew the attention of the press to the plight of many grant recipients in the province and not the unusualness of their situation. It is submitted therefore that the hardship suffered by many began well before the first story was reported. What is also significant is that these stories have been reported over a period of five years and the number of stories does not seem to have diminished over time nor do the problems reported seem to have changed. This implies that the Department has done little over the past five years to improve the administration of the Act in the province, despite the spotlight that the media has cast on its incompetence, inefficiency and uncaring attitude.

In his discussion of the plight of the members of class in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza, Cameron JA held that 'it is the needs of such persons, who are most lacking in protective and assertive armour, that the Constitutional Court has repeatedly emphasised must animate our understanding of the Constitution's provisions'.[76] The situation of the people whose stories are recounted above, even if they were not members of the class, were similar to those who were in fact part of the class and it is submitted that these people are in fact those 'most lacking in protective and assertive armour' as described by Cameron JA. Therefore it is necessary to note what in fact the promise of the Constitution has been to these people.

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[76] Cameron JA cited the following cases as examples: Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC), paragraph 149; Mohlomi v Minister of Defence 1997 (1) SA 124 (CC), paragraph 14; Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC), paragraph 8; and Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46, paragraph 25.

The Preamble of the Constitution states: 'We [the people of South Africa] therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to- heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person...' Section 1 declares that South Africa is one, sovereign, democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms, the supremacy of the Constitution and the rule of law, and universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. Section 3(2) states: 'all citizens are entitled to the rights, privileges and benefits of citizenship'. All of these provisions illustrate the Constitution's commitment to social justice and the protection and advancement of human rights.

Section 195 of the Constitution deals with the basic values and principles governing public administration. Section 195(1) provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: a high standard of professional ethics must be promoted and maintained; efficient, economic and effective use of resources must be promoted; services must be provided impartially, fairly, equitably and without bias; people's needs must be responded to, and the public must be encouraged to participate in policy-making; public administration must be accountable; and transparency must be fostered by providing the public with timely, accessible and accurate information.[77]

In addition, in Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government, Froneman J held that the Constitution 'declares ours to be a democratic State (s 1). One of the foundations of democracy is that those who are chosen to rule are must be accountable to those they govern. The Constitution recognises that to be a founding value of our democracy (s 1(d)). It also recognises that modern societies need to be run by persons other than those directly elected by the people. Those in the public administration must accordingly also be subject to the foundational

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[77] Sections 195(1)(a), (1)(b) and (1)(d)-(g) respectively.

values of democracy, otherwise the promise of democracy may become an illusion'.[78]

As well as being governed by the values and principles set out in the Constitution, public administration is guided by those set out in the White Paper on Transforming Public Service Delivery.[79] Eight principles for transforming public service delivery were identified by the Department of Public Service and Administration in this paper, these being the *Batho Pele* principles.[80] They include consultation, service standards, access, courtesy, information, openness and transparency, redress and value for money. It has been stated that '*Batho Pele* aims to make sure that attitudes, systems and procedures are reoriented in favour of service delivery'.[81]

It is submitted that the stories recounted in this chapter and the thousands of other similar ones that have not been told, suggest that for many South Africans, the Constitution's commitment to social justice, human rights and the improvement of 'the quality of life of all citizens' may seem to be merely a laudable ideal. However, on the other hand, it is submitted that the LRC's litigation campaign has played a significant role in making the promise of the Constitution more of a reality to those 'most lacking in protective and assertive armour'. The litigation campaign has been an attempt to protect the rights of these people to social assistance and just administrative action and in this way to protect their rights to dignity, equality and life.[82] The campaign has consequently narrowed, and continues to narrow, the gap between reality and the ideals of the Constitution.

Despite this, the stories recounted in this chapter indicate, however, that there is a disjuncture between the way the Department has gone about providing social assistance and the promise of the

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[78] At 620G-H

[79] 'White Paper on Service Delivery' Department of Public Service and Administration, 18 September 1997, General Notice 1459 of 1997 (Government Gazette No. 18340, 1 October 1997 or www.gov.za/whitepaper/1997/18340.pdf)

[80] *Batho Pele* is Sesotho for 'People First'. This name was chosen to 'express the key message of the campaign, that the purpose of the Public Service is to serve all the people of South Africa' (www.dpsa.gov.za/projects/batho-pele/faqs.htm).

[81] Ibid

[82] Protected in terms of sections 27(1)(c), 33, 10, 9 and 11 of the Constitution respectively.

Constitution. The Department's conduct, as described in this chapter and the previous one, does not illustrate a commitment to social justice, to the protection and advancement of human rights, or to the improvement of the quality of life of all citizens. It does not indicate that the Department is governed by any of the basic values and principles set out in section 195(1) by which public administration must be governed. Neither does it indicate that the Department has paid heed to any of the principles of *Batho Pele*. Rather, it is submitted that the Department's conduct indicates that the promise of democracy is in danger of becoming an illusion.

As Chaskalson CJ said in the Third Bram Fischer Lecture: 'the Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another. We are capable of realising this vision but in danger of not doing so. We seem temporarily to have lost our way. Too many of us are concerned about what we can get from the new society, too few with what is needed for the realisation of the goals of the Constitution. What is lacking is the energy, the commitment and the sense of community that was harnessed in the struggle for freedom...All of us have an obligation to make the Constitution work, and it is in all of our interests that this be done...it is appropriate that we remind ourselves of what still remains to be done and of the commitment that it demands from us all'.[83] It is submitted that the Department has indeed 'lost its way'. Furthermore, it needs to be reminded of what it must to do help to bring about the Constitution's vision of the future and of the commitment the Constitution demands from it, that is, a commitment to social justice, to the advancement and protection of human rights and the improvement of the quality life of all citizens. It is submitted that by committing itself to the basic values and principles which must govern public administration, the Department would make considerable strides towards the fulfilment of the demands of the Constitution.

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[83] A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193 205

CHAPTER FIVE

Interviews

In order to determine the impact of the LRC's litigation campaign against the Department in the Eastern Cape, it was necessary to interview several groups of people affected by or involved with the campaign. These groups included paralegals at various Advice Offices in areas around the Eastern Cape, legal practitioners from the LRC, several representatives of the Black Sash, an official from the Department of Welfare in the Eastern Cape, a former MEC for Health and Welfare in the Eastern Cape Provincial Government, a private legal practitioner involved in social welfare matters, and a leader of the Anglican Church in the Eastern Cape who has been involved in pension matters for many years.[1]

These interviews were conducted between August and December 2001, and then again in March, July and October 2002. Interviewing the paralegals at the various Advice Offices entailed several visits on a number of occasions with two representatives of the Rhodes Legal Aid Clinic who were conducting circuits of the Advice Offices which the Legal Aid Clinic services, and then telephonic interviews in July with paralegals further afield. The methodology of the interviews involved asking the paralegals various questions regarding their experiences with clients with welfare problems, such as what role they played in the litigation, and their opinions regarding the problems within the welfare system in the province; specifically, what problems they felt had been addressed and what still remained to be addressed, their suggestions as to what could be done to improve the system, what they hoped would come out of the litigation, whether the campaign had brought about change and whether they felt that the litigation had been a success. It was not possible to interview paralegals at Advice Offices in all areas of the Eastern Cape and to thereby get a full picture of the situation throughout the whole province. However, it is submitted that the paralegals were representative and that the experiences of paralegals at Advice Offices elsewhere in the province would be much the same.

Interviews with the legal practitioners at the LRC involved several visits to the Grahamstown office

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[1] See Annexure A for further details regarding these people.

in September and October 2001 and again in March 2002 subsequent to a settlement being reached in the class action. A telephonic interview took place in September 2002 in order to update the research regarding the progress in the matter. During these visits, interviews were conducted with various individuals involved in the litigation campaign in various capacities and at various times. The questions asked related to the background to the campaign as well as each individual's opinion regarding the impact of the litigation, that is, the changes it had brought about, the issues that had been addressed and those that still needed to be addressed, whether the litigation had been a tool to bring about change and whether or not the campaign had been a success.

With regard to the interview with Robert Martindale, the private legal practitioner who was interviewed,[2] the questions asked of him sought his opinion as someone involved in the litigation, but from a different perspective to that of the legal practitioners employed by the LRC. The questions asked were much the same as those asked of the LRC practitioners, namely, which issues had been addressed by the campaign and which still remained to be addressed, the impact of the litigation, an evaluation of the campaign as a tool to bring about change and his experiences with welfare matters.

The interviews with the various representatives of the Black Sash and Bishop Russell of the Anglican Church in the Eastern Cape focused on each individual's personal experience in welfare matters and sought both background to the litigation campaign and opinions regarding the impact of the campaign, the changes it brought about and what still remained to be addressed. The representatives of the Port Elizabeth and Grahamstown Black Sash Advice Offices were able to give details of the kind of problems that their offices dealt with and their experiences of what has or has not changed as a result of the litigation. Sheena Duncan and Bishop Russell gave details of their personal histories with welfare matters and their assessments of the campaign and the use of litigation as a tool to bring about change.

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[2] Mr Martindale is a private legal practitioner who was drawn into welfare litigation by the LRC. The idea was to draw private practitioners into litigating such cases in order to get more cases into court. See Chapter Two.

The interview with Dr Trudie Thomas, a former MEC for Health and Welfare in the Eastern Cape, was aimed at compiling a background to the campaign from the perspective of someone who was involved in the administration of the Department during the amalgamation and integration process. The questions dealt with the problems the Department had to deal with at the time of amalgamation and what the Department was trying to achieve by the process of the review of grants and the re-registration of grant recipients.

The questions asked of Mark Rasmussen, Deputy Director of the Department for Social Security, dealt specifically with what changes the Department had made as a result of the landmark cases discussed above. He was asked whether any changes had been made to the procedures followed by Department officials regarding hearings and notice as a result of Bushula;[3] whether any changes had been made to the standard form 'reasons' given to grant recipients when their grants were suspended or cancelled or their applications rejected as a result of Nomala;[4] whether the Department had learnt anything from the individual cases; whether the litigation had had a positive impact on the administration of the Department; and whether there had been any attempt to improve the Department's performance as a result of the litigation.

This chapter will discuss the issues raised during the course of the interviews and attempt to bring together and assess the common threads that ran through the interviewees' responses.

Changes

All of the paralegals who were interviewed had dealt with many clients' problems regarding welfare matters. Most of them noted that there have been some improvements in the welfare system since the LRC began its litigation campaign against the Department and said that the situation is 'slowly

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[3] Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (2) SA 849 (E)

[4] Nomala v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another 2001 (8) BCLR 844 (E)

improving'.[5] Three of them said that the numbers of cases they dealt with had remained the same, despite the litigation and another three said that they dealt with fewer recent cases of problems, but still dealt with many problems from the past.

They noted that some people had had their grants reinstated and that their grants were now being paid on a monthly basis; that applications were being processed more quickly by the Department, although they were not always processed within three months;[6] that some people were now receiving notice of potential cancellations and that some people were given the opportunity of a hearing regarding the cancellation of their grants;[7] that standard form reasons were not used as much as in the past;[8] that those individuals with court orders were now being paid or had received decisions on their applications;[9] that those grants that had been reinstated were less likely to be cancelled again than previously; that some areas previously without satellite welfare offices now had such offices to deal with applications and problems; and that more people were aware of the social assistance available to them. Most of them agreed that these changes had occurred as a result of the litigation, particularly the class action.

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[5] Two exceptions were Mr Bottoman from Aliwal North who said that nothing had happened in the area since the class action and Mr Matiso from Jamestown who said that there had been no progress in the area at all since the class action and that people were still waiting to be reinstated or re-assessed.

[6] In Mahambehlala v MEC for Welfare, Eastern Cape, and Another 2002 (1) SA 342 (SE) and Mbanga v MEC for Welfare, Eastern Cape, and Another 2002 (1) SA 359 (SE), Leach J held that three months was a reasonable period of time in which a decision regarding applications for grants should be made. See Chapter Two for details.

[7] This was noted as being a requirement in Bushula *supra* and again in Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another 2001 (2) SA 609 (E). See Chapter Three.

[8] These 'reasons' were found to be insufficient in law in Nomala *supra*. See Chapter Three.

[9] In Ndevu v MEC for Welfare, Eastern Cape Provincial Government and Another SECLD Case no. 597/02 (unreported), it was held that officials are required in terms of the Regulations and the Constitution to make decisions regarding grant applications and in Somyani v MEC for Welfare, Eastern Cape and Director-General, Department of Welfare, Eastern Cape SECLD Case no. 1144/2001 (unreported), it was held that officials are required in terms of the Constitution to obey court orders, and specifically that Department officials are required to obey courts orders compelling them to make decisions regarding grant applications.

A voluntary paralegal for the LRC, Rosemary Smith, also commented that the litigation campaign and particularly the class action, had made a difference to the crisis within the social welfare system in the province. She said that the number of problems referred to the LRC appeared to have diminished although it was difficult to tell to what extent. She said that the office dealt not only with problems dating quite far back, but also with more recent problems and that recently there seemed to be smaller numbers of complaints being referred to the office. She pointed out that there had been various positive changes as a result of the litigation, such as the fact that the Department had addressed the issue of the standard form letter giving reasons for the cancellation of grants[10] and that the Department had recently been making suggestions as to how to improve the administration of social welfare in the province.

Robert Martindale stated that the number of problems that he dealt with had not diminished over the past few years, but that the nature of problems had changed. He said he used to deal mainly with applications to compel the Department to act because of long delays in the processing of applications, but that he now dealt mainly with issues of back pay and interest. He said that it appeared that the Department seemed to be speeding up the processing procedure and that there seemed to be an attempt to adhere to a three month period for processing. He felt this was partly as a result of the cases of Mahambehlala and Mbanga and partly because of the LRC's campaign.

Nomzi Vasi from the Black Sash agreed with this, saying that the Department appeared to be trying to process applications more quickly since, in her experience, new applications seemed to be being processed in less than three months now. She also said that officials appeared to be trying to improve the Welfare office in Port Elizabeth.

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[10] This does not appear to be the case, however. In a recent article in the *Daily Dispatch*, it was claimed that the Department continues to use the standard form letter which was ruled to be invalid in Nomala since it did not constitute reasons as required by the Constitution and the Social Assistance Regulations (see Chapter Three). In terms of the order in Nomala, the Department was given 60 days to draft an alternative letter for the rejection of disability grant applications and the cancellation of disability grants. According to the article, the Department admitted that it continues to use the same or similar letters and 'legal experts say the department has [thus] placed in jeopardy thousands of decisions it has taken to reject or cancel disability grants' (A Carlisle 'Unlawful grant letter still in use say experts' *Daily Dispatch* 18 September 2002).

Mark Rasmussen stated that several changes had been made by the Department during the LRC's campaign. He contended that the procedures challenged in Bushula had been corrected before the matter came to be heard, in that the procedures followed during the 1998 review process included grant beneficiaries being given written notice that their grants must be reviewed; reasons why their grants must be reviewed; the consequences of the review or suspension of their grants and those if their grants were not reviewed; written reasons as to why grants were suspended after review; and opportunities for appeal. He said that there was a problem in that the LRC had taken an 'old case' to court when the Department's procedures had already been corrected.[11] He said that the Department was now giving people both notice and the opportunity of hearings before grants were cancelled or suspended.[12]

Regarding the case of Nomala, Mark Rasmussen complained that the case had been based on the standard form letter used in the cancellation of disability grants in 1997.[13] He said that by the time the matter reached court, the Department had already been using a new letter. Instead of containing five standard reasons, one to be marked, the standard form letter used by the Department now contained three new standard reasons for the cancellation of grants with space provided for individualized written explanations of these reasons. He said that these written explanations usually

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[11] This contention is strange because this was never claimed during the course of the proceedings and the Department still opposed the matter, despite the fact that, as Rasmussen claims, its procedures had already been corrected. In fact, instead of making the claim that the procedures had been corrected, the Department claimed in the Bushula matter that the procedures it followed were adequate as they stood. Later, in the Ngxuza matter, in the Answering Affidavit which he made, Rasmussen stated: 'The Department took note of the judgment of this Honourable Court and the valuable guidance it had given in respect of the suspension and/or cancellation of disability grants in the Bushula case. The officials of the Department have been instructed to act accordingly' (paragraph 3.17).

[12] This is at odds with the facts. Paralegals interviewed both in August 2001and July 2002 stated that few people had received notice or been given the opportunity of hearings when their grants were cancelled. Also, the many people who were members of the class in Ngxuza also claimed that they had not been accorded these rights, despite the outcome of Bushula, and the members of the class included people whose grants had been cancelled subsequent to Bushula, in which the judgment was handed down in December 1999

[13] This directly contradicts the Respondents' contention in the Nomala matter where they argued that the letter was not used in the context of the cancellation of grants, but in the context of re-applications therefor (Nomala *supra* at 852B).

consisted of the reasons given by the examining doctors on the medical forms completed during application for disability grants.[14]

He said that officials had 'picked up the mistakes' that had been made by the Department in the past and, as a result of the class action in particular, officials had 'pulled' the files of those on the Department's list of people who had had their grants cancelled between March 1996 and September 2000 and examined the procedures followed for any illegality. He said that this process was almost complete and that as a result, the Department had discovered that about 16 000 out of the 43 000 on the list were deceased.[15] This was determined by comparing the Department's list with Home Affairs' records of death certificates.

He said that officials in the Department were 'learning all the time' and that they had learnt from the LRC's litigation against the Department: it was not a question of officials not wanting to follow the correct procedures in the past, but that they did not know what the correct procedures were. He said that the Black Sash had held workshops for Department officials on administrative justice and that, as a result, the Department had documents concerning 'that kind of thing'.

Jonathan Walton, also from the Black Sash, was cautious and said that it was difficult to say whether there had been changes as a result of the campaign and that in his experience, there seemed to be no real evidence of any changes having been made by the Department.

Dr Trudie Thomas, former MEC for Health and Welfare in the Eastern Cape, was also cautious, saying that the litigation seemed to have focused people's minds, but that the reinstatement of people

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[14] This is also at odds with the facts. This was never stated in the papers filed in the matter, but rather that the standard form letter was adequate in law. Also, the Department never tendered such a letter as proof of this claim.

[15] This claim is somewhat undermined by the fact that the Department removed many people from the system because it claimed that they were deceased. In fact, many of these people were not deceased, but when they went to their pay points to collect their pensions, they were informed that they were deceased. See Chapter Four for examples.

onto the welfare system and the improvement in the Department's procedures were more a result of the passage of time and not of any positive work on the part of the Department.

When he was interviewed in mid-September 2001, Mark Euijen from the LRC was rather pessimistic about the campaign, saying that 'nothing much has changed' with regard to the situation of social grant recipients in the province and the procedures which the Department followed.[16] He said that the LRC had received approximately seven thousand written responses to its call for information regarding problems people had experienced regarding the welfare system. These responses had been entered into a database and an analysis had indicated that people were still experiencing many problems regarding their grants. He did, however, concede that there had recently been some progress towards improving the situation in that, for the first time, the Department had accepted that it had to make changes to its procedures in order to act lawfully and that, in relation to those whose grants were unlawfully cancelled, it had to reinstate them with backpay and assess their situations before making decisions regarding cancellation. He said that it was still too early to determine whether the LRC's relationship with the Department had improved since the office had had no real contact with the Department since August 1999, other than in court.

However, Johan Roos said that the LRC commanded more respect since the outcome of the class action and that the Department's attitude towards the LRC, as evidenced in a letter containing a proposal for a settlement agreement and the fact that the officials with whom the LRC had met had appeared to be eager to reach an agreement and to implement such agreement, was a 'far cry' from

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[16] In April 2002, when interviewed for a second time, Johan Roos commented on the pessimism of some of the legal practitioners in the LRC in previous interviews. He said that it was inevitable that one would feel pessimistic about the LRC's litigation campaign if one believed that one could reform government through human rights litigation and in the process 'go down in history' as having brought about a 'model system'. He said that human rights or public interest litigation has an incremental effect and that the campaign had had the effect of making central government much more aware of the serious problem in the Eastern Cape. He said that the press had also been made aware of the issue and that therefore so had 'every opinion-former'. He said that one very important outcome of the campaign was that it had 'given people a voice'. If one looked at the litigation in this way, as a slow process and not as an overnight solution to the problem, then it was easier to be positive about its results. One way to look at it was that there was a list of approximately 40 000 people who were 'prejudiced by the Department's ineptitude', and that if 10 000 of those people had been helped by the litigation campaign, then a lot of people had benefited, even if not all of them had.

the relationship between the two during the class action when the two parties were 'so sick of each other' that they 'couldn't agree on anything'. In the letter, the Department seemed 'quite happy' with suggestions made by the LRC as to how to resolve the matter and had shown some kind of willingness to resolve the matter. He attributed this partly to the fact that the publicity surrounding the LRC's litigation campaign had been 'intensely embarrassing' to the Department and partly to the appointment of a new Permanent Secretary,[17] along with a 'change in attitude' among top officials in the Department. He said that although there had been a turning point in the Department's attitude, whether it would be 'practically beneficial' to welfare recipients remained to be seen. He said that one would have to 'wait and see' whether the Department's good intentions came to fruition or not. He described the situation as being 'at the stage of potential benefit' for many people in the province and said that there would be a positive improvement to the situation if a settlement agreement could be reached in the class action.[18]

Sarah Sephton from the LRC said that she had the impression that Department was trying to rectify the wrongs of the past. She also said that the Department was 'battling with overwhelming difficulties themselves,' but that officials did seem to be trying.

Sheena Duncan from the Black Sash was optimistic and said that the situation in the Eastern Cape had improved for many as a result of the LRC's litigation and that it would improve for many more people as the judgments it obtained were enforced. She said that it was an improvement that certain actions, such as the limiting of back pay, the delaying of the processing of applications, and the cancellation of grants following unlawful procedures were now clearly defined as being unlawful.[19] She said that in this way the campaign had made a 'big difference' for many people and that it would continue to make a difference for many 'in the long run'.

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[17] Professor Makalima had been sent to Argentina as a South African ambassador.

[18] The settlement that has now been reached in the class action was discussed in Chapter Three.

[19] In Bacela v MEC for Welfare (Eastern Cape Provincial Government) [1998] 1 All SA 525 (E); Ndevu, Mahambehlala and Mbanga (*supra*); and Bushula and Ngxuza (*supra*) respectively.

Issues

During the course of the interviews, it became clear that many issues with regard to welfare still needed to be addressed in the Eastern Cape, despite the changes that may have resulted from the litigation. Mark Euijen said that 'the general efficiency of the administration of the Department' needed to be addressed and all of the interviewees agreed that service delivery was an important issue that the Department needed to improve. Bishop Russell was of the opinion that it was important that systems were put in place to ensure that deserving people were paid their grants, that their grants were paid timeously and that people were not forced to endure hardships such as travelling long distances, lack of adequate shelter at pay points, and long periods of waiting at pay points for their money.

The issue of capacity was raised by Johan Roos when he mentioned that a representative of the National Department of Social Welfare had once commented to him that there was no communication between the national and provincial spheres of government in the provision of social assistance. He raised the issue of the province's autonomy regarding the welfare function and the subsequently small degree of control that the National Department had over issues of welfare. He wondered what in fact the role of national government was and whether the National Department could in practice intervene in the situation in the Eastern Cape in terms of section 100 of the Constitution.[20] He was not sure whether the National Department could contribute anything to the resolution of the problem in the Eastern Cape in this way.[21]

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[20] Section 100 states that '(1) When a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation.' Such intervention includes the issuing of a directive to the provincial executive describing the extent of its failure to fulfil its obligations and stating the steps necessary to meet its obligations, and the assumption of responsibility for the obligation in the province to the extent necessary.

[21] It appears that, as a result of a case launched by the Pretoria office of the LRC, national government may take the welfare function back from the provinces. See footnote 47 for details.

Sheena Duncan argued that the biggest issue that needed to be looked at in the future was the 'whole business of the national budget and Government's priorities'.[22] She said it was difficult to see how such issues could be challenged in a legal sense, but that a means to do so might have to be found in order to resolve the welfare crisis in the Eastern Cape and other provinces. She felt that the government was not acting in accordance with its obligations to achieve the progressive realization of socio-economic rights 'within its available resources' and that this was not a budgetary priority.

Mark Rasmussen raised the issue of unemployment. He said that the problems in the Eastern Cape were difficult to resolve in that many people were not disabled to the extent required by the Act in order to qualify for disability grants, but that minor disabilities combined with unemployment caused great hardship for many. He felt that unemployment was an issue that compounded the welfare crisis in the province and that it needed to be addressed by government departments other than Welfare since it was more of an economic issue than a welfare issue. He argued that, although a Basic Income Grant that had been suggested as a means to address poverty,[23] this might not be the answer to the crisis. He felt that the Department had been unfairly targeted in relation to problems caused by unemployment.

Mark Euijen raised the issue of the definition of 'disabled' in relation to the requirements for eligibility for disability grants. He said that it was a problem that, when assessing whether or not to approve applications for disability grants, the Department used the medical definition of the term *'in vacuo* while the Act takes into account a person's ability to work and support themselves'.[24] It seemed possible that officials would only approve an application for a disability grant where the medical examination determined that a person was 100 percent disabled, rather than taking into consideration

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[22] See Chapter 7.

[23] See Chapter One for details.

[24] In Rangani v Superintendent-General, Department of Health and Welfare 1999 (4) SA 385 (T), at 389I-J Kirk-Cohen J referred to an expert witness who spoke of the enquiry as to whether or not a person is 'disabled' as being a multi-factorial one which takes into consideration the patient's disability within the context of that person's life, background and environment.

other relevant factors. He emphasized that it was 'imperative' that consensus be reached on the criteria for separating those deserving of disability grants from the undeserving. Several other people agreed that there needed to be a balance in how people were assessed for disability grants, since applicants might feel entitled to grants because they were unable to gain employment due to slight disabilities, while the Department applied a far more stringent test.

Robert Martindale said that the interpretation of certain provisions of the Act was needed to be addressed. In particular, he mentioned that, because of long delays in the processing of applications, some applicants had died before their applications were processed. Section 11(2)(b) of the Social Assistance Act provides that 'if...a beneficiary dies, an amount payable to such beneficiary by virtue of the rendering of social assistance, shall not form part of the...deceased estate...' He was of the view that the Department interpreted this section as meaning that 'you lose everything when you die' and argued that this was not so, but rather that the section meant that applicants only lost *future* benefits on death and that their survivors were still entitled to the back pay owed to the deceased. This was an issue that he felt needed to be clarified.[25]

Sarah Sephton was 'despondent about the class action' because of the difficulty in enforcing a court order against the Department when the numbers involved were as large as those in the class action.[26] Because thousands of people were affected by the judgment, it would be very difficult for the LRC to ensure that every person was re-assessed and if found to be deserving, reinstated onto the system and paid their back pay.[27] This meant that the issue of how to deal with such large numbers of people needed to be addressed in order for the matter to be resolved adequately.

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[25] Since this interview, he has brought an application to clarify the issue, namely, January v MEC for Welfare, Eastern Cape, and Another SECLD 20 September 2002 Case no. 2294/99. In his judgment, Chetty J made a finding that was consistent with Mr Martindale's interpretation of the section and made an order that compelled the Respondents to pay the lump sum of social grant payments which was owing to the deceased up until her death to her surviving husband.

[26] This issue may still be a problem with regard to the implementation of the settlement agreement.

[27] See below regarding the difficulties encountered in the implementation of the settlement agreement.

Jonathan Walton made the point that there were still constitutional issues which needed to be addressed. He argued that it would take a long time to 'get Department officials into the human rights mode' and that there was a need to educate Department officials about human rights and their obligations in terms thereof in order for them to start acting within the context of the requirements of the Constitution.

Bishop Russell stated that it had been very disillusioning for poor people in the Eastern Cape because what was supposed to be the 'people's government' was 'still the same as before'. He argued that there had been a breakdown in communication and delivery on the part of the Department. He said that, as a result, people felt sadness, anger and disappointment because it appeared that the vulnerable had been pushed aside by officials. He felt that this was an important issue that the Department should address.

Problems

All of the interviewees said that numerous problems still prevailed in the Eastern Cape welfare system despite the litigation against the Department. While the paralegals at Advice Offices set out the specific problems which their clients faced and the legal practitioners set out more general problems in the system, people such as Bishop Russell and Dr Trudie Thomas explained why these problems existed.

The paralegals enumerated many problems which are brought to their Advice Offices by clients, and these included the Department's failure to pay back pay;[28] the issue of when the Department was required to start paying back pay;[29] the non-payment or short-payment of grants; delays in the

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[28] In Bacela *supra* it was held that the Department is required to pay backpay in terms of the Regulations (see Chapter Three).

[29] This issue was dealt with definitively in Trustees of the Black Sash Trust v Minister for Social Development TPD September 2000 Case no. 30368/2000 (unreported) where the repeal of Regulation 10 was set aside and therefore it was held to be of full force and effect. In terms of the regulation, a grant accrued from the date of attestation of the application by an authorised officer (see Chapter Two).

processing of applications;[30] the lack of response to applications;[31] the lack of notice when grants were to be cancelled or suspended; the lack of opportunities for hearings regarding the potential cancellation or suspension of grants and the reasons for such cancellations or suspensions;[32] where reasons were supplied, the insufficiency of the standard form reasons;[33] applications being lost; the Department's unwillingness to act unless compelled to do so by court orders; the Department's lack of compliance with such court orders in favour of welfare recipients;[34] District Surgeons' assessments of disabled people as being able to work when they could not; District Surgeons not examining applicants for disability grants properly; disparities between doctors' assessments of what constituted 'disabled' and those of the Department; the repeat cancellation of previously cancelled grants after brief periods of reinstatement; the fact that welfare officials who visited towns could only deal with applications and not problems or enquiries; the Department's failure to respond to enquiries (both telephonic and written); delays in medical examinations for disability grant applications because of monthly visits by District Surgeons; poor administration in the Department; beneficiaries' details being incorrectly noted with the result that they were unable to receive payment;[35] Department officials' failure to keep promises; corruption and nepotism within the Department; the inability of clients to apply for social grants because they did not have identification documents because of Home Affairs' lack of records; the lack of a procedure for the reinstatement of wrongfully cancelled or

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[30] In the Mahambehlala and Mbanga matters, Leach J held that a reasonable time which an application for a grant should be processed was three months (see Chapter Two).

[31] In Ndevu, Erasmus J held that officials are obliged to make decisions regarding grant applications (see Chapter Four for details).

[32] In the Bushula and Nomala matters, it was made clear that these are requirements for the lawful cancellation or suspension of grants (see Chapter Three).

[33] The standard form reasons used by the Department to justify cancellations and suspensions of grants or the rejection of applications for grants were found to be insufficient in law in the Nomala matter (see Chapter Three).

[34] In Somyani, it was held that Department officials are obliged in terms of the Constitution to comply with court orders.

[35] An example of this was in the Bacela matter where a number other than Ms Bacela's identity number was used as a reference for her file. When her identity number was entered into the system at her allocated pay point as is the regular practice, it was indicated that no money was owed to her when in fact it was. Because of the incorrect noting of her identity number, she was unable to receive payment of her grant.

suspended grants - the only way to be reinstated on to the system was re-application; the lack of social relief supplied to those awaiting approval of their grant applications; and people's lack of education regarding available social assistance and the requirements for eligibility. Rosemary Smith said that it was another problem that 'lindelas' were not always given to grant applicants[36] and, without these, applicants were unable to prove that the Department has received their applications. This often lead to multiple applications before such applications were eventually processed.[37]

Subsequent to the settlement being reached between the Department and the LRC, several of the paralegals interviewed in July 2002 complained that there had been a lack of improvement in the situation of welfare recipients in their areas. Mr Bottoman from Aliwal North said that nothing had happened in his area since the settlement: no panel had visited and that there was no doctor there to do re-assessments. He said that those people whose grants had been suspended in 1996 and 1998 had still not received any money from the Department. Mr Matiso from Jamestown said that there had been no progress in his area either. All that has happened was that the four people in town whose grants had been cancelled had been told to re-apply after review. They were still waiting for responses from the Department.[38] In Lusikisiki, Mr Mthetheleli said that the Advice Office had received a list from the Department of people whose grants had been cancelled between March 1996 and September 2000 and that the office had added the names of people who did not appear on this list, but who fell into this category and forwarded the list to the LRC. They were told by the Department that there was no need for reviews and about 90 of the 600 affected people received an unexplained amount from the Department. The other 500 were still waiting for their money. Ms Mazeka from Bizana said

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[36] In terms of Regulation 8(3)(b), 'the applicant shall be furnished with a copy of the application or a receipt, which shall be dated and stamped with the official Department stamp and shall contain the name of the applicant, and of the attesting officer and the date of application.' Such receipts are known as 'lindelas'. The fact that they are dated is important since they indicate from when applicants' back pay is due.

[37] 'Lindela' means 'to wait'. It is submitted that this says something about how people view the welfare system.

[38] It is precisely because of this type of failure on the Department's side that the LRC has recently set the Ngxuza matter down for January 2003 to have the order amended and to try to compel proper compliance by the Department.

that the review procedure was supposed to have started in November 2001, but that it had been delayed until January 2002 and that of the office's 475 clients affected by the cancellations between March 1996 and September 2000, only a few had been reinstated on review. She said that most people had been rejected and that some were still waiting to hear whether they would be reinstated or not. Of the few who had been reinstated, they had received payment from the Department, but no explanation was given as to how the amount was calculated. No explanation had been given by the Department regarding what was going to happen regarding the reinstatement of the remaining people's grants or what the review procedure would be. Lastly, Mr Jikijela of Molteno said that 15 people in the area had received money from the Department, but that the money owed to 30 more people was still outstanding. He said that the affected people had been sent to the District Surgeon and made to fill in new applications and to re-apply for their grants. He said that some of these people had been reinstated onto the system.

Nomzi Vasi said that despite the litigation, she still dealt with many problems relating to delays and back pay at the Advice Office in Port Elizabeth. Jonathan Walton also said he still dealt with problems relating to social grants, particularly problems relating to disability grants and care dependency grants in Grahamstown. He said that many people were given 'once off' payments after the judgment in Ngxuza in an attempt to stop the litigation against the Department and that despite this judgment, the Department continued with the same attitude toward welfare recipients, using unlawful strategies to 'get people off the system'. Large numbers of people were still not receiving adequate reasons for the cancellation of their disability grants or for the rejection of their applications, despite the judgment in Nomala and in his experience, the Department was still using the standard form letter that was challenged and found to be insufficient to meet constitutional and statutory requirements. He also said that the Department was still not giving notice or hearings to people whose grants were cancelled:[39] 'cancellation is a one way situation' and 'the Department decides to cancel grants and that's that'. Finally, he said that it was still taking the Department between six and eight months to process applications and that some people he had dealt with had had to wait 'for a year to 18 months,

[39] As was noted as a requirement in Bushula.

even'.[40]

More generally, he said that one of the biggest problems in the Eastern Cape's welfare system was the lack of flow of information: 'no one knows what's going on'. He said that he had hoped that 'the Department's legal advisors would impart information regarding the outcome of the various cases to district officials to educate them', but that this has not been the case. He said that 'the province blames the regions and the regions blame the province' for problems within the system and he felt that 'officials at ground level are isolated from the decisions of the courts' and that therefore such decisions had had no impact.

With regard to disability grants, he said that the welfare system was 'not adequately capacitated to deal with problems'; that 'there are not enough doctors and there are no pharmacists in government hospitals' because the pay and conditions were poor and the provincial government was 'not attracting people to work there'. He was of the opinion that 'the State cannot cope with problems,

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[40] The Standing Committee on Public Participation and Petitions conducted public hearings on social welfare issues throughout the Eastern Cape during 2000. These public hearings were conducted jointly with the Standing Committee on Welfare. They were held to inform the public about the re-registration process which was taking place; to receive oral and written submissions from the public about welfare matters of concern; and to promote and seek the spirit of co-operation and partnership in order to find constructive solutions ('Report of the Standing Committee on Public Participation and Petitions' February 2000, paragraph 1). These hearings were held between 24 January and 2 February 2000 and were conducted simultaneously by five groups in different regions of the province in order to cover as much of the province as possible. NGOs, concerned groups and members of the public were invited to attend to express their views. The exercise intended to afford an opportunity to everyone to attend and to be heard ('Notice of Public Hearings on Social Welfare Matters/Standing Committees on Public Participation and Welfare' 19 January 2000). The Standing Committee considered both oral and written submissions as well as queries made during the hearings and its findings were listed in its report dated February 2000, along with its recommendations. The problems which were reported were similar to those discussed above and they included pension review problems; administrative problems; identity document problems; communication problems; staff attitude problems; inadequate administrative infrastructure and staff; fraud; policy problems; and other welfare issues , such as the fact that social grant issues constituted the main activity of the Department and crowded out other welfare services ('Report of the Standing Committee on Public Participation and Petitions' 25-30).The Committee's main recommendations included to drawing up of a plan, including time frames, for the reinstatement of grant recipients wrongfully removed from the system; the payment of back pay; the investigation and resolution of queries; Department officials becoming more accessible to the public to deal with grievances and queries; the training of officials; a departmental audit; improved communication between the Department and the public; the provision of information to the public; the addressing of problems with the assessment of applicants for disability grants; and the support and strengthening of pension forums (Ibid 30-34).

although the money is there'.

Mark Rasmussen said that the Department had a problem with giving people proper reasons in that 'only doctors can give proper reasons' as to why a person is 'not disabled', but that 'they refuse to write letters and will only fill in medical forms'. He said that 'now officials must fill in the space provided for explanations on the new standard form letter' and that they generally used the doctors' reasons from the medical forms completed on assessment. He pointed out that it was Department officials who were 'called to court' to explain the Department's reasons for cancelling or suspending a grant, but that they 'cannot always explain the doctors' reasons'. He complained that 'doctors are not called to court' to explain their reasons and that this was a problem that needed to be addressed.[41]

He also argued that in the past, the Department had 'asked the LRC for input on the standard form letters' but that the LRC had 'refused to help' saying that they were 'there to help the people and not the Department'.[42] He argued further that the Department had asked various advocates for opinions

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[41] This argument illustrates the point that there is a lack of understanding on the part of the Department regarding its own empowering provisions and what the Constitution and the law requires of it. In fact, the doctors who examine applicants for disability grants do not have to give reasons because they do not make decisions whether or not to award a grants, rather they assess the disabilities of applicants. It is the person who makes the decision regarding whether or not to approve or reject an application for a grant who must give reasons, that is, a Department official. This involves the consideration of more than the medical condition of the applicant (in Rangani v Superintendent-General, Department of Health and Welfare, Northern Province 1999 (4) SA 385 (T) at 389I-J, Kirk-Cohen J referred to an expert witness who spoke of the enquiry as to whether or not a person is 'disabled' as being a multi-factorial one which takes into consideration the patient's disability within the context of that person's life, background and environment).

[42] In a recent interview (1 October 2002), this allegation was refuted by Sarah Sephton of the LRC. She stated that the Department had asked for the Nomala matter to be postponed so that it could meet with the LRC regarding the standard form letter. The LRC said that it would not draft the letter for the Department, but did indicate to the Department which parts of the drafts of its proposed new letter of rejection it was unhappy with. Mr Rasmussen's allegation was also contradicted in a recent article in the *Daily Dispatch* in which the MEC, Ncumisa Kondlo, said that her department and the LRC had 'put their heads together last year to draft an acceptable letter containing pertinent reasons for rejecting individual grants'. She said that 'The idea was to issue [a] system generated letter [which was a national rather than provincial responsibility] accompanied by a unique provincial letter outlining reasons'. However, she said that, because officials were unable to interpret District Surgeons' reports, the system had become 'cumbersome' and simply could not be implemented. In the same article, Sarah Sephton was quoted as saying that she was 'stunned that the MEC never bothered to come back to us to say they had a problem administering the letter we agreed upon. Instead they reverted to something that is unlawful. It is

regarding what constituted proper reasons, but that either these were 'not correct or they did not help'. He said that 'there was never a standard set for what was correct', but that Nomala had helped the Department by setting such a standard.[43]

Mark Euijen pointed out another problem: the Department had recently started informing people that their grants were temporary and that they had 'expired'.[44] He argued that this was another attempt

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ridiculous to say they don't have the wherewithal to put in writing the reasons [they] use to refuse a disability grant' (A Carlisle 'Unlawful grant letter still in use say experts' *Daily Dispatch* 18 September 2002).

[43] This contradicts his earlier comment that Nomala was not necessary because the standard form letter had already been changed by the time the matter came to be heard.

[44] This happened in Nomala. The Applicant received a letter from the Department informing her that her 'temporary disability grant' had 'expired', that payment of her grant would cease in approximately three months, and that if she felt she qualified for a temporary disability grant, she should reapply for one without delay. Payment of her disability grant had in fact ceased at roughly the time she received the letter and on re-application for her grant, she received no response from the Department. In a letter to the Department, the Applicant's attorney stated that she had been unaware that her grant was temporary and that the applicable Regulations made no provision for temporary disability grants. She also stated that the Applicant's condition was severe and had not changed and that she was entitled to a permanent grant. On this basis she requested the reinstatement of her grant (Founding Affidavit, paragraphs 21-25). No further mention was made of the fact that her grant was a temporary grant when the Applicant later received two letters from the Department stating that her grant had in fact been 'rejected' on the grounds that she was 'not disabled' (Ibid, paragraph 28). The Applicant submitted that these two letters constituted a bad faith attempt to justify the Permanent Secretary's unlawful suspension or cancellation of her grant nearly two years previously. The original letter had stated unequivocally that her grant was temporary and that it was to expire and no mention had been made of the fact that she was 'not disabled'. The issue of the retrospective reinstatement of payment of the Applicant's grant was settled and an order to this effect was issued by consent. See too Mpofu v MEC for Welfare and Population Development, Gauteng Provincial Government and Another WLD 18 February 2000 Case no. 99/2848 (unreported). In this case the Applicant suffered from *grand mal* epilepsy and partial paralysis of the right side of his body as a result of an attack in 1982. He had been unable to maintain himself since 1992 when he applied for a disability grant. The District Surgeon found him to be 60 percent disabled and accordingly classified him as 'temporarily disabled for one year'. The Applicant was not informed that he had been found to be temporarily disabled and that his grant was due for review in a year. However, he continued to receive his grant for five and a half years until it was cancelled without notice or the opportunity of a hearing being afforded to him. It was found that, in terms of the Regulations, the grant should have been reviewed after a year, rather than simply being cancelled, and that the grant could only be cancelled after such review. Since the grant was not reviewed after a year, it was still of full force and effect and its period of validity could not later be determined. If the grant had in fact been suspended rather than cancelled, the fact that the Applicant was not informed of the reasons for such suspension or of the 90 days he had to seek restoration of the grant in terms of Regulation 23(2), meant that the Department had not acted in terms of the regulations and that therefore, even if the grant was reviewed, the process was flawed and could not be allowed to stand. It was therefore held that the grant had not lapsed and that no review procedure had

by the Department to reduce the number of people on the welfare system and that it was nothing less than a 'way around the constitutional requirement for procedural fairness when cancelling a permanent grant' since, in this way, the Department could merely inform the recipient that the end of the fixed period of the grant had been reached and therefore cease payment of the grant. He said that the LRC would disagree with this method employed by the Department 'on point of principle'.

Mark Rasmussen complained that private practitioners had 'jumped on the bandwagon' and were 'making a killing' in litigation against the Department. As an example, he said that 'if a person is not on the system within exactly three months, [private practitioners] file notices of motion against the Department demanding payment' without having first made enquiries with the Department or sending letters of demand or even notice of their intention to sue. He said that the Department might have already made a decision on an application within two months, but that it could take a month to put the person onto the system. The provincial department did not do this itself, since it had a central database. He complained that these private practitioners did not give Department officials a chance to explain this and said that it would help if private practitioners made enquires before instituting actions against the Department, which would then have a chance to inform them that the application had been processed and that it was just a matter of the person being put onto the system.[45]

Another problem raised was that, because of differences in language between grant recipients and legal practitioners, Department officials and the courts, illiteracy, lack of education, and pensioners' lack of resources, it was very difficult for the most needy to have their problems resolved, either through litigation or by other means. Robert Martindale expressed it in this way: 'The problem is that the masses who are dependant on grants are ignorant and don't know what they are entitled to and have no access to justice'.

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been carried out. If such a review procedure had been carried out, it was so flawed that it was totally ineffective. On this basis, the decision to cancel the Applicant's disability grant was reviewed and set aside.

[45] It would appear that this explanation, which would be a defence to an application for a mandamus, has never been raised by the Department in any of the numerous matters that have come before the courts.

The problem of the enforcement of court orders against the Department was raised several times. Several people were of the view that obtaining a judgment against the Department was 'not good enough on its own', but that such orders needed to be enforced to ensure that people received what was due to them. Sheena Duncan said that although people like the LRC had obtained court orders in favour of many pensioners, there was still the problem of 'having to keep going back to court to enforce them'.

Johan Roos was positive about the settlement that had been reached between the LRC and the Department,[46] but felt that there was a problem with the Department's understanding of Nomala. An essential part of the agreement reached was that those people whom the Department decided not to reinstate after they had presented themselves to the panels visiting the various areas were entitled to be given reasons as to why they were not to be reinstated. He was of the opinion that the Department did not understand why the court had found in Nomala that there was a problem with the reasons which it had been giving grant recipients for the cancellation of their grants. The Department did not understand, for example, that it needed to say more than merely 'condition treatable', but that it needed to explain *how* it was treatable and where such treatment could be obtained. The Department officials who met with the LRC argued that it needed to obtain such information from the Department of Health and that the problem was that they could not vouch for the accuracy of information from that department. Johan Roos said that it was a problem that the responsibility for obtaining this information lay with the provinces and that it would be better if this responsibility was placed with national government instead.[47]

He said that the process of the implementation of the settlement agreement was underway and that the Department was to report back to the court in April 2002 regarding what it had done in relation

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[46] The settlement was discussed in Chapter Three.

[47] In fact, in a recent interview (20 September 2002), Johan Roos said that an application has been made in the Pretoria High Court for an order compelling the national government to take on the social assistance function which has been devolved to the provinces on the basis that the provinces do not have the capacity for this function. He said that none of the provincial governments, except the Western Cape Provincial Government, had contested the application and that neither had the national government.

to notifying regions and actually going to these regions with an assessment panel. However, since the beginning of February 2002, the LRC had been in telephonic contact with many Advice Offices in the province, enquiring whether people were indeed being reinstated onto the system and whether this was being done in accordance with the process agreed to in the settlement. From the responses, it appeared that very little had in fact been done by the Department and that what had been done, had not been done in accordance with the agreed process. He said that officials visited areas after having sent lists of people it wanted to see to Advice Offices, that 'across the board, people are just given blank forms to fill in as if they are reapplying' for their grants and this was not the procedure to which they had agreed.[48] In light of this, he said it would be interesting to hear what the Department would report to the court regarding its progress.[49]

Johan Roos said that these problems with the implementation of the settlement agreement highlighted the difficulties in trying to ensure delivery through 'semi-paralysed' departments. He said that the fact that the Johannesburg office of the LRC was able to sort out similar problems regarding cancellations over the telephone, illustrated the inequity between the various provinces.

Another problem which many people raised was the inefficiency of the Department and its officials. Rosemary Smith complained that she never received any kind of reply from enquiries made directly to the MEC; that people making enquiries were 'shunted from one person or office to another' without their problems being resolved; that money was sent to the wrong pay points; that people were paid incorrect amounts; that officials were unable to deal with problems at pay points; that people who could deal with problems were inaccessible to the rural poor because of long distances and lack of resources; that the Department was not 'user friendly'; and that there was 'too much bureaucracy

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[48] For more detail on this procedure, see Chapter Three.

[49] In a recent interview (20 September 2002), he said that the Department had in fact filed such a report and that it was very poor and therefore difficult to reply to. The LRC found many potential problems with the Department's implementation of the process and pointed them out in its reply (see Chapter Three). He said that the LRC's first reaction was that the agreement was not working and that they should revert to the terms of the original court order, but on consideration decided that this was not desirable either. At the time of the interview, the LRC was still as yet finalising the approach it will take in the matter. The matter was subsequently set down for resolution by the court in January 2003.

in the Department'. She conceded that 'it is not always officials' fault' that there were problems in the province: the Eastern Cape had traditionally been the 'poor relation' of the Cape Province and that now the 'top people have been creamed off for Parliament and the private sector', leaving the province with 'fourth-tier officials'. She argued that officials were therefore often promoted beyond their competence. As a result, she was of the view that 'although the old regime was bad, the inefficiency of the new one is worse'. Robert Martindale agreed and went so far as to say that 'all provincial government departments in the Eastern Cape are inefficient'. In his dealings with the Departments of Education, Health and Welfare, he has found none to be 'any worse than the other' and he contended that there was an 'overwhelming inefficiency' in the Eastern Cape provincial government. Bishop Russell described the Department's main problem as 'plain inefficiency' and said that the Department lacked 'experienced people with managerial competence at every level'.

Corruption was another problem that was raised.[50] Bishop Russell said that 'corruption is easy when a system is inefficient, [since] there are no controls'. He said that the 'inefficiency and incompetence of officials laid the way open for corruption' since 'corruption feeds on incompetence'. He argued that even if there were people within the Department who were competent and efficient, there still had to be a focus on those who were corrupt and that those parts of the Department that were rotten 'must be eliminated' since 'the areas of inefficiency and corruption are destructive'.

Jonathan Walton agreed with this when he said that 'the biggest problem in the Eastern Cape is maladministration[51] and corruption'. He regarded these issues as 'a serious challenge to any progress

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[50] As an example of this, Ms Mazeka from Bizana Advice Office said that most people in the area had to wait for more than a year for their grant applications to be processed, but when she brought a certain woman's problem to the attention of an official from Bisho, the official went to the welfare office to sort it out personally and the application was processed within two weeks. This showed that it was possible for applications to be processed in a period of time much shorter than a year. She also said that there was an element of bribery in the process, since she said that if applicants paid an amount of R70 or R100, their applications would be processed within a period of three months. In a recent article in the *Business Day*, it was reported that the 'Eastern Cape, the poorest province, is the hardest hit by fraud and corruption, with nearly R6m having been stolen' by government officials in 2002 ('Officials take R15m meant for the poor' *Business Day* 10 December 2002).

[51] He was quoted in a recent article in the *Daily Dispatch* as saying that the Department's continued use of the unlawful standard form letter for the rejection of disability grant applications and the

being made in the province'. He found it frustrating that the Department 'is not using or considering any of the many good ideas that offices such as the Black Sash have provided it with' and felt that both the Department's and other organisations' resources 'are being wasted on litigation instead of being used to try to resolve the problems in the system'.

Bishop Russell conceded that the Department's problem of financial constraints was a legitimate one since 'ghost' beneficiaries resulted in a 'massive expense' to the Department, however, he argued that the Department's actions in attempting to resolve the problem were unjustifiable. Mark Euijen argued that it was the Department's 'solution' to the fraud of some recipients that had caused the problems which the LRC's campaign sought to address. He regarded its 'solution' to the problem as 'heartless' and felt that its approach was not a real solution.[52] He said that the Department's approach was to 'get as many people off the system as possible and hope that the deserving keep trying and eventually get back onto the system'. He contended that the Department 'didn't really follow a pattern or have a method other than just to remove as many people from the system as possible'. He even contended that often the Department itself could not explain why it 'kicked people off the system'. He made an analogy with the National Party's approach in implementing apartheid and said that although apartheid was obviously wrong, 'at least they had a method, unlawful though it was'.

The fact that the provincial government depends on national government for money added to the financial difficulties of the Department. In terms of the Constitution, an Act of Parliament must make provision for the equitable division of revenue raised nationally among the national, provincial and local spheres of government and the determination of each province's equitable share of the provincial

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cancellation of disability grants was an example of the Department's 'maladministration, mismanagement, and disregard for the Constitution, the Bill of Rights and court orders' (A Carlisle 'Unlawful grant letter still in use say experts' *Daily Dispatch* 18 September 2002).

[52] This view was vindicated by Cameron JA's words in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others 2001 (10) BCLR 1039 (SCA), where he said that 'the method the authorities chose to deal with the situation was extreme, and the consequences for large numbers of needy people savage' (paragraph 7). He held that the point of the class action was 'the cost the province's remedy [to the large amount of money 'ghost' beneficiaries were costing the province had] exacted in human suffering on those who were entitled to benefits' (paragraph 15).

share of that revenue.[53] It also provides that each province is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it'.[54] Bishop Russell argued that in the past, national government underestimated the amount that the Eastern Cape would need for social grants and that 'this left the province in an awkward position'. He argued that this created tension between these two spheres of government and that 'when there was a serious collapse of the system at the beginning of 1998, each sphere blamed the other'. He explained that 'part of the problem was that the National Treasury could not risk giving the Department vast amounts without the proper controls in place' and that in the Eastern Cape, 'the proper controls did not exist'. He attributed the province's financial problems to the fact that no proper procedures were in place within the Department, arguing that 'because of the shortage of money and the callousness of officials, the Department chopped people off the system' on the grounds that their grants were being reviewed. He argued that the Department 'had no right to do this in the way it did' and said that its approach had 'terrible consequences that were absolutely disastrous' for the people whose grants were cancelled. Since they were so poor and since they were dependant on their grants to survive, 'they had no cushion' when their grants were cancelled. He regarded the Department's treatment of these people as 'unacceptable'. He recognized that 'there are people in government who would like to see an improvement in the system' and that 'many do care about the people', but he felt that the 'trouble is with those who don't care'.

Dr Trudie Thomas said that the Department's financial problems stemmed from the budget allocated to the province being inadequate. In 1997, this combined with factors such as 'the new International Monetary Fund policies', the appointment of a new MEC for Finance and a new Premier of the Eastern Cape, led to overspending by the Department. She argued that the review of social grants was an 'entirely cost-containment exercise' and that it was a 'draconian and unscrupulous system'.

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[53] Section 214(1)(a) and (b)

[54] Section 227(1)(a)

Mark Euijen was of the view that it was not so much a deliberate refusal to act procedurally and lawfully on the part of Department officials, as a 'lack of concern or capacity' on their part. He argued that 'there is not enough care and concern for the poor' and that these vulnerable people were a very low priority to the Department. He argued that the Department's 'very poor legal strategy' in the matter was 'a symptom of the lack of concern about the issue'. Bishop Russell agreed with this view, saying that there appeared to be a 'lack of care' in the Department and that the attitudes of officials often 'left a lot to be desired,' with 'too many officials being seen to be rather callous by the people'.[55]

There was consensus among the interviewees that the problems noted above ultimately originated from the amalgamation and integration of the four administrations which existed in the province prior to 1994. This amalgamation process enabled people to enter the system without being entitled to grants and led to the information on the system often being inaccurate and incomplete or insufficient.[56]

Bishop Russell described the situation that the 1994 provincial government inherited as 'unenviable' when it had to combine the numerous administrations into one. He felt that the biggest problem at that time was that there was no reliable database of grant recipients, so people could easily cheat the system by using both South African identity documents and those of the former homelands to obtain multiple grants. This problem was compounded by the fact that the Department of Home Affairs still

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[55] In the Third Bram Fischer Lecture, Arthur Chaskalson said that 'the Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another. We are capable of realising this vision but in danger of not doing so. We seem temporarily to have lost our way. Too many of us are concerned about what we can get from the new society, too few with what is needed for the realisation of the goals of the Constitution. What is lacking is the energy, the commitment and the sense of community that was harnessed in the struggle for freedom...All of us have an obligation to make the Constitution work, and it is in all of our interests that this be done' (A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193 205).

[56] This amalgamation process was discussed in Froneman J's judgment in Ngxuza (at 616A-D) and in Cameron's judgment in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza *supra* (at paragraph 7).

had to supply everyone in the province with new bar-coded identity documents and the Department of Welfare had to wait for Home Affairs to do this before it could check the system for duplications.

Dr Trudie Thomas enumerated the many problems which the provincial government had to deal with during the integration and amalgamation process. These included the fact that the Department 'took over 14 different databases during amalgamation'; that people could use numerous identity documents to claim grants because of the different documents used in the homelands and the Republic; that all of the administrations that were to be unified were fairly dysfunctional at the point of amalgamation; that it was a 'huge administrative task to amalgamate and unify these administrations'; that there was a lack of systems and infrastructure in the province to respond to the needs of 'about 600 000' social grantees - many places had no telephone lines, no offices, and no basic equipment necessary to process applications and many filing systems were in a state of chaos or non-existent; that there were several different types of administrations in different parts of the province - the Transkei administration was run through the Justice system using headmen and magistrates, while the Cape Province and the Ciskei administrations were run through the Welfare system; that the database was 'unclean', that is, the Department knew that there were numerous people who had 'got on to the system irregularly' and that some people who were entitled to grants were not on the system because their applications had not been processed or because they were unable to apply for grants owing to inadequate numbers of staff in the Department to deal with applications; that there were only several hundred social workers in the province to meet the needs of thousands of people; and that there were very few social pension clerks to deal with the day-to-day running of the Department.

Both Bishop Russell and Dr Thomas were of the view that it was also the political process and the delaying tactics of those with political agendas that prevented a new system from being put into place and that 'the Department was left to deal with the administrative nightmares' created by a dysfunctional system. Dr Thomas felt that politics 'impacted on the administrative nightmare of lack of staff, information technology people, effective systems, and computers'.

Evaluations

Many of the people who were interviewed were optimistic that the LRC's litigation campaign had made a positive impact on the pension crisis in the Eastern Cape. Many of them were of the opinion that the class action had precipitated a response to the crisis by the Department better than the individual cases had.

Most of the paralegals agreed that the litigation had been a success in that some people had been reinstated onto the system and had received money which was owed to them by the Department. However, it was also agreed that many people had yet to feel the positive effect of the class action and that the reinstatement of grants and the payment of arrears needed to be accelerated.[57] Because of this slow progress, Robert Martindale said that the LRC's litigation campaign had 'not even really scratched the surface yet', and that hundreds of thousands of cases still remained to be resolved.

With regard to the class action in particular, it was generally agreed that the class action was 'of vast significance'. Robert Martindale said that 'the class action is [one's] biggest weapon, but it is tricky and needs refining since it is still in the pioneering stage'. Most people agreed that the class action 'can definitely be seen as a success, but the [settlement] still needs to be enforced'. Bishop Russell said that Ngxuza 'is symbolically important' and that it was positive since it was a 'new and creative approach'. He applauded the LRC for being 'thorough, systematic and keeping good records so that they knew what they were talking about' and for 'keeping on like beavers and not letting up against the huge and frustrating bureaucracy it faced'.

Mark Rasmussen felt that the class action had been 'misinterpreted and blown out of proportion by the press'. He said that although the class action had been reported negatively, it was 'positive because it made sure that process was correct'. He said that 'the Department did not go to court to deny people their rights', but to ensure that the Department could follow the procedures prescribed

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[57] It must be borne in mind that the resolution of the class action is still in progress and that it will take time for the matter to be fully resolved and for all members of the class to feel its effect.

by the court. He said that as a result of the class action, the Department had changed its procedures in order to ensure that it acted lawfully. He also said that the resultant changes 'have had a positive effect on the administration of social welfare' and that 'any corrections of mistakes are positive'.

He argued that the LRC's attempts to bring about change could have been made differently. He contended that the LRC 'never wanted to work on a consultative basis' and that the LRC had not been willing to help the Department to correct its procedures. He was of the opinion that the LRC 'could have been a lot more helpful'.[58] He went so far as to say that he felt there was 'a lot of showcasing in the class action and a lot less good intention'. He said the time frame for a resolution to the issues dealt with in the class action 'could have been 18 months shorter if the LRC had just accepted the Department's offer in April 2000', since the order that the court handed down 18 months later had had the same terms.[59] He argued that 'the Department never said that it never did anything wrong, it just disagreed with the LRC' as to how to correct its wrongs.[60]

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[58] This is at odds with the facts. In the Founding Affidavit in Ngxuza, a detailed account of the LRC's attempts to help and consult with the Department was set out. From this account it appears that it was in fact the Department that was unhelpful and even obstructive during the time preceding the judgment in the class action. In Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza, Cameron JA said that 'the papers before us recount a pitiable saga of correspondence, meetings, calls, appeals, entreaties, demands and pleas by public interest organisations, advice offices, district surgeons, public health and welfare organisations and branches of the African National Congress itself, which is the governing party in the Eastern Cape. The Legal Resources Centre played a central part in coordinating these entreaties and in the negotiations that resulted from them. But their efforts were unavailing. The response of the provincial authorities as reflected in the papers included unfulfilled undertakings, broken promises, missed meetings, administrative buck-passing, manifest lack of capacity and at times gross ineptitude' (paragraph 8).

[59] It is unclear what offer Rasmussen was referring to here, since it is submitted that, bearing in mind Johan Roos' comment above regarding the desirability of a settlement, the LRC would have been glad to agree to a settlement with the same terms as the order in Ngxuza and the appeal, if the Department had indeed made such an offer in April 2000.

[60] This is also at odds with the facts in that the Department had claimed that the procedure that it followed in the cancellation and suspension of grants was adequate, when it had been found in Bushula that its procedures were unlawful. However, in Ngxuza, the Department opposed the class action on the basis of *locus standi* and not on the basis that its decision to cancel the members of the class' grants was lawful. In the appeal, Cameron JA said that 'the province says that it "took note" of the judgment [in the Bushula matter] "and that the valuable guidance it has given in respect of the suspension and/or cancellation of disability grants". Its officials have, it says, "been instructed to act accordingly"...At best the statement...implies that the province will not in future unlawfully terminate disability grantees' benefits. What it omits to say is more pertinent, which is whether *Bushula* will in fact be implemented for

Mark Euijen said that the campaign 'had to be done' and that 'it has kept the issue alive and prevented it from being forgotten'. If the LRC had not launched the campaign, the affected people 'would have had no remedy against the Department'. He went on to say that the litigation 'has not proved that law is an instrument for social change', but rather that it was a 'tool for regulation once changes have been made'. He felt that 'the political process is more successful in bringing about change than legal pressure', but that legal pressure 'can be a platform for social pressure' and that the two were related.

Other people were more positive. Rosemary Smith said that 'law *is* an instrument for social change' (her emphasis), but that it was 'just one prong of the campaign' since 'litigation cannot be successful alone' to bring about change. Johan Roos said that 'ultimately government is where things happen - law has a limited value. It is strategically useful, but is useless if the State doesn't enforce it'. Robert Martindale agreed with him, saying that 'litigation is a part of the solution to the problems in social welfare, but it is not the sole solution. It is an effective tool, but the judgments obtained [by the LRC] need to be enforced for the campaign to be successful'. He contended that 'in the long run, the best method for resolving the problems in the welfare system is *not* litigation' (his emphasis).

Bishop Russell said that he had 'a sense that with the right kind of legal action, one can help the small person' and that 'litigation is a means to shake up government and the authorities and to shame them into getting their house in order'. He said that 'litigation is definitely one of the ways to go, but there are various ways to bring about change'. He was of the opinion that litigation needed publicity to go with it in order for it to be effective. He said that the problems in the Eastern Cape were 'often a political thing' and that litigation 'needs press support to help shame the government into making changes'. Johan Roos was of the view that the LRC had 'used the press successfully to help in the battle'. He said that two years ago a certain newspaper had claimed that its readership was not interested in welfare issues. Now, even this publication was interested in the 'story' of the litigation campaign. He wondered whether the LRC's campaign would have succeeded without the media

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grantees already removed unprocedurally from the system' (paragraphs 9 and 10).

since he felt that 'newspapers can have more power than the courts'. Sheena Duncan said that litigation, as an instrument to bring about social change, 'works extremely well along with things like social activism'.[61]

Sarah Sephton said that 'litigation has proved to be a tool for change', since 'the only time that the Department takes welfare matters seriously is when it is taken to court'. She felt that any changes made by the Department were 'a knee-jerk reaction only when it was essential to react'. She was of the view that 'litigation is the way to go to ensure that the law relating to social assistance is applied properly'. However, she also said that sometimes it felt that the litigation had had 'no real impact' and that 'it feels like trying to push back the tide'. She said she felt this because 'it is difficult to do anything on a big enough scale' and it was 'still a big battle' to make any progress.

Others made comments such as 'the litigation campaign has been a good strategy' and 'the litigation campaign has been a very powerful tool in keeping the Department on its toes and accountable'. Jonathan Walton commented that 'litigation is a last option and has had good results - it is definitely the way to go', while Dr Trudie Thomas said that 'litigation is one of the most powerful tools to bring about change. It has raised awareness of the problems in the province and has forced the Department to respond to demands and improve the system'. Sheena Duncan said that 'the LRC can be proud that its campaign was effective and that it won [the class action]' and that she had 'great admiration for the way the LRC operated during the campaign'. She said that 'the LRC has done the most amazing work' and that 'having a public interest law firm like the LRC at hand to take up these issues makes all the difference'.

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[61] This sentiment was echoed by Sandra Liebenberg in 'Editorial' in the (1999) 1 ESR Review where she wrote that 'Litigation is thus only one strategy, among many, to advance socio-economic rights. Other strategies include advocacy and lobbying public institutions, monitoring the realisation of rights, and awareness campaigns' (http://www.communitylawcentre.org.za/ser/esr1999/1999march_editorial.php).

Suggestions

Various suggestions were made during the course of the interviews regarding what might be done to improve the welfare system in the Eastern Cape. The paralegals in particular made numerous specific suggestions. Rosemary Smith said that 'people must be informed of the status of their applications'; that communication had to be improved - officials had to deal directly with people, Advice Offices, and NGOs 'rather than holding big meetings'; that the Department should be made more accessible to beneficiaries through toll free numbers and responses being made to queries and letters; and that officials needed to 'improve their public relations skills'. Ms Mazeka from Bizana Advice Office said that officials needed to attend workshops on capacity building that were offered by Advice Offices. It was also suggested that officials explain problems and decisions to beneficiaries better; that doctors who assess applicants for disability grants should have specialist knowledge regarding disabilities; that social relief be provided to those awaiting the outcome of their applications for social grants; and that the Department adhere to a particular time period for the processing of applications.[62] Mr Ndyebi, a paralegal from Adelaide Advice Office suggested that each town should have its own welfare office to deal with local problems and applications, rather than welfare officials visiting towns on a monthly basis.

All of the paralegals emphasized the need for training of Department officials. It was felt that officials 'need to be taught discipline'; to understand what their jobs require of them, how the system has to be administered, what the needs of grant recipients are and that they should be looked after; and to know what the Department's policies were.

Robert Martindale said that it was necessary to 'educate Department officials about what they are legally obliged to do'. He was of the opinion that 'from the highest level down, all officials seem vague about what they must do in terms of the Social Assistance Act'. Officials needed skills training and proper systems needed to be put in place because officials were 'inefficient and do not appear to

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[62] It is submitted that, because of Leach J's judgment in Mahambehlala, this time period should be three months.

know what to do'. Bishop Russell felt that the education of officials would be 'helpful'and that they needed training in 'the right kind of approach and to motivate them to act properly'.

Mark Rasmussen said that the education of officials regarding administrative justice was important, but that 'this must be done hand-in-hand with changes to the Act'. It would be 'good if the National Department would initiate an education process within all provinces on all the changes and issues' relating to welfare and that 'national government must make policy changes in line with the outcome of cases regarding methods of operation'. He suggested that the Department should work together with the LRC and other organisations to rectify the Department's past mistakes. He pointed out that this would entail 'starting at the top and looking at the Act itself to see what is and what is not in line with constitutional requirements', then making the required changes to the procedures and processes of all welfare departments.[63]

Robert Martindale suggested that the Department should be run like a business and argued that the Department needed to 'get in a strong leadership and middle management with licence to fire incompetents and bring in competent people'. He said that 'it must start at the top. The Department needs a strong leader with a long term relationship with the Department and goals [which he or she] plans to achieve in a specific length of time'. He felt that one of the problems with the Department was that there were 'too many acting positions' and that no one had been in a long term relationship with the Department. He emphasized that officials also needed 'the backing and resources' to bring about change.

Along these same lines, Mr Mana from Fort Beaufort Advice Office suggested that it be a requirement for the appointment of top level officials that they have an understanding of the specific needs and interests of the people in the particular area in which they were employed. He felt that it was necessary that officials had some kind of loyalty to and understanding of the people they dealt with

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[63] It is submitted that Bacela, Bushula and Nomala all made it clear to the Department what changes needed to be made to its processes and procedures and that it is not a case of whether or not provisions of the Act are in line with constitutional requirements, but whether the actions and policies of the Department meet these requirements.

in order for them to act appropriately and effectively.

It was suggested that people ought to be educated about what kind of social assistance is available and the requirements therefor. In order to inform beneficiaries as to what they can expect and demand of officials, Robert Martindale suggested that 'a massive public education campaign' be launched to inform all applicants of their rights and duties. He commented that the usefulness of the Department's website was limited in that 'it is not very good', but particularly because it was not accessible to those who needed access to the information it provided. He suggested that the Department should have 'people on the ground handing out pamphlets [containing information about social assistance and the Act] in all the languages of the area'. He said that such people 'need to go to pay points armed with information' and in this way officials would be 'forced into knowing what they must do'.

Another suggestion was the institution of a Basic Income Grant to replace other social grants paid by the Department that would entail a fixed amount being paid to all members of the population. There has been some debate as to whether this would in fact be a solution to the problems in the province, but this issue has yet to be decided.[64]

Johan Roos said that a suggestion had been made by the LRC that officials from the Department 'go from pay point to pay point with a mobile assessment team', having advertised that they are going to do this, to assess people for grants. This would make the Department more accessible to the needy and ensure that applications were processed. Mark Rasmussen said that 'the Department is trying to introduce [such] panels to make decisions on disability grant applications collectively'. These panels would probably consist of a doctor, an official from the Department, a person representing the disabled community, and possibly a representative from the Black Sash or a similar organisation.[65]

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[64] This issue was discussed in Chapter One.

[65] See Chapter One for details.

Jonathan Walton felt that the courts 'should become more vigorous and harsh in terms of punishing administrators who are the cause of unnecessary litigation'. He argued that the courts should make such officials pay the Department's legal fees out of their own pockets.[66] Several paralegals also emphasised that officials guilty of corruption and nepotism had to be 'brought to book' and Mark Euijen agreed that 'the accountability of officials, both for their decisions and for their failure to perform their duties' needed to be addressed.

Geoff Budlender from the LRC said that the campaign needed the help of pressure by NGOs, Advice Offices and trade unions, that is, 'organisations that deal with large numbers of people on a regular

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[66] This is in line with an attempt made by the LRC to secure an order for costs *de bonis propriis* in the contempt proceedings (see Chapters Two and Three). Another possible means of discouraging officials from engaging in unnecessary litigation is by invoking the terms of the Public Finance Management Act 1 of 1999. In terms of the Act, 'an accounting officer for a department or a constitutional institution commits an act of financial misconduct if that accounting officer willfully or negligently...makes or permits...a fruitless and wasteful expenditure' (section 81(1)(b). The Act defines an accounting officer as 'a person mentioned in section 36' (section 1), which provides that 'the head of a department must be the accounting officer for the department' (section 36(2)(a)) although 'the relevant treasury may, in exceptional circumstances, approve or instruct in writing that a person other than the person mentioned in subsection (2) be the accounting officer for a department or a constitutional institution...' (section 36(3)(a) as amended by section 18 of the Public Finance Amendment Act 29 of 1999). A department is defined as 'a national or provincial department' (section 1 as amended by section 1of the Amendment Act), while 'fruitless and wasteful expenditure' is defined as 'expenditure which was made in vain and would have been avoided had reasonable care been exercised' (section 1). In terms of the Act, 'a charge of financial misconduct against an accounting officer...must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer...and any regulations prescribed by the Minister...' (section 84). Furthermore, an accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer willfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40' (section 86(1)). In terms of section 38, the accounting officer of a department must take effective and appropriate steps to 'prevent...fruitless and wasteful expenditure...' (section 38(1)(c)(ii)); 'on discovery of any...fruitless and wasteful expenditure, must report, in writing, particulars of the expenditure to the treasury...' (section 38(1)(g)); and 'must take effective and appropriate disciplinary steps against any official in the service of the department...who makes or permits...fruitless of wasteful expenditure...' (section 38(1)(h)(iii)). On the basis of these provisions of this Act, it might be possible to make a case against the Head of the Department of Welfare as the accounting officer of the Department for willfully or in a grossly negligent way, failing to comply with the provisions of section 38, and therefore being guilty of an offence. It might be possible to claim that the Head of Department has failed to prevent fruitless and wasteful expenditure as required by section 38(1)(c)(ii) and failed to take effective and appropriate disciplinary steps against any official in the service of the Department who makes or permits fruitless of wasteful expenditure as required by section 38(1)(h)(iii) in that, it is submitted, officials of the Department who continue to fail to comply with court orders, or who fail to make decisions regarding grant applications, or who oppose matters against them without hope of an outcome in their favour, make or permit fruitless and wasteful expenditure as defined by the Act.

basis'. Sheena Duncan and Bishop Russell said that the LRC and other organisations involved in the campaign 'must keep at it'; that 'the situation needs ongoing monitoring'; that the litigation needed to be 'part of a wider campaign of publicity, advocacy, and lobbying'; that there must be 'ongoing vigilance'; that 'the LRC must follow up on the problems and keep going on and on' in its efforts to bring about change; and that the affected people had to be empowered to deal with problems. Mark Euijen commented that those involved in the litigation process 'could have also used parliamentary subcommittees to create internal pressure'.

Robert Martindale made the suggestion that private companies and sponsors be encouraged to fund more litigation, if necessary, as well as 'the movement against the Department'. In this way they would ensure that the money that they donated would 'go back into the economy' since people would be paid their grants and this money would thereby boost their communities' economies. He argued that 'unless the poorest of the poor's quality of life changes, companies are only making money on a temporary basis'. He felt that the corporate world and industry should take more interest in the problems faced by pensioners and that they should 'give to those who really need help'.

Results

The LRC's campaign against the Department brought about a variety of results. Many people said that the most important result was that a number of deserving people had been reinstated on to the system, now received their grants and had been paid the back pay owed to them or were to be paid shortly.[67] As a result of this, money had been able to flow into many communities' economies and

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[67] According to the Department's Director of Social Security, Mr Maqetuka, more than 357 000 Eastern Cape pensioners were to benefit from nearly R393 million in back pay to be paid out from June 2002. He broke down the pay outs as follows: 208 988 child support grant beneficiaries would receive a total of R77 146 650 (about R3 7000 per pensioner); 79 197 old age pensioners, including war veterans, would share R124 489 867 in July; 62 453 pensioners would share R167 970 298 in August; and 6 457 beneficiaries would be paid out a total of R22 526 528 in September 2002 (L Mati 'Welfare to back pay R393m' *Daily Dispatch* 12 April 2002). The promise of these pay outs came as a result of the litigation against the Department regarding Regulation 11 discussed in Chapter Two. Welfare organisations and activists welcomed such pay outs, but warned that government had to act quickly and pay the pensioners soon in order to minimise the prejudice they had suffered. Isobel Frye of the Cape Town Black Sash Office acknowledged that the task of making these payments would be huge and a challenge to handle correctly,

Robert Martindale described this as a 'remarkable achievement of the campaign'.

Mark Euijen said that the LRC had held a meeting with the Department in September 2001 for the first time since August 1999 and that 'even the Permanent Secretary came'. He said this was progress since the LRC had stopped holding meetings with the Department because 'it was a waste of time' and because the meetings 'got so hostile and acrimonious'. It was, however, too soon to tell if the officials' attitude had changed, but that it must have been as a result of the class action that they were open to meeting with the LRC again.

Another positive result of the litigation had been that the LRC received a letter from the Department after the judgment was handed down in the appeal against Ngxuza. It stated that the Department accepted that there was something wrong with the welfare system and that the problems had to be addressed. It also set out what the Department proposed to do about the situation and ultimately formed the basis of the settlement reached between the LRC and the Department.[68] This appeared to be a step towards the resolution of the problems in the system.

Sarah Sephton said that as a result of the litigation, 'the Department does take the LRC and the issue [of lawfulness] seriously now' because of the negative publicity the litigation attracted to the Department and that the Department was now trying to rectify the situation. She did qualify this statement by adding that it 'still remains to be seen how much [the Department] will change its position'. Rosemary Smith commented that the publicity surrounding the class action was 'good for

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but said that civil society was there to help the Department. Jonathan Walton of the Grahamstown Black Sash Office said that the office had reached many people who were owed back pay following the court's ruling in 2001 (in Trustees of the Black Sash Trust v Minister for Social Development *supra*) and had forwarded their files to Bisho. However, he pointed out that it should not be up to Advice Offices or lawyers to find such people, but that the Department had their records on the national database and that they should be identifying and reimbursing people at pay points. Johan Roos said that most people who were entitled to back pay were 'simply unaware of the court order' and that it was up to government to access the information at its disposal and inform each province who was owed money, and the amount which was owed to them (A Carlisle, 'Black Sash calls for quick payouts. Welcome relief for pensioners.' *Daily Dispatch* 15 February 2002).

[68] See Chapter Three for the terms thereof.

the cause' and had 'made other provinces and departments think'.

Johan Roos pointed out that another positive outcome of the litigation was that when the Constitution was being drafted, there was a fear that the right to administrative justice would 'become a paper tiger' and that 'it would not benefit the citizenry across the board', but the fact that the LRC was able to employ the right at the beginning of the new constitutional era was useful and 'gave meaning to the Constitution from the perspective of the poor'. He also pointed out that it was valuable that Ngxuza 'established what class actions mean and how to or how not to institute them'. He said that various people were now 'making noises for class actions' for other groups.[69] He was of no doubt that Ngxuza would have this spinoff.

Another 'spinoff' of the class action that he mentioned was that some of the people who had worked on the case were now researchers in the Constitutional Court. He said that 'they also learnt something from the campaign' and he felt that the expertise that was gained by the legal practitioners and caseworkers who had been involved in the proceedings added to the body of expertise of the legal profession.

Robert Martindale said that the 'major clarifications' of the law had also made 'a significant contribution to the body of law, particularly in welfare, but not exclusively'. Geoff Budlender agreed, saying that the litigation had 'added new principles to the body of the law, has held the Eastern Cape

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[69] Mr Justice H C Nel was appointed as head of a commission of enquiry into the affairs of the Masterbond Group and investor protection in South Africa. In his report dated 1 April 2001, he wrote that 'The Commission is convinced that the introduction of a class action in the South African law is essential for the protection and empowerment of investors' (paragraph 16.2). He also wrote that 'Although section 38 of the South African Constitution...provided for the introduction of a class action when a right protected by the Bill of Rights has been infringed or is threatened, no procedure for such an action has been formulated' (paragraph 16.3). A Proposed Bill for the institution of class actions and public interest actions had been drafted by the South African Law Commission and Mr Justice Nel wrote in his report that 'its acceptance is recommended' (paragraph 16.50). The purpose of this Bill was to make provision for the institution of class actions and public interest actions; to regulate the conduct of class actions and public interest actions; and to provide for matters connected therewith (Ibid). (The Honourable Mr Justice H C Nel 'Commission of Enquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa. Corporate Law and Securities Regulation in South Africa' Cape Town, April 2001, Volume 3 (http:// www.doj.gov.za/commissions/nelcommission/chapter15_18. pdf))

provincial government to account, and will affect and has already affected a large number of people positively'.

Hopes

The interviewees hoped that a variety of things would come out of the litigation. Most people had the obvious hope that thousands of people would be reinstated on to the welfare system or at least be given hearings to assess whether they were deserving or undeserving of grants, that the deserving received backpay, that the system was improved so that grants were processed within a reasonable time and that people were paid the right amounts at the right time. Many were still optimistic that this would happen in time, although the paralegals interviewed in July 2002 felt that the process needed to be accelerated.

Jonathan Walton hoped that 'this has been a good lesson for the Department'; that 'all people [who had been] treated unfairly since 1996 will get what they deserve'; that 'the public service will respect and uphold the Constitution at all times, not just when it suits them'; that 'public servants will respect court orders and stop wasting money on legal fees'; and that the Department would resolve problems in the system through discussion and agreement and not by means of litigation. Nomzi Vasi said that she hoped that the Department would 'move on and pull up its socks, become more efficient, respect people, treat people with dignity, and ensure that there are no more delays'.

Bishop Russell's hope was that the product of the litigation would be 'a just and transparent system where people won't have to go to court to assert their rights'. He also hoped that the system would become one that 'works to address poverty'.

Robert Martindale hoped that the publicity surrounding the litigation had informed people of what they were entitled to and that it had clarified the law. He also hoped that the litigation had made the Department sit up and assess the situation and begin to deal with the problems, although he felt that there was 'a long way to go in this still'.

Mark Euijen said that he hoped that the Department 'finally accepts' that it has to afford individuals their constitutional rights and that it changes its procedures to facilitate this.

Conclusions

Based on the comments made by the various people interviewed during the course of this research, it is submitted that there is a general view that the LRC's litigation campaign has indeed brought about positive changes and that it has been worthwhile because of this. It is also recognised that it has been the litigation, in conjunction with the publicity that the campaign attracted to the crisis, that has ultimately brought about the changes in the Department's attitude and procedures.[70]

There was agreement that there has been some progress towards improving the situation in the Eastern Cape, but that it has been slow. Paralegals seem to have more immediate expectations of the judgments than legal practitioners and welfare activists and it is submitted that this is because they deal with individuals' problems on a day-to-day basis whereas legal practitioners are somewhat distanced from immediate contact with the affected people and therefore see the bigger picture of the changes in the law and attitudes of Department officials to making change. It is submitted that this slow improvement has been a direct result of the litigation, rather than because of the passage of time as suggested by Dr Trudie Thomas. As was commented by Sarah Sephton, the Department only appears to act when taken to court rather than in response to meetings and correspondence with organisations such as the LRC.

From what Mark Rasmussen said when interviewed, there seems to be a lack of understanding on the part of the Department regarding the action it needs to take as a result of the court orders granted in the six landmark cases discussed above. Because of the litigation, the Department has now accepted

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[70] It is submitted that, in light of this recognition by many of the people involved in and affected by the litigation campaign, the more pessimistic comments made by people such as Sarah Sephton and Mark Euijen can be discounted as despondency and frustration at the slow progress that is being made in the improvement of the welfare crisis in the province, rather than a real belief that no progress has been made at all.

that it needs to respect the constitutional rights of welfare beneficiaries, but it does not seem to be sure what this entails. It seems to have a particularly underdeveloped idea of what the Act and Regulations require of it. As Johan Roos said, although the Department appears to have recognised that it needs to furnish people with notice, hearings and reasons, it does not seem to understand fully why the courts held that its concept of what these entailed was inadequate, as evidenced by Mr Rasmussen's comments when he was interviewed.[71] This is a very important issue that needs to be addressed.

It is clear from the responses of the interviewees that there are still other important issues which need to be addressed, the most important of these being education and training; efficiency; service delivery and the elimination of corruption. Most of the problems mentioned by the interviewees were linked to these issues and it is submitted that by addressing these issues, the Department would to a large extent address the specific problems which were raised at the same time. These are issues that have been highlighted through the various cases that have formed part of the litigation campaign against the Department.

Judging from people's varying responses, there is some ambiguity regarding the success of the campaign. It is submitted that the interviewees felt that it has in fact been successful and worthwhile because it is clear that it has had important results, but that it has not been an overnight or radical solution;[72] that the campaign is not over yet, but that the litigation has been part of an ongoing strategy that includes lobbying, the raising of public awareness and activism.[73] The consensus seemed

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[71] An example of the serious lack of understanding of the law and, in particular, the judgments in Ngxuza, is found in the Eastern Cape Premier's State of the Province Address. Reverend Stofile said: 'The Department is committed to re-instating (*sic*) beneficiaries of social security who qualify in terms of the law. This is line with our Cabinet decision of 1998 as well as the court judgment on this issue. We are pleased the Bloemfontein Court upheld our view that only beneficiaries that qualify should be reinstated. Not just any person or ghost, as some had tried to force us (*sic*)' (Provincial Legislature Chamber, Bisho, 15 February 2002).

[72] The paralegals in particular seemed to feel that the effects of the litigation needed to be felt by affected grant beneficiaries more quickly; that it was too gradual.

[73] This was a feeling particularly with legal practitioners and welfare activists who seemed to view the campaign as a means of bringing about changes in policies and attitudes, as well as a means to have

to be that the future is promising and that the campaign has made a difference both to individuals and generally.[74] It also seems clear that there is still a lot of work to be done in order to ensure that many more people's lives are improved.

Many of the people interviewed had practical and useful suggestions with regard to how to improve efficiency and service delivery of the Department and its officials, and how to combat ignorance on the part of both officials and the public. It is submitted that government should utilise these suggestions and continue to seek the help of civil society for suggestions and strategies as to how to bring about positive change in the welfare system.

People appear to be hopeful that the situation will improve over time, but are at the same time realistic in their expectations in that they realise that radical changes will not be made overnight. It is clear from the length of time over which the campaign has stretched that it will take time to get results and achieve change. It also appears that people are willing to continue to work towards bringing about change within the system as evidenced by the work of the many involved in the LRC's campaign. It is also important that the LRC and the Black Sash seem to acknowledge that they need to keep up a relationship with the Department in order to do this.

It is submitted that it is through the LRC's litigation campaign that the rights of those who are entitled to social assistance have become more of a reality than they have been since the amalgamation and integration of the various administrations in the province and the Department's subsequent 'review' process and that because of this, it can be regarded as a success.

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individuals reinstated and paid their back pay.

[74] See 'Changes' and 'Results' above.

CHAPTER SIX
Conclusion

It has been said that 'public interest law focuses on the wider public interest rather than the more private interest of a particular individual' and that 'public interest law therefore typically focuses on the test case.'[1] The argument is that 'this is an attempt to produce a legal decision which will affect the conditions or circumstances of a whole class or group'.[2] On this basis, it is submitted that the LRC's litigation campaign against the Department has been a classic example of public interest law. Because of the small size of the office and its limited resources, rather than attempting to take on thousands of individual cases, this strategy was employed in order to bring about changes that would positively affect the largest number of people possible. This research has been an attempt to evaluate this litigation campaign and to assess the impact this campaign has had on the social security system in the Eastern Cape. This chapter will draw together the conclusions drawn in the preceding chapters regarding the six landmark cases of the litigation campaign, the human aspect of the campaign and the expert opinions of those interviewed during the course of this research and finally conclude that the LRC's litigation campaign has indeed had a positive impact on the social security system of the Eastern Cape and that the right entrenched in section 27(1)(c) is in fact more of a reality and more accessible as a result of the litigation than it was prior to the campaign.

The legal impact of the LRC's litigation campaign

This research shows that the LRC's litigation campaign against the Department has made a significant contribution to both the field of administrative law and the field of constitutional law.[3] The six landmark cases discussed in Chapter Three have played an important part in the development of the particular administrative law that may be described as 'social assistance law'. Prior to the first of these cases, there was very little written about this area of law. There were also no cases relating to this area of law reported and this is indicative of the fact that this area of law had been marginalised until the litigation campaign began. The campaign's concentration

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[1] G Budlender 'On Practising Law' in H Corder *Essays on Law and Social Practice in South Africa* Cape Town, Juta and Co. 1988, 319 322

[2] Ibid

[3] See Chapter Three, page 123 onwards for more detail.

of effort on this area of law has had the effect of 'fleshing out' the Act with regard to its interpretation and application and has thereby developed the particular administrative law called social assistance law.

The litigation campaign has also made a significant contribution to the field of general administrative law, in that the cases have played an important role in its development. The cases succeeded in drawing boundaries regarding what was lawful conduct and what was not for administrators of the Act who had received little guidance in the past from the courts as to the limits of their powers. Bacela, Bushula and Nomala were particularly important in this respect, since the boundaries of the MEC's powers regarding the payment of arrears were clarified in Bacela, the requirements for procedural fairness were clarified in Bushula, and the requirements regarding what constitutes reasons was clarified in Nomala. These cases are particularly striking examples of the courts defending and upholding the principle of legality which is the core of the constitutional state. In Ngxuza, Froneman J held that '[o]urs is a constitutional State where the exercise of public power is dependent on the principle of legality. The constitutional task of the Courts is to control the exercise of public power so that it conforms to the principle of legality'.[4] Because of this, these cases are important developments in the new constitutionally inspired administrative law based on the values contained in section 1 of the Constitution.[5]

The questions of whether the payment of arrears can be limited and what constitutes a reasonable length of time for the processing of grant applications were dealt with in the 'spinoff' cases of Trustees of the Black Sash and Mahambehlala and Mbanga. These important developments in the field of administrative law would not have happened were it not for the LRC's litigation campaign against the Department.

The area of constitutional law was also developed by these six landmark cases. Although not all of the cases were decided on the constitutional points argued by the LRC on behalf of the Applicants, the cases did deal with the right to social assistance in terms of section 27(1)(c), the

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[4] Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another 2001 (2) SA 609 (E) at 618F-G

[5] Particularly the supremacy of the Constitution and the rule of law (section 1(c)).

right to just administrative action under section 33 and the requirements for representative standing in terms of sections 38(b), (c) and (d) of the Constitution. An important contribution of the litigation campaign to the area of constitutional law was that the requirements for representative standing and the institution of class actions was clarified in both Ngxuza and the subsequent appeal. Of particular significance was Cameron JA's finding in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza regarding the 'quintessential requisites' for a class action in terms of section 38(c). Up until this decision, these requisites had yet to be explicitly set out. But for the LRC's launching of the application on behalf of Mr Ngxuza and the rest of the members of the class, this point of law would not have been clarified.

Also important is the fact that Ngxuza dealt with section 38(b) and the question of whether a person could litigate in his or her own name was dealt with, not on a hypothetical basis, but on the basis of the grim realities of the South African life.[6] This may be an indication that the law is becoming more 'user-friendly' when the rights of the poor are in issue and that the courts are responding positively to the requirements of the Constitution. As Cameron JA held in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza, the Constitution 'commands all organs of state to be loyal to the Constitution, and requires that public administration be conducted on the basis that 'people's needs must be responded to...'[7] He also held that '[i]t is the needs of such persons, those who are most lacking in protective and assertive armour, that the Constitutional Court has repeatedly emphasised must animate our understanding of the Constitution's provisions'.[8] The fact that the law appears to becoming more 'user-friendly' is important because it is in line with the new constitutional order's commitment to social justice as contained in the preamble of the Constitution.

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[6] At 621E-I. This approach was followed in Leach J in Mahambehlala and Mbanga (at 355G-H and 369E-370F respectively). See by way of contrast Southwood J's approach in Maluleke v Member of the Executive Council, Health and Welfare, Northern Province 1999 (4) SA 367 (T)at 374.

[7] Paragraph 15. See section 41(1)(d) and section 195(1)(e) respectively.

[8] Paragraph 12

Nomala also made a significant contribution to the field of constitutional law because it dealt with the issue of public interest standing as provided for in section 38(d) of the Constitution. Nomala built on the decision in Port Elizabeth Municipality v Prut NO and Another,[9] in which the court held that the issue of whether a litigant would be accorded public interest standing, regardless of their own interest in the matter, depended solely on whether the matter was of purely academic interest or not.[10] In Nomala, Pillay AJ held that it seemed that the issue of public interest was ultimately a question of justiciability and it was on this basis he held that the Applicant was entitled to act in the public interest. In the context of social assistance, public interest standing is particularly important since large numbers of people are affected by the Department's actions and also because these people are often the most vulnerable members of society who have limited access legal assistance and very limited resources. It is therefore important that litigants can act in the public interest, regardless of their own interest in the matter in question, in matters dealing with social assistance.

The social and political impact of the LRC's litigation campaign

On the basis of the opinions expressed by those interviewed during the course of this research, it is submitted that the LRC's campaign has indeed had a positive impact on the social security crisis in the Eastern Cape. The people who were interviewed all have firsthand knowledge of the way in which the social assistance system in the Eastern Cape works in reality and this is why their views are worth consideration. Most of them noted that there have been improvements in the system since the LRC began its campaign against the Department and said that the situation is 'slowly improving'.[11] This is a very important point to note because even those legal practitioners who were disillusioned about the litigation and the Department official who disputed the necessity of the litigation agreed that the campaign has achieved something positive.[12] Many of the interviewees questioned the ability of the law to resolve all of the problems within the social

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[9] 1996 (4) SA 318 (E)

[10] At 324F-326B

[11] See Chapter Five, 'Changes' section for more detail.

[12] See Rasmussen's concessions in the 'Changes' and 'Problems' sections of Chapter Five.

security system, but they agreed that the litigation had in fact precipitated a response from the Department that would probably not otherwise have occurred.[13] Those interviewed also acknowledged that the litigation had had tangible results, such as the reinstatement of people onto the system, the payment of outstanding arrears and the speedier processing of applications, even if these changes were slow and patchy.[14] They were hopeful that more positive changes would come about as result of the campaign.[15]

An important point to note is that, although comments have been made regarding the slowness of the changes being made as a result of the litigation, overnight change is not the nature of public interest law. Public interest litigation uses law as a tool to bring about social change and this is a gradual process and takes time. The litigation campaign has already achieved certain significant results and this is an ongoing process. The contempt case alone unlocked approximately R500 000 for people whose grants had not been paid or whose applications had not been processed and all of the individual cases either had the result of getting people their pensions, putting money in their pockets, or of getting decisions out of the Department, and this will continue to happen. A large number of people were assisted in this way by the cases launched by the LRC and, more significantly, by the spin-off cases brought by legal practitioners such as Robert Martindale and others.[16] Even more significant is the fact that these cases have changed the 'rules of the game' for the future, in that Bacela, as well as stopping the Department's unlawful practice of refusing to pay arrears, resulted in forcing the Department to pay arrears of hundreds of millions of rands to those who had been denied payment and it also had to pay arrears

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[13] See Chapter Five, 'Evaluations' section for more detail.

[14] See Chapter Five, 'Changes' and 'Results' sections for more detail.

[15] See Chapter Five, 'Hopes' section for more detail.

[16] In Ndevu v MEC for Welfare, Eastern Cape Provincial Government and Another SECLD Case no. 597/202 (unreported), Erasmus J pointed out that the matter was one of 27 unopposed matters on the roll in which applicants sought relief in the form of a social grant under the provisions of the Act and that there were '34 similar matters on the roll for this coming motion court, and no doubt many more in the pipeline' (paragraphs 1 and 2). In Somyani v MEC for Welfare, Eastern Cape and Director-General, Department of Welfare, Eastern Cape SECLD Case no. 1144/2001 (unreported), Froneman J pointed out that 'There were 41 unopposed matters on the motion court roll in PE on 11 June 2001 where relief was sought against the respondents [the MEC and the Director-General for Welfare], as is also the case in this matter' (paragraph 1).

in future, that is, until the Regulations were changed to limit the payment of arrears.[17] This has had significant consequences for destitute people who have waited long periods of time for their grants. The same is true of the Bushula and Nomala matters. In terms of Bushula, the Department's practices of not giving notice or hearings regarding the cancellation or suspension of grants has been put to a stop, as has its practice of using standard form reasons for the cancellation or suspension of grants as a result of Nomala. These two cases have had the effect of forcing the Department to reinstate thousands of people onto the system and to pay millions of rands to those whose grants were unlawfully and unprocedurally cancelled or suspended. The illegal conduct of the Department which was dealt with in all three of these cases was widespread and general in its application and therefore it affected hundreds of thousands of people across the province. The effect of these successful challenges to the illegal conduct of the Department is therefore correspondingly widespread.

Another significant point is that President Thabo Mbeki recently appointed a task team to address various ongoing problems in the Eastern Cape Province.[18] What is particularly relevant to this research is that the task team is to focus on the Departments of Education, Health and Welfare and this is indicative of the profile that the LRC's campaign has given the issue of social assistance in the province. Furthermore, an application has recently been made in the Pretoria High Court for an order compelling the national government to take on the social assistance function which has been devolved to the provinces on the basis that the provinces do not have the capacity for this function. It is significant that none of the provincial governments, except the Western Cape Provincial Government, have contested the application and neither has the national government. This seems to indicate that the litigation campaign has highlighted the fact that the provinces, and

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[17] See Chapter Two regarding the litigation which dealt with Regulation 11 (Trustees of the Black Sash v Minister for Social Development TPD September 2000, Case no. 30368/2000 (unreported)).

[18] According to an article in the Mail & Guardian, 'The Cabinet this week gave its official backing to the deployment of a top-level management team to overhaul government and social delivery in the Eastern Cape. The interim management team will start operating in the province in January to assist the Eastern Cape in ensuring delivery of services. Its work will focus on health, education, social development, roads and public work sectors'. Joel Netshitenzhe, chief government spokesperson said: 'for the past 18 months, President Thabo Mbeki and ministers have visited the province to deal with problems of delivery and allegations of corruption. The team will help develop turnaround plans to address service delivery backlogs for implementation by the administration' ('Management team tackles E Cape troubles' *Mail & Guardian* 6 December 2002).

particularly the Eastern Cape Province, do not have the capacity for the welfare function.

Finally, the litigation campaign had the important effect of putting the problems of social assistance delivery into the public eye in a way that no amount of occasional 'hard luck' stories in the media could have, and possibly even in a way that no amount of social activism could have. As Cameron JA found in his judgment in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza, 'the papers before us recount a pitiable saga of correspondence, meetings, calls, appeals, entreaties, demands and pleas by public interest organisations, advice offices, district surgeons, public health and welfare organisations and branches of the African National Congress itself...The Legal Resources Centre played a central part in coordinating these entreaties and in the negotiations that resulted from them. But their efforts were unavailing. The response of the provincial authorities...included unfulfilled undertakings, broken promises, missed meetings, administrative buck-passing, manifest lack of capacity and at times gross ineptitude'.[19] The litigation campaign drew into the debate a range of social and political actors who may not otherwise have been aware of the problems or their extent, or may otherwise not have been even particularly interested in the issue. The campaign also set the parameters of the debate, to an extent, since the courts clarified what was acceptable and what was not, for example, in Bacela it was held that obedience to the law 'trumped' administrative efficiency and in Bushula it was made clear that individual notice to recipients and individual hearings were required before the cancellation of grants.

This research has also had the effect of highlighting the disjuncture between the promise of the Constitution and the Department's actions. The many stories that have been reported in the press regarding the immense hardship and suffering of those whose lives have been adversely affected by the inefficiency, incompetence and uncaring attitudes of Department officials in the province may suggest that the Constitution's commitment to social justice, the protection and advancement of human rights and the improvement of the quality of life of all citizens may seem to be merely a noble ideal, but it is submitted on the basis of this research that the LRC's litigation campaign has played a significant role in narrowing the gap between reality and the promise of the Constitution. This research highlights the disjuncture between the way that the Department has

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[19] Paragraph 8

gone about providing social assistance and the promise of the Constitution, along with the principles of *Batho Pele*, and it is concluded that the Department needs to be reminded of what the Constitution demands of it.[20]

Submissions

On the basis of the arguments set out above, it is submitted that the LRC's litigation campaign has indeed had a positive impact on the social security system in the Eastern Cape. Compared to the situation in 1996 before the campaign began, the situation for grant recipients has indeed improved and this is as a direct result of the six landmark cases and their 'spinoffs' discussed in this research. The right to social assistance as entrenched in terms of section 27(1)(c) of the Constitution is in fact more real and more accessible as a result of the litigation campaign than it was before. Were it not for the LRC and its campaign against the Department, it is submitted that these changes would not have come about and that, in fact the situation would have become even worse. The LRC's role in bringing about social change has therefore been significant, especially since it is only because of the LRC that any other legal practitioners have been litigating in the area of social assistance law.

It is submitted that the campaign has now achieved all that it can to demonstrate to the Department what changes it needs to make and that litigation now needs to be used to ensure that these changes are in fact made. As well as using litigation to challenge the issues that still have to be addressed by the Department, the next stage of the campaign should be to use litigation as a tool to regulate the changes that have already been made within the social security system,[21] and those that are made in the future. Litigation should also be used as a means to ensure that the courts' decisions discussed above are complied with and enforced since it is important that the situation not be allowed to revert to the previous unacceptable state of affairs.

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[20] See Chapter Four for more detail.

[21] When he was interviewed during the course of this research, Mark Euijen said that rather than being a tool for bringing about change, litigation is a means to regulate changes once they have been made. It is submitted that this is indeed the case at this stage in the campaign against the Department.

It is submitted that an important accompaniment to this must be the education of Department officials and staff, as well as the greater community, especially human rights organisations and institutions, regarding the significance of the six landmark cases discussed in this research and the reasons as to why the LRC's campaign was necessary, since there is a very disturbing lack of understanding and appreciation of the significance of these cases.[22]

It is further submitted that what is necessary now, is some kind of action on the part of government, both at provincial and national level, other than mere planning and strategising, to address the issues that have been raised during the course of the litigation and by those interviewed during the course of this research. It is submitted that, as well as the issues raised by those interviewed for this research,[23] there are other important issues which both the national Department and the Eastern Cape Department must address. It is vital that the efficiency of officials both in relation to their dealings with grant recipients and in relation to the administration of the system be improved. This means that effective systems need to be put in place and that officials need to be educated regarding their obligations and duties within their jobs. At the same time, a degree of humanity needs to be injected into the system: officials need to acknowledge that the system is meant to help the most vulnerable people in society and to perform their functions in such a way as to do so.[24] Co-operation between departments and the various spheres of government is also essential in order for the system to be more effective and efficient, as is a uniform standard of service throughout the country. This uniformity requires that the

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[22] See Chapters Five and Six for examples.

[23] See 'Issues' section of Chapter Five.

[24] Cameron JA made this point in Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza where he said that the Constitution 'commands all organs of state to be loyal to the Constitution [section 41(1)(d)], and requires that public administration be conducted on the basis that 'people's needs must be responded to [section 195(1)(e)]...' (paragraph 15). Arthur Chaskalson said in the Third Bram Fischer Lecture that 'the Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another. We are capable of realising this vision but in danger of not doing so. We seem temporarily to have lost our way. Too many of us are concerned about what we can get from the new society, too few with what is needed for the realisation of the goals of the Constitution. What is lacking is the energy, the commitment and the sense of community that was harnessed in the struggle for freedom...All of us have an obligation to make the Constitution work, and it is in all of our interests that this be done' (A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193 205).

infrastructure in several of the provinces, particularly in the Eastern Cape, be improved in order to raise the level of service delivery to that of other provinces.[25]

To make these changes, it is submitted that there needs to be a reprioritising of government resources: national government needs to make funds available to provincial departments so that the changes that are necessary within the social security system can be implemented. The Financial and Fiscal Commission (FFC) has submitted its recommendations to Parliament regarding the provinces equitable share allocations of national revenue for the provision of constitutionally mandated social services. It is submitted that if the recommendations which the FFC has made are promulgated as legislation or become government policy, they may have a positive effect on the Eastern Cape Provincial Government's ability to fulfill its obligations with regard to social assistance.[26]

It is also submitted that those who argued so strenuously for the inclusion of socio-economic rights in the 1996 Constitution, and specifically those who are now in government, must recognise these rights as genuine rights, as opposed to privileges, which must be given substance and

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[25] In Chapter Five, Johan Roos was quoted as saying that the problems with the implementation of the settlement agreement highlighted the difficulties in trying to ensure delivery through 'semi-paralysed' departments. He said that the fact that the Johannesburg office of the LRC was able to sort out problems regarding cancellations over the telephone, illustrated the inequity between the various provinces.

[26] In it recommendations, the FFC 'applied a costed norms approach to the allocation of national revenues for the provision of constitutionally mandated basic social services. The costed norms approach is a formula-based method for calculating the financial resources necessary for the provision of basic social service levels, given nationally mandated norms and standards...The main objective of the Commission's approach is to ensure that each province has sufficient financial resources to provide constitutionally mandated basic social services to all its citizens...' (Recommendations for the 2001-2004 Medium-Term Expenditure Framework Cycle (May 2000), 7). 'The first step in the costed norms approach is to establish basic social service levels, expressed in the form of norms and standards, for each programme area. These levels may be provided explicitly in government legislation or implicitly in government policy. Once the norms and standards are established, the resources needed to deliver these social services are calculated by taking into account the structure of the provincial population. This should provide a more objective measure of the financial resources necessary to attain the norms and standards that have been nationally determined' (Ibid 9). The FFC's recommended formula for social security takes into account 'the number of individuals eligible for each of six separate social security programmes and the entitlement amount of each; an allowance for administrative expenses; and phase-in parameters for social security programmes with law take-up rates, to provide for gradually increased utilisation' and 'as an interim solution and in view of urgent need, conditional grants be allocated to provinces out of the national equitable share to support the reduction or elimination of social infrastructure backlogs' (Ibid 14). For more details see Annexure B for excerpts from the Financial and Fiscal Commission's Recommendations.

recognition. It is not enough that the battle for their inclusion in the Constitution has been won: these rights need to be protected, enforced and made a reality.[27]

The issue of unemployment also needs to be addressed, particularly in the Eastern Cape where it is a serious problem. It is submitted that by addressing unemployment, some of the problems within the social security system will be alleviated, particularly the problem of the economies of entire communities being dependant on social grants. If the levels of unemployment in the province drop, it is submitted that the problem of poverty will be alleviated to an extent and that this will help to decrease the burden on State resources that social assistance constitutes. It is also submitted that the payment of outstanding grants and arrears that are due to people would provide an important boost to the economy and in turn provide new employment opportunities within the community. This too would be an important means for alleviating poverty within the province.

The Department must also address the needs of those groups of people who are excluded from the social security system and who are in great need of social assistance, including poor children over the age of seven, the structurally unemployed and the informally employed,[28] as well as those of people who have in the past been and are at present affected by the HIV/AIDS pandemic.[29] Provision needs to be made for the assistance of these people since it is submitted that the number of such people is growing.

In conclusion, it is submitted that, as a result of the LRC's litigation campaign, the right to social security, and particularly the right to social assistance, has become more accessible and far more of a reality on the ground in the Eastern Cape than it was prior to the litigation. Furthermore, it is submitted that, but for the LRC's campaign, the situation in the province would not have improved at all, and that it may in fact have deteriorated even further were it not for the landmark litigation discussed in this research.

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[27] Particularly since, in terms of section 7(2) of the Constitution, the state is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.

[28] This issue was discussed in Chapter One.

[29] This issue was also discussed in Chapter One.

ANNEXURE A

List of people interviewed during the course of this research:

Paralegals at Advice Offices

- Adelaide - Mr B Ndyebi
- Alicedale - Mr M Manjati
- Aliwal North - Mr Bottoman
- Bedford - Mr K Nqobe and Mr L Mange
- Bizana - Ms N Mazeka
- Fort Beaufort - Mr M Mana
- Jamestown - Mr Matiso
- Lusikisiki - Mr Mthetheleli
- Molteno - Mr A Jikijela
- Paterson - Mr T Manene
- Peddie - Ms Nkuzo

Legal Resources Centre

- Mark Euijen (legal practitioner - Grahamstown)
- Sarah Sephton (legal practitioner - Grahamstown)
- Johan Roos (legal practitioner - Grahamstown)

These three legal practitioners with the LRC have at various times been directly involved in the litigation campaign. Mr Euijen is an advocate of the High Court of South Africa and is a member of the Eastern Cape Bar. He has held the position of Regional Director of the Grahamstown LRC. Ms Sephton is an attorney employed by the Grahamstown LRC. Mr Roos is an advocate of the High Court of South Africa and is a member of the Eastern Cape Bar. He is the current Regional Director of the Grahamstown LRC.

- Geoff Budlender (legal practitioner - Cape Town)

Mr Budlender has been involved in pension cases through the LRC for many years since the late

1980s. He has been National Director of the LRC. In May 1996, he left the LRC to take up the post of Director-General of the Department of Land Affairs. He returned to the LRC in 2000 and is held the position of Director of the Constitutional Litigation Unit, until he moved to Cape Town where he is an attorney in the LRC's Cape Town office.

- Rosemary Smith (voluntary worker - Grahamstown)

Ms Smith was the Regional Director of the Grahamstown Black Sash Advice Office for many years until she retired at the end of 1999. She currently does volunteer work for the LRC where she has co-ordinated the notification of prospective members of the class in the class action. She has also co-ordinated the LRC's gathering of information from those affected by the pension crisis in the Eastern Cape.

Black Sash

- Sheena Duncan (National Office)

Ms Duncan has been involved with Advice Offices since 1963. She was involved in discussions which ultimately brought about the creation of the LRC and she was President of the Black Sash over two extended periods of time. Besides her work in the Black Sash and especially its Advice Offices, Ms Duncan is, amongst other things, the Honorary Life Vice President of the South African Council of Churches.

- Jonathan Walton (Grahamstown)

Mr Walton has been the Regional Director of the Grahamstown Black Sash Advice Office since 2000. Prior to this, he was employed at this office as a senior case worker for 12 years.

- Nomzi Vasi (Port Elizabeth)

Ms Vasi is employed as a paralegal by the Port Elizabeth Black Sash Advice Office.

Other

- Robert Martindale (private practitioner - Port Elizabeth)

Mr Martindale is an attorney and human rights lawyer who has been involved in constitutional litigation since 1994. He became aware that the LRC was involved in social welfare cases in 1996 and became involved as the LRC's correspondent in Port Elizabeth when he was asked by Professor Clive Plasket to commission affidavits at the Port Elizabeth Black Sash Advice Office for the LRC. When it became clear that this process was inefficient, he was asked to become involved in the litigation himself. The Port Elizabeth Black Sash Advice Office now refers cases directly to him, rather than to the LRC in Grahamstown. Other NGOs and individuals now also approach him directly. He has won several important cases in the campaign, including Mahambehlala v MEC for Welfare, Eastern Cape, and Another and Mbanga v MEC for Welfare, Eastern Cape, and Another[1] and has obtained at least 300 to 400 orders against the Department.

- Bishop David Russell (Anglican Bishop of Grahamstown)

Bishop Russell has been the Bishop of the Anglican Diocese of Grahamstown for 14 years. He has been involved in the issue of pensions since the late 1960s and early 1970s, when he was involved particularly in issues relating to child and maintenance grants and old age pensions. He went on a six month campaign to protest against the meagre R5,00 old age pension during which he lived on the amount and wrote to the Minister every month, describing the difficulties of living on such a small amount. Since then he has been an active campaigner for the rights of the welfare recipients in the province and he met with the MEC for Health and Welfare in 1997 to discuss the problems in the system. He has written numerous letters to government officials, including the Premier of the Eastern Cape Government, the National Minister of Welfare and the Deputy President, bringing the problem to their attention. He visits congregations around the province virtually every week and hears stories from pensioners and grant recipients regarding their cancelled grants and the problems within the welfare system. He also made an affidavit in support of the class action.

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[1] 2002 (1) SA 342 (SE) and 2002 (1) SA 359 (SE) respectively.

- Dr Trudie Thomas (former MEC for Health and Welfare, Eastern Cape)

Dr Thomas was the MEC for Health and Welfare in the Eastern Cape between 1994 and mid-1997, when the Department was split into two separate departments and she became MEC for Health. She has also been Chairperson of the Public Participation and Petitions Standing Committee of the Eastern Cape Legislature and was instrumental in the holding of public hearings into the pension system in the Eastern Cape.

- Mark Rasmussen (Department of Welfare, Eastern Cape)

Mr Rasmussen is the Deputy Director of the Department for Social Security in the Eastern Cape Provincial Government. He has made affidavits in this capacity for the Department during the course of the LRC's litigation against the Department.

ANNEXURE B

Below are excerpts relevant to this research taken from the Financial and Fiscal Commission's Recommendations for the 2001-2004 Medium-Term Expenditure Framework Cycle (May 2000) which were submitted to Parliament for consideration:

'The Financial and Fiscal Commission has conducted a review of various aspects of intergovernmental fiscal arrangements in South Africa. After extensive consideration of the research conducted throughout 1999 and evaluation of options in the light of the provisions of the Constitution and international best practice, the FFC developed numerous proposals for appropriate fiscal arrangements. These proposals served as the basis for a consultative process that the Commission embarked upon with stakeholders and commentators between February and April 2000. The Preliminary Recommendations were thus revised in line with the inputs received.

This Report therefore presents the Commission's recommendations and advisories for the 2001/02 and subsequent fiscal years of the MTEF Cycle.

The costed norms approach to the allocation of national revenues

The Financial and Fiscal Commission has applied a costed norms approach to the allocation of national revenues for the provision of constitutionally mandated basic social services. The costed norms approach is a formula-based method for calculating the financial resources necessary for the provision of basic social service levels, given nationally mandated norms and standards...The main objective of the Commission's approach is to ensure that each province has sufficient financial resources to provide constitutionally mandated basic social services to all its citizens... The main difference from the current provincial grants system is the clear link between any tentative proposal for the provincial equitable share and what that amount will buy in basic social services in that province.

The Constitution provides the foundation for the approach. The Bill of Rights stipulates that certain basic social services, including education, welfare, and health, are to be provided to all South African citizens regardless of their place of residence. The Constitution specifies that provinces carry the responsibility for delivery of these services, and that national revenue shall be

shared equitably in order to finance these basic social services.'[1]

' The essence of the costed norms approach

...

The first step in the costed norms approach is to establish basic social service levels, expressed in the form of norms and standards, for each programme area. These levels may be provided explicitly in government legislation or implicitly in government policy. Once the norms and standards are established, the resources needed to deliver these social services are calculated by taking into account the structure of the provincial population. This should provide a more objective measure of the financial resources necessary to attain the norms and standards that have been nationally determined.'[2]

'1. The Costed Norms Approach

A key component of the system of fiscal arrangements in South Africa is the division of national revenues into national, provincial and local equitable shares. This involves both the division among provinces and municipalities (the *horizontal* division), and the three-way aggregate division (the *vertical* division).

The approach that the FFC uses to partially determine these two divisions is called the *costed norms approach*. It is based on the obligation set out in the Constitution that the provincial equitable share should be sufficient to enable provinces to provide basic education, welfare, and health services up to the mandated national standard within the resources available.'[3]

'Recommendations for the 2001-2004 MTEF Cycle

...

...the FFC hereby presents its set of recommendations for the Medium-Term Expenditure Framework and financial year beginning 2001.

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[1] 'Executive Summary' 7

[2] Ibid 9

[3] 'PART ONE: RECOMMENDATIONS FOR THE MTEF CYCLE 2001-2004' 17

1. Constitutionally mandated basic levels of service in basic education, primary health, and social security be provided for in the provincial equitable share allocations, and that provinces be held accountable for the delivery of such services. Furthermore, that where possible the costed norms approach be used to ensure the adequate provision of constitutionally mandated basic levels of service in education, welfare, and health. Implementation should be as early as possible, taking into account the Medium-Term Expenditure Framework cycle.

2. The FFC has used the costed norms approach in arriving at the formulae for constitutionally mandated basic social services in education, welfare, and health in this report such that the recommended formula:

...

2.2 for social security takes into account:

- the number of individuals eligible for each of six separate social security programmes and the entitlement amount of each;
- an allowance for administrative expenses; and
- phase-in parameters for social security programmes with law take-up rates, to provide for gradually increased utilisation.

...

3. Each province should be allocated:

- a Basic (B) Element, which will include the provision of all services not defined as constitutionally mandated basic services and any other functions negotiated by the three spheres of government. The B Element is determined in a manner that is consistent with the principle that both the vertical and horizontal divisions of revenue be based on clear and transparent norms where possible, and it is net of the Institutional Element; and
- an Institutional Element set equal to the minimum cost of operating government institutions.

...

5. As an interim solution and in view of urgent need, conditional grants be allocated to provinces out of the national equitable share to support the reduction or elimination of

social infrastructure backlogs.'[4]

'2 THE SOCIAL SECTOR USING THE COSTED NORMS APPROACH

In this section, prototype formulae were presented for the social sector components of the provincial equitable share allocation, namely education, welfare, and health.

2.1 General Principles

It is necessary, over time, to define more precisely what constitutes "basic services" in education, welfare, and health. ...in many instances national norms and standards are not in place. It therefore becomes difficult to assess the service level that is constitutionally guaranteed...

The FFC has chosen to interpret "basic" social services narrowly. It has relied on a descending hierarchy of instruments to determine what might constitute the basic levels of service in each of the three social sectors: the Constitution, existing legislation that prescribes standards, policy and past practice. In addition, in order to overcome the absence of comprehensive norms and standards regimes in the sectors, the formulae proposed have been constructed with a significant degree of flexibility. The allocation that each formula will deliver may be varied to produce equitable share allocations that more closely reflect the preferences of national and provincial governments by adjusting a series of policy/technical parameters.

Once decisions have been made about the appropriate public service outputs that will define basic services in the areas of education, welfare, and health, the costed norms approach requires that the financial resources needed to achieve these basic public output goals must be quantified for each province. In other words, how much does it cost each province to achieve levels of educational attainment, social welfare, and health care?

The key consideration in calculating costs of delivering any public service is to include only those expenditures that reflect factors that are beyond the influence of provincial authorities...

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[4] Recommendations for the MTEF Cycle 2001-2004 13-14

Cost estimates should not simply mirror past expenditure patterns. Historical patterns of spending may be higher in some provinces than others. This is often explained by the efficiency with which services are delivered. Spending may also vary because some provinces provide higher than average levels of services. Finally, spending may vary because the costs of providing a given level of service are higher due to uncontrollable outside factors. Under the costed norms approach, only the uncontrollable factors should affect the equitable share. If instead allocations are based on historical expenditure patterns, each province's share will be determined by all of these factors. Provinces that are relatively inefficient in service delivery will have little incentive to reduce inefficiencies; and funds will be directed towards provinces which exceed basic service levels, at the expense of provinces that have insufficient revenues to meet their constitutionally prescribed basic service goals. It is therefore important to use an objective measure of the costs of providing basic services as the basis for the horizontal allocation of equitable share.

It is important to emphasise that input standards are used in the allocation of the equitable share as proxies for public sector output measures. Provincial governments must be informed that input standards are not to be interpreted as policy prescriptions. Each provincial government must determine for itself, based on local conditions, the best way to achieve basic education, health care, and welfare service goals...

Lastly, provinces could choose to provide higher-than-basic levels of services, but the financing for these services would have to come from provincial governments' own-source revenues.'[5]

'2.3 The welfare component

For the welfare formula, the FFC defines *social security* as the basic level of service. Social security in this definition constitutes direct non-contributory social grants to individuals entitled in terms of the regulations. Although the current provincial formula makes an allocation for social security grants, it does not provide explicitly for social welfare services. Until the Department of Welfare gives a clear set of policy guidelines, social welfare services is included in the Basic Element of the provincial equitable share formula.

...

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[5] 'Recommendation 1' 25-26

2.3.1. The current allocation

Under the current fiscal arrangements, nearly all social security spending is included in the provincial equitable share. National government sets eligibility requirements and the payment levels of social security grants, while the administration and financing of these grants is a provincial function, with funding coming primarily from provinces' equitable share allocations.

In the current equitable share allocation, the costs of social grants are related to the demographic and income differences across provinces, however, the current formula combines these elements in a manner that is not directly related to eligibility or the costs of social security...

2.3.2 FFC proposal for the welfare component

To apply the costed norms approach to the distribution of cash transfers, the FFC's proposed formula determines the number of persons who are potentially eligible for each of six separate social security programmes and multiplies that number by a province's average grant amount. The average grant amount depends on the government-determined formula and the income of those people who are eligible for the grant. To implement this approach, it is necessary to develop a reasonably accurate count of the number of individuals who are eligible for each grant.

The FFC's approach is to use nationally available data sets, primarily from Statistics South Africa, to obtain an objective measure of the potential population eligible for various social security transfers. To the census data is then applied the income-based means test specified in the grant regulations, in order to estimate the number of individuals eligible for each type of cash transfer...

There is considerable variation across provinces in the rate of take-up for the various social assistance categories. To the extent that current rates of participation in social assistance programmes vary across provinces because of differences in the underlying eligibility rates...then the equitable share allocations generated by the proposed formula will mirror these differences. However to the extent that existing variations reflect historical differences in rates of assistance by race or region, the costed norms formula will redistribute aid from provinces with high rates of participation to provinces with lower rates. Because the cost of administration of the social grants is related to the provincial take-up rates, a percentage share allocation of 5 percent is

applied for administration, based on that province's total social security cost.

For several of the social security grants, the current number of individuals receiving that grant is a small fraction of the total number of eligible individuals. In those cases, the formula employs a phase-in parameter, beta (β), to allow the equitable share allocations designated for that grant programme to mirror more closely the aggregate expenditures under the current grant.

All provinces are likely to face a gap between available funds and the amounts that would be required if there were universal participation of persons eligible for assistance. Provinces should be encouraged to resolve this gap between resources and needs in as equitable a manner as possible. In addition, the transparency of the equitable share amount for social security under the costed norms approach should encourage provinces to search for the most equitable ways to limit welfare obligations. For example, census data indicate that, given the distribution of income among eligible persons, average grant levels should be substantially lower than the maximum grant. However, the management data from the SOCPEN system indicate that almost all recipients of old age assistance and disability assistance receive the maximum grant. Hence, the gap between needs and resources could be reduced by a stricter application of the means test for determining grant amounts. In the case of disability grants, the costed norms approach will encourage provinces to award grants based on the severity of the disability, and to provide periodic reviews of eligibility.

Below, the FFC's formula approach to each of the six social security programmes is described.

2.3.2.1 Old age pensions

Subject to a means test, all males over the age of 64 and females of the age of 59 are entitled to receive an old age pension. The old age pension system is non-contributory, with all eligible persons entitled to a monthly cash transfer. The maximum pension is currently R540 per month. The grant amount each individual is entitled to depends on his or her income, assets and marital status.

The number of persons eligible for old age pensions in each province is calculated using 1996 census data that classifies individuals by age, gender, and income. For each province, the size of the average old age pension to which eligible individuals are entitled was calculated using data on the 1996 income distribution by age and gender in each province, and applying the old age pension grant-determination formula as specified in Department of Welfare regulations.

However, the SOCPEN management reports indicate that almost every individual who receives an old age pension is receiving the maximum R540, despite the intended reduction in actual grant awards implied by the clawback effect of the means test. This state of affairs attests to the fact that provinces do not have the resources capacity to apply the means test, which is in any case extremely complicated. And even where attempts are made to apply the means test more strictly, the cost will far outweigh the benefits at this stage. The FFC further recognises the real risks to individuals that would result from abrupt changes in the provincial allocations for welfare. Hence, in the proposed welfare formula the value of the average old age pension in each province is an average of the current grants.

According to FFC calculations, nearly 88 percent of individuals who are eligible for old age pensions currently receive them. International evidence indicates that in most countries, even with generous welfare benefit systems like Scandinavia, the take-up rate rarely exceed 90 percent. The FFC therefore assumes that this take-up rate will increase only modestly for the foreseeable future and proposes that the beta for old age pensions is given a value of .90.

2.3.2.2 War veterans pensions

According to SOCPEN management reports, only about 7 962 war veterans (combatants between 1915 and 1945) are currently receiving war veteran pensions. Because this pension is being phased out, the current spending level is used as a basis to cost this programme.

2.3.2.3 Disability grants

All individuals of working age who are unable to support themselves because they have a physical or mental disability (and have no other source of income) are entitled to a grant of up to R540 per month. For the purposes of the disability grant, working age is defined as over 18 and under 60

for females and 65 for males. In order to receive a disability grant, an individual must undergo a medical examination to certify that his or her disability is serious enough to prevent gainful employment. As with the old age pension, eligibility for disability grants is restricted to those with low incomes.

While the administrative task of determining eligibility for old age pensions is reasonably straightforward, the same cannot be said for disability grants. Although some disabilities, such as blindness and severe mental retardation, are relatively easy to identify, a determination of the extent to which any given physical or mental condition reduces or prevents employment is a difficult and contentious issue. The key to allocating revenues to provinces for the purposes of funding disability grants is the use of measures of disability that are not subject to influence by the provinces.

One important goal in designing the disability allocation rule is to provide all provinces with strong incentive to adhere closely to national standards for eligibility for disability grants, and to apply these national standards in a uniform and consistent way. If procedures for determining eligibility are similar across provinces, then the actual rate of disability becomes a good indicator of need. As noted above, by determining the equitable share for disability in this transparent fashion, each province will be encouraged to adopt uniform eligibility criteria and to allocate the limited funds based on the severity of disability.

The only available measure of disabilities (other than a count of those receiving disability grants), is self-reported data on disabilities from the 1996 census. Although self-reported data are not perfect, they do provide, when combined with data on income, an independent measure of eligibility for disability grants. Individuals with one of the following five categories of disability are included in the FFC's count of the disabled: sight, hearing, physical, mental, and multiple disabilities. The final count appears to be comparable with international trends.

The latest data from the Department of Welfare indicate that about 611 000 individuals currently receive disability grants. This figure is only 53 percent of the FFC estimate of the total number of persons eligible for disability grants. In the proposed equitable share allocation formula, the

cost of disability grants in calculated as the average of the SOCPEN number. In order to reflect that eligibility for disability benefits exceeds the actual number of disability benefit recipients, the phase-in parameter for disability grants (β) is set equal to 0.60 in the formula.

2.3.2.4 Child Support Grant

The newest social security grant is the Child Support Grant. It replaces the Child Maintenance Grant and is directed towards providing financial assistance to children under the age of seven who are being raised in poor families. All eligible children are entitled to a flat grant of R100 per month. Again, the availability of census data on age and household income, combined with rural/urban distinction, makes it possible to estimate the number of children that are eligible for the Child Support Grant.

The FFC estimates that in mid-1999, there were a little over four million children eligible for the grant. According to the latest SOCPEN data, 369 000 children are currently receiving the grant. This low (9 percent) 'take-up' rate has increased dramatically over the past year, indicating that provincial welfare departments are now more aggressive in signing up new grant recipients.

In calculating the full cost of the child support grant for each province, the number of eligible children is multiplied by R100. In order to account for the anticipated growth in this programme, the phase-in parameter is given a value of 0.20.

2.3.2.5 Foster care grants

These grants are intended to provide basic economic support to children requiring foster care. Children below the age of 19 are eligible, and as with the other social security grants, eligibility is means-tested. All eligible children are entitled to a monthly grant of R374.

Unfortunately, there are no data available on the number of children who should qualify as recipients for foster care and who are potentially eligible for this grant. As an approximate mechanism for determining the number of children eligible for the foster care grant, the number of orphans listed in the 1996 census that passed the means test was tallied. To reflect the fact that a number of children who receive foster care do not live in orphanages, the number of children

eligible for foster care grants in each province was assumed to be two times higher than the number of orphans living in that province.

Based on the FFC's estimate of the number of eligible children, only about 29 percent of those eligible are currently receiving foster care grants. The phase-in parameter for foster care grants in the proposed formula has been set at 0.35.

2.3.2.6 Care dependency grant

Subject to a means test, families (or other caregivers) of children under the age of 19 who suffer from disabilities are eligible for this grant. Combining data on age, household income, and disabilities from the census, it is possible to estimate the number of children who are eligible for a child care dependency grant. The census data indicate that approximately 500 000 children under the age of 19 have some form of disability. Since the care dependency grant targets those with more severe physical or mental disabilities, the FFC estimates that approximately 5 percent of the disabled population under 19 is eligible for this grant Of this number, about 23 percent are currently receiving the grant. In costing this grant, the number of eligible persons is multiplied by the value of the grant. In the formula, the phase-in parameter has been assigned the value of 0.30.

2.3.2.7 Grant-in-aid

The Grant-in-aid is available to individuals who care for the mentally and physically inform. The latter includes the aged, disabled adults and severely disabled children. Since the management report from SOCPEN has since late 1999 included the cost of the Grant-in-aid along with pensions, disability and care dependency grants, there is no need for separate costing.

...

Based on the most recent available data and on the parameter values specified in the discussion of the formula, the prosed welfare formula allocation would be slightly more than the current equitable share allocation for social security. This total could be increased or decreased as a result of parameters set by national policy-makers.'[6]

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[6] 'The welfare component' 35-40

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