CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/03

LOUIS KHOSA	First Applicant
ELIASSE MUCAMBO MULHOVO	Second Applicant
SANIA NDLOVU	Third Applicant
versus	
THE MINISTER OF SOCIAL DEVELOPMENT	First Respondent
THE DIRECTOR-GENERAL OF SOCIAL DEVELOPMENT	Second Respondent
THE MEMBER OF THE EXECUTIVE COMMITTEE FOR HEALTH & WELFARE IN THE NORTHERN PROVINCE	Third Respondent

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Case CCT 13/03

SALETA MAHLAULE	First Applicant
ALTINAH HLUNGWANA	Second Applicant
versus	
THE MINISTER OF SOCIAL DEVELOPMENT	First Respondent
THE DIRECTOR-GENERAL OF SOCIAL DEVELOPMENT	Second Respondent
THE MEMBER OF THE EXECUTIVE COMMITTEE FOR HEALTH & WELFARE IN THE NORTHERN PROVINCE	Third Respondent

Heard on : 13 and 30 May 2003

Decided on : 4 March 2004

JUDGMENT

MOKGORO J:

[1] These two cases concern a constitutional challenge to certain provisions of the Social Assistance Act 59 of 1992 (the Act). They were referred to this Court for the confirmation of orders of constitutional invalidity arising from similar applications brought in the Transvaal Provincial Division of the High Court (the High Court). The applicants in both matters are permanent residents. In the one application, *Khosa and Others v The Minister of Social Development and Others*[1] (the *Khosa* matter), the applicants challenged the constitutionality of section 3(c) of the Act which reserves social grants for aged South African citizens. Similarly, in the other application, *Mahlaule and Another v The Minister of Social Development and Others*[2] (the *Mahlaule* matter), the constitutional challenge was to sections 4(b)(ii) and 4B(b)(ii) of the Act, as amended by the Welfare Laws Amendment Act 106 of 1997 (Welfare Laws Amendment Act), which similarly reserve child-support grants and care-dependency grants respectively for South African citizens only. The respondents in both matters are the Minister of Social Development, the Director-General of Social Development and the Member of the Executive Committee for Health and Welfare in the Northern Province. Because the two

[1] Case number 25455/02.

[2] Case number 25453/02.

matters are related and involve similar considerations and arguments of law, they were heard together both in the High Court and in this Court.

Factual background

[2] The applicants in both matters are Mozambican citizens who have acquired permanent residence status in South Africa in terms of exemptions granted to them under the now repealed Aliens Control Act 96 of 1991.[3] All of the applicants in both matters, save for the second applicant in the *Khosa* matter, fled Mozambique in the 1980s as a result of the outbreak of civil war and sought refuge in South Africa. They integrated into the local community in the former Gazankulu territory in what is now known as Limpopo Province. The second applicant in the *Khosa* matter came to South Africa to work for the then National Parks Board at Skukuza until his retirement in May 1992. He, like the other applicants in this case, is also a permanent resident.

[3] All of the applicants in both matters are destitute and would qualify for social assistance under the Act but for the fact that they are not South African citizens. In the *Khosa* matter, the second applicant had applied for an old-age grant on 1 September 1992 which was eventually paid to him in November

[3] South Africa granted a series of amnesties and concessions as exemptions to the immigration process in terms of section 28(2) of the Aliens Control Act. In October 1993, a tripartite agreement was signed between South Africa, the United Nations High Commissioner for Refugees and the Mozambican Government granting formal refugee status to those Mozambicans who had fled to South Africa as a result of the civil war in Mozambique. In October 1995, the South African government granted an amnesty to Mozambican miners permitting them to apply for permanent residence status. In July 1996, the South African government granted amnesty to nationals of the Southern African Development Community, which included Mozambique. Finally, in December 1996, the South African government permitted all Mozambicans who wished to remain in South Africa and who were not covered by the previous amnesties to apply for permanent residence status.

1996. This grant was later withdrawn in February 1998 during a "pension clean-up" by the Northern Province provincial government in which the payment of some 94 000 grants was discontinued. He was thereafter not permitted to apply for a new grant under the Act because of his lack of South African citizenship.

[4] In the case of the other applicants in both matters, their applications for old-age grants were refused because they are not South African citizens as required by the Act. In the *Mahlaule* matter, the first applicant attempted to apply for a child-support grant under section 4 of the Act in respect of two of her children who were then below the age of 7, but she too was not permitted to apply for the grant on the basis that she lacks South African citizenship. Another of her children, aged 12, is diabetic and would qualify for a care-dependency grant under section 4B(b)(ii).[4] Section 2(g) of the Act, which currently regulates the allocation of care-dependency grants, read together with regulations 5 and 9[5] promulgated under the Act, does not expressly preclude non-citizens from receiving care-dependency grants.

Proceedings in the High Court

[5] The applicants in both matters instituted motion proceedings in the High Court in which they sought to challenge the constitutionality of the relevant

[4] Section 1 of the Act defines a "care-dependent child" 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".

[5] Government Gazette 18771 GN R418, 31 March 1998.

provisions of the Act. In the *Khosa* matter, the impugned law was subsection 3(c) of the Act. Section 3 of the Act states:

> "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 at the time of the application in question;
> (c) is a *South African citizen*; and
> (d) complies with the prescribed conditions."[6] (Emphasis added.)

In the *Mahlaule* matter, both applicants challenged subsection 4(b)(ii) of the Act.[7] Section 4 of the Act governs child-support grants and states:

> "Subject to the provisions of this Act, any person shall be entitled to a child-support grant if that person satisfies the Director-General that —
> (a) he or she is the primary care-giver of a child; and
> (b) he or she and that child —
> (i) are resident in the Republic at the time of the application for the grant in question;
> (ii) are *South African citizens*; and
> (iii) comply with the prescribed conditions." (Emphasis added.)

In the *Mahlaule* matter, the first applicant also challenged the constitutionality of subsection 4B(b)(ii) which will be introduced into the Act.[8] That section reads as follows:

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[6] Section 3 of the Act will be substituted by section 3 of the Welfare Laws Amendment Act, a provision which has yet to be put into operation by proclamation.

[7] Section 4 of the Act has been substituted by section 3 of the Welfare Laws Amendment Act. Subsection 4(b)(ii) of the Act was brought into operation on 1 April 1998 by proclamation in Government Gazette GN R27 18731, 13 March 1998.

[8] Section 4B(b)(ii) will be introduced by section 3 of the Welfare Laws Amendment Act in that part of the section relating to care-dependency grants and has also yet to be put into operation by proclamation.

> "Subject to the provisions of this Act, any person shall be entitled to a care-dependency grant if that person satisfies the Director-General that —
> (a) he or she is the parent or foster parent of a care-dependent child; and
> (b) that he or she and that child —
> (i) are resident in the Republic at the time of the application for the grant in question;
> (ii) in the case of a parent and his or her child, are *South African citizens*; and
> (iii) comply with the prescribed conditions." (Emphasis added.)

[6] In the High Court, the respondents noted an intention to oppose the applications. Although the answering affidavits were due on 28 October 2002, none was filed by that date. The matter was set down for hearing before the High Court on 12 November 2002, but was postponed and the respondents were ordered to pay the wasted costs.

[7] On 12 March 2003, the matter came before the High Court again. It was not opposed by the respondents who were not present at the hearing. The High Court dealt with the matter as an unopposed application and made orders in similar terms to those sought by the applicants in their notice of motion. In the *Khosa* matter, the High Court granted the following order:

> "IT IS ORDERED that:
> 1. Section 3(c) of the Social Assistance Act, 59 of 1992, (prior to amendment by the Welfare Laws Amendment Act, 106 of 1997) is

inconsistent with the Constitution of the Republic of South Africa, 108 of 1996 ('the Constitution'), and invalid.

2. Section 3(c) of the Social Assistance Act (prior to amendment by the Welfare Laws Amendment Act, 106 of 1997) is struck down.
3. The order in terms of paragraphs 1 and 2 is referred to the Constitutional Court for confirmation.
4. The second and third respondents are directed to:
   4.1 pay the applicants an old-age grant within three months;
   4.2 pay arrear old-age grant monies within three months
      4.2.1 to the first applicant calculated from 1 November 2001;
      4.2.2 to the second applicant calculated from 1 February 1998; and
      4.2.3 to the third applicant calculated from 1 January 2000.
   4.3 pay interest on such arrear grant monies at 15,5% per annum calculated from the dates in the preceding paragraph within three months.
5. The first and second respondents are directed to re-programme their computer data-base to allow it to accept and process the claims of non-South African citizens who qualify for social grants in terms of the Social Assistance Act.
6. The second and third respondents are directed to:
   6.1 forthwith receive and process an application for a social grant for the persons listed on the schedule annexed to this order; and
   6.2 within three months of application, either pay the persons listed on the schedule a social grant or advise them in writing of the reasons for the refusal of their applications.
7. The respondents are directed to pay the costs of this application."

[8] Similarly, in the *Mahlaule* matter, an order was granted in the following terms:

"IT IS ORDERED:

1. Section 4(b)(ii) of the Social Assistance Act, 59 of 1992, as amended by the Welfare Laws Amendment Act, 106 of 1997, is inconsistent with the Constitution and invalid.

2. Section 4(b)(ii) of the Social Assistance Act, as amended by the Welfare Laws Amendment Act, 106 of 1997 is struck down.
3. Section 4B(b)(ii) of the Social Assistance Act, 59 of 1992, as amended by the Welfare Laws Amendment Act, 106 of 1997, is inconsistent with the Constitution and invalid.
4. Section 4B(b)(ii) of the Social Assistance Act, as amended by the Welfare Laws Amendment Act, 106 of 1997 is struck down.
5. The order in terms of paragraph 1 to 4 is referred to the Constitutional Court for confirmation.
6. The second and third respondents are directed to:
   6.1 pay a child-support grant to the first and second applicants within three months;
   6.2 pay the first and second applicants arrear grant monies calculated from 1 April 2002 within three months; and
   6.3 pay the first and second applicants interest on such arrear grant monies at 15.5% per annum and within three months.
7. The second and third respondents are directed to:
   7.1 forthwith receive and process an application for a child support grant for the persons listed on the schedule attached to this order; and
   7.2 within three months of application, either pay them a child-support grant or advise them in writing of the reasons for the refusal of their application.
8. The respondents pay the costs of this application."

[9] The effect of the orders of the High Court is to oblige the state to provide social assistance under the Act to all "residents" who qualify for such assistance, irrespective of their citizenship. Unless "resident in the Republic" is construed narrowly to cover only permanent residents this implies an obligation on the state to provide assistance to both permanent and temporary residents.

[10] The matter was dealt with in the High Court as an unopposed application and an order was made by the judge without giving reasons. An order of

constitutional invalidity made by a High Court is of no force and effect unless confirmed by this Court.[9] To enable it to deal with the matter, this Court needs to know a judge's reasons for making an order and the provisions of the Constitution which he or she relied on in doing so.[10] This Court was denied this benefit in the present case. An order declaring a provision of a statute to be invalid deals with an important constitutional matter and has far-reaching implications.[11] Such an order should only be made after careful consideration and reasons for the decision should always be given.

[11] Because the applicants challenged the constitutionality of section 4B(b)(ii) of the Act as amended by the Welfare Laws Amendment Act, the order of the High Court was directed at that section. Technically, because that section has yet to be brought into force, it is incorrect to refer to the provision in that way. Until promulgation the section is situated in section 3 of the Welfare Laws Amendment Act and it is preferable, therefore, to refer to it as that part of section 3 which is to introduce section 4B(b)(ii) into the Act. For the sake of convenience, however, this judgment will refer to the impugned section as section 4B(b)(ii), as it appears in section 3 of the Welfare Laws Amendment Act.

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[9] See section 172(2) read with 167(5) of the Constitution.

[10] *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 17.

[11] *Zantsi v Council of State, Ciskei and Others* 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at para 5.

Proceedings in the Constitutional Court on 13 May 2003

[12] The orders of invalidity in both matters were referred to this Court for confirmation as required by section 172(2) of the Constitution. The Chief Justice gave directions setting both matters down for hearing on 13 May 2003. He further directed that if the respondents wished to oppose the application or appeal against any of the orders of the High Court they should lodge a notice to that effect on or before 14 April 2003 and arguments by not later than 6 May 2003. Paragraph 6 of those directions stated that:

> "The respondents are requested to advise the registrar of the Constitutional Court and the Minister of Justice and Constitutional Development by not later than 14 April 2003 whether or not they intend making representations to the Court on the issues raised in these directions.
>
> If the respondents do not intend to make representations to the Court, the Minister of Justice is requested in terms of section 8(2) of the Constitutional Court Complementary Act 13 of 1995 to appoint counsel to present argument to the Court on the issues raised in these directions, and in particular, on the government's attitude to the order made. Such argument must be lodged by not later than 6 May 2003."

[13] By 6 May 2003 no arguments had been lodged by any of the respondents or by the Minister of Justice and Constitutional Development (the Minister). Instructions had apparently not been given to the attorney of record in the State Attorney's office, who was under the impression that the respondents did not intend to oppose the relief sought by the applicants. In response to an enquiry by the Registrar of this Court, the State Attorney indicated that the Minister had

little to contribute to the case as he was not the Minister responsible for the legislation. The State Attorney requested, however, that the Minister be allowed until 23 May 2003, a date falling ten days after the date set down for hearing, to make representations to this Court.

[14] Responding on the same day to the State Attorney, the Chief Justice wrote:

> "The direction to which you refer was given in terms of section 3(2) of the Constitutional Court Complementary Act which requires the Minister to appoint counsel to submit argument to the Court if requested to do so by the Chief Justice. Once the request was made the Minister was obliged to instruct counsel. If the counsel concerned required instructions or information from the Department of Social Development, as seems to be essential in the present case, the necessary arrangements should have been made timeously. It appears from your letter that the delay is the result of the failure to give effect to the Chief Justice's directions. The case has been set down for hearing on 13 May and an extension to 23 May is not possible. The delay is unfortunate but the issues raised in the case are important and the Court requires the assistance of counsel for the State. Counsel must do the best they can in the circumstances and lodge their submissions as soon as possible and at the latest by 4.00 pm on the 9th May."

[15] The Director-General of the Department of Justice and Constitutional Development then informed the Registrar that the respondents wished to oppose the matter. There was therefore no longer a need to brief counsel on behalf of the Minister.

[16] When the matter came before this Court on 13 May 2003 the respondents were represented by counsel. They contended that the proceedings in the High Court had been irregular and that its order should be set aside, alternatively that because of the absence of material evidence on the record, the matter should be referred back to the High Court to be dealt with there. They tendered an affidavit deposed to by the Acting Director-General of the Department of Social Development (as he then was) which stated in relevant part:

> "6.4 During November 2002, the respondents received an opinion from the state law advisors. In short the state law advisors were of the opinion, prima facie, that the requirement that only South African citizens are obliged to receive grants in terms of section 3(c) and 4(b)(ii) of the Social Assistance Act no. 59 of 1992 ("the Act") constitutes unfair discrimination and is in conflict with section 9 of the Constitution.
>
> 6.5 However, in regard to the limitation clause, the state law advisors were of the opinion that only a competent court can determine this question.
>
> 6.6 After much deliberation in the department, a decision was taken not to oppose the matter. It has now transpired that since we are dealing with an application to declare the provisions of the Act unconstitutional, it was necessary that the respondents should have opposed the matter in the High Court."

[17] Counsel for the respondents contended that there was a duty on the High Court judge flowing from the Constitution and the doctrine of separation of

powers, to call for evidence on the availability of resources on the part of the respondents and to give a reasoned judgment for the finding of invalidity. As neither of these was done, the respondents contended that the High Court decision infringed the doctrine of separation of powers and therefore ought not to be confirmed by this Court. They further argued that even if the decision did not infringe the separation of powers, this Court should not confirm the order of the High Court as the relevant statistical and financial information had not been before it at the time of hearing the application.

[18] The respondents had the opportunity to place evidence before the High Court and cannot be heard to say that it was the duty of the High Court to call for evidence before declaring the impugned legislation unconstitutional. It was the respondents who were to be blamed for the failure to place relevant information and argument before the High Court which explained the reasons for the disputed provisions and the purpose they were intended to serve.

[19] Any challenge to legislation, whether national, provincial or local, is important. National legislation does not belong to a particular Minister or Department. It is the collective expressed will of Parliament. Declaring legislation invalid can have grave implications for our constitutional jurisprudence and, in some cases, far-reaching practical effects.[12] Even in those cases where the view is taken that there is nothing to be said in support of

[12] Id

challenged legislation, a court, in order to exercise the due care required of it when dealing with such matters, may well require the assistance of counsel.[13] In this case it should have been apparent to the respondents that the declaration of invalidity of the impugned legislation could have significant budgetary and administrative implications for the state. If the necessary evidence is not placed before the courts dealing with such matters their ability to perform their constitutional mandate will be hampered and the constitutional scheme itself put at risk.[14] It is government's duty to ensure that the relevant evidence is placed before the court.

[20] Counsel for the respondents also submitted that it was necessary for the Minister of Finance, who wished to intervene in the proceedings, to be joined in this matter as he had a "direct and substantial interest" and might be prejudiced by the order of the High Court. The non-joinder of the Minister of Finance, the respondents argued, was material and had the effect of vitiating the proceedings and the order of the High Court.

[21] As an alternative to the dismissal of the application for confirmation, the respondents submitted that the matter be referred back to the High Court for the

[13] *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 41; *S v Ntsele* 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC) at para 13; *Parbhoo and Others v Getz NO and Another* 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at para 5; *S v Mello and Another* 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC) at para 11; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 at para 7; *Dawood* above n 10 at para 17.

[14] Id *Dawood.*

relevant evidence to be considered there, or that this Court postpone the matter to enable the respondents to lodge such evidence here.

[22] The lack of evidence before this Court does not, in and of itself, justify the granting of a postponement.[15] A postponement is granted only at the discretion of the Court when it is in the interests of justice to do so.[16] Had this case not involved the confirmation of an order declaring a legislative provision to be inconsistent with the Constitution, which if confirmed could have far-reaching implications for the budget, the application for a postponement would almost certainly have been refused. The respondents were in wilful default both in the High Court and in this Court, and the government had also failed to comply with the directions issued by this Court in terms of the Constitutional Court Complementary Act.[17]

[23] It would not, however, have been in the public interest in this case for this Court to have proceeded with the hearing without the information necessary for a proper determination of the case, nor would it have been appropriate to refer the matter back to the High Court. Even though the High Court had not provided a reasoned judgment for its decision, it had finalised the

[15] *National Coalition* above n 13 at para 7.

[16] Id at para 11; *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC); 2002 (10) BCLR 1028 (CC) at para 7.

[17] See para 14 above.

matter and had made an order of invalidity. The matter was thus properly before this Court.

[24] Public interest dictates that there should be certainty as to the constitutionality of legislation, and the operation of an order of constitutional invalidity, a matter which falls squarely within the jurisdiction of this Court, should therefore not be held in abeyance for longer than is necessary.[18] Here this concern was heightened by the fact that the applicants are indigent persons who find themselves in dire circumstances. There was therefore a need to bring these proceedings to a close. Remitting the matter back to the High Court would only have caused undue delay, contrary to the interests of justice.

[25] This Court required further information to enable it to discharge its constitutional duty, and it was in the interests of justice that such information be placed before it. In the circumstances, the most appropriate way of dealing with the situation was to require the respondents to place the necessary information before this Court expeditiously. For these reasons, the matter was postponed. The Court considered it appropriate to make a special order of costs against the respondents and made the following order:

> "1. The hearing in this matter is postponed until 09:00 on 30 May 2003.

[18] *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC) at para 5. See also *President, Ordinary Court Martial and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at para 14.

> 2. The respondents are required to lodge their written argument by 16:00 on 21 May 2003.
> 3. The applicants may lodge a reply by 16:00 on 27 May 2003.
> 4. The Minister of Social Development is to pay the wasted costs of this application on the scale of attorney and own client."

The orders for confirmation by this Court

[26] The orders of the High Court which are subject to confirmation by this Court are the orders of invalidity contained in paragraphs 1 and 2[19] of the order in the *Khosa* matter, and paragraphs 1 to 4[20] of the order in the *Mahlaule* matter. In addition, that court made interim orders aimed at providing relief pending a decision by this Court. The interim orders appear in paragraphs 4 and 5 of the order handed down in the *Khosa* matter[21] and paragraphs 6 and 7 of the order handed down in the *Mahlaule* matter.[22] The interim orders in this case are not themselves directly subject to confirmation and there has been no appeal against them.[23]

[27] Section 3(c) of the Act has been substituted by section 3 of the Welfare Laws Amendment Act, a provision which has not yet been brought into force.[24] This amendment introduces no substantive change to section 3(c) of the Act.

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[19] Para 7 above.

[20] Para 8 above.

[21] Para 7 above.

[22] Para 8 above.

[23] See above n 10 at para 12.

[24] See above n 6.

The amendment, when it comes into force, will change the wording in section 3 from:

> "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* —
>
> . . .
>
> (c) is a South African citizen . . . "[25] (emphasis added)

to:

> "Subject to the provisions of this Act, any person shall be entitled to the appropriate social grant if *that person* satisfies the Director-General that *he or she* —
>
> . . .
>
> (c) is a South African citizen"[26] (emphasis added).

The substantive requirement for citizenship in section 3(c) as a basis for qualification for access to the social grant will therefore remain intact after amendment.

[28] Since section 3(c) as amended had not yet been brought into force, the High Court only gave an order dealing with section 3(c) prior to amendment by section 3 of the Welfare Laws Amendment Act. The newly introduced section 4B(b)(ii) as it appears in section 3 of the Welfare Laws Amendment Act, which was challenged by the applicant and struck down by the High Court as constitutionally invalid in the *Mahlaule* matter, has also not yet been brought into force.[27] The only section which was challenged by the applicants in the

[25] Section 3 of the Act prior to amendment by the Welfare Laws Amendment Act.

[26] Section 3 of the Act after amendment by the Welfare Laws Amendment Act.

[27] See above n 8.

High Court and which is in force, as amended by the Welfare Laws Amendment Act, is section 4(b)(ii) of the Act.

[29] In their written argument, the applicants therefore sought to reserve the right to amend their notice of motion so as to challenge the amended section before this Court. However, no such application was made, either in writing or in oral argument. Were the applicants to have done so, this would potentially have changed the nature of the proceedings in the *Khosa* matter from confirmation proceedings to an application for direct access to challenge the constitutionality of a section that was not directly before the High Court.[28] If section 3(c) prior to amendment is found to be unconstitutional, it would certainly be the case that section 3(c) after amendment would also be unconstitutional, given that the wording of the two subsections is substantively identical. I return to the question of the constitutionality of the section after amendment later in this judgment.

[30] In the case of section 4B(b)(ii), no substantively similar provision is made for care-dependency grants in the existing legislation. Care-dependency grants are defined in section 1 of the Act and administered under section 2(g) of the Act. Regulation 5 read with regulation 9 under the Act currently provides for the administration of these care-dependency grants. There is

[28] See *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); 2002 (9) BCLR 986 (CC) at para 5.

nothing in the Act, or in either of those regulations or in any other applicable regulation which expressly restricts these grants to South African citizens only.[29]

[31] This Court has accepted without comment the constitutional propriety of the practice of including in legislation a provision empowering the President to determine the date of operation of legislation.[30] In *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another* this Court was asked to examine the constitutionality of a provision in legislation that had not yet been brought into force but declined to do so on the ground that the challenge to that provision was not properly before it.[31] This case is, however, somewhat different to *Walters*. The Court in *Walters* was invited to consider matters of interpretation of the provision in question without the applicants challenging the constitutionality of a provision. Here, this Court is confronted with an order declaring a legislative provision invalid and inconsistent with the Constitution where that provision has not yet been brought into force. That order was

[29] Regulation 9 requires applicants to submit an identity document issued in South Africa with a thirteen-digit identity number. In terms of sections 4 and 8 of the now repealed Identification Act 72 of 1986 and sections 3, 7 and 8 of the replacement Identification Act 68 of 1997, permanent residents who are non-South African citizens can be (and are) issued with South African identity documents containing thirteen-digit identity numbers except that the last three digits of that number indicate that the person is not a South African citizen.

[30] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC); *In re: Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC); 2001 (11) BCLR 1126 (CC). See also *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) at para 71. In *Pharmaceutical Manufacturers* at paras 76 and 85-6 and *Walters* at para 73, this Court further held that this is a public power which the President is obliged to exercise lawfully and for the purpose for which it was given in the enactment and that the exercise of this power will be reviewable by the courts in certain circumstances.

[31] Id *Walters* at paras 73-5.

referred to this Court in terms of section 172(2)(a) of the Constitution which provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

This Court is now required to confirm that order before it comes into operation and is of any force and effect. Up to now this Court has not had to confront the question as to whether or not a court can declare legislation invalid which has been passed by Parliament and assented to by the President but which has not yet been brought into force, nor did counsel address this issue either in written argument or in oral submissions before this Court.

[32] This case is a section 172 confirmation matter. In the *President, Ordinary Court Martial* case,[32] this Court had to decide whether it is obliged to hear matters referred to it under section 172 or whether it has a discretion to do so.[33] Langa DP (as he then was) held that subsection 172(2) does not expressly provide that this Court is obliged to determine such appeals or matters which come for confirmation. He held that while it is clear that the confirmation procedure in section 172 exists to provide certainty, and that in general this Court will be required to hear and determine such proceedings, subsection

[32] *President, Ordinary Court Martial* above n 18.

[33] Id at para 14.

172(2) does not require this Court in all circumstances to determine matters brought to it under that subsection.[34] In that case the legislation that had been declared invalid by the High Court had been repealed prior to reaching this Court for confirmation. As a decision on the constitutional invalidity of that legislative provision would have no practical effect on the parties to the litigation and there were no considerations of public policy involved, the Court declined to hear the matter referred to it.[35] Similarly in *Independent Electoral Commission v Langeberg Municipality*[36] Yacoob J held that if a confirmation order will have no practical effect, this Court will not exercise its discretion under section 172 in favour of confirmation.[37] The fact that section 4B(b)(ii) as it appears in section 3 of the Welfare Laws Amendment Act has not yet been brought into force is a matter to which I return later in this judgment.

The tender by the state

[33] At the second hearing of this matter before this Court on 30 May 2003 the respondents conceded that, as a matter of law, children who are South African citizens should not be denied access to child-support grants and that a provision in legislation which denies such children access because their primary care-giver or their parents are not South African citizens would be

[34] Id at para 16.

[35] Id at paras 16-18.

[36] 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11.

[37] In the case of *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15 Didcott J made reference to the well-established and uniformly observed judicial policy directing courts not to exercise their discretion in favour of deciding points that are merely abstract, academic or hypothetical.

unconstitutional.[38] They did not oppose the confirmation of the order in so far as it declared section 4(b)(ii) of the Act as amended and section 4B(b)(ii) as it appears in section 3 of the Welfare Laws Amendment Act to be inconsistent with the Constitution to the extent that they exclude children who are South African citizens from social assistance. They contended, however, that such an order of invalidity should be suspended for 18 months to enable Parliament to amend the legislation.

[34] Acknowledging the plight of the applicants who are destitute and in need of care, the second respondent informed the Court that the first respondent had been urgently requested to consider extending the definition of a "South African citizen" in the Act[39] to accommodate the present applicants and former refugees from Mozambique who were granted exemptions under the Aliens Control Act.[40] The respondents contended that these concessions should settle the dispute between the parties and that there was therefore no need for this Court to confirm the order of invalidity in respect of subsection 3(c) of the Act.

[38] The effect of these provisions is that, in terms of section 4(b)(ii) of the Act, although a child is a South African citizen, because the primary care-giver is a non-South African citizen the child cannot have access to a child-support grant. Similarly, the effect of section 4B(b)(ii) when it is introduced will be that a child, although a South African citizen, will be denied access to a care-dependency grant because his or her parent is a non-South African citizen.

[39] The definition of "South African citizen" in section 1 of the Act contemplates that the Minister of Welfare and Population Development, with the concurrence of the Minister of Finance, may by notice in the Gazette extend the category of South African citizens for purposes of the Act to members of a group or category of persons defined in that notice, which is to be published in the Gazette.

[40] See above n 3.

[35] An offer to settle the dispute made by one litigant to the other, even if accepted, cannot cure the ensuing legal uncertainty or dispose of the confirmation proceedings. Even if the applicants had accepted the offer it would have settled the dispute only between these litigants. The impact of the settlement would have been too limited and would not resolve the unconstitutionality of the impugned provisions and the impact that they have on the broader group of permanent residents who qualify in all other respects for social grants. An important purpose of confirmation proceedings is to ensure legal certainty.[41] If parties were permitted to reach agreements that would remove this Court's power to hear confirmation proceedings in relation to an order of invalidity, that purpose would be defeated.

Standing

[36] In the High Court the applicants brought their application under section 38(a)-(e) of the Constitution.[42] They claimed standing in their private capacities, on behalf of their children and on behalf of permanent residents who cannot act in their own names, and in the interest of classes of permanent residents and children affected by the impugned legislation. The applicants also claimed to act in the public interest. However, before this Court, the

[41] *President, Ordinary Court Martial* above n 18 at para 14.

[42] Section 38(a)-(e) of the Constitution entitles the following persons to approach a competent Court for the enforcement of rights contained in the Bill of Rights:

> "(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."

respondents contested the appropriateness of the applicants bringing these proceedings in the public interest. They contended that the issues of fact and law raised in this case concern a finite group of persons and not permanent residents in general.[43] Thus, the case regarding a wider category of permanent residents, in the circumstances, was abstract and hypothetical and should not be entertained.

[37] In my view, the applicants meet more than one of the requirements under section 38. They need not satisfy all of the provisions in section 38 for them to have standing to approach this Court.[44] In this case, the status of the applicants as permanent residents is sufficient to accord them standing to bring this challenge. Further, it is appropriate for the applicants to bring this matter in the interest of permanent residents and children who are in the care of permanent residents. They are indeed members of a group or class of people who would qualify for social assistance under the Act but for the fact that they are not South African citizens. They also act on behalf of children who cannot act on their own and who would qualify for social assistance but for the citizenship limitation. I am satisfied that based on these provisions the applicants have standing before this Court. There is therefore no need to decide the applicants' claim of public-interest standing.

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[43] The respondents relied on the fact that the declaration of invalidity sought in the High Court had a clearly defined group of persons whose names were attached to the applicants' notice of motion and could therefore not be extended to a 'nameless' group of persons.

[44] *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 4.

Main contentions of the parties

[38] The applicants contended that the exclusion of all non-citizens from the scheme is inconsistent with the state's obligations under section 27(1)(c) of the Constitution to provide access to social security to "everyone". The relevant parts of section 27 of the Constitution provide:

> "Health care, food, water and social security —
> (1) Everyone has the right to have access to —
>
> . . .
>
> (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 realisation of each of these rights."

[39] They also argued that the exclusion limited their right to equality and was unfair under section 9 of the Constitution and that the limitation was unjustifiable under section 36 of the Constitution. They further contended that their right to life under section 11 of the Constitution and their right to dignity under section 10 were infringed without justification. In so far as the grants in favour of children were concerned, they contended that the exclusion also infringed the rights that children have under section 28 of the Constitution. The respondents essentially advanced reasons that motivated and, so it was submitted, justified the decision to exclude all non-citizens, including

permanent residents. These arguments will be dealt with in detail later in this judgment.

The approach to claims for socio-economic rights

[40] The socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom.[45] Yacoob J observed in *Government of the Republic of South Africa and Others v Grootboom and Others* that the proposition that rights are inter-related and are all equally important, has immense human and practical significance in a society founded on these values.[46]

[41] In this case we are concerned with these intersecting rights which reinforce one another at the point of intersection. The rights to life and dignity, which are intertwined in our Constitution,[47] are implicated in the claims made by the applicants. This Court in *Dawood* said:

> "Human dignity . . . informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. . . . Section 10, however, makes it plain that dignity is not

[45] Section 1 of the Constitution states in the relevant part:

> "The Republic of South Africa is one sovereign democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

[46] 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

[47] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 327.

> only a *value* fundamental to our Constitution it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."[48]

[42] Equality is also a foundational value of the Constitution and informs constitutional adjudication in the same way as life and dignity do. Equality in respect of access to socio-economic rights is implicit in the reference to "everyone" being entitled to have access to such rights in section 27. Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.

[43] This Court has dealt with socio-economic rights on four previous occasions.[49] What is clear from these cases is that section 27(1) and section 27(2) cannot be viewed as separate or discrete rights creating entitlements and obligations independently of one another. Section 27(2) exists as an internal limitation on the content of section 27(1) and the ambit of the section 27(1) right can therefore not be determined without reference to the reasonableness of

[48] Above n 10 at para 35.

[49] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 76-8; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); *Grootboom* above n 46; *Minister of Health and Others v Treatment Action Campaign and Others* (2), 2002 (5) SA 721; 2002 (10) BCLR 1033 (CC).

the measures adopted to fulfil the obligation towards those entitled to the right in section 27(1).[50]

[44] When the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness. This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. What is relevant may vary from case to case depending on the particular facts and circumstances. What makes this case different to other cases that have previously been considered by this Court is that, in addition to the rights to life and dignity, the social-security scheme put in place by the state to meet its obligations under section 27 of the Constitution raises the question of the prohibition of unfair discrimination.

[45] It is also important to realise that even where the state may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole. Thus if the means chosen by the legislature to give effect to the state's positive obligation

[50] Id *Soobramoney* at para 22; *Grootboom* at para 74; *Treatment Action Campaign* at paras 23 and 39.

under section 27 unreasonably limits other constitutional rights, that too must be taken into account.

The ambit of the right of access to social security in terms of section 27(1)(c)

[46] The socio-economic rights in sections 26[51] and 27 of the Constitution are conferred on "everyone" by subsection (1) in each of those sections. In contrast, the state's obligations in respect of access to land apply only to citizens.[52] Whether the right in section 27 is confined to citizens only or extends to a broader class of persons therefore depends on the interpretation of the word "everyone" in that section. The applicants relied on section 25 of the Constitution, as well as various other rights in the Bill of Rights,[53] to argue that "everyone" in section 27 included non-citizens and therefore also (for the purposes of this case) permanent residents.

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[51] Section 26 provides:

"26. Housing
(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[52] Section 25(5) of the Constitution provides:

> "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable *citizens* to gain access to land on an equitable basis." (Emphasis added.)

[53] Some rights in the Bill of Rights such as political rights in section 19; citizenship rights in section 20; the right to a passport and to enter, remain and reside in the Republic in sections 21(3) and 21(4); freedom of trade, occupation and profession in section 22; and certain labour rights in section 23 are qualified as being available to smaller groups of people than "everyone".

[47] This Court has adopted a purposive approach to the interpretation of rights.[54] Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of "all people in our country",[55] and in the absence of any indication that the section 27(1) right is to be restricted to citizens as in other provisions in the Bill of Rights, the word "everyone" in this section cannot be construed as referring only to "citizens".[56]

The reasonableness of the legislative scheme

[48] A court considering the reasonableness of legislative or other measures taken by the state will not enquire into whether other more desirable or favourable measures could have been adopted, or whether public resources could have been better spent.[57] A wide range of possible measures could be adopted by the state to meet its obligations and many of these may meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement would be met.

[49] In dealing with the issue of reasonableness, context is all important. We are concerned here with the right to social security and the exclusion from the

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[54] Above n 47 at para 9; *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 8.

[55] Section 7(1) of the Bill of Rights provides:

> "[The] Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of *all people in our country* and affirms the democratic values of human dignity, equality and freedom." (Emphasis added.)

[56] *Commissioner for Inland Revenue v NST Ferrochrome (Pty) Ltd* 1999 (2) SA 228 (T) at 232.

[57] Above n 46 at para 41.

scheme of permanent residents who, but for their lack of citizenship, would qualify for the benefits provided under the scheme. In considering whether that exclusion is reasonable, it is relevant to have regard to the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose. It is also necessary to have regard to the impact that this has on other intersecting rights. In the present case, where the right to social assistance is conferred by the Constitution on "everyone" and permanent residents are denied access to this right, the equality rights entrenched in section 9 are directly implicated.

The purpose of providing access to social security to those in need

[50] The state did not suggest that the exclusion of permanent residents was a temporary measure, nor did it argue that the exclusion was an incident of attempts by it progressively to realise everyone's right of access to social security. The state's case is rather that non-citizens have no legitimate claim of access to social security and it therefore excluded them from the scheme that it put in place. It is that proposition that has to be tested against the constitutional standard of reasonableness demanded by section 27(2).

[51] Those who seek assistance must meet stringent means tests prescribed by regulations made under the Act. Grants are made to those in need, including vulnerable persons. According to Mr Madonsela, the Director-General of the Department of Social Development, the legislation is part of the government's

strategy to combat poverty. He says also that the legislation is directed at realising the relevant objectives of the Constitution and the Reconstruction and Development Programme, and giving effect to South Africa's international obligations.

[52] The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.[58]

The reasonableness of citizenship as a criterion of differentiation

[53] It is necessary to differentiate between people and groups of people in society by classification in order for the state to allocate rights, duties, immunities, privileges, benefits or even disadvantages and to provide efficient and effective delivery of social services. However, those classifications must satisfy the constitutional requirement of "reasonableness" in section 27(2). In this case, the state has chosen to differentiate between citizens and non-citizens. That differentiation, if it is to pass constitutional muster, must not be arbitrary or irrational nor must it manifest a naked preference. There must be a rational connection between that differentiating law and the legitimate government

[58] Id at para 44.

purpose it is designed to achieve. A differentiating law or action which does not meet these standards will be in violation of section 9(1) and section 27(2) of the Constitution.

[54] The respondents averred that citizenship is a requirement for social benefits in "almost all developed countries".[59] That may be so in respect of certain benefits. But unlike ours, those countries do not have constitutions that entitle "everyone" to have access to social security, nor are their immigration and welfare laws necessarily the same as ours.

[55] The respondents contended that immigrants, before entering the country, are required to show self-sufficiency in order to qualify for permanent residence status. They are only restricted from accessing the right in question for a temporary period of five years, after which they can apply for citizenship by reason of naturalisation. On receipt of citizenship, they would have a right to social security. In their submission, any infringement of the right was therefore only of a temporary nature. They did not, however, offer any justification for denying the right to permanent residents during this five-year period.

[56] In essence, the Constitution properly interpreted provides that a permanent resident need not be a citizen in order to qualify for access to social

[59] The respondents referred to the position in the United States, Canada and the United Kingdom.

security. Justifying the restriction of that right of access by the fact that the South African Citizenship Act 88 of 1995 allows them to apply under exceptional circumstances for naturalisation,[60] and thereby obtain access to the grants in question, is not reasonable. Besides, it is doubtful whether the need for a social grant will be viewed as an "exceptional circumstance" sufficient to waive the normal requirements for naturalisation considering that the Immigration Act 13 of 2002 requires, in terms of sections 25 to 28, that a person applying for permanent residence in South Africa either be self-sufficient or have a supporting sponsor. The decision to grant naturalisation under the South African Citizenship Act may well be subject to administrative discretion and would therefore be beyond the control of the applicants.[61]

[57] The respondents argued that the state has an obligation toward its own citizens first, and that preserving welfare grants for citizens only creates an incentive for permanent residents to naturalise. This argument, commonly found in American jurisprudence, is based on the social contract assumption that non-citizens are not entitled to the full benefits available to citizens.[62] The argument, however, does not accord with the stated legislative intention in the Immigration Act which provides that:

[60] See section 5(9).

[61] See para 65 below.

[62] See, for example, *Mathews v Diaz* 426 US 67, 78 (1976). See also para 66 below.

> "The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship."[63]

Financial considerations

[58] I accept that the concern that non-citizens may become a financial burden on the country is a legitimate one and I accept that there are compelling reasons why social benefits should not be made available to all who are in South Africa irrespective of their immigration status. The exclusion of all non-citizens who are destitute, however, irrespective of their immigration status, fails to distinguish between those who have become part of our society and have made their homes in South Africa, and those who have not. It also fails to distinguish between those who are being supported by sponsors who arranged their immigration and those who acquired permanent residence status without having sponsors to whom they could turn in case of need.

[59] It may be reasonable to exclude from the legislative scheme workers who are citizens of other countries, visitors and illegal residents, who have only a tenuous link with this country. The position of permanent residents is, however, quite different to that of temporary or illegal residents. They reside legally in the country and may have done so for a considerable length of time. Like citizens, they have made South Africa their home. While citizens may leave the country indefinitely without forfeiting their citizenship, permanent

[63] Section 25(1).

residents are compelled to return to the country (except in certain circumstances) at least once every three years.[64] While they do not have the rights tied to citizenship, such as political rights and the right to a South African passport, they are, for all other purposes mentioned above, in much the same position as citizens. Once admitted as permanent residents they can enter and leave the country.[65] Their homes, and no doubt in most cases their families too, are in South Africa. Some will have children born in South Africa. They have the right to work in South Africa,[66] and even owe a duty of allegiance to the state.[67] For these reasons, I exclude temporary residents and it would have been appropriate for the High Court to have done so.

[60] The respondents also sought to deny the benefit to permanent residents on the grounds that this would impose an impermissibly high financial burden on the state. The respondents relied for this point on an affidavit deposed to by Mr Kruger, the Chief Director of Social Services in the National Treasury. According to him, the development of a system of social grants has been a key pillar of the government's strategy to fight poverty and promote human development. This has led to a substantial and rapid increase in expenditure on social grants. In the last three years alone the expenditure, excluding costs of

[64] Section 28(c) of the Immigration Act.

[65] Section 9(2) and 9(3)(d) of the Immigration Act.

[66] *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC) at para 24.

[67] *S v Tsotsobe and Others* 1983 (1) SA 856 (A) at 866E; *S v Zwane and Others* 1989 (3) SA 253 (W) at 256I.

administration, has increased from R16.1 billion to R26.2 billion. It is contemplated that over the next three years grants will increase from R26.2 billion to R44.6 billion. In addition, provision has to be made for expenditure on other socio-economic programmes. Mr Kruger says that if provision has to be made for the expenditure necessary to give effect to the High Court order, the costs will be large and will result in shortfalls in provincial budgets particularly in the poorer provinces.

[61] Mr Kruger indicates that there is a paucity of information concerning the number of persons who might qualify for grants if they are extended to permanent residents. He refers to various classes of persons who have been exempted from the normal immigration requirements and have been accorded permanent residence status. They include Mozambican refugees and various persons from members of the Southern African Development Community and other African countries. He estimates that there are at least 260 000 such persons currently in South Africa. Most of these permanent residents have been living in South Africa for a considerable period of time. In the case of the applicants, they have all been in South Africa since 1993 or longer. The respondents were unable, however, to furnish this Court with information relating to the numbers who hold permanent resident status, or who would qualify for social assistance if the citizenship barrier were to be removed.

[62] There is thus no clear evidence to show what the additional cost of providing social grants to aged and disabled permanent residents would be. Taking into account certain assumptions relating to the composition of the groups and numbers of dependents, Mr Kruger concludes that the additional annual cost of including permanent residents in grants in terms of sections 3, 4 and 4B could range between R243 million and R672 million. The possible range demonstrates the speculative nature of the calculations, but even if they are taken as providing the best guide of what the cost may be, they do not support the contention that there will be a huge cost in making provision for permanent residents. Approximately one fifth of the projected expenditure is in respect of child grants and the unconstitutionality of the citizenship requirement in that section of the Act has already been conceded by the respondents. The remainder reflects an increase of less than 2% on the present cost of social grants (currently R26.2 billion) even on the higher estimate. Bearing in mind that it is anticipated that the expenditure on grants will, in any event, increase by a further R18.4 billion over the next three years without making provision for permanent residents, the cost of including permanent residents in the system will be only a small proportion of the total cost.

Self-sufficiency

[63] Another reason given for excluding permanent residents from the scheme was the promotion of the immigration policy of the state, which seeks

to exclude persons who may become a burden on the state and thereby to encourage self-sufficiency among foreign nationals.

[64] Limiting the cost of social welfare is a legitimate government concern. If it is considered necessary to control applications for permanent residence by excluding those who may become a burden on the state, that too is permissible, but it must be done in accordance with the Constitution and its values. The state can protect itself against persons becoming financial burdens by thorough, careful consideration in the admission of immigrants, or by taking adequate security from those admitted, or by demanding such security or guarantees from their sponsors at the time the immigrants are allowed into the country or are permitted to stay as permanent residents. It would not necessarily be unreasonable in such circumstances to require a permanent resident to look in the first instance to his or her sponsor for support, and to permit a claim on the security system only if, notwithstanding the security or guarantee, that fails.

[65] At the time the immigrant applies for admission to take up permanent residence the state has a choice. If it chooses to allow immigrants to make their homes here it is because it sees some advantage to the state in doing so. Through careful immigration policies it can ensure that those admitted for the purpose of becoming permanent residents are persons who will profit, and not be a burden to, the state. If a mistake is made in this regard, and the permanent resident becomes a burden, that may be a cost we have to pay for the

constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who make their homes here. Immigration can be controlled in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destitution if they fall upon hard times. The category of permanent residents who are before us are children and the aged, all of whom are destitute and in need of social assistance. They are unlikely to earn a living for themselves. While the self-sufficiency argument may hold in the case of immigrants who are viable in the job market and who are still in the process of applying for permanent resident status, the argument is seemingly not valid in the case of children and the aged who are already settled permanent residents and part of South African society.

[66] Respondents relied in their argument on the decision of a United States appellate court in *City of Chicago v Shalala.*[68] In that case it was held that the relevant legislative provisions which disqualified non-citizens who were legal permanent residents from participation in the scheme, were not inconsistent with the equal protection clause of the US Constitution.[69] In reaching its decision the court applied a rational basis standard of review, holding that there was a rational connection between the federal government's immigration policy and its welfare policy of encouraging the self-sufficiency of immigrants.

[68] 189 F.3d 598 (7th Cir 1999).

[69] Id at 609.

[67] The test for rationality is a relatively low one. As long as the government purpose is legitimate and the connection between the law and the government purpose is rational and not arbitrary, the test will have been met.[70] Despite the failure of many of the respondents' arguments with respect to the purpose of the exclusion of permanent residents from the social-assistance scheme, I am prepared to assume that there is a rational connection between the citizenship provisions of the Act and the immigration policy it is said to support. But that is not the test for determining constitutionality under our Constitution. Section 27(2) of the Constitution sets the standard of reasonableness which is a higher standard than rationality.[71]

Is there unfair discrimination?

[68] The fact that the differentiation between citizens and non-citizens may have a rational basis does not mean that it is not an unfairly discriminatory criterion to use in the allocation of benefits. If the differentiation is based on a ground listed in section 9(3)[72] of the Constitution a rebuttable presumption that the discrimination is unfair is created by section 9(5).[73] However, where, as in

[70] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 27.

[71] *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 46.

[72] Section 9(3) provides:

> "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."

[73] Section 9(5) states:

this case, the ground for the differentiation is not itself listed but is analogous to such listed grounds, there is no presumption in favour of unfairness and the unfairness first has to be established.

[69] In *President of the Republic of South Africa and Another v Hugo*[74] Goldstone J stated that:

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.
>
> . . .
>
> To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination."

[70] Citizenship is not a ground of differentiation that is specified in section 9(3) of the Constitution. In *Hoffmann v South African Airways* this Court held that "at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in

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> "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

See also *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 53.

[74] 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paras 41-3.

society, must be accorded equal dignity."[75] To be considered an analogous ground of differentiation to those listed in section 9(3) the classification must, therefore, have an adverse effect on the dignity of the individual, or some other comparable effect.[76]

[71] In *Larbi-Odam*[77] the Court found that discrimination on the basis of citizenship in the context of permanent employment amounted to unfair discrimination. With respect to permanent residents the Court had the following to say:

> "[Permanent residents] have been selected for residence in this country by the Immigrants Selection Board, some of them on the basis of recruitment to specific posts. Permanent residents are generally entitled to citizenship within a few years of gaining permanent residency, and can be said to have made a conscious commitment to South Africa. Moreover, permanent residents are entitled to compete with South Africans in the employment market. As emphasised by the appellants, it makes little sense to permit people to stay permanently in a country, but then to exclude them from a job they are qualified to perform."[78]

With regard to the vulnerability of permanent residents, the Court in *Larbi-Odam* found that first, foreign citizens are a minority in all countries, and have little political muscle. Secondly, the Court felt that citizenship is a personal attribute which is difficult to change. The respondents argued in this Court that

[75] 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 27.

[76] Above n 74 at para 52.

[77] Above n 66.

[78] Id

citizenship is not a matter within the discretion of the Minister of Home Affairs, and that the state would be compelled to grant citizenship to persons who have resided in South Africa for five years and who satisfy the other criteria required for citizenship by naturalisation. Even if that were true (and it is not necessary to decide the point) it remains so that citizenship is typically not within the control of the individual and is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs. It is also true, as was noted in *Larbi-Odam*, that in the South African context individuals were deprived of rights or benefits ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race. Differentiation on the grounds of citizenship is clearly on a ground analogous to those listed in section 9(3) and therefore amounts to discrimination.[79]

[72] With this said, one must now determine whether that discrimination is unfair. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against.[80] Relevant considerations in this regard include:

> "(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

[79] Id at para 20.

[80] Above n 75.

> (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. . . .
> (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."[81]

These factors do not constitute a closed list and it is their cumulative effect that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair.[82]

[73] In *Brink v Kitshoff NO*, O'Regan J, with the concurrence of all the members of the Court, stated:

> "Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of section 8 and, in particular, subsections (2), (3) and (4)."[83]

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[81] *Harksen* above n 73 at para 51.

[82] *National Coalition* above n 13 at para 41.

[83] 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 42.

[74] There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance.[84] Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.[85] In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.[86]

[84] Rosberg "The Protection of Aliens from Discriminatory Treatment by the National Government" (1977) *Supreme Court Review* 275 at 311.

[85] Chang "Immigrants Under the New Welfare Law: A Call for Uniformity, A Call for Justice" (1977) 45 *University of California Los Angeles Law Review* 205 at 223.

[86] To use the terminology from *Plessy v Ferguson* 163 US 537, 551 (1896) and *Brown v Board of Education* 347 US 483, 494 (1954), the exclusion of foreigners from state welfare programmes not only operates to stamp them with a "badge of inferiority", but marginalises them by sending a message of second-class status in the communities in which they reside.

[75] Social grants in terms of section 3 of the Act can be claimed by "an aged person, a disabled person or a war veteran". Child-support grants in terms of section 4 can be claimed by the primary care-giver of the child, and care-dependency grants can be claimed by the parent or foster parent of a care-dependent child. In terms of section 1 of the Act, a care-dependent child is one who requires and receives permanent home care owing to his or her severe mental or physical disability.

The impact of the exclusion

[76] The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. These families or dependants, who may be in need of social assistance themselves, are asked to shoulder burdens not asked of other citizens. The denial of the welfare benefits therefore impacts not only on permanent residents without other means of support, but also on the families, friends and communities with whom they have contact. Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.

[77] As far as the applicants are concerned, the denial of the right is total and the consequences of the denial are grave. They are relegated to the margins of

society and are deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution. Denying them their right under section 27(1) therefore affects them in a most fundamental way. In my view this denial is unfair.

[78] Section 4(b)(ii) of the Act, which deals with child-support grants, requires both the adult and the child to be South African citizens. In the case of care-dependency grants, section 4B(b)(ii) requires that both the parent and the child be South African citizens. However, there is no citizenship requirement in respect of foster parents of a care-dependent child. Foster-child grants in terms of section 4A are also not subject to a citizenship requirement. The children referred to in section 4(b)(ii) and 4B(b)(ii) may have been born in South Africa and may be citizens, but if the primary care-giver or parent, excluding foster parents, is not a South African citizen, the grant is not payable. The respondents did not seek to support these provisions, which discriminate against children on the grounds of their parents' nationality. It was therefore conceded that citizenship is an irrelevant consideration in assessing the needs of the children concerned. Moreover the denial of support in such circumstances to children in need trenches upon their rights under section 28(1)(c) of the Constitution.[87]

[87] Section 28(1)(c) reads:

> (1) Every child has the right —
> . . .
> (c) to basic nutrition, shelter, basic health care services and social services."

Evaluation

[79] It is now necessary to weigh up the competing considerations taking into account the intersecting rights that are involved in the present case. Of crucial importance to this analysis is the fact that the Constitution provides that "everyone" has the right to have access to social security if they are unable to support themselves and their dependants. We are concerned here with a scheme that has been put in place by the state to provide access to social security to persons unable to support themselves and their dependants. The only challenge to the scheme is that it denies access to non-citizens. There is no suggestion that the scheme is otherwise inappropriate or inconsistent with the Constitution.

[80] I have already indicated that the exclusion of permanent residents from the scheme is discriminatory and unfair and I am satisfied that this unfairness would not be justifiable under section 36 of the Constitution. The relevant considerations have been traversed above and need not be repeated. What is of particular importance in my view, however, and can be stressed again, is that the exclusion of permanent residents from the scheme is likely to have a severe impact on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus cast in the role of supplicants.

[81] The denial of access to social assistance is total, and for as long as it endures, permanent residents unable to sustain themselves or to secure meaningful support from other sources will be relegated to the margins of society and deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution. Denying permanent residents access to social security therefore affects them in a most fundamental way.

[82] In my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution.

[83] There is a difficulty in applying section 36 of the Constitution to the socio-economic rights entrenched in sections 26 and 27 of the Constitution. Sections 26 and 27 contain internal limitations which qualify the rights. The state's obligation in respect of these rights goes no further than to take "reasonable legislative and other measures within its available resources to achieve the progressive realisation" of the rights. If a legislative measure taken by the state to meet this obligation fails to pass the requirement of

reasonableness for the purposes of sections 26 and 27, section 36 can only have relevance if what is "reasonable" for the purposes of that section, is different to what is "reasonable" for the purposes of sections 26 and 27.

[84] This raises an issue which has been the subject of academic debate but which has not as yet been considered by this Court.[88] We heard no argument on the matter and do not have the benefit of a judgment of the High Court. In the circumstances, it is undesirable to express any opinion on the issue unless it is necessary to do so for the purposes of the decision in this case. In my view it is not necessary to decide the issue. Even if it is assumed that a different threshold of reasonableness is called for in sections 26 and 27 than is the case in section 36, I am satisfied for the reasons already given that the exclusion of permanent residents from the scheme for social assistance is neither reasonable nor justifiable within the meaning of section 36.

[85] The Constitution vests the right to social security in "everyone". By excluding permanent residents from the scheme for social security, the legislation limits their rights in a manner that affects their dignity and equality in material respects. Dignity and equality are founding values of the

[88] See Van der Walt *The Constitutional Property Clause* (Juta, 1997) 92-5; Rautenbach *General Provisions of the South African Bill of Rights* (Butterworths, 1995) 84-5 and 106-07; De Waal et al *The Bill of Rights Handbook* 4 ed (Juta, 2001) 451; Liebenberg "Socio-economic Rights" in Chaskalson et al (eds) *Constitutional Law of South Africa* (Juta, 1999) 41-7 to 41-8; De Vos "Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution" (1997) 13 *SAJHR* 67 at 79-80; Pieterse "Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases? *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*" (2003) 120 *SALJ* 41.

Constitution and lie at the heart of the Bill of Rights. Sufficient reason for such invasive treatment of the rights of permanent residents has not been established. The exclusion of permanent residents is therefore inconsistent with section 27 of the Constitution.

Remedy

[86] For the reasons given above, we do not confirm the order of the High Court and we find section 3(c), prior to amendment by the Welfare Laws Amendment Act, to be unconstitutional. It was the submission of the respondents that we find sections 4(b)(ii) and 4B(b)(ii) of the Act, as amended by the Welfare Laws Amendment Act, unconstitutional and that we strike them both down, coupled with an order suspending invalidity. Section 4B(b)(ii) as it appears in section 3 of the Welfare Laws Amendment Act is not yet in force. Although this new section will become part of the Act when it is promulgated, it has been passed as part of the Welfare Laws Amendment Act. Thus, the High Court's determination of the impugned section as a provision of the Social Assistance Act was technically not in order. Since the impugned section was before the High Court it is necessary for it to be considered in these confirmation proceedings. However, in view of the fact that the new provision is currently contained in the Welfare Laws Amendment Act, making, in the strict sense, that Act the subject of constitutional challenge, the order regarding this issue should be directed at the Welfare Laws Amendment Act and not the Social Assistance Act. For the same reasons as in the case of section 3(c), we

do not confirm the order of the High Court and also find section 4(b)(ii) to be unconstitutional. The constitutionality of section 4B(b)(ii), as it appears in section 3 of the Welfare Laws Amendment Act is discussed below.

[87] Once the Court has found constitutional inconsistency, it must declare invalidity to the extent of the inconsistency.[89] The Court may then make an order which is "just and equitable".[90] In this case, the impugned provisions are inconsistent with the Constitution in that they exclude permanent residents from access to social security on the basis that they are non-citizens. The declaration of invalidity therefore does not affect the full extent of the impugned provisions. In such circumstances, the approach of this Court has been to declare only the relevant part of the impugned legislation inconsistent with the Constitution.[91]

[88] When courts consider a remedy following a declaration of invalidity of a statute, the question of remedial precision, which relates directly to respect for

[89] Section 172(1)(a) of the Constitution provides:

> "(1) 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."

[90] Section 172(1)(b) reads:

> "(1)When deciding a constitutional matter within its power, a court —
> (b) may make any order that is just and equitable, including —
> (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."

[91] *National Coalition* above n 13 at para 87.

the role of the legislature, is an important consideration.[92] As permanent residents are not included in the allocation of social grants in section 4(b)(ii) of the Act, remedying the defect with the necessary precision would require the reading in of the curing words, rather than striking down the impugned provisions and suspending the declaration of invalidity, as submitted by the respondents. Suspending the declaration of invalidity would, in my view, not constitute a "just and equitable order" as contemplated by section 172(1)(b) of the Constitution.[93] There is every reason not to delay payment of social grants any further to the applicants and those similarly situated. Even if this Court were to grant interim relief to the applicants during the period of suspension, other permanent residents would be barred from applying until the end of the period of suspension. Striking down without an order of suspension is not appropriate either, as it would make the grants instantly available to all residents including visitors within South Africa who satisfy the other criteria.

[89] Reading in the words "or permanent resident" after "South African citizen" in section 3(c) and "or permanent residents" after "South African citizens" in section 4(b)(ii) offers the most appropriate remedy as it retains the right of access to social security for South African citizens while making it instantly available to permanent residents.

[92] Id

[93] Above n 90.

The constitutionality of legislation not yet in force

[90] Section 81 of the Constitution provides:

> "A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act."

The Welfare Laws Amendment Act has been signed by the President and is therefore an Act of Parliament within the meaning of section 81 of the Constitution. In terms of section 172(2)(a) a court may make an order concerning the constitutional validity of an Act of Parliament. Thus, the fact that section 4B(b)(ii) has not yet been brought into force should not remove it from the jurisdiction of this Court to determine its constitutionality. This is similar to the position in Canada[94] and the United States where a provision can also be challenged if it has not yet been brought into force.[95]

[91] Similarly to section 3(c) prior to amendment, section 4B(b)(ii) as it appears in section 3 of the Welfare Laws Amendment Act is inconsistent with the Constitution only because it excludes permanent residents from the right of access to social security. Because this Court has yet to consider whether it can assess the constitutionality of a provision that has yet to be brought into force,

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[94] In *National Citizens' Coalition Inc v Attorney-General for Canada* (1985) 11 DLR (4d) 481 the Supreme Court of Canada considered the constitutionality of certain provisions of the Canada Elections Act, even though the law had not yet come into force.

[95] *Commonwealth of Pennsylvania v West Virginia* 262 US 553, 593 (1923); Tribe *American Constitutional Law* Vol 1 3 ed (Foundation Press, 2000) at 337.

the question of which remedies can be granted in these circumstances has also not been considered. Whether words can be read into such a provision was not raised nor argued before us. However, having found that reading in the curing words offers the most appropriate remedy in this matter, I can see no reason why this Court should be precluded from also reading in the appropriate words into section 4B(b)(ii). Section 172(1), which empowers courts to declare laws to be inconsistent with the Constitution, does not distinguish between laws which have been brought into force and those which have not. Once a matter is properly before this Court, there should be no bar to the just and equitable remedies that can be granted, so long as this Court is ever mindful of its role in relation to Parliament. In the case of a provision that has yet to be brought into force the legislative process is complete and we have a duly enacted Act of Parliament before us. In the consideration of a precise remedy, aimed at respecting the role of the legislature, there seems to be no material difference between this Court's power to read words into such a provision, and its power in respect of provisions that have been brought into force.

[92] This Court has held that any order relating to the constitutionality of law or conduct must have a practical effect.[96] In the present matter, unlike in the cases of a challenge to repealed legislation[97] or where there is no longer a live

[96] *President, Ordinary Court Martial* above n 18 at paras 16-8; *Independent Electoral Commission v Langeberg Municipality* above n 36 at para 11.

[97] See *President, Ordinary Court Martial* above n 18.

controversy between the parties,[98] an order in respect of section 4B(b)(ii) will have a practical effect, although the effect will be delayed. Parliament has approved the provision, the President must bring it into force[99] and at that point it will impact on the lives of many people who are in a position similar to that of the applicants. Having reached this conclusion, the just and equitable order for this Court to make would be to read the words "or permanent resident" into the section so as to make the grants available to permanent residents.

[93] One further matter needs to be addressed and that is whether this Court's order reading words into section 3(c) of the Act can be formulated in a way that will survive the bringing into force of section 3 of the Welfare Laws Amendment Act? Although the amendment made by the Welfare Laws Amendment Act takes the form of substituting a new section 3(c) for the existing section 3(c), the wording of the existing section is retained apart form the old usage of referring only to the male gender in statutes. Both genders are referred to in the new section. Save for that, the language of the new section is identical to the language of the existing section.

[94] If this Court's order is formulated in a way that addresses only the wording of the existing section 3(c) it would mean that if section 3 of the Welfare Laws Amendment Act is brought into force in its present form, the

[98] See *Independent Electoral Commission v Langeberg Municipality* above n 36.

[99] *Walters* above n 30 at para 73.

order made by this Court in respect of social grants would be frustrated. The President would face the dilemma of either bringing into force a provision known to be unconstitutional, or refraining from bringing section 3 of the Welfare Laws Amendment Act into force, although that is what the statute requires him to do. If this Court can formulate its order in a way that avoids this dilemma I have no doubt that it would be just and equitable to do so.

[95] Since the amendment to the existing section 3(c) introduced by the Welfare Laws Amendment Act does not change the substance of the existing section, or alter the words that are the subject of the constitutional objection, it seems to me that it would be just and equitable for this Court to declare that the words "or permanent resident" must be read into the existing section, and into the section as it will read once section 3 of the Welfare Laws Amendment Act is brought into force. To refrain from doing so would be to put form above substance. The result would be that the applicants and others in their position would not receive the full protection of the rights to which they are entitled. A just and equitable order would therefore be to read in the words "or permanent resident" after the word "citizen" into section 3(c) of the Act in its present form and in the form it will have when section 3 of the Welfare Laws Amendment Act comes into force.

[96] Following the reading-in of the above words, the sections will then read:

"Section 3 [of the Social Assistance Act]:

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 at the time of the application in question;

(c) is a South African citizen *or permanent resident*; and

(d) complies with the prescribed conditions." (Emphasis added.)

"Section 3 [of the Social Assistance Act as it appears in the Welfare Laws Amendment Act]:

Subject to the provisions of this Act, any person shall be entitled to the appropriate social grant if he or she satisfies the Director-General that he or she —

(a) is an aged or disabled person or a war veteran;

(b) is resident in the Republic at the time of the application in question;

(c) is a South African citizen *or permanent resident*; and

(d) complies with the prescribed conditions." (Emphasis added.)

"Section 4 [of the Social Assistance Act, as amended by the Welfare Laws Amendment Act]:

Subject to the provisions of this Act, any person shall be entitled to a child-support grant if that person satisfies the Director-General that —

(a) he or she is the primary care-giver of a child; and

(b) he or she and that child —

(i) are resident in the Republic at the time of the application for the grant in question;

(ii) are South African citizens *or permanent residents*; and

(iii) comply with the prescribed conditions." (Emphasis added.)

"Section 4B [as it appears in the Welfare Laws Amendment Act]:

Subject to the provisions of this Act, any person shall be entitled to a care-dependency grant if that person satisfied the Director-General that —

(a) he or she is the parent or foster parent of a care-dependent child; and

(b) that he or she and that child —

(i) are resident in the Republic at the time of the application for the grant in question;

> (ii) in the case of a parent and his or her child; are South African citizens *or permanent residents*; and
> (iii) comply with the prescribed conditions." (Emphasis added.)

Costs

[97] The applicants have successfully prosecuted an important constitutional claim and are entitled to their costs.

The Order

[98] The following order is made:

1. In the *Khosa* matter, the order of invalidity and striking down of section 3(c) of the Social Assistance Act 59 of 1992, prior to its amendment by the Welfare Laws Amendment Act 106 of 1997, made by the High Court is set aside and replaced with the following order:
   1.1. The omission of the words "or permanent resident" after the word "citizen" from section 3(c) of the Social Assistance Act 59 of 1992, prior to amendment by the Welfare Laws Amendment Act 106 of 1997 is declared to be inconsistent with the Constitution.
   1.2. To remedy the defect, section 3(c) of the Social Assistance Act 59 of 1992 prior to amendment by the Welfare Laws Amendment Act 106 of 1997 is to read as though the words "or permanent resident" appear after the word "citizen".
   1.3. The omission of the words "or permanent resident" after the word "citizen" from that part of section 3 of the Welfare Laws Amendment Act 106 of 1997 which is to amend section 3(c) of the

Social Assistance Act 59 of 1992 is declared inconsistent with the Constitution.

1.4. That part of section 3 of the Welfare Laws Amendment Act 106 of 1997 which is to amend section 3(c) of the Social Assistance Act 59 of 1992 is to be read as though the words "or permanent resident" appear after the word "citizen".

2. In the *Mahlaule* matter, the order of invalidity and striking down of section 4(b)(ii) of the Social Assistance Act 59 of 1992, as amended by the Welfare Laws Amendment Act 106 of 1997, made by the High Court is set aside and replaced with the following order:

2.1. The omission of the words "or permanent resident" after the word "citizen" from section 4(b)(ii) of the Social Assistance Act 59 of 1992, as amended by the Welfare Laws Amendment Act 106 of 1997, is declared to be inconsistent with the Constitution.

2.2. Section 4(b)(ii) of the Social Assistance Act 59 of 1992, as amended, is to be read as though the words "or permanent residents" appear after the word "citizens".

3. In the *Mahlaule* matter, the order of invalidity and striking down of section 4B(b)(ii) of the Social Assistance Act 59 of 1992, as amended by the Welfare Laws Amendment Act 106 of 1997, made by the High Court is set aside and replaced with the following order:

3.1. The omission of the words "or permanent resident" after the word "citizen" from that part of section 3 of the Welfare Laws Amendment Act which is to introduce section 4B(b)(ii) into the Social Assistance Act 59 of 1992 is declared to be inconsistent with the Constitution.

3.2. That part of section 3 of the Welfare Laws Amendment Act 106 of 1997 which is to introduce section 4B(b)(ii) into the Social Assistance Act 59 of 1992 is to be read as though the words "or permanent residents" appear after the word "citizens".

4. The first and second respondents are ordered, jointly and severally, to pay the costs of the confirmation proceedings.

Chaskalson CJ, Langa DCJ, Goldstone J, Moseneke J, O'Regan J and Yacoob J concur in the judgment of Mokgoro J.

NGCOBO J:

Introduction

[99] The question presented in these confirmatory proceedings is whether the state can, consistent with the Constitution, exclude non-citizens from the social welfare system that it has put in place to meet the needs of those who are unable to support themselves. The social welfare grants that are the subject matter of the claims in these proceedings are social grants, child support grants and care dependency grants. At issue is the constitutional validity of sections 3(c)[1], 4(b(ii)[2] and 4B(b)(ii)[3] of the Social Assistance Act 59 of 1992[4] which

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[1] Section 3 provides:

> "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 at the time of the application in question;
> (c) is a South African citizen; and
> (d) complies with the prescribed conditions."

[2] Section 4 provides:

> "Subject to the provisions of this Act, any person shall be entitled to a child-support grant if that person satisfies the Director-General that—
>
> (a) he or she is the primary care-giver of a child; and
> (b) he or she and that child—
> (i) are resident in the Republic at the time of the application for the grant in question;
> (ii) are South African citizens; and
> (iii) comply with the prescribed conditions."

[3] Section 4B provides:

> "Subject to the provisions of this Act, any person shall be entitled to a care-dependency grant if that person satisfies the Director General that –
> (a) he or she is the parent or foster parent of a care-dependent child; and
> (b) that he or she and that child –
> (i) are resident in the Republic at the time of the application for the grant in question;
> (ii) in the case of the parent and his or her child, are South African citizens; and
> (iii) comply with the prescribed conditions."

limit social grants, child support grants and care dependency grants respectively, to South African citizens.

[100] The applicants, who are permanent residents, meet all the requirements for social welfare grants save for the requirements of citizenship. They contend that the citizenship requirement in sections 3(c), 4(b)(ii) and 4B(b)(ii) is inconsistent with the Constitution. For this contention, they rely, in particular, on the right to have access to social security[5], to equality[6], to human dignity[7], to life[8] and to children's rights.[9]

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[4] Section 4B(b)(ii) will be introduced by section 3 of the Welfare Laws Amendment Act 106 of 1997. See n 8 of the main judgment.

[5] Section 27 provides:

> "(1) Everyone has the right to have access to—
> (a) health care services, including reproductive health care;
> (b) sufficient food and water; and
> (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 realisation of each of these rights.
> (3) No one may be refused emergency medical treatment."

[6] Section 9 provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> . . .
> (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.
> . . .
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[7] Section 10 provides:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

[8] Section 11 provides:

[101] This case presents a novel question in the context of socio-economic rights. In the past this Court has been called upon to evaluate programmes that the state has put in place in order to determine whether they comply with the Constitution.[10] In this case, the state has put in place a scheme for social welfare assistance to meet its obligations under the Constitution. The contents of the scheme are not in issue. The only complaint is that access to the benefits system is limited to citizens only. We are therefore not concerned with what should be made available to those in need but with who among the needy should receive the social welfare benefits.

The problem of the governing constitutional provisions

[102] Two interesting and difficult questions arise. The first is conceptual: which provisions of the Constitution should govern the constitutional challenge

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"Everyone has the right to life."

[9] Section 28 provides:

"(1) Every child has the right—
(a) . . .
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
. . .
(2) A child's best interests are of paramount importance in every matter concerning the child.
(3) In this section "child" means a person under the age of 18 years."

[10] See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* (2), 2002 (5) SA 721; 2002 (10) BCLR 1033 (CC).

involved in this case? The right of access to social security is no doubt implicated because this case is concerned with access to social security. But the impugned provisions exclude non-citizens from benefiting from the scheme. The exclusion of non-citizens from the scheme manifestly implicates the right not to be discriminated against. This question was not addressed in argument. It need not be considered on this occasion. The outcome would be the same under either constitutional provision.

[103] My colleague, Mokgoro J, has approached the matter on the footing that the right of access to social security governs the question presented in this case. There is much to be said for this view. The parties themselves have framed the legal issue as involving the right of permanent residents not to be excluded from the benefits system. On this logic, the primary right implicated is guaranteed by section 27 of the Constitution. The constitutional validity of the exclusion must therefore be examined by reference to the right to have access to social security. But, as the main judgment acknowledges in this case, the result under either of these constitutional provisions would be the same.

[104] That is not to say that the other rights asserted by the applicants do not enter the picture. The Bill of Rights is the cornerstone of our constitutional democracy and it "affirms the democratic values of human dignity, equality and freedom."[11] The founding values will inform most, if not all, of the rights

[11] Section 7(1) of the Constitution.

in the Bill of Rights. Socio-economic rights must be understood in the context of the founding values of our Constitution. Access to socio-economic rights is crucial to the enjoyment of the other rights mentioned in the Bill of Rights, in particular the enjoyment of human dignity, equality and freedom. A denial of access to a social welfare scheme may, as demonstrated by this case, therefore have an impact on more than one constitutional right. We are therefore concerned with a statute implicating multiple constitutional rights that reinforce one another at their point of intersection.

The problem of methodology

[105] But if section 27 governs the present constitutional challenge, the problem of a methodological approach arises. The obligations of the state under section 27(2) are limited to taking "reasonable legislative and other measures." The main judgment regards this as an internal limitation on the right of access to social security. I agree. But is it possible to find that a measure is reasonable within the meaning of subsection 2 yet not reasonable and justifiable under section 36(1), the limitation clause?

[106] Let us take a non-controversial group, the temporary visitors, which the main judgment also accepts can legitimately be excluded from the social welfare benefits. If their exclusion would be reasonable under section 27(2), is the state required to show also that their exclusion is reasonable and justifiable under section 36(1)? This raises a number of related questions, including,

whether the standard for determining reasonableness under section 27(2) is the same as the standard for determining reasonableness and justifiability under section 36(1) and, if not, what is the appropriate standard for determining reasonableness under section 27(2). These questions were not addressed in argument and for reasons that will appear below, they will not be answered now.

[107] Faced with these questions, the main judgment adopts the attitude that the outcome would be the same whether the enquiry is to be conducted under section 27(2) or section 36(1). I prefer to approach the matter differently – by looking first to the enquiry required in section 27 and then, if necessary, to section 36. I should add, though, that the outcome would be the same even if the enquiry were to begin and end in section 27(2).

Is there a limitation of a constitutional right?

[108] For convenience, the relevant provisions of section 27 are set out hereunder:

> "(1) Everyone has the right to have access to—
>
> . . .
>
> (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 realisation of each of these rights."

[109] Section 27(1) and (2) must be read together to give content to the right of access to social security. Subsection 1 delineates the scope of the right by vesting the right in everyone.[12] In *Grootboom*, this Court held that subsection 1 of section 26 places a negative obligation on the state to desist from preventing or impairing the right of access to adequate housing. This applies to section 27 as well.

[110] Subsection (2) imposes a positive obligation upon the state "to devise a comprehensive and workable plan to meet its obligations in terms of the subsection."[13] However, this is a qualified obligation, to "(a) take reasonable legislative and other measures; (b) to achieve the progressive realisation of the right; and (c) within available resources".[14]

[111] Section 27(1) vests a right of access to social security in "everyone". The constitutional reference to "everyone" implies that all in need must have access to the social welfare scheme that the state has put in place. Where some who are in need are excluded, everyone does not have access to the scheme. The word "everyone" is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system.

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[12] *Grootboom* above n 10 at para 34.

[13] *Grootboom* above n 10 at para 38.

[14] Id

[112] However, that does not mean that there can be no limitation imposed on those who may have access to that system. The Constitution contemplates that the rights in the Bill of Rights "are subject to limitations contained or referred to in section 36, or elsewhere in the Bill."[15] The right to have access to social security, which is a right contained in the Bill of Rights, is therefore subject to limitation in terms of section 36.

[113] Confining social security to citizens in the Act does constitute a limitation on the right of access to social security of those applicants who are not citizens. What has to be determined therefore is whether that limitation is reasonable and justifiable in terms of section 36.[16] And this question involves a proportionality analysis that takes into account the nature of the right, the nature and extent of the limitation, the importance of the purpose of the

[15] Section 7(3) of the Constitution.

[16] Section 36 provides:

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

limitation, the relationship between the limitation and purpose and the existence of less restrictive means to achieve that purpose.[17]

Is the limitation justifiable?

[114] The importance of the right in issue cannot be gainsaid. It is a right that goes to one of the core values of our Constitution – human dignity. The state has an obligation to ensure that its citizens have access to basic needs such as food, clean water and shelter. Social security is a vital component of the social system that is available for those who cannot provide these basic needs for themselves or their families.

[115] However, the limitation imposed by the impugned statutory provisions on permanent residents is neither absolute nor permanent. It is true that only citizens can qualify for social security under the Act. But a permanent resident becomes eligible for citizenship after a fixed period of time. Under section 5(1) of the South African Citizenship Act 88 of 1995,[18] a permanent resident

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[17] *S v Manamela (Director-General of Justice intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 32.

[18] Section 5(1) provides:

> "The Minister may, upon application in the prescribed form, grant a certificate of naturalisation as a South African citizen to any alien who satisfies the Minister that—
> (a) he or she is not a minor; and
> (b) he or she has been lawfully admitted to the Republic for permanent residence therein; and
> (c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than one year immediately preceding the date of his or her application, and that he or she has, in addition, been resident in the Republic for a further period of not less than

need only have resided continuously in the Republic for a period of five years in order to qualify for citizenship by naturalisation.

[116] It is also true that the five year waiting period could prove harmful to permanent residents who are unable to provide for themselves, just as it might prove harmful to a South African citizen who has to wait for five years to reach the qualifying age for a social grant. But recognising this possibility, the law also includes a provision for such individuals to obtain benefits during this interim period. Under section 5(9)(a) of the South African Citizenship Act, the Minister

> "may under exceptional circumstances grant a certificate of naturalisation as a South African citizen to an applicant who does not comply with the requirements of the said subsection (1) relating to residence or ordinary residence in the Republic."

[117] It is therefore plain from these provisions that a permanent resident can get social benefits after five years, but that the state can waive the residential waiting period for permanent residents in exceptional cases. From this, it must

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four years during the eight years immediately preceding the date of his or her application; and

(d) he or she is of good character; and

(e) he or she intends to continue to reside in the Republic or to enter or continue in the service of the Government of the Republic or of an international organisation of which the Government of the Republic is a member or of a person or association of persons resident or established in the Republic; and

(f) he or she is able to communicate in any one of the official languages of the Republic to the satisfaction of the Minister; and

(g) he or she has an adequate knowledge of the responsibilities and privileges of South African citizenship."

follow that permanent residents need not always wait for five years to become citizens and thus become eligible for social security.

[118] There is a further consideration that is relevant in this regard. It is this: under section 1 of the Act, the Minister for Welfare and Population Development, may, with the concurrence of the Minister of Finance, extend the definition of a citizen to include non-citizens.[19] The effect of this provision is that a permanent resident who is defined as a citizen becomes eligible for social benefits under the Act. In the present case, the Minister of Welfare and Population Development with the concurrence of the Minister of Finance, actually agreed to extend the definition of citizen to include the applicants, except for the five whose applications were under consideration at the time. That offer was apparently rejected by the applicants.

[119] Properly understood, therefore, the limitation of rights involved in this case is of a limited duration and is not absolute. The denial of benefits lasts for a period of five years, when a permanent resident has to wait to become a citizen by naturalisation. However, the Minister may either waive the five year waiting period or extend the definition of a citizen to include a non-citizen.

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[19] The relevant part of section 1 provides:

> "'South African citizen' includes any person who—
>
> . . .
>
> (b) is a member of a group or category of persons defined by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette".

Thus, even the most destitute of permanent residents, for whom waiting would lead to severe hardship, could have their condition ameliorated. The impugned provisions do not therefore disadvantage permanent residents in a manner that is beyond their control, as the applicants suggest.

[120] The state has advanced two reasons for the limitation. First, it says that it is consistent with a basic principle that a state is obliged to cater for the needs of its citizens. The Act is obviously designed to combat the very serious social ill of poverty. The state has committed a significant amount of resources to combat poverty in this nation by increasing financial expenditures. The state, like all other governments, has limited resources to confront this policy challenge. The harsh reality is that there are simply insufficient resources available to cater for all the various persons who might enter its borders seeking assistance.

[121] The second rationale that the state offers in defence of its policy is that immigrants should be encouraged to be self-sufficient. Immigrants within our borders should not depend on public resources to meet their needs but rather on their own capabilities and the resources of their families and their sponsors. This must be seen against the need to ensure that the availability of public benefits does not constitute an incentive for immigration to South Africa. The legitimacy of a legislative goal of discouraging immigration that is motivated by the availability of the welfare benefits, cannot be gainsaid.

[122] It is true that the immigration laws already prohibit the immigration of those who are likely to become a burden to the state purse.[20] But that fact in itself does not detract from the importance of the purpose advanced to defend the legislation at issue here. Nor does it detract from the clear relationship between the limitation and its purpose. It is important to bear in mind here that those who, after immigrating to this country, find themselves destitute and unable to provide for themselves are not completely left in the cold. They could be catered for through the extension of the definition of a citizen or through the waiver of the residence requirement for naturalisation.

[123] So too is the fact that the elderly, physically challenged and children will not be encouraged to work because they are simply unable to work. As a matter of public policy, I cannot say that the impugned provisions are unreasonable simply because some immigrants who are unable to work will not be induced to work to provide for themselves. In the legislature's view, immigrants might have to rely on their families or sponsors rather than on the state purse. The impugned provisions are reasonably related to that goal and there is a close relationship between the limitation and its purpose.

[20] The permanent residence permit is now governed by sections 26 and 27 of the Immigration Act 13 of 2002. Both those sections authorise the issue of permits to foreigners who have "received an offer for permanent employment" or who are spouses or children under the age of 21, of such a foreigner. In addition, section 30 provides that a person who is "likely to become a public charge" may be declared an undesirable foreigner.

[124] South Africa is not the only country that denies welfare benefits to non-citizens. The United States, Canada and Britain are developed countries that have resources that far exceed ours. They may have constitutions and immigration laws different to ours. The point is that South Africa is not alone in denying benefits to permanent residents. The rationale for this approach includes, amongst other things, the policy of encouraging the non-citizen's self-sufficiency, preventing the creation of incentives for immigration, and preserving the public treasury by confronting the rising costs of operating benefits programs.

[125] There are important differences between citizens and permanent residents. In terms of the Immigration Act, they do not have the rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship. Thus, they do not enjoy political rights, they do not enjoy the right to choose their trade, occupation or profession freely. Before a certificate of naturalisation is issued, a permanent resident is required to make a declaration of allegiance to the Republic.

[126] It is true that permanent residents enjoy a right to work in South Africa, the right to own houses, the obligation to pay taxes, and the responsibility to contribute to the economic growth of South Africa. But some of these privileges and duties also apply to another group of non-citizens – work permit holders. Just as permanent residents, work permit holders may establish a

home in South Africa for their families; indeed, members of this group may well elect to become permanent residents. Both groups of non-citizens are under the Constitution entitled to socio-economic rights. The crucial question is whether social security benefits should be made available to every person who is within our borders. In my view, the state has successfully advanced compelling reasons for limiting the benefits to citizens. The need to reduce the rising costs of operating social security systems, the need to prevent the availability of social security benefits from constituting an incentive for immigration and the need to encourage the immigrants to be self-sufficient.

[127] The state is justifiably concerned about the impact of providing social security benefits to non-citizens on the state finance and its ability to provide expenditure on other socio-economic rights. Mr Kruger, the Chief Director of Social Services in the National Treasury, tells us that the war on poverty has led to a substantial and rapid increase in expenditure. Expenditure on social grants has increased from R16.1 billion to R26.2 billion and this is expected to increase to R44.6 billion over the next three years. These figures show an increasing demand for social grants.

[128] There is a paucity of information concerning the number of persons who might qualify for grants if they are extended to permanent residents. This is not surprising. Mr Kruger however estimates that the annual costs of including permanent residents could range between R243 million and R672 million.

Policymakers have the expertise necessary to present a reasonable prediction about future social conditions. That is precisely the kind of work that policymakers are supposed to do. Unless there is evidence to the contrary, courts should be slow to reject reasonable estimates made by policymakers.

[129] The fact that the increase is not huge is not relevant. The fact of the matter is that there will be an increase; how huge that increase will be, will be determined by an increase in the number of permanent residents. What makes it difficult to predict the number of persons who might qualify, is that there is no clear information about the number of people who might qualify under a more generous immigration regime. And if there is merit in the possibility that the state could become a magnet for new immigrants seeking permanent resident status, estimating the likely size of the pool of grant applicants and an accurate estimate of the financial burden would be even more arduous a task.

[130] There is a further reason which is implicit in the reasons advanced by the state. The state's policy encourages the naturalisation process. As pointed out earlier, temporary and permanent resident status are both precursors to the full commitment of citizenship.[21] By crafting the benefits rule so that only citizens qualify, the statute provides a legitimate incentive for an alien to become a citizen. The unequivocal declaration of loyalty and commitment that

[21] In terms of section 26 of the Immigration Act, a holder of a work permit who has a permanent offer for employment may be issued with a permanent residence permit. In terms of section 5 of the South African Citizenship Act, a permanent resident qualifies for citizenship after five years.

an alien can give to a country is through naturalisation and taking the oath of allegiance. After this a permanent resident becomes a citizen and thus qualifies for social security benefits.

[131] I accept that the applicants were entitled to test the validity of the impugned provisions. However, one should not lose sight of the fact that the applicants have lived in this country since the 1980s. They, therefore, qualify for naturalisation and acquisition of citizenship in South Africa. None have applied, nor have any advanced reasons why they have not applied. Had they applied for citizenship or even sought an exception, they would have qualified for social security benefits under the statutes. I draw attention to this fact to illustrate the limited nature and impermanence of the limitation involved in this case. Unlike the case of minors, these adult non-citizens are quite capable of obtaining citizenship but have chosen not to exercise their option.

[132] The state's management and control of the immigration process is a legitimate purpose. No careful immigration policy can foresee that an immigrant once admitted will fall upon hard times and thus become unable to provide for him or herself. The policy of the Act is to admit only those who are self-sufficient and will not be a burden on the state. This is in any event a temporary phase, for after they have been permanent residents for five years, they may qualify for citizenship. However, the immigrants who become destitute are not abandoned to destitution. As pointed out earlier, they can seek

designation as "citizens" for the purpose of qualifying for benefits under the Act or request that the five-year residence requirement be waived and thus expedite their naturalisation under the South African Citizenship Act and ultimately, entitlement to social welfare benefits.

[133] It is inconceivable that the statutory exceptions that would allow a permanent resident to have access to social security benefits would be invoked in circumstances where there is a sponsor who is able and willing to provide for the permanent resident. It is only when the permanent resident has no sponsor or is unable to support him or herself, that the statutory exceptions could be invoked. Properly understood, therefore, the Act requires a permanent resident to look in the first instance to his or her own resources, or his or her sponsor for support and permits a claim on the security system only if that fails. The main judgment accepts that a statute which requires a permanent resident to look to the sponsor or his or her own resources in the first place and permits a claim on the social security system only if that fails, is not unreasonable.

[134] Weighing up the competing considerations, in particular, having regard to the fact that the limitation in issue here is neither absolute nor permanent, I am satisfied that the limitation imposed by section 3 of the Act is reasonable and justifiable under section 36(1) of the Constitution.

[135] However, the same cannot be said of the limitation imposed by sections 4(b)(ii) and 4B(b)(ii) of the Act. Foster child grants under section 4A are not subject to a citizenship requirement. Yet the child support grants under section 4 and the care-dependency grants under section 4B are subject to a citizenship requirement. The children referred to in sections 4(b)(ii) and 4B(b)(ii) may be South African citizens. It matters not according to these provisions. What matters is whether their primary caregiver or parent is a South African citizen.

[136] These provisions therefore deny the assistance to some citizens, while affording benefits to other citizens. What is more, they fail to take sufficient account of section 28(2) of the Constitution. That section reminds us that "[a] child's best interests are of paramount importance in any matter concerning the child." The exclusion of the children from these benefits cannot therefore be reasonable and justifiable in terms of section 36. The respondents very properly conceded that such exclusion cannot be justified.

[137] But, there is a problem with section 4B(b)(ii). That problem arises because that section will be introduced by section 3 of the Welfare Laws Amendment Act 106 of 1997. Section 3 has not yet been brought into operation. Does the fact that it has not yet been brought into operation preclude a court from pronouncing on its constitutional validity?

[138] Section 172(2)(a) of the Constitution authorises a high court to "make an order concerning the constitutional validity of an Act of Parliament". The Welfare Laws Amendment Act, which introduces section 4B(b)(ii) is "an Act of Parliament." In terms of section 81 of the Constitution, "[a] Bill assented to and signed by the President becomes an Act of Parliament". That it has not taken effect matters not. Accordingly, I agree with the main judgment that this Court has jurisdiction to determine the constitutional validity of section 4B(b)(ii).

[139] Once it is accepted that this Court has jurisdiction to consider the constitutional validity of section 4B(b)(ii), it follows that this Court has the power not only to declare that provision unconstitutional, but also to grant "any order that is just and equitable" under section 172(1) of the Constitution. I agree with the main judgment that the appropriate remedy would be to read the words "permanent resident" into section 4B(b)(ii). The same goes for section 4(b)(ii).

[140] In the result, I concur in the conclusion reached by Mokgoro J in relation to sections 4(b)(ii) and 4B(b)(ii) and in the order that she proposes in that regard. However, I am unable to concur in the result reached by Mokgoro J in relation to section 3(c) and in the order that she proposes in that regard. In my view, the order of invalidity in relation to section 3(c) should not be confirmed. I would make no order for costs.

Madala J concurs in the judgment of Ngcobo J

For the applicants: P Kennedy SC instructed by the Legal Resources Centre, Pretoria.

For the respondents: MTK Moerane SC and SA Nathi instructed by the State Attorney, Cape Town.