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Introduction

South Africa's Constitution guarantees various social and economic rights, alongside civil and political rights. In addition, other rights, which have a bearing on the realization of socioeconomic rights, are protected. The enjoyment of social and economic rights requires that other ancillary rights are also realized, since there is a close correlation between constitutional rights and values. The rights in the Bill of Rights, thus, must be read together within the setting of the Constitution, as a whole. Their interconnectedness needs to be considered in realizing any one of them because together they have a significant impact on the dignity of people and their quality of life.²

Due to the interconnectedness of constitutional rights, the realization of socioeconomic rights is facilitated in part by the claimants' enjoyment of the right of access to justice. The vast numbers of socioeconomic rights cases, which have been dealt with by South African courts since the adoption of the Constitution, point to the role of the right of access to justice in realizing social and economic rights. Efforts to provide for socioeconomic rights must be accompanied by the promotion of the right of access to justice. Access to justice is related to all the rights in the Bill of Rights and is a tool for the enforcement of all the rights in the Bill of Rights. Giving effect to the right of access to justice is thus fundamental to realizing the socioeconomic rights protected in the Constitution.

This paper investigates the role of access to justice in promoting the rights of social security beneficiaries in South Africa. The chapter analyzes how the right of access to justice has been interpreted and given effect to; and how this has affected the rights of social security beneficiaries (especially, social assistance claimants who are particularly desperate and vulnerable).

Right of Access to Social Security

The Bill of Rights of the South African Constitution states that everyone has the right to have access to social security, including appropriate social assistance, if they are unable to support themselves and their dependents.³ It further enjoins the state to adopt reasonable legislative and other measures (within its available resources) to achieve the progressive realization of the right of access to social security.⁴ In addition, other rights that have a bearing on the realization of the right to have access to social security are

¹ This is a posthumous publication. Mathias Nyenti was a Senior Lecturer, University of Johannesburg when he presented this paper at SAIPAR/IAD Cornell conference entitled "Inequality in Africa: Economic Vulnerability, Environmental Risks, and Inequitable Access to Justice," Livingstone, August 3 -4, 2017.

² *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) para 53 (hereafter, *Grootboom*).

³ Section 27(1)(c) of the Constitution.

⁴ Section 27(2) of the Constitution.

protected in the Constitution. These include the rights to equality;⁵ human dignity;⁶ land;⁷ access to adequate housing;⁸ access to health care services;⁹ access to sufficient food and water;¹⁰ access to just administrative action;¹¹ and access to justice.¹²

Social security and related rights are guaranteed because of their role in realization of the aims and values of the Constitution, as well as in enjoyment of other constitutional rights. The aims of the Constitution are, among others, to heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights, and to improve the quality of life of all citizens.¹³ In addition, the right of access to social security and related rights are closely related to the Constitution's founding values of human dignity, equality, and freedom.¹⁴ Access to these rights is crucial to the enjoyment of the other rights in the Bill of Rights, especially, human dignity, equality, and freedom.¹⁵ The protection of a person's dignity is the core aim and basis for social security and ancillary rights (Van Rensburg and Lamarche 2005, 235).

The right of access to social security, particularly social assistance for those unable to support themselves and their dependents is further protected, because South Africa seeks to ensure that people are afforded their basic needs.¹⁶ The Constitutional Court has held that a society must seek to ensure that the basic necessities of life are accessible to all, if it is to be a society based on human dignity, equality, and freedom.¹⁷ Since the State has an obligation to ensure that its residents have their basic needs met, and as such, have access to food, clean water, and shelter, social security is a vital component of the social system that is available for those who cannot meet these basic needs for themselves or their families.¹⁸

Since the Constitution guarantees the right of access to social security and social assistance, it considers the concept as consisting of social insurance and social assistance. However, (comprehensive) social protection, a notion of the concept that is more ideal for South Africa, has been developed. Such a broader conceptualization of social security is in line with the Constitution, which guarantees "a right to have access to social security" instead of "a right to social security." The Constitutional Court has concluded that the "right to have access to" (in the case of housing in section 26) is broader than "the right to."¹⁹ In explaining the implications of the difference between "a right to" and "a right to have access to," the Constitutional Court remarked:

[T]he right delineated in section 26 (1) is a right of "access to adequate housing" as distinct from the right to adequate housing.... This difference is significant. It recognizes that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of

⁵ Section 9 of the Constitution.

⁶ Section 10 of the Constitution.

⁷ Section 25 of the Constitution.

⁸ Section 26 of the Constitution.

⁹ Section 27(1)(a) of the Constitution.

¹⁰ Section 27(1)(b) of the Constitution.

¹¹ Section 33 of the Constitution.

¹² Section 34 of the Constitution.

¹³ Preamble of the Constitution.

¹⁴ See section 1(a) of the Constitution.

¹⁵ *Khosa and Others v. The Minister of Social Development and Others; Mahlaule and Another v. The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) para 104 (hereafter *Khosa*).

¹⁶ *Grootboom* para 44; and *Khosa* para 52.

¹⁷ *Grootboom* para 44.

¹⁸ *Khosa* para 114.

¹⁹ See the *Grootboom* case.

water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met. There must be land, there must be services, there must be a dwelling. Access to land for the purposes of housing is therefore included in the right.”²⁰

Social security and related rights as well as the rights to life and human dignity are intertwined in the Constitution.²¹ This is because the rights are interrelated, interdependent, and mutually supporting.²² The interrelated nature of rights has immense significance in a society founded on the values of human dignity and equality.²³ In the opinion of the Constitutional Court:

... affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.²⁴

Dispute resolution mechanisms are an integral part of any social security framework (see, for example, ILO 2011). Therefore, they must be considered as included in the notion of measures aimed at ensuring comprehensive social security. In addition, the right of access to social security and the obligations of the state in this regard require the adoption of measures for the realization of the right and the provision of all relevant services and processes, including dispute resolution. Further, these require the State to create the conditions that make these services accessible to persons or categories of persons (Van Rensburg and Lamarche 2005, 235). The realization of the rights of equality and access to justice is thus pivotal in giving effect to the right of access to social security and related rights.

The Role of Constitutional Values

South Africa is founded on the values of human dignity, the achievement of equality, and advancement of human rights and freedoms, non-racialism, and non-sexism.²⁵ The Bill of Rights enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality, and freedom.²⁶

Fundamental rights are entrenched to promote the values that inform and underpin the Constitution. In addition to being fundamental rights that lie at the heart of the Bill of Rights,²⁷ equality and human dignity are foundational values that inform constitutional interpretation and enforcement.²⁸ Section 9 of the Constitution states that everyone is equal before the law and has the right to equal protection before the law;²⁹ and that

²⁰ *Grootboom* para 35.

²¹ *Khosa* para 41.

²² *Grootboom* para 24.

²³ *Khosa* para 40.

²⁴ *Grootboom* para 23.

²⁵ Section 1 of the Constitution.

²⁶ Section 7(1) of the Constitution.

²⁷ See *Khosa* para. 85; and *S v Mlungu* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC) para 111.

²⁸ See sections 36 and 39 of the Constitution.

²⁹ Section 9(1) of the Constitution.

equality includes the full and equal enjoyment of all the rights and freedoms.³⁰ Section 9(3) and (4) state that the State and a person 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, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.

There is a formal and a substantive dimension to equality. Formal equality requires that unjustified discrimination is prohibited, and all persons are treated in the same manner, irrespective of their circumstances. It therefore ignores economic and social disparities between individuals or groups of persons (Currie and De Waal 2005, 233). What is needed is equality that is wider than formal equality.

Section 9(2) promotes substantive equality as it aims to achieve equality by focusing on outcomes. Equality of outcomes tolerates disparity of treatment in order to achieve equality. (Currie and De Waal 2005, 233). This means the economic and social conditions of individuals or groups of persons are considered in determining the attainment of equality. Substantive equality requires positive measures to address inequality and remedy disadvantage, thus creating the conditions for full and equal participation in society.³¹

The Constitution's obligations on the State to protect particularly vulnerable and desperate persons and groups is one more reason for the adoption of substantive equality. In the *Grootboom* case, the failure by the State to make express provisions to facilitate access to temporary housing relief for people, who have no access to land, no roof over their heads, or who live in intolerable conditions, was found to fall short of the obligation set by section 26(2) in the Constitution.³²

The Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.³³ Human dignity is a value and a right that informs the rights in the Bill of Rights, and the State's obligations in terms of these rights. The relationship between human dignity and all the other rights in the Bill of Rights (especially, socioeconomic rights) also influences the impact of human dignity.³⁴ As the Constitutional Court has stated, "there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing, or shelter."³⁵

Right of Access to Justice

Section 34 of the Constitution states that everyone has the right to have any dispute that can be resolved by the application of law, decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. This means any dispute resolution system, which is established to realize the right of access to social security, must be in accordance with the right of access to justice.

³⁰ Section 9(2) of the Constitution.

³¹ See *Brink v. Kitschoff NO* 1996 6 BCLR 752 (CC) para 42; *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) para 41; and Cheadle, Davis, and Haysom (2002, 57 and 76).

³² See *Grootboom* paras 52 and 69.

³³ Section 10 of the Constitution.

³⁴ See *President of the Republic of South Africa and Another v. Hugo* para 41.

³⁵ *Grootboom* para 23.

Context of Right of Access to Justice

The right of access to justice is entrenched because of South Africa's history of lack of access to courts; as well as its current context. Lack of access to justice in the past was partly due to the deliberate denial of access by the State through mechanisms, such as prohibition of legal proceedings against the State, interference in the independence of the judiciary, and the use of "ouster clauses," as well as restrictive time limit and notice requirements.

The current context of the right of access to justice involves the textual setting of the right in the Constitution and its social context. The textual context of access to justice concerns its relationship with all the other rights in the Bill of Rights (the rights in the Bill of Rights are interrelated, interdependent, and mutually supporting). Since the right of access to courts is a "leverage right," through which persons can enforce their other rights, it is a tool for the enforcement of all the other rights in the Bill of Rights (Brickhill and Friedman 2006, 59-3).

The social context of the right of access to justice relates to the social and economic conditions prevailing in South Africa, especially for social security claimants. The Constitutional Court explained the socioeconomic context of persons in need of access to courts, when it remarked that South Africa is:

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 who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce these, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.³⁶

Nature and Scope of Right of Access to Justice

There are three components to the right of access to justice in section 34: the right to be able to bring a dispute to a court or tribunal to seek redress (right of access to justice); the need for courts, tribunals, or other dispute resolution forums to be independent and impartial; and the need for disputes to be resolved in a fair and public hearing (Currie and De Waal 205, 704).

Right to Be Able to Bring a Dispute to a Court or Tribunal

The traditional definition of access to justice referred to access to the courts or tribunals and to legal services (OSF 2003, 5). However, it was held that although courts or tribunals are a very important component of access to justice, the concept could not be confined to the courts or tribunals. The concept was thus broadened to include social justice, economic justice, and environmental justice. However, section 34 is concerned with the

³⁶ Didcott J in *Mohlopi v. Minister of Defence* 1997 (1) SA 124 (CC) para 14. See also *Soobramoney v. Minister of Health (KwaZulu Natal)* ((1997) 12 BCLR 1696 (CC) para 8), in which the Court stated, "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 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."

legal dimension of access to justice and, therefore, with legal rights, processes and procedures, and access to the courts or tribunals (Murlidhar 2004; Bowd 2009). Such a view of access to justice only focuses on the operation of the dispute resolution system (Schetzer, Mullins, Buonamano 2002).

While the view of legal dimension of access to justice has been slightly widened (Sackville 2003), it still failed to take account of the impact of social and economic conditions on claimants' ability to seek legal redress. This requires access to justice to be more than the proper functioning of courts and tribunals. Even where courts and tribunals are functioning effectively, the social and economic circumstances of claimants (such as poverty, illiteracy, differences of culture and language, lack of awareness about legal rights, and lack of access to professional advice and assistance) affect their ability to utilize these forums. Therefore, access to justice must include measures to empower users of the courts and tribunals. The concept must consider ways in which access is denied (spatial, temporal, linguistic, social, or symbolic barriers) (Baxi 2007), and it must eliminate these barriers. This is the conceptual framework proposed by the South African Constitution, which guarantees equal access to justice for everyone.

The formal dimension of equality of access to courts ensures that all persons have access to effective dispute resolution mechanisms necessary to protect their rights and interests. This means the legal system should be open to everyone, irrespective of circumstance, thereby ignoring economic and social disparities between individuals or groups of persons. Therefore, formal equality is therefore insufficient to ensure equality of access to justice, since the social and economic circumstances of claimants influence access. A substantive approach to equality of access to justice is required. This means the legal system should be designed to ensure equality of outcome and must be able to accommodate the social and economic circumstances of claimants in order to achieve equality (Currie and De Waal 2005, 233).

Social security litigants, especially social assistance beneficiaries, are particularly vulnerable and desperate, since they are indigent and have to satisfy the means (income and asset) test to qualify for benefits. A substantive approach to equality of access to justice is thus required for this category of persons.³⁷

Need for Independent and Impartial Courts or Tribunals

Access to justice requires effective courts or tribunals. This means they must be independent and impartial, so as to be able to decide disputes according to the facts and the law, including freedom from improper internal and external influence.³⁸ Independence and impartiality of courts, tribunals, and forums is a constitutional requirement.³⁹ However, due to differences in the judicial functions performed by courts and other tribunals and forums, there is a difference in independence standards between these institutions.⁴⁰

The independence of a tribunal or forum has three essential components: security of tenure for the tribunal or forum officials, a basic degree of financial independence for the tribunal, and institutional independence in matters that relate directly to the exercise of

³⁷ See, for example, *Cele v. the South African Social Security Agency and 22 related cases* (2009 (5) SA 105 (D) para 2), in which the Hon. A. J. Wallis rightly wondered how social security (specifically social assistance) litigants, who are so impoverished that they qualify for social assistance grants, can be required to pay legal fees.

³⁸ ILO *Social security and the rule of law* (2011) para 433.

³⁹ See also section 165(2) of the Constitution.

⁴⁰ See *Financial Services Board v. Pepkor Pension Fund* 1999 (1) SA 167 (C) para 174F-G; and Currie and de Waal (2005, 723).

the tribunal's judicial function.⁴¹ Impartiality means that the institution or the person making a decision is not biased, and that a reasonable member of the public does not perceive the institution or person to be biased.⁴²

Resolution of Disputes in a Fair and Public Hearing

Section 34 requires that courts and tribunals or forums must conduct proceedings in a fair public hearing. In *De Beer NO v. North-Central Local Council and South-Central Local Council*, the Constitutional Court held that:

This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution the courts must interpret legislation and the rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair.⁴³

It is not a requirement for proceedings, tribunals, or forums to be identical to court, due to the flexibility of the requirements of fairness in terms of section 34.⁴⁴

Procedural equality is an aspect of the right to a fair hearing. Elements of procedural equality include giving reasonable notice of the time of the hearing to the person concerned, with the power of condonation for any failure to comply with notice requirements; power to determine the appropriate procedures; personal appearance and appropriate behavior; equal access to the relevant evidence; rapid resolution of disputes; inexpensive adjudication procedures; and guarantee of an effective remedy.⁴⁵ The right to free legal assistance is also part of the right to have a fair public hearing in section 34.⁴⁶ The courts have held that free legal assistance must be provided in civil cases if substantial injustice would result.⁴⁷ It has been proposed that factors to consider when evaluating a fair public hearing in civil cases include the consequences of the case for the party concerned; the complexity of the issues; the ability of the party to represent himself or herself effectively; the risk of error if a party is not represented, and possible "inequality of arms" if the other party is likely to be represented (Budlender 2004, 344).

Social security claimants' aptitude or ineptitude to fend for themselves in legal proceedings, the ramifications for them of the decision whether or not to provide free legal assistance, the complexity or simplicity of the case, the consequences of a failure to have access to justice (their inability to realize all the values and rights in the Bill of

⁴¹ *De Lange v. Smuts NO* 1998 3 SA 785 (CC) para 70.

⁴² *De Lange v. Smuts NO and Others* 1998 (3) SA 785 (CC) para 71.

⁴³ *De Beer NO v. North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) para 11.

⁴⁴ See *Mbebe and Others v. Chairman, White Commission and Others* 2000 (7) BCLR 754 (Tk) para 776; *Bongoza v. Minister of Correctional Services and Others* 2002 (6) SA 330 (TkH) paras 22-25; and *Brickhill and Friedman* (2006, 59-97, 59-98).

⁴⁵ See ILO (2011) para 433; *De Beer NO v. North-Central Local Council and South-Central Local Council* paras 13 and 14; *Bangindawo v. Head of the Nyanda Regional Authority* 1998 (3) BCLR 314 (Tk) 331D; and *Beinash & Another v. Ernst and Young & Others* 1999 (2) SA 91; 1999 (2) BCLR 125.

⁴⁶ *Bernstein v. Bester NO* 1996 (2) SA 751 (CC) para 106; Budlender (2004); Dugard (2008); *S v. Vermaas*; *S v. Du Plessis* 1995 (3) SA 292 (CC) para 15.

⁴⁷ In *Nkuzi Development Association v. Government of the Republic of South Africa* (2002 (2) SA 733 (LCC) para 12, the Land Claims Court interpreted the phrase "if substantial injustice would otherwise result" in section 35(3)(g) of the Constitution to imply that the right to a fair public hearing guarantees a right to legal representation in certain circumstances.

Rights) call for the provision of free legal assistance to this category of persons in every case.

State's Obligations in Relation to Access to Justice

The Constitution provides that its obligations must be fulfilled.⁴⁸ Section 7(2) compels the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. This means the state must adopt reasonable legislative and other measures within its available resources to achieve the progressive realization of social security.

In realizing its obligations in relation to access to social security and justice, the State should establish a functional judicial system.⁴⁹ It further includes ensuring that prospective users of the system are able to access the system, by addressing the obstacles or barriers that prevent potential users from having access to system (Heywood and Hassim 2008, 266). In relation to the right of access to housing, the Constitutional Court has held that the State is obliged to devise a comprehensive and workable plan to meet its obligations. According to the Court:

[T]he state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation.⁵⁰

The Court laid down the requirements for the State's measures to be reasonable. It held that reasonableness must also be understood in the context of the Bill of Rights as a whole. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom, and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavor to realize. Those whose needs are the most urgent and whose ability to enjoy all rights, therefore, are most in peril, must not be ignored by the measures aimed at achieving realization of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realization of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.⁵¹

Realizing Access to Justice for Social Assistance Claimants

A social security system is currently in place to give effect to the right. The system is made up of both social insurance and social assistance schemes. Social insurance system includes schemes regulated by the Compensation for Occupational Injuries and Diseases

⁴⁸ Section 2 of the Constitution.

⁴⁹ See *President of the Republic of South Africa v. Modderklip Boerdery* 2005 (5) SA 3 (CC) paras 39–43.

⁵⁰ *Grootboom* paras 38 and 42.

⁵¹ *Grootboom* para 44.

Act (COIDA),⁵² the Occupational Diseases in Mines and Works Act (ODMWA),⁵³ and the Unemployment Insurance Act.⁵⁴ Compensation funds in terms of COIDA and ODMWA provide cash benefits to employees (formal sector workers) who sustained injuries or contract occupational diseases (lung diseases in the case of ODMWA), and to the dependents of workers who die as a result of occupational injuries or diseases. The Unemployment Insurance Fund, established under the Unemployment Insurance Act, pays unemployment insurance benefits to certain specified categories of employees.⁵⁵ Health care is provided mainly through the public health care system.⁵⁶ Private and occupational schemes also exist for medical and retirement insurance.⁵⁷ In addition to restricting coverage to formal sector workers, most social insurance schemes further exclude certain categories of employees from their scope of coverage. Examples are the Unemployment Insurance Act and COIDA.

The Social Assistance Act regulates the social assistance scheme which pays out grants to certain categories of persons deemed to be in need of support.⁵⁸ The social assistance scheme consists of grants for children (child support grants, foster care grants, and care dependency grants); grants for the elderly (old age grant and war veterans' grants); grants for persons with disabilities (disability grant); and grant-in-aid.⁵⁹ Social relief of distress is also provided, which is the temporary provision of assistance to persons in such dire need that they are unable to meet their or their families' most basic needs.⁶⁰ It is non-contributory in nature, which means beneficiaries do not make any contribution to the scheme. It is means-tested, with benefits paid to persons who lack sufficient means to meet their basic needs. The scheme is financed through state funds, as payments are made on the basis of an annual budgetary allocation by Parliament.

Statistics South Africa's *Quarterly Labour Force Survey* for the fourth quarter of 2016 (October to December) reveals that the working age population (15–64 years) was 36.9 million persons, with the labor force comprised of 21.85 million. A total of just over 16 million people were employed, with 11.156 million employed in the formal (nonagricultural) sector, 2.6 million employed in the informal (nonagricultural) sector, just under 1 million employed in agriculture, and about 1.3 million employed in private households (STATS SA 2016, 1). Since some social insurance laws exclude certain categories of employees from their scope of coverage, it means that less than the 16 million people employed in the fourth quarter of 2016 had access to such schemes.

In addition, there were about 17.3 million social assistance beneficiaries as at April 30, 2017.⁶¹ This means that there are slightly less than 30 million social security claimants. With such a large number of persons who are vulnerable and in need of access to social security, the State's obligations in relation to social security (including access to justice for claimants) must be fulfilled.

The State's constitutional obligations and requirements, outlined by the Constitutional Court for the State's actions to be reasonable, indicate that an effective

⁵² Compensation for Occupational Injuries and Diseases Act 130 of 1993 (hereafter called COIDA).

⁵³ Occupational Diseases in Mines and Works Act 78 of 1973 (hereafter called ODMWA).

⁵⁴ Unemployment Insurance Act 63 of 2001.

⁵⁵ See section 1(1) of the Unemployment Insurance Act.

⁵⁶ See National Health Act 61 of 2003.

⁵⁷ See Medical Schemes Act 131 of 1998 and Pension Funds Act 24 of 1956.

⁵⁸ See section 4 of the Social Assistance Act 13 of 2004.

⁵⁹ Sections 6-11 of the Social Assistance Act.

⁶⁰ Section 13 of the Social Assistance Act.

⁶¹ The number of recipients of the various grants are as follows: Old Age grant: 3,313,630; War Veteran's grant: 175; Disability grant: 1,058,328; Grant in Aid: 165,192; Care Dependency grant: 145,030; Foster Child grant: 445,404; and Child Support grant: 12,101,127 (see South African Social Security Agency (see SASSA 2017a).

social security dispute resolution system, which gives effect to the right of access to justice, must be established. This is especially true for social assistance beneficiaries, who are so poor that they satisfy the requirements of the means test.⁶² In addition, due to their level of poverty and destitution, they cannot afford any interruption to the provision of grants, especially because of the failure to realize their right of access to justice. Realizing access to justice for this category of persons is of paramount importance.

The Social Assistance Act has established a dispute resolution framework. The first instance is internal reconsideration by SASSA while appeals are decided by the Independent Tribunal for Social Assistance Appeals. Further appeals are to the High Court, Supreme Court of Appeal, and finally, the Constitutional Court.

An applicant or a beneficiary of social assistance (or a person acting on his or her behalf) who is aggrieved by a decision and reasons for the decision by the SASSA may apply to SASSA requesting reconsideration of its decision.⁶³ An application for reconsideration must be submitted within 90 days of the decision, and in the manner stipulated by the Act.⁶⁴

The chief executive officer of SASSA or his/her delegate must assign the necessary number of officials to decide applications for reconsideration.⁶⁵ An official who reconsiders a decision must be of a rank higher than the original decision-maker.⁶⁶ This assumes that the senior official is qualified to undertake reconsiderations. However, there are no qualification criteria for officials who handle applications for reconsideration.

Where a decision has been reconsidered by SASSA but a claimant is still unhappy, he/she can lodge a written appeal with the Minister of Social Development, outlining reasons why the decision should be varied or set aside.⁶⁷ The Minister is empowered to confirm, vary, or set aside that decision, or appoint an independent tribunal to consider an appeal.⁶⁸ When the Minister establishes an independent tribunal, appeals are considered by the tribunal.⁶⁹

The Independent Tribunal for Social Assistance Appeals has been established to determine appeals. A social assistance claimant (or a person acting on the claimant's behalf) can lodge an appeal against the decisions of SASSA, in relation to all matters regulated by that Social Assistance Act.⁷⁰ The functions and powers of the members of each Tribunal panel are stipulated.

Accessibility of the Tribunal

Accessibility of the Tribunal is promoted in various ways. In terms of geographical accessibility, Tribunal panels decide appeals in regional clusters in Gauteng, KwaZulu-Natal and the Eastern Cape. However, it plans "to move from a national to provincial

⁶² Means testing implies that the South African Social Security Agency (SASSA) evaluates the income and assets of a person applying for social assistance in order to determine whether the person's means are below a stipulated amount. The means test, which varies from one grant type to another, is a way of determining whether a person qualifies to receive a grant, as grants are indeed meant for those who have insufficient means to support themselves (see SASSA 2017b).

⁶³ Section 18(1) of the Social Assistance Act 13 of 2004.

⁶⁴ Regulation 2(2) of the of the Regulations relating to the Lodging and Consideration of Applications for Reconsideration of Social Assistance Application by the Agency and Social Assistance Appeals by the Independent Tribunal (GN R746 published in GG 34618 of 19 September 2011) (Regulations to the Social Assistance Act of 19 September 2011).

⁶⁵ Regulation 3(1) of the Regulations to the Social Assistance Act of 19 September 2011.

⁶⁶ Regulation 3(2) of the Regulations to the Social Assistance Act of 19 September 2011.

⁶⁷ Section 18(1A) of the Social Assistance Act.

⁶⁸ Section 18(2) of the Social Assistance Act.

⁶⁹ Section 18(3) of the Social Assistance Act.

⁷⁰ Section 18 of the Social Assistance Act.

footprint, so that it could get closer to the communities it served.”⁷¹ The three regional cluster offices are to be replaced by offices in all nine provinces, with six coordinating offices (Eastern Cape, Gauteng, KwaZulu-Natal, Western and Northern Cape, Limpopo/Mpumalanga, and Free State/North West Provinces).⁷²

Accessibility of the Tribunal is further facilitated by its appeal lodgement time periods and procedures. A claimant lodges an appeal to the Tribunal in the prescribed form.⁷³ This can be delivered to an office of the Department of Social Development or to the Tribunal, by hand delivery, post, fax, or electronic mail.⁷⁴

An appeal application must be accompanied by any document provided by SASSA, as proof of receipt of an application for social assistance; a copy of a letter of rejection or approval of social assistance application by SASSA; any other relevant document in relation to the application; and (in the case of a person applying on behalf of a claimant) a copy of the power of attorney or proof of his/her appointment by the claimant to act on the claimant’s behalf.⁷⁵ Appeal applicants may also produce any evidence or information that was not provided to SASSA at the time of application for social assistance.⁷⁶

Although an appeal must be lodged within 90 days of the original decision for reconsideration, a late application can be condoned if good cause is shown. A decision whether to condone a late application will consider the reason for the delay, whether it is in the interest of justice that condonation be granted, and if there are reasonable prospects of success for the appeal.⁷⁷

Independence and Impartiality of the Tribunal

The independence and impartiality of the Tribunal have not been appropriately guaranteed. This relates to the modalities for the appointment, discipline, and termination of panel members, as well as the Tribunal’s operational arrangements. Panel members are appointed by the Minister of Social Development, who is also the institutional head of SASSA, for a specific period of time and on terms and conditions determined by the Minister.⁷⁸ The Minister can also discipline them and terminate their service.

The Tribunal’s funding; human resource and administrative support; managerial framework; governance, oversight, and supervision; and accountability and reporting arrangements also reveal that it is an administrative unit of the Department of Social Development. It thus lacks the required institutional separation between administrative accountability, review, and revision, on the one hand, and a wholly independent, substantive system of appeals, on the other. It is not an independent Tribunal but a higher internal review forum within the Department of Social Development.

⁷¹ *Petersen v. Independent Tribunal for Social Assistance Appeals on its Operational Plan and Progress Report: National Assembly Briefing* (31 Aug 2010).

⁷² *Petersen v. Independent Tribunal for Social Assistance Appeals on its Operational Plan and Progress Report: National Assembly Briefing* (31 Aug 2010).

⁷³ See Form 3 (Lodging of an Appeal) in the Regulations to the Social Assistance Act of 19 September 2011.

⁷⁴ Regulation 14(2)(b) of the Regulations to the Social Assistance Act of 19 September 2011.

⁷⁵ Regulation 14(2)(c) read with Form 3 in Annexure A of the Regulations to the Social Assistance Act of 19 September 2011.

⁷⁶ Regulation 14(3) of the Regulations to the Social Assistance Act of 19 September 2011.

⁷⁷ Section 18(4) of the Social Assistance Act and Regulation 15 of the Regulations to the Social Assistance Act of 19 September 2011.

⁷⁸ See Regulation 4 of the Regulations to the Social Assistance Act of 19 September 2011.

Fairness of Tribunal Procedures

Tribunal appeal procedures are conducted in the absence of the claimant or the person acting on the claimant's behalf, through the consideration of submitted documentary evidence.⁷⁹ A hearing where a claimant can appear in person to present oral arguments are only organized in exceptional cases and at the discretion of the Tribunal.⁸⁰

The expeditious resolution of disputes is promoted, with the Tribunal required to finalize an appeal within 90 days of receipt.⁸¹ This will end the long delays that appeal applicants normally face. Notification of the appeal findings is delivered in writing to a claimant or a person acting on their behalf and to SASSA. Notification to claimant or a person acting on the claimant's behalf is sent to the address provided or any other method chosen in the appeal.⁸²

Promotion of Access to Justice by the High Court

As a superior court of record with inherent powers and standing, the High Court is empowered to review the decisions of all social security institutions except where expressly provided otherwise in legislation. The High Court also hears appeals against the decisions of some of the social security adjudication forums. It also decides social security disputes at first instance in some cases.⁸³ Various social security statutes also specifically provide for some issues to be dealt with by the High Court. The High Court thus forms an integral part of the South African social security dispute resolution system and must also promote access to justice for social assistance claimants.

The High Court has a wide scope of jurisdiction to hear reviews and appeals.⁸⁴ It hears all constitutional matters, except matters that only the Constitutional Court can decide or matters assigned to a court of similar status (such as the Labour Court).⁸⁵ It also decides on any other matter not assigned to another court by an Act of Parliament.⁸⁶

Accessibility of the High Court

Divisions of the High Court are spread throughout the country. Since there is no time limit for the lodging of a case to the High Court, a person can bring a case at any time. The only exception is when timeframes are required by a particular law, such as the Prescription Act.⁸⁷ Accessibility of the High Court is limited due to the high cost of court proceedings and the absence of legal aid.

The High Court deals with cases in a purely technical and legalistic basis, meaning that a person who brings a case would require legal representation. The amount of benefits received by social assistance beneficiaries barely covers their basic needs. They would

⁷⁹ Regulation 16(1) of the Regulations to the Social Assistance Act of 19 September 2011.

⁸⁰ See *Petersen v. Independent Tribunal for Social Assistance Appeals* on its Operational Plan and Progress Report: National Assembly Briefing (31 August 2010).

⁸¹ Regulation 16(2) of the Regulations to the Social Assistance Act of 19 September 2011.

⁸² Regulation 20 of the Regulations to the Social Assistance Act of 19 September 2011.

⁸³ Examples include the failure of assessors to agree with the presiding officer in a COIDA Compensation Court hearing; or when a person with a claim against the Road Accident Fund is required to bring an action in a High Court in the area of jurisdiction in which the occurrence of the accident caused the injury or death (see section 91(3)(b) of COIDA; and section 15(2) of the Road Accident Fund Act).

⁸⁴ Section 19(1)(a) and (b) of the Supreme Court Act 59 of 1959.

⁸⁵ Section 169(a) of Constitution.

⁸⁶ Section 169(b) of Constitution.

⁸⁷ Prescription Act 68 of 1969.

be, therefore, unable to afford legal representation.⁸⁸ Their position is aggravated by the absence of free legal assistance (legal aid) in all cases. The rights to equality to have access to social and to justice entail that every litigant should have access to state-provided legal assistance.

Legal Aid South Africa provides free legal assistance to indigent litigants. In the 2014–2015 year, it provided criminal and civil legal aid and legal advice services to 769,436 poor and vulnerable persons. (Legal Aid 2015, 1). In terms of criminal and civil legal aid, criminal legal matters made up 88%, while civil legal matters accounted for 12% (Legal Aid 2015, 1). Considering the different types of civil cases covered by Legal Aid South Africa, it is doubtful that a sizeable number of social assistance litigants would receive free legal representation. Absence to free legal assistance for social security and other indigent litigants adversely affects their enjoyment of the rights in the Bill of Rights. This is confirmed by some commentators who remark that:

... legal assistance for poor persons is lacking in a variety of civil matters, in administrative forums where their rights are routinely overlooked; in government bureaucracies which deny them access to social security, and other socio-economic rights (such as in social security administration and delivery institutions and government departments); and in the general context of upholding their dignity, equality and social justice. (Vawda 2005, 239)

Independence and Impartiality of the High Court

The Constitution guarantees the independence and impartiality of the High Court. According to section 165, courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor, or prejudice. In addition, no person or organ of the State may interfere with the functioning of the courts. Organs of the State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts.

Modalities for the appointment, discipline, and termination of High Court judges facilitate its independence and impartiality. The independence and impartiality of High Courts are further promoted by the Courts' funding; human resource and administrative support; managerial framework; governance, oversight, and supervision; and accounting and reporting arrangements.

Fairness of High Court Procedures

High Court proceedings are in the form of litigation in open court, except as otherwise directed.⁸⁹ The High Court can refer some civil matters for investigation. When this is the case, it can adopt the investigation report and make an order in relation to the report, as necessary or desirable.⁹⁰ Any litigant may be represented by a legal practitioner due to the right to be represented by a legal practitioner before a court of law.⁹¹ Litigation poses

⁸⁸ See *Cele v. the South African Social Security Agency and 22 related cases* (2009 (5) SA 105 (D)); and *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v. Ngxuza* 2001 4 SA 1184 (SCA).

⁸⁹ Section 16 of the Supreme Court Act 59 of 1959.

⁹⁰ Section 19(2) of the Supreme Court Act 59 of 1959.

⁹¹ See *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v. Mahumani* (2004) 25 ILJ 2311 (SCA).

challenges for indigent litigants, including social assistance claimants. These include the purely technical and legalistic bases of dealing with cases, with little regard to broader fairness considerations; as well as delays in finalizing of cases, which make some claimants have to wait for long times for disputes to be resolved (Committee of Inquiry 2002, 124).

Conclusion

The Constitution guarantees a right of access to social security, including appropriate social assistance for those unable to support themselves and their dependents. The state is obliged to adopt reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right. Due to the interconnectedness of the rights in the Constitution, other rights that have an effect on access to social security must also be realized. The protection of “a right to have access to” instead of “a right to” social security supports the need for rights ancillary to social security to be also realized. Other rights that have a bearing on social security include equality, human dignity, land, access to adequate housing, access to health care services, access to sufficient food and water, access to just administrative action, and access to justice. All of these rights are guaranteed due to their role in realization of the aims and values of the Constitution, as well as in enjoyment of other constitutional rights.

The right of access to justice is entrenched because of its historical and current context. The historical context relates to the denial of access to courts during apartheid. Its current context is its interrelationship with all other rights, since it is a “leverage right,” and the social and economic conditions prevailing in South Africa impact the enjoyment of the right. Its realization is thus vital for the attainment of the Constitution’s aims and values.

In giving effect to the right of access to justice, all its three components must be in place: empowering users to be able to bring that dispute to a court or tribunal to seek redress; establishment of independent and impartial courts, tribunals, or forums; and resolution of disputes in a fair and public hearing. Therefore, the State’s obligations in this regard are not only to establish a functional judicial system, but further, to ensure that prospective users of the system are able to access the system, by addressing the obstacles or barriers that prevent potential users from having access to the system.

Since the State is enjoined to adopt reasonable legislative and other measures, the access to the justice framework is evaluated against the standard of reasonableness. Reasonableness must be understood in the context of the Bill of Rights, as a whole. Reasonable measures must not leave out of account the degree and extent of the denial of the right that they endeavor to realize. Those whose needs are the most urgent and whose ability to enjoy all rights, and therefore, are most in peril, must not be ignored by the measures aimed at achieving the right. In addition, everyone must be treated with care and concern, and the measures must to respond to the needs of those most desperate.

The social security system established in terms of the right of access to social security provides for a dispute resolution framework that seeks to promote access to justice for claimants. The dispute resolution system of the social assistance scheme is particularly important, due to the level of poverty and destitution of the claimants and the role of the social assistance grants to the over 17 million recipients.

The dispute resolution framework established by the Social Assistance Act consists of internal reconsideration by SASSA, in the first instance, while appeals are decided by the

Independent Tribunal for Social Assistance Appeals. Further appeals are to the High Court, Supreme Court of Appeal, and finally, the Constitutional Court. Since most of the appeals are handled by the Independent Tribunal for Social Assistance Appeals and the High Court, these institutions must promote the right of access to justice for this category of persons.

The Tribunal attempts to promote access to justice in a variety of ways, such as through geographical accessibility, and its appeal lodgment time periods and procedures. The Tribunal's hearing procedures also facilitate access to justice. Although Tribunal appeal procedures are conducted in the absence of the claimant (or the person acting on the claimant's behalf), through the consideration of submitted documentary evidence, the Tribunal can organize a hearing wherein a claimant can appear in person to present oral arguments. Appeals are also resolved expeditiously, with the requirement for the Tribunal to finalize an appeal within 90 days of receipt. However, the independence and impartiality of the Tribunal is not appropriately guaranteed. This is due to the modalities for the appointment, discipline, and termination of panel members, as well as the Tribunal's operational arrangements, which cause a lack of the required institutional separation between administrative accountability, review, and revision, on the one hand, and a wholly independent, substantive system of appeals, on the other. Its independence and impartiality are thus impaired.

The High Court is also physically accessible, with divisions of the Court spread throughout the country. The absence of time limits for the lodging of a case to the High Court also means a person can bring a case at any time. The independence and impartiality of the High Court is guaranteed by the Constitution. Modalities for the appointment, discipline, and termination of the High Court judges also facilitate its independence and impartiality. The Courts' funding; human resource and administrative support; managerial framework; governance, oversight, and supervision; and accounting and reporting arrangements further promote the Court's independence and impartiality.

High Court proceedings are in the form of litigation in open court, except as otherwise directed. However, the Court can refer some civil matters for investigation. Litigation poses challenges for indigent litigants, such as social assistance claimants, with the purely technical and legalistic basis of dealing with cases showing little regard to broader fairness considerations and with delays in finalizing of cases. The right to legal representation would assist in promoting the accessibility of the High Court. However, free legal assistance (legal aid) in all cases is absent. Although Legal Aid South Africa provides free legal assistance to indigent litigants, criminal legal matters made up 88% while civil legal matters accounted for only 12%. The lack of free legal assistance for social security claimants and other indigent litigants adversely affects their enjoyment of the rights of access to justice and to social security, as well as the other rights in the Bill of Rights.

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