PROCEDURAL FAIRNESS AND REASONABLE ADMINISTRATIVE ACTION WITHIN THE SOCIAL ASSISTANCE SYSTEM: IMPLICATIONS OF SOME SETTLED CLASS ACTIONS

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Abstract

This article discusses five High Court class actions brought under the Social Assistance Act 59 of 1992, dealing with the rights to procedurally fair and reasonable administrative action under the Promotion of Administrative Justice Act 3 of 2000. The cases have contributed significantly to the shaping of the policies and practices of the administration of social assistance. However, because in each case the state consented to the terms of each court order, these orders have not been reported and are not widely known. The cases deal with the following issues: the right to appeal against the conditional award of a grant; the lapsing of a grant without a hearing where the basis for the lapsing is disputed; the right to a prior investigation before administrative action is taken; unreasonable application requirements; the need for policy guidelines when exercising a discretion affecting fundamental rights and the reasonable content of the right of access to social assistance for people in desperate need. A number of themes emerge from the cases: shortcomings in procedural fairness in the regulations under the Social Assistance Act; the absence of measures to minimise the disruption of benefits where internal remedies arising from the unlawful stoppages of grants are pending; the duty arising from errors in the population register; the state's failure to implement these other court orders; the need to integrate court orders into the state's internal management.

I INTRODUCTION

This article discusses five High Court class actions brought under the Social Assistance Act 59 of 1992 (SAA), dealing with the rights to procedurally fair and reasonable administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). These cases have contributed significantly to the shaping of the policies and practices of the administration of social assistance but, because the state has

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1 This Act has been repealed and replaced by the Social Assistance Act 13 of 2004, but it is the 1992 Act which was in force at the time of the cases discussed here. All references to the regulations are likewise to the regulations under the 1992 SAA.
consented to the terms of each court order, the orders have not been reported and are not widely known. It is important that they should be publicised because they confer rights on the class represented (typically the beneficiaries under the SAA), represent the evolution of the social assistance system and demonstrate the application of PAJA, in addition to laying the basis for future developments. The cases deal with the following issues: the right to appeal against the conditional award of a grant; the lapsing of a grant without a hearing where the basis for the lapsing is disputed; the right to a prior investigation before administrative action is taken; unreasonable application requirements; the need for policy guidelines when exercising a discretion affecting fundamental rights and the reasonable content of the definition of a person in desperate need of social assistance. These are important issues in social assistance.

The value of the orders in these matters is that, although not argued in court, they are rulings binding on the state for the benefit of all beneficiaries under the SAA. The expansion of the classes of people whose access to social assistance is secured by these cases, and the improvement of the social assistance benefits brought about by each case represents the progressive realisation of access to social assistance. In appropriate cases, the state may also be issue estopped from denying the benefits obtained for the class in these matters from any member of the class who may subsequently wish to claim the same procedural or substantive benefits. They also demonstrate the effectiveness of using litigation as a platform to negotiate the content of socio-economic rights. It is hoped that subsequent litigation will further develop these advances.

In what follows I will briefly set out the facts of each case and the relevant terms of the orders, and examine issues arising from the implementation of the order. I then analyse the following themes emerging from these and other cases: shortcomings in procedural fairness in the regulations under the SAA; the absence of measures to minimise the disruption of benefits where internal remedies arising from the unlawful stoppages of grants are pending; the duty arising from errors in the population register; the state’s failure to implement these and other court orders; the need to integrate court orders into the state’s internal management.

II The cases

(a) The right to appeal against the conditional award of a grant: Mashishi

The regulations under the SAA make provision for a disability grant to
two categories of disabled person: one whose ‘disability is permanent in that the disability will continue for more than twelve months’ and another whose disability is ‘temporary in that the disability will continue for a continuous period of not less than six months or for a continuous period of not more than twelve months, as the case may be’. The benefit that an applicant applies for and receives is known only as a ‘grant to a disabled person’, and the distinction is introduced by the administration at the time of approving the grant. It is particularly important for the termination of grants, as a grant for temporary disability lapses without further notice once the period of temporary disability has expired while one for a permanent disability continues indefinitely subject to periodical review. The time limitation of a temporary grant accordingly operates as a resolutive condition.

Officials have often misapplied the temporary classification, and simply used it as a matter of convenience to award a ‘half-grant’ where they felt a permanent classification was not justified. So, for example, where the medical evidence was incomplete but supported a grant, rather than correspond with the doctor to obtain an improved medical report, the official would award a temporary grant and hope a better report would appear once the grant had lapsed. Also, if an enduring condition was not considered particularly serious, a temporary classification would be made. There was confusion too amongst social security officials as to whether a ‘disability’ was the underlying medical condition or the resultant inability to generate an income. Consequently, many beneficiaries were recorded as temporarily disabled where they were awaiting payments from the Road Accident Fund, the Compensation Fund, or a private disability insurance or pension scheme.

Conversely, many people had also been classified as permanently disabled where their medical conditions did not justify this. Based on this consideration, the various provincial departments responsible for social assistance, coordinated by the national Department of Social Development, adopted a plan in late 2002 to terminate some 125 000 temporary disability grants. They intended to provide each beneficiary with three months prior written notification of the intended stoppage of his or her grant, during which time the beneficiary was invited to undergo a review to ascertain if he or she qualified for such a grant, either on a continued temporary basis or on a permanent basis.

At the time, various measures provided for in the regulations were not in place. The regulations make provision for an applicant for a grant to be given written notice of the outcome of his or her application and, if

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3 Regulation 2(3)(a)(i) and (ii).
4 Section 2(a) of the SAA.
5 Regulation 24(1)(c).
6 Regulation 23(2) and (8).
refused, written reasons for the refusal.\textsuperscript{7} If the application was refused, the applicant must also be told of his or her right to appeal against the refusal.\textsuperscript{8} Although the SAA and its regulations did not make provision for advising a beneficiary of the temporary status of his or her disability grant, its duration or that the grant was to lapse on expiry of this period, it followed from reg 25 that a beneficiary was entitled to know of any conditions under which the grant was awarded, and particularly if the grant was limited in time.

These three provisions formed part of the right to procedurally fair administrative action under s 3(2) of PAJA, and were mandatory and material procedures as envisaged by s 6(2)(b) of PAJA.\textsuperscript{9} Particularly the decision to make the grant temporary constituted administrative action affecting the rights of the beneficiary and the beneficiary was entitled to a clear statement of this action and notice of his rights to appeal or review the imposition of the condition with sufficient information of the formal requirements necessary to enforce these rights.\textsuperscript{10} Regulation 25(2) of the regulations under the SAA requires the state to give reasons for any refusal of a grant, and since the award of a temporary grant is not a refusal, the state is probably not under a duty in terms of this regulation to provide reasons for the temporary classification but it would be obliged to do advise the beneficiary of his or her rights to request reasons in terms of s 3(2)(b)(v) of PAJA.

The various provinces, which were responsible for administering the grants, did not at the time advise beneficiaries in writing of the outcome of their applications, as required by reg 25. Beneficiaries were typically simply told to go and check at their local pay-point on an appointed date to see if their grants were available. Even where they were given written notification of the award, there was no reference to the fact that it may lapse. When the state accordingly wished to terminate the 125,000 grants in question, it had failed to accord these beneficiaries an opportunity to challenge the temporary status of their grants.

The grants of David Mashishi and three other permanently disabled persons were either stopped or placed under threat in this manner. Mashishi’s right leg had been amputated above the knee as a result of a car accident. His three co-applicants respectively suffered from a congenital leg deformity which resulted in a shortening of the leg and a severe limp, severe chronic hypoedema leaving the feet grossly swollen and compelling lifelong confinement to a wheelchair, and a paralysed left arm following a stroke. These are obviously not temporary conditions,

\begin{itemize}
\item \textsuperscript{7} Regulation 25(1) and (2) respectively.
\item \textsuperscript{8} The applicant’s right to an internal appeal is set out in s 10(1) of the SAA.
\item \textsuperscript{9} \textit{Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government} 2000 (7) BCLR 728 (E).
\item \textsuperscript{10} Section 3(2)(b)(iii) to (v) of PAJA read with regs 24(b) and 25(c) of the regulations under the PAJA.
\end{itemize}
yet the grants had been made temporary without notice to the beneficiaries and were stopped summarily in December 2003. The applicants applied to the High Court\(^\text{11}\) for the reinstatement of their own grants and, acting on behalf of the remaining beneficiaries under threat, sought various orders against the proposed stoppages on behalf of the class of affected beneficiaries. The orders were aimed at reinstating the 125,000 grants or preventing their stoppage, regulating systems to inform beneficiaries of the temporary nature of their grants, and redressing the misinterpretation of ‘temporary disability’.

At the urgent hearing of the matter, in addition to reinstating the wrongfully terminated grants, the following order was agreed to by the parties in relation to the class relief:

\[\ldots 0.1 \ldots (T)he \ respondents \ are \ interdicted \ from \ proceeding \ with \ the \ stoppages \ of \ payment \ of \ any \ temporary \ disability \ grants \ until \ such \ time \ as \ they \ have \ lawfully \ and \ fairly:
\]
\[0.1.1 \ ascertained \ that \ the \ beneficiary's \ disability \ is \ temporary \ as \ defined \ in \ reg \ 2(3)(a)(i) \ of \ the \ regulations \ under \ the \ Social \ Assistance \ Act \ alternatively \ ascertained \ that \ the \ beneficiary \ is \ entitled \ to \ a \ permanent \ disability \ grant,\]
\[0.1.2 \ advised \ the \ beneficiary \ accordingly \ as \ envisaged \ by \ reg \ 25(1) \ of \ the \ said \ regulations,\]
\[0.1.3 \ informed \ the \ beneficiary \ of \ his \ right \ to \ appeal \ or \ review \ any \ such \ finding, \ and\]
\[0.1.4 \ permitted \ the \ beneficiary \ an \ opportunity \ to \ appeal \ against \ such \ finding.\]

The response of the national Department of Social Development was commendable. It established a national task team to review its procedures and the status of the affected beneficiaries. An appeal process which, despite s 10 of the SAA, had not operated in most of the provinces prior to the application, was established. Standard form letters were introduced in all the provinces, notifying beneficiaries of the outcome of their applications and advising them of their right to appeal against a refusal of benefits or the imposition of a condition rendering the grant temporary. A report by the task team served as a manual to train officials and ensure consensus and guide the process. In this manner, the interim aspects of the matter were resolved in compliance with s 3(2)(b)(vi) and (v) of PAJA. The excerpts of the order set out above became final during May 2003.

At an early stage in this process, the Department accepted that temporary disability related to the duration of the medical condition only. This was brought to the attention of officials as part of the process. The state accordingly did not oppose the following prayer for final relief: ‘Declaring that any test to determine whether a disability grant is temporary or permanent other than one based on the duration of the medical condition is unlawful’. This relief was granted on 3 February

\(^{11}\) Mashishi and others v Minister of Social Development and others, unreported Transvaal Provincial Division case number 4239/03.
2004. Its effect is to resolve some of the ambiguity in the factors to be considered when determining whether a person is permanently or temporarily disabled. Only the medical officer’s prognosis of the duration of the medical condition is thus relevant in determining whether a grant is permanent or temporary.

There have been other judgments on this issue. The facts before the court in *Mpofu v MEC for Welfare and Population Development, Gauteng* were that the applicant suffered from a permanent disability but had been classified as temporary disabled in accordance with a policy to do so where the degree of disability was less than 60 per cent. Marais J held that this ‘was not a medical assessment but an assessment based on a policy which ignored the reality of whether persons were permanently disabled.’ Despite this judgment, the practice of misusing the temporary disability categorisation has continued. Hopefully the *Mashishi* order concludes a sorry period in the administration of disability grants, where people were wrongfully categorised as temporarily disabled to allow for the easier administration of their cases.

**(b) The lapsing of grants without a hearing: Sibuye**

An agent for a large national insurance company persuaded a number of people living in Acornhoek in Limpopo to take out life insurance policies. At the same time, he required them to sign blank claim forms against their policies. Through a friend who worked in the Department of Home Affairs, he obtained fraudulent death certificates for these clients, lodged a claim against their policies and received payment of the death benefits. A monthly computer link-up between the population register held by the Department of Home Affairs and the social assistance database held by the Department of Social Development conveyed information of these ‘deaths’ to the latter database, which automatically cancelled their grants.

The clients became aware of the fraud only when they reported to collect their old-age grants, and were refused payment. Jim Sibuye and seven other beneficiaries of old-age grants were politely told by the social security official that, although he accepted that they were obviously alive, there was nothing he could do because they were registered as dead; they had to first change their registration as deceased, then re-apply for social assistance. This is a process that takes many months, sometimes years.

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12 For judicial approval of the correct test for disability, albeit obiter, see Kirk-Cohen J’s judgment in *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T), 389I.

13 Unreported WLD case 2948.

Regulation 24(1)(a) provides that ‘a social grant shall lapse on the last day of the month in which the beneficiary dies.’ This provision justifiably terminates the right to social assistance when it is no longer needed, but it relies on an assumption that the information is correct and allows no procedure to dispute it. The same result applies to any other fact upon which lapsing hinges, such as a foster child reaching the age of 18 or 21 in terms of reg 23(2), the death of the child for whom a child support grant is received in reg 23(2) or the lapsing of temporary disability in reg 23(1)(c).

From a strictly legal perspective, death is a jurisdictional fact on which the lapsing depends, and the lapsings in these cases were accordingly null and void. They could have been set aside on this ground, but a clinical legal finding based on legality and divorced from the reality of the administrative processes necessary to manage social assistance would be of little assistance in regulating the rights of similarly placed beneficiaries. The population register may be deemed in courts of law to be prima facie proof of the facts recorded in it, but the administration cannot rely on such a presumption to deny a hearing if the contents of a certificate are disputed, much less if the contents of a computer exchange based on the population register is disputed. Some routine opportunity to dispute administrative action based on the disputed facts is required. The regulations make no provision for a hearing to do so. In addition to the lapsing being tainted by illegality, the failure to conduct a hearing in such circumstances is procedurally unfair as envisaged by s 6(2)(c) of PAJA.

Mr Sibuye and his co-‘deceased’ proceeded in the High Court against the various provincial members of the executive committees responsible for social assistance, and the national Minister of Social Development, claiming the urgent reinstatement of their grants and declaratory and interdict orders to redress the lacunae in the social assistance system on behalf of the class of social grant beneficiaries in the Republic. The following are the relevant provisions of the order of court:

1.1 Declaring that, where a beneficiary of a social grant that has lapsed contends that the circumstances giving rise to the lapsing of his grant do not exist, then the beneficiary is entitled:
1.1.1 to a fair opportunity to show that he remains entitled to receive the grant and
1.1.2 to have the grant promptly restored, if it is found that he remains entitled to it.

15 Section 13(2) of the Identification Act 68 of 1997, provides that certificates of death, birth and marriage reflecting the population register are prima facie proof of the facts contained therein in courts of law.
16 Only reg 23(5) provides any amelioration: it allows a beneficiary whose grant has lapsed through a failure to collect it for three consecutive months to advance reasons as to why the failure was not due to circumstances within his or her control.
17 Jim Sibuye and others v Member of the Executive Committee for Health and Welfare in Limpopo and others, unreported Transvaal High Court case number 17713/03.
1.2 Declaring that the respondents are under a duty to advise a person whose social grant has lapsed of his right to:
1.2.1 apply for the restoration of the grant or
1.2.2 appeal against any decision that led to the lapsing in terms of s 10(1) of the Social Assistance Act.
1.3 Declaring that, a beneficiary is entitled to continued social assistance during the period that his application for the restoration of his grant or his appeal is under consideration.

Various prayers regarding the implementation of the order were also granted, including an order directing the Minister of Social Development to formulate regulations to regulate these aspects of the administration of social grants within six months. Although the Minister has to date failed to promulgate such regulations, these declaratory orders effectively supplement the regulations under the SAA and any beneficiary could claim their benefit and compel the state to provide the same benefits of a hearing to him or her.

(c) The right to a prior investigation before administrative action is taken:

Manganye

Johanna Nyanisi Manganye and Johanna Nyanisi Manganye live in Limpopo and the North West province respectively. They do not know their full dates of birth, only the year of birth, which is the same for each. Both were allocated a date of birth by the Department of Home Affairs. Both had been given the same identity number by the Department of Home Affairs, presumably because their names are identical. When they qualified for old age grants, one grant was issued to the Mrs Manganye who applied first. When the other applied, her application was rejected. When she complained and pointed out that she qualified, the grant of the first-qualifying Mrs Manganye was summarily stopped and the benefit was ‘transferred’ to the second Mrs Manganye. When the first-qualifying Mrs Manganye complained, the grant was again ‘transferred’ to her. This rigmarole continued for three years.

A transfer typically takes place when a beneficiary moves from one province to another, and it is at the beneficiary’s request. These ‘transfers’ were without the consent of the beneficiaries and were a bureaucrat’s creative attempt to resolve a problem where the computer system would not allow a second Manganye on the same identity number. The national computer database of beneficiaries, known as Socpen 5, automatically screens for duplicated identity numbers, and summarily stops such grants on the assumption that they are fraudulent rather than that there is a mistake. The flaw in the system lay in the automated nature of the process, and the failure to investigate whether the underlying assumption was valid.

The two Mrs Manganyes set out their efforts to secure a grant in an
application to court. The respondents were the national Ministers of Social Development and Home Affairs as the first two respondents and the provincial members of the executive committee responsible for the administration of social grants as the third to eleventh respondents. Their affidavits listed seven similar cases, where grants were misadministered because of a fault in the identity registration process. The papers pointed out that the officials of the various national and provincial Departments of Social Development had powers to compel information from the Director-General of Home Affairs to ascertain facts relevant to the administration of social assistance, that they possessed fingerprint evidence with which to verify the independent identity of the beneficiaries, yet the officials responsible for the stoppages of the Manganyes’ grants had failed to utilise any of these powers. In the circumstances of the case, the Manganyes contended that the relevant official in the Limpopo Department of Health and Welfare had a duty to establish the correct facts before stopping a grant.

The presumption in s 11 of the Identification Act 68 of 1997 regarding the contents of certificates reflecting the population register is not applicable where the contents are palpably incorrect, and in any event only applies in courts of law. It does not relieve an administrator from the duty to apply his or her mind to the application once the applicant has provided a 13-digit identity document are required by the SAA and its regulations.

The state did not oppose the application. On 13 October 2005, in addition to personal relief for the Manganyes and a costs order, an order was handed down regulating such stoppages on behalf of the class:

1 Declaring that the first and third to eleventh respondents practice of summarily stopping social grants if there are duplications in identity numbers, without notice or a fair hearing, is wrongful and unlawful.

2 Interdicting the first and third to eleventh respondents from summarily stopping, without notice or a fair hearing, the social grants of the applicants and any other person who receives a social grant if there are duplications of the identity numbers of the beneficiary.

The state did not immediately implement this policy and stoppages continued until about March 2006. It also has not set up any structured interaction with the Department of Home Affairs to improve the investigation of these cases or enable it to independently decide if the person qualifies for a grant. It has instead constructed a process which reduces the impact of the duplication. From approximately March 2006, the stoppages ended and the person receiving the grant was not affected. The applicant with the duplicated identity number who is not receiving a grant is conveyed to the local office of the Department of Home Affairs,

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18 Johanna Nyanisi Manganye and Johanna Nyanisi Manganye v The Minister of Social Development and others, unreported Transvaal Provincial Division case number 23178/2005.
which will take a fresh set of fingerprints and an affidavit relating to identity and investigate the duplicated identity number. This person is provided with social relief of distress in the amount of a social grant as an interim measure for as many months as it takes for the Department of Home Affairs to take a decision.19 If one of the persons is found to hold a fraudulent identity document, the grant is stopped in a manner that is fair in the circumstances. This policy has also not been uniformly applied within the provincial administrations, and irregularities still occur.

(d) Unreasonable application requirements: Bishogo

A foster child grant is available for all foster children, including those without South African citizenship or permanent residence rights in the country. Such children may prove their identity using documentation from their own countries.20 The foster parent who applies for the grant need likewise not hold South African citizenship or permanent residence rights,21 but the regulations under the SAA, quite illogically, require proof of identity only by an ‘identity card’ issued to South African citizens or permanent residents in terms of the Identification Act 68 of 1997.22 The result is that there is no provision for the identification of refugees or temporary residents who may be caring for foster children. The practice is that refugees are identified by a document issued in terms of the Refugees Act 130 of 1998 with a 13-digit identity number, but their particulars do not appear on the population register and the identity number reflects a code that differs from the code held by citizens or permanent residents. The Socpen computer programme does not recognise identity numbers with such codes.

In Bishogo and others v Minister of Social Development and others23 three such refugee foster parents applied for foster child grants, their applications were rejected by the computer database, the state claimed not to be able to set up any alternative system to process their applications and they approached the High Court for a range of orders compelling the state to recognise their claims and provide for a system that would properly administer them.

By consent, the following order was handed down on 7 September 2005:

1 The Department of Social Development (‘the Department’) will forthwith adjust its administrative and computer infrastructure so that it is able to process the foster care grant applications of the applicants and similar applications brought by refugee foster parents in terms of the Social Assistance Act No. 59 of 1992 (‘the Act’).

19 This use of social relief of distress is presumably authorised by the regulations as ‘awaiting permanent aid’ in terms of reg 26(1)(a).
20 Regulation 9(1)(b).
21 Section 4A of the SAA.
22 The definition of ‘identity card’ in reg 1 read with reg 9(1)(a).
23 Unreported Transvaal Provincial Division case number 9841/2005.
4 It is recorded that the adjustment of the Department’s administrative and computer infrastructure referred to above is anticipated to occur within a period of three months from the date of this order.

After an initial delay, the state has implemented this order and refugee foster parents are able to access social assistance.

(e) The need for policy guidelines when exercising a discretion affecting fundamental rights: Kutumela

Abbey Kutumela was a machine operator who lost the fingers of his left hand in a work accident and subsequently also lost his job. After receiving a disability grant for 14 years, it was summarily stopped in April 2001, presumably for suspected fraud. He re-applied for a disability grant in April 2001, but his application was not processed for more than 18 months. Mr Kutumela suffered greatly as he waited for his grant: he and his wife could only afford to eat once every two days and his family disintegrated as he was compelled to send his small children to live with distant family members who had access to a more reliable and regular source of food.

In February 2003 he applied for social relief of distress. This is ‘temporary immediate relief’ provision to people in terms of reg 26(1) or 26(3) of the regulations under the SAA. It is intended to provide three months relief in a range of crisis situations listed in reg 26(1), such as where a breadwinner has died or been institutionalised, or where fire has destroyed a home. One such listed situation is that the beneficiary is ‘awaiting permanent aid’. This includes people who are waiting for the approval or payment of social grants. Mr Kutumela fell into this category. He accordingly qualified on this ground, under reg 26(1)(a).

He also qualified for assistance under reg 26(3) of the SAA. The discretion to award social relief of distress in reg 26(3) is not bound to a particular form of crisis, and it makes provision for social relief of distress in ‘exceptional cases where the Director-General is of reasonable opinion that refusal may cause undue hardship’. No reasonable person could regard the suffering of a man who qualified for a disability grant, was denied it, and had to endure his family struggling to hold together on one meal every second day and ultimately disintegrating, as anything other than ‘undue’ either in its meaning of ‘undeserved’ or in the meaning of ‘excessive’.

It is important to understand the context of the relief in reg 26(3). Although s 27(1)(c) of the Constitution of the Republic of South Africa, 1996 extends the right of access to social assistance to ‘everyone’, the structure of the SAA provides grants only to vulnerable categories such as the aged, the disabled, the child-rearing and so forth. Some provision

24 See the definition in reg 1.
25 Regulation 26(1)(a).
is needed for people who fall outside these categories and who are in desperate need of assistance. Regulation 26 of the regulations under the Act accordingly supplements the various categories of social grant by making provision for temporary aid to people who are facing a serious crisis. Assistance to people in desperate need is an essential feature of a reasonable programme to provide access to socio-economic rights under the constitution, as envisaged by the Constitutional Court in *Grootboom v Government of the Republic of South Africa*. Regulation 26(3) is accordingly a vital constitutional safeguard and protects the state from the challenge that the Act does not cater for ‘everyone’ as required by the introductory words to s 27(1)(c) of the Constitution.

A social worker investigated and reported on Mr Kutumela’s circumstances, and recommended that he be awarded social relief of distress. When he went to apply, his application was not processed, as the social security officials on duty in the North West did not know what social relief of distress was.

In May 2003, after receiving a grant for a short time, Mr Kutumela’s grant was again summarily stopped, presumably because his grant had been a temporary one and had been stopped in the circumstances discussed in the *Mashishi* case above. He appealed against this decision, and again during June 2004 he applied for social relief of distress as a person ‘awaiting permanent aid’ and enduring ‘undue hardship’. By September 2003 neither his appeal nor his applications for a disability grant or social relief had been processed. He and two co-applicants, who were also unable to feed their families while waiting for appeals to be finalised, and who had similarly applied without response for social relief of distress, approached the High Court in Mmabatho for orders compelling the relevant provincial member of the executive committee to consider their applications for social relief of distress.

The applicants acted on behalf of the class of persons who reside in the North West and qualify for social relief of distress, and their minor children. The papers described the efforts of many people to apply for social relief of distress, detailed a history of correspondence attempting to persuade the North West province to implement the regulations pertaining to social relief of distress and their stubborn refusal to do so. The relief sought included orders declaring social relief of distress to be a necessary part of the state’s social assistance programme, and a

26 2001 (1) SA 46 (CC) para 44.
27 Note 11 above.
28 *Kutumela and others v Member of the Executive Committee for Social Services, Arts and Sport in the North West Province and another*, unreported Bophuthatswana General Division case number 671/2003.
29 These proceedings were only against the North West province and the national Minister of Social Development, as the remaining provinces indicated at least a willingness to try to implement the regulations.
structural injunction compelling the state to devise policy guidelines on who qualified for social relief of distress under reg 26(3), to train officials and to advise the public of their right to such assistance.

The discretion in reg 26(3) is in wide terms and must be applied by officials at district service points who are not experts in determining need or the prioritisation of need. Unless they are given guidance as to what constitutes ‘undue hardship’ and ‘exceptional cases’, they cannot exercise their discretion and the benefits intended by reg 26(3) remain unavailable to those who need them. This is in fact what has occurred: reg 26(3) has not been implemented since its inception in 1998 because there have never been national or provincial policies and procedures to implement it. In addition, social relief in desperate need under reg 26(3) is to be made available on the day of application.\(^{30}\) Special administrative procedures are required to provide cheques, food parcels or other relief to people in desperate need on the same day of application; not least because of the possibility of fraud and theft by state officials. To be operational, such procedures must be described in a procedure and policy and the officials in question must be trained to implement them. It must furthermore be a national policy, since what constitutes an exceptional case and undue hardship are norms and standards for the delivery of social assistance and social security and, to be performed effectively, it is necessary that they are regulated by national norms and standards that apply generally in South Africa. This is in accordance with the principles adopted by the Constitutional Court in *Mashavha v President of the Republic of South Africa*.\(^ {31}\) It is accordingly the duty of the Minister of Social Development to devise such policy, procedures and guidelines.

The state withdrew its initial opposition to the *Kutumela* case, and settled the matter in terms of an agreed court order which, shorn of the individual relief and the detailed provisions of the structural injunction, reads as follows.

1 The respondents acknowledge that social relief of distress
1.1 in terms of reg 26(3) and
1.2 provided on the date of application is a necessary part of a programme to provide social assistance that
1.3 makes short term provision for people who are in a crisis or desperate situation,
1.4 provides effective relief for people who are in a crisis or desperate situation,
1.5 responds adequately to the needs of those people who are most desperate and it must be
1.6 implemented reasonably and
1.7 effectively made known to officials and to persons in need who may be able to obtain a benefit through it

\(^{30}\) As provided for in the definition of ‘social relief of distress’ in reg 1.
\(^{31}\) 2005 (2) SA 476 (CC).
2 The respondents shall take immediate steps to devise a programme to provide social relief of distress as envisaged by the regulations promulgated further to the Social Assistance Act, that will:

2.1 enable them to receive and process applications for social relief of distress on the same day of receipt of the application for those cases referred to in regulations 26(1)(a) to (f), 26(1)(h) and 26(3),

2.2 enable their officials to appropriately assess or evaluate those applicants, in addition to the categories referred to in reg 26(1), who qualify for the exceptional relief referred to in reg 26(3) of the regulations under the Social Assistance Act,

2.3 dispense with social worker reports in cases for first time applicants falling under reg 26(1)(a), (b) and (h) of the regulations under the Social Assistance Act and

2.4 pay or otherwise provide the first instalment of social relief of distress on the date of application to persons who qualify for social relief of distress in terms of regulations 26(1)(a) to (f), 26(1)(h) and 26(3)

3 To this end, it shall:

3.5 finalise national guidelines and a national procedural manual for the social relief of distress envisaged by reg 26(3).

There were also various orders relating to the implementation of the order, which made provision for the training of officials and advertising the right to the public.

The Kutumela case did not compel the state to devise social relief of distress for people in desperate need, but merely to implement it reasonably. One aspect of the reasonable implementation of discretionary social relief was the need for guidelines to indicate who qualified for the relief under reg 26(3). In *Dawood v Minister of Home Affairs* 32 the Constitutional Court had held that the state has a duty to provide guidelines for the exercise of administrative discretions when the content of an applicant’s constitutional right depends on the decision of a functionary who cannot reasonably be expected properly to weigh up the competing interests of the applicant and the state without such guidance. Although that case dealt with immigration law, its general administrative principles apply likewise to social relief of distress in terms of reg 26(3). Guidelines to the official are particularly important in regard to eligibility for social relief because of the state’s limitation on spending in social assistance. Without such guidelines, it is not reasonable to expect a line functionary to be able to weigh up the applicant’s need against internal departmental financial imperatives, nor to be able to consistently resist the temptation to give relief to a demanding applicant or one whom has come to rely unduly on state support.

The discretion in question is exercised by ‘the second attesting officer’. 33 This is a social security official who may have some degree of experience in processing applications but does not have the

32 2000 (3) SA 936 (CC) paras 52 6.
33 Regulation 27(2)(c).
professional expertise to decide who is in desperate need or the degree of need and the alternative resources available to assist in such a situation. Although a social worker’s report and recommendation can be requested,\(^{34}\) this is not necessary and is only required for a second or third application.\(^{35}\) Such an official is accordingly the type of official who would require guidelines, as envisaged by the *Dawood* judgment in regard to a discretion affecting fundamental rights. Guidelines are furthermore necessary since the regulations impliedly require them as a necessary element of a valid delegation of the Director-General’s discretion to award social relief of distress.\(^{36}\) ‘Guiding standards or decisional referents’ setting ‘discernible standards which provide a framework within which the delegee must operate’ are necessary where the effect of a delegation would otherwise entitle a subordinate in effect to become the person who determines a policy issue which the Director-General is expected by the regulations to address.\(^{37}\) Section 5(2) of the SAA authorises the Director-General to award social relief if he is ‘satisfied’ that a person is in need of it. The policy and standards required for this discretion are not amenable to delegation without guidelines and for the Director-General to do so is to abdicate his responsibility under the SAA and the regulations.

Regulation 26(3) sets out a rights-based tool for the eradication of extreme poverty. The South African government has committed itself to realising the end of extreme poverty by 2015, but this is a political goal. Since it is unlikely that extreme poverty will be eradicated through general economic improvement, it is necessary to have a discretionary remedy to identify people objectively as needing immediate assistance. One would have thought that *Kutumela* would be properly implemented, but the state did not take active responsibility for doing so for at least two years. Eventually, in February 2006, following various advisory reports, negotiations and under threat of proceedings for contempt of court and for breaches of the Public Finance Management Act 1 of 1999 (PFMA), the state adopted guidelines on the implementation of social relief of distress. It did so in the form of an internal manual setting out procedures

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\(^{34}\) Regulation 27(5).

\(^{35}\) Although it used to be standard practice to first require a social worker to report in applications for reg 26(3), this is no longer required under the guidelines set out in the Department of Social Development, ‘Procedure Manual for Social Relief of Distress’ (March 2006) para 4.

\(^{36}\) In apparent contradiction with reg 26(3), reg 27(2)(c) states that it is the second attesting officer who decides the application. However, this cannot detract from the discretion vested in the Director-General in terms of s 5(2) of the SAA and the only sensible reading is that the reference to the second attesting officer in reg 27(2)(c) is intended to explain the process of the double approval and not to accord power to decide, so that he or she still needs to hold personally delegated authority to act in the Director-General’s stead.

for social relief of distress. The Manual describes the way in which the discretion for relief to people in ‘undue hardship’ should be considered, and provides the following:

Social Relief of Distress for undue hardship in terms of reg 26(3) is for those people who cannot be assisted under the categories in reg 26(1). The regulation gives a general discretion to the Director General, which is delegated to the attesting officer, to give help to people who ‘are unable to support themselves or their dependents’ as envisaged by s 27(1)(c) of the Constitution.

Examples of the types of people who may qualify in terms of this sub regulation are:
(a) An elderly person who is 50 years and older who cannot qualify for an old age pension but also cannot obtain work and support him or herself and his or her dependent children.
(b) A person evicted from a farm, rural area or rented accommodation and is unable to secure employment immediately in his or new area.
(c) A single parent who has to care for one or more child/ren and is unable to take up employment because of the caring responsibilities and therefore cannot provide a nutritious meal for him or herself or his or her dependents.
(d) Children who live alone and have no access to a nutritious meal a day.
(e) Families where there are symptoms of malnutrition and stunted growth in children.
(f) Children in need of care as a result of orphanhood, sick parent/s, neglect, abuse and abandonment and have not been placed in foster care, residential facility or an institution.
(g) Individuals who are homeless and have no access to a nutritious meal. Being homeless can be a consequence of a number of circumstances such as:
   • Discharged from institutions such as psychiatric hospitals, prisons, general hospitals etc without continued support.
   • Displacement from families and farms and rural settlements.

The Manual also sets parameters for the manner in which the discretion should be exercised:

Persons with insufficient income must be referred to the Expanded Public Works programme for income supplementation and youth in needs of skills development and fund for self development should be referred to the Umsobomvu Youth Development Fund or any other national or provincial programme.

NB. Assistance in terms of sub reg 26(3) cannot be refused and the provinces must have the necessary resources to respond to this need. However need can be managed by referring every applicant to a social or development worker who will assist with linking the applicant with sustainable resources, assist with verifying the circumstances of the beneficiary and motivate for continuation Social Relief of Distress in respect of second and third payments in the absence of documentation and for the extension of Social Relief of Distress for a further period if the need continues to exist.

The Manual relates the notions of ‘exceptional circumstances’ and ‘undue hardship’ used in reg 26(3) to the notion of people who are ‘are unable to support themselves or their dependents’ used in s 27(1)(c) of the Constitution. The narrower meaning of the words in reg 26(3) are thereby

38 Department of Social Development ‘Procedure Manual’ (note 35 above).
39 Ibid p3.
given the meaning that would align them with the wider test used in the
Constitution. Any other reading of the words in reg 26(3) would cause it
to limit the right of access to social security, and in the absence of any
apparent justification, particularly after the concessions in paragraph 5 of
the Kutumela order, would not be justifiable or reasonable. The Manual
similarly uses the phrase ‘exceptional circumstances’. This phrase should
also be interpreted as meaning no more than ‘unable to support
themselves’.

The degree of realisation of the socio-economic rights set out in s 27(1)
and (2) of the Constitution is determined by the content of the state’s own
programmes. The extent to which the Manual accordingly allows
people to qualify for social relief sets the bar on the content of the right of
access to social assistance for people in crisis and who are unable to
support themselves and their dependents. In removing these linguistic
obstacles on the right of access to social assistance for people in desperate
need, the guidelines in the Manual contribute to its progressive
realisation.

The Kutumela case in effect required the Director-General to determine
a level of hardship that is ‘desperate’, and accordingly determine a
minimum core content to the right of access to social assistance for
people in desperate need. The concept that there is a minimum core of
socio-economic rights that are essential to ensure a basic access to the
right in question has been an approach adopted by the United Nations
Committee on Economic, Social and Cultural rights as a tool to measure
compliance and development in nations that are signatories to the
Covenant on Economic, Social and Cultural Rights. It is not an
appropriate tool for courts when exercising constitutional jurisdiction,
not the least because it draws them into policy formulation rather than
evaluation, and has been rejected in favour of a case-by-case evaluation
of state policy on the content of socio-economic rights using the criterion
of reasonableness. Accepting reasonableness as the appropriate
criterion in judicial pronouncements, litigation nonetheless provides the

40 Minister of Health v Treatment Action Campaign (2) 2002 (5) SA 721 (CC) para 47.
41 The guidelines also contribute to the progressive realisation of the right of access to social
assistance in other regards: applicants need not be in possession of a bar-coded identity
document and may apply with any acceptable proof of identity (note 35 above, para 6(a), page
7), thereby permitting people awaiting the delivery of identity documents to claim some form
social assistance. The recovery of social relief from subsequent grant payments is limited to
cases where applicants qualified as awaiting permanent aid, and may not take place if a food
voucher only is provided (para 2, page 4). Provision is made for social relief to be awarded to
refugees and asylum seekers (para 13, page 18).
42 Grootboom (note 26 above) paras 26 to 33; Treatment Action Campaign (note 40 above) paras
26 39. For academic opinion supporting the minimum core approach, see David Bilchitz
‘Towards a Reasonable Approach to the Minimum Core: Laying the Foundations of a Future
Socio-Economic Rights Jurisprudence’ and M Wesson ‘Grootboom and Beyond: Reassessing
the Socio-Economic Jurisprudence of the South African Constitutional Court’ (2004) 20
SAJHR 284. These arguments are convincingly rejected by Carol Steinberg ‘Can Reason-
ablleness Protect the Poor?’ (2006) 123 SALJ 264.
platform to negotiate with the state on the content of the specific socio-economic rights, allowing a court to give its authority to the eventual enforcement of what, in effect, is an agreed norm for the delivery of socio-economic rights. The state thereby retains responsibility for developing a multi-layered approach to the social problem, and is compelled to do so through the pressure of the litigation and the resultant order.

The implementation of discretionary social relief of distress in terms of reg 26(3) presents the state with considerable difficulties. It was concerned at the rapid expansion of its social assistance budget, which had grown by 17 per cent in the preceding three years and was felt to be unsustainable in the long term. Its social workers are overburdened with duties to provide statutory social services, particularly in placing orphans in foster care. Only a few of its social security officials are trained in administrative law, or in assessing what constitute exceptional circumstances or undue hardship. It could not merely list additional circumstances in which people could qualify, as that would not address the need for a discretionary remedy, and there were fears that a general criterion, such as an economic poverty datum or food access level below which it was unacceptable to be without social assistance, could escalate into a new grant type.

Access to social assistance is intended to provide, at the least, food to people who cannot support themselves. The limits of the human body and the universally accepted etiology of malnourishment impose a broadly acceptable minimum core content on the right to food and the corresponding right of access to social assistance for desperate need. In its most basic form, this must mean sufficient food to avoid the risk of malnutrition or its related illnesses. Examples (c), (d), (e) and (g) of the guidelines are probably intended to provide a workable criterion for this purpose. Pressing social circumstances provide another criterion: the sharp increases in orphans and child headed households are matters of frequent concern where the state has struggled to provide workable solutions. It is clear that the guidelines view such cases as desperately in need of assistance, or where people can be said to be unable to support themselves, or exceptional circumstances causing undue hardship.

The guidelines do not provide any general principles on how to exercise this discretion. Rather than trying to set out principles that could apply generally to identify people in desperate need, the guidelines focus on what the state perceives to be the most pressing social needs, such as AIDS orphanhood and homelessness. The examples demonstrate a wide application of both structural circumstances (homelessness, orphanhood, single parenthood) and events (eviction, child neglect or abandonment) and resultant conditions (symptoms of malnutrition, absence of a nutritious meal and so forth). Where the listed circumstances are no more than ‘examples’, it cannot be said that they constitute new grounds
for qualifying for social relief of distress. The avoidance of any firm statement as to when a person qualifies for social relief as of right reflects the state’s concern at its fiscal commitment to social assistance, and the listed problem-specific solutions can be politically justified. This conservative, ambiguous but development orientated approach will allow practices around assisting families in desperate need to become clearer, but it gives little firm direction to officials and invites pressure to expand the remedy until more concrete criteria are adopted.

The policy guidelines required by the *Dawood* judgment should contain the detail necessary to serve their purpose. This will depend upon the circumstances. The Constitutional Court envisaged that, where a discretion determines access to a fundamental right, the discretion may be framed in broad terms. O’Regan J mentioned three circumstances where this applies: ‘where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible to identify them in advance’, where the factors to be considered ‘are indisputably clear’ or where the decision-maker has the necessary ‘expertise relevant to the decision’. None of these are present here.

The guidelines on undue hardship obviously need refinement and development. In addition to giving examples, they should set out general principles that can be applied in a wide variety of situations. They should define a poverty datum below which the state cannot tolerate a person to be living. What they represent, though, is the first step into a terrain that the state has not previously been prepared to enter. They manifest the progressive realisation of the right of access to social assistance envisaged by s 27(2) of the Constitution, and compel the state to work on and improve on these gains.

Where the state has not been prepared to determine a minimum core content or decide on a poverty datum below which it will intervene and provide social assistance, the guidelines allow for a case-by-case expansion towards that goal as people in a wide range of crisis situations seek help. What is a busy social security official who must make a decision on what is by definition an emergency case to do? It is hard to imagine, in practice, an official who is not simply going to apply the examples. It is also difficult to envisage a court refusing to do likewise. But the listed examples also operate to soften the discretion and make it more tangible for officials. They relate the abstract concepts of ‘unable to support’, or ‘undue hardship’ and ‘exceptional circumstances’ to real social conditions that the social security official knows and understands and the official will more readily be able to extend assistance in comparable situations.

The guidelines provide that assistance cannot be refused if a person is found to be unable to support herself and her dependents. This is an important aspect. First, it avoids a repetition of the control of social relief of distress seen in the past, where very limited resources were made
available in order to exclude claims. An extreme example of this is ten food parcels made available per month to a region of more than 100,000 desperately poor inhabitants.\footnote{This was explained to the author by the chief social worker in Thulamahashi, Limpopo, during 2004. See also \textit{Bacela v MEC for Welfare (Eastern Cape)} 1998 1 All SA 525 (E), where a refusal to pay arrear social grant monies because of ‘serious budgetary constraints’ was given short shrift.} A programme for crisis relief that provides only for those who, quite arbitrarily, are first in the queue is obviously not reasonable. The state must structure its control in such a manner that it enables the benefit to reach those that need it most in a ‘comprehensive and workable’ manner.\footnote{\textit{Grootboom} (note 26 above) paras 38 and 42.} If limited state resources are to be factored into the eligibility criteria in some manner, it must be done rationally, in terms of the qualifying criteria or the amount of the benefit, and not because the benefit has run out.\footnote{\textit{Treatment Action Campaign} (note 40 above).}

Secondly, this provision is important because it gives effect to a positive duty on state officials to give assistance in some form. It is a breach of its duty for the state simply to turn away people in desperate need. This has a procedural and a substantive dimension. A state that is obliged to provide access to social assistance and access to sufficient food is obliged to at least apply its mind to the circumstances of a person in desperate need. The form of assistance may, at the minimum, be only a referral to another agency for help (which, it goes without saying, would have to be known at the time to be effective help and not an empty referral to get rid of the applicant). The corollary is that, if there is no alternative assistance available and the person is in desperate need, then the state cannot deny social relief of distress. It has a positive duty not to allow people to starve or be without access to social assistance where they are in desperate need. The state is a resource of last resort and it has to fulfill that duty.

Where social relief of distress is provided, the applicant who can work or be trained must be referred to agencies which will help him to sustain himself. This requirement is further fleshed out in the procedure to assess cases, which requires that both ‘successful and unsuccessful applications’ be referred to a range of helping organisations ‘to obtain assistance of a sustainable nature’.\footnote{Department of Social Development ‘Procedure Manual’ (note 35 above) p 11.} A central concern in social relief is to avoid dependency. The requirement to refer to agencies to enable people to become self-sustaining is in mandatory terms, but presumably only if such agencies are available and have work or training to offer.

There are inadequate work-related social assistance programmes in South Africa realistically to address widespread poverty and training programmes are not accessible or appropriate to all.\footnote{\textit{Consolidated Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa} (March 2002), 19 (the Taylor Report) para 6.2.4. S Dagut & A Bernstein ‘Labour Intensive Public Works’ (Centre for Development \& Enterprise, 2003).} Although the state
has attempted to provide work for welfare options through its ‘Working for Water’ and ‘Expanded Public Works’ and similar programmes, these are difficult programmes to organise and to manage. The scale on which such programmes are required must be very substantial before they can be seen as a real solution. In addition, they are typically short-term programmes that do not last long enough to provide sustainable incomes. With levels of unemployment in various regions at 80 per cent, the existing and planned programmes clearly cannot provide adequate access to work or income-generating opportunities in order to redress South Africa’s deep poverty, particularly rural poverty. Social relief is the only remedy currently available to fill this gap.

But can it do so? Social relief of distress is by definition short-term relief. The benefits last for only three months, extendable on further application, while many of the examples of beneficiaries in the guidelines are people who are obviously not merely passing through a short-term crisis – women over 50 with no prospect of employment who are waiting for old age grants that will become available only years later or foster children waiting for placement in a notoriously slow process. The guidelines hint that social relief may have to be extended for as long as it is needed, but a discretionary short-term benefit is clearly not the most efficient administrative mechanism for addressing chronic poverty. It is expensive to administer, with the present shortage of social workers it is likely to be delayed and the cost to the applicant of repeated applications — people typically have to pay for the taxi fare to travel to and from the service point where their applications will be received — reduces the benefits and operates as a limitation on access that is not reasonable or justifiable. In time, social relief of distress must bifurcate into two forms of relief: the current short-term crisis relief and a longer-term poverty relief for people living in circumstances where they cannot generate an income needed to attain access to the daily food needed for basic human health and dignity.

III THEMES EMERGING FROM THE LITIGATION

There can be little doubt that the litigation discussed above is significant. It has escaped attention because of the laudable determination of the state to grapple with the normative aspects of these issues directly, rather than be forced to do so by order of court. A number of important themes emerge from these cases and the state’s response to them.

(a) Absence of procedural fairness in the regulations

_Sibuye_48, _Mashishi_49 and _Manganye_50 were all stoppage cases where there was an absence of a reasonable opportunity to make representations on

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48 Note 47 above.
49 Note 11 above.
50 Note 18 above.
administrative action. The social assistance scheme must process cash transfers to some eleven million people each month. Each administrative action relating to an application or a stoppage of a grant is repeated many times over and a small unnecessary cost in the process is multiplied many times over. The processes for stoppages must consequently be efficient and effective and preferably they should be standardised as far as possible. If this is not done, officials in different provinces across the country are required to develop their own procedures and there is an increased risk of a failure of procedural fairness.

The regulations provide the framework within which the system must operate. Ideally, the regulations will describe in detail the most logistically advantageous manner of achieving the standards of administrative justice required by s 3 of PAJA in the context of this system, so that basic routines are as efficient as possible.

One of the startling absences in the regulations under the SAA is that it is almost completely silent on fair administrative procedures. It neither describes the procedure in which beneficiaries may reasonably make representations on the decision to stop a grant, nor does it give guidance for the procedure in appeals. The result is that each official faced with a decision that has a material effect on a beneficiary’s rights is required to apply and adapt the procedure prescribed by s 3(2)(b) of PAJA.

The state faces considerable difficulties in administering hearings to the vast numbers of beneficiaries. These hearings need to be streamlined and focused. It may or may not make it easier to describe their process in great detail in the regulations, but some structure would guide officials and would have assisted the officials and the beneficiaries in the Sibuye, Mashishi and Manganye cases. As matters presently stand, officials are required to apply the general principles of s 3(2)(b) of the PAJA and derive a fair procedure. This must be part of the reason why there has been such a poor record of administrative justice in the delivery of social grants.

The Mashishi, Sibuye and Manganye cases demonstrate that officials cannot be left without guidance in dealing with routine stoppages.

51 The 2004 SAA provides for detailed hearing provisions where a beneficiary leaves the country, and gives some guidance where the abuse of a grant is suspected, but the draft regulations under this SAA are likewise silent on those cases where a hearing will most often be required.

52 This basic procedure provides that the official must give notice of the nature and purpose of the proposed administrative action, a reasonable opportunity to make representations, a clear statement of the decision once taken, notice of any internal appeal or review process with sufficient information of any formal requirements for its enforcement and the right to request reasons for the administrative action.

53 See, for example, Maluleke v MEC for Health, Northern Province 1999 (4) SA 367(T); Rangani v Superintendent General, Department of Health and Welfare, Northern Province 1999 (4) SA 385 (T); Permanent Secretary, Department of Welfare, Eastern Cape v Ngxaza 2001 (4) SA 1184 (SCA) and Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (7) BCLR 728 (E).
(b) The absence of measures to minimise the disruption of benefits

The *Mashishi*, *Sibuye* and *Manganye* cases all arose as a result of the failures of the state’s own systems or the mistakes by the state’s own employees leading to factual errors: the wrongful registration of death, the incorrect classification of disabled beneficiaries suggesting that their disabilities were temporary and the wrongful duplication of identity numbers implying that the person did not exist. While mistakes are unavoidable, there needs to be some provision to ensure that the victim continues to receive social assistance while the difficulty is resolved. Anything less is a breach of the constitutional rights of access to social assistance, to food and to dignity. In each of these cases, it was necessary for the applicants specifically to ask the court to order that they continued to receive benefits while the state remedied its systems.

Social relief of distress could provide a remedy in such a situation. Regulation 26(1)(h) allows for social relief of distress where a person ‘has appealed the suspension of his or her grant’. A beneficiary has no general right of appeal, and even if ‘appealed’ is to be widely understood to include any internal remedy, such as an application for restoration where the beneficiary has failed to collect a grant for more than 90 days, it would not cover the *Sibuye*, *Manganye* or *Mashishi* situations. It can hardly be expected that a beneficiary must meet the stringent requirements of reg 26(3) before receiving the relief that he or she is in any event entitled to under the SAA and the constitution. And social relief is only for a three-month period. It typically takes the state much longer to resolve problems with identity documents. Another strict test must be passed before social relief can be extended, again requiring a social worker’s report. All this takes place at the risk and cost of the indigent beneficiary, who must travel in to the service point to make the application, await the outcome and so forth.

When fragile families are confronted with such economic disasters as the sudden termination of a grant, they often turn to money-lenders to tide them over, at interest rates in excess of 20 per cent per annum. Families then find themselves paying interest on money for food, and later struggling to meet the payments on arrears when the grants are subsequently restored. They lose their meager possessions and enter a cycle of debt that exacerbates their poverty.

This is not a matter where the state is called upon positively to realise

54 Regulation 24(5).
55 Note 17 above.
56 Note 18 above.
57 Note 11 above.
58 As pointed out above in relation to the *Manganye* case (note 18 above), the state now provides relief to people with duplicated identity documents whose applications are pending as ‘awaiting permanent aid’ in terms of reg 26(1), which is stretching the provisions of the regulations. The situation discussed here relates to the unlawful stoppages of such grants.
the right of access to social assistance, and can first look to see if it has the money in its pocket; it requires immediate attention as the state’s own unjust conduct has breached the right of access to social assistance and it is the state’s duty to respect and protect that right. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, which provide a persuasive exposition of internationally accepted norms on socio-economic rights, recognise that states are obligated ‘regardless of the level of economic development, to ensure respect for minimum subsistence rights for all’. Social grants are a minimum subsistence right for most families and the failure to provide interim social assistance to people awaiting redress after an unjust stoppage is not compatible with the due respect and protection of their right of access to social assistance.

The Department of Social Development’s Manual on Social Relief of Distress (discussed above in regard to the Kutumela case59) explains what is meant by ‘awaiting permanent aid’ in reg 26(1)(a). It states that this applies ‘in the case of application and approval of grants including the Foster Child Grant.’60 The state’s practice is not to include appeals as ‘awaiting permanent aid.’ While they may persuade the official that they are facing ‘undue hardship’ in terms of reg 26(3), this category of relief is deserving of more explicit and secure treatment.

The state’s failure to provide interim social assistance immediately to people whose grants have been stopped in circumstances that appear to be unjust, and for as long as the stoppage continues, is almost certainly a breach of its duty to provide access to social assistance. The regulations ought to provide that a responsible official has a discretion to approve such relief, after considering the merits of the applicant’s claim to social assistance and the circumstances of the family. Such a general duty would have protected the Sibuye, Manganye and Bishogo applicants. At the very least, it seems inescapable that, since ‘undue’ means ‘unwarranted or inappropriate because excessive or disproportionate’61 unwarranted stoppages are included in the relief under reg 26(3). The Procedure Manual for Social Relief of Distress should be expanded to at least include these cases.

(c) The duty arising from errors in the population register

The Bishogo,62 Manganye63 and Sibuye64 cases required the Department of Social Development to verify particulars held by the Department of Home Affairs. These particulars are the identities of refugees, the

59 Note 35 above.
60 Para (a) p 2 of the Procedure Manual (note 35 above).
62 Note 23 above.
63 Note 18 above.
64 Note 17 above.
existence of people with duplicated identity numbers, and whether people who were registered as dead may be alive. In the case of Bishogo, no more than access to the database of refugees held by the Department of Home Affairs was required. In the cases of Sibuye and Manganye, a simple investigation leading to a comparison of fingerprints was required.

The SAA makes provision for the necessary mechanisms to do this and indicates which department should take the leadership in initiating the inquiry and taking the eventual administrative decision: s 14 of the SAA authorises the authority vested with administering social assistance to compel information from any person, including the Department of Home Affairs, in the course of taking a decision on the administration of grants. The purpose of the inquiry is to determine whether a person is in need of help and is entitled to social assistance. It is quite a different function from that of the Department of Social Development, which is concerned with maintaining a population register, issuing identity documents and administering the residence of refugees. The Department of Home Affairs does not administer human need, or access to food or nutrition for children. Yet identity documents are so hard-wired into the system that until the requirements of the Department of Home Affairs have been met, there is no process to give access to social assistance.

If it could be said that the Department of Home Affairs’ administration was satisfactory, few would deny that there are considerable benefits in a system based on the certainty of the officially verified information contained in the population register. But the delay and errors of the Department of Home Affairs are notorious, and in these circumstances the administration of social assistance needs to be based on information with a lesser degree of formal certainty than the population register.

Leaving aside the question of whether it is constitutionally proportionate to make qualification for social assistance dependent upon holding an identity document, and if it is assumed that it is reasonable that the SAA and its regulations require that life and death be proven by the population register, then these weightings cover only the routine cases where there is no error. Where the state, in any of its manifestations, has caused an error in the process of providing an otherwise lawful identity document, it cannot avoid liability for social assistance. The Department of Social Development then has a duty to investigate patent errors in identity particulars in the course of exercising its discretion to approve or refuse an application for benefits. If this is not done where there is a patent error in the population register, a host of administrative justice breaches occur: the functionaries under the SAA fail to exercise their discretion under the SAA, access to social assistance is rendered arbitrary because the entitlement to social security is decided by whether Home Affairs has rectified the particulars yet, the decision is irrational and based on irrelevant considerations because the consistency of the data at the Department of Home Affairs is not rationally related to an inability
to maintain oneself and one’s dependents and it is not for the purpose intended by the legislation, since it could never have been intended that human needs for food and sustenance should be put aside while the state resolves its own administrative errors. These are all grounds of review in terms of s 6(2) of PAJA.

The state’s duty in relation to the rights enshrined in the Bill of Rights is to respect, protect, promote and fulfill these rights. Where a right to social assistance is frustrated by the error of the Department of Home Affairs, it is not adequate to tell people in the position of Mr Sibuye or the Manganyes to first rectify their identity documents, even if it takes them years to do so. The state functionaries charged with the duty to respect, protect, promote and fulfill the right of access to social assistance are obliged to take a positive role in remedying the state’s own errors by using their power to investigate to ensure that people retain their access to social assistance. The failure to actively protect in this situation is a failure to take an administrative decision, and is actionable under s 6(2)(g) of PAJA.

(d) The failure to implement the orders

Of the cases discussed in this article, it is really only the Mashishi order that has been properly implemented. There are clear reasons for this. Firstly, the financial burden lay in not implementing the order, and continuing to pay 125,000 undue disability grants. It was only by complying with the court order that the state could continue to stop the grants of supposedly undeserving beneficiaries. Secondly, there was considerable ministerial and treasury pressure at the time to end what was perceived as the payment of fraudulent disability grants. The programme to stop grants was directed by senior managers across all the provinces, and it had broad internal support among the provinces. Thirdly, implementation was neither technically nor financially demanding, and the only obstacle to implementation lay in the state’s internal procedures. The only major challenge to implementation in Mashishi was coordinating the various provincial departments around new agreed procedures when each province held assigned power to administer social assistance.65

The state has not implemented the orders adequately in those cases requiring an amendment to its regulations66 or to its computer systems67 or where a significant commitment of resources is required.68 All these issues concern perhaps difficult policy questions, but not sufficiently

65 These difficulties have been overcome following Mashavha (note 31 above) which set aside the assignment of the administration of social assistance to the provinces and had the effect of re-vesting the administration of social assistance in the national sphere of government.
66 Sibuye (note 17 above) and Bishogo (note 23 above).
67 Manganye (note 18 above).
68 Kutumela (note 28 above).
difficult to justify the degree of delay and prevarication. These cases differ from the Mashishi case in that there was no carrot for the state to implement the orders. The pressure on the state was only negative: if it did not implement, it may be held to be in contempt. The benefit of advancing the social assistance system was not sufficient to motivate the state. The thread through these cases seems inescapable: if the state has something to gain from the court order, it will be motivated to implement it. If it does not, then it is inclined to forget its undertakings in court and can only be moved by repeated pressure. This means that a significant degree of pressure is required to ensure the implementation of administrative justice, and this must be built into the court order.

This conclusion is supported by other litigation. In a recent Supreme Court of Appeal judgment,\textsuperscript{69} Maya AJA spoke of ‘a massive and ever-increasing volume of litigation by thousands of indigent applicants for social assistance seeking relief’ against the state as a result of its failure to comply with the requirements of the SAA and PAJA. This ‘unprecedented phenomenon’, she stated, ‘disrupts the general functioning of the courts’, represents a ‘long-standing crisis’ in the administration of social grants and tells of ‘hardship and frustration’ for the indigent at the hands of the state.

This swathe of litigation on the failure of administrative justice to beneficiaries under the Social Assistance Act is mostly for individual clients, based either on the absence of a hearing before the termination of benefits, or to compel the administration to decide on an application for benefits within a reasonable time. While a handful of these judgments may lay down practical principles in the lawful, reasonable and fair administration of the right of access to social assistance in areas that may have been disputed, most of them simply show poor management. All these experiences indicate that, while there are some understanding of the principles of a culture of accountability and responsiveness, it does not extend to taking responsibility for the active enforcement of administrative justice principles, and this inability is aggravated by technical or political difficulty in implementing the order.

The courts have applied been four broad strategies to redress this. The first is judicial criticism.\textsuperscript{70} An example of this strategy has been Plasket J’s efforts in Vumazonke. He listed the judgments criticising the state’s contempt for orders regarding the mismanagement of grants, set out the constitutional reasons for why this was unacceptable, criticised this conduct and ordered that his judgment be served on the Minister, the

\textsuperscript{69} MEC for the Province of KwaZulu-Natal Responsible for Social Welfare and Development v Machi and others, unreported SCA judgment (case number 333/05).

\textsuperscript{70} Vumazonke v MEC for Social Development, Eastern Cape and three similar cases 2005 (6) SA 229 (SE), para 10; Ngxuza (SCA) (note 53 above) 1194 F and 1197 C; Machi and others v Member of the Executive Committee for Social Welfare and Population Development, KwaZulu-Natal, unreported NPD case number 4392/04.
chairperson of the Social Development Standing Committee of the Eastern Cape Provincial Legislature, the South African Human Rights Commission, the Public Service Commission. Probably influenced to some degree at least by this, the state instituted a programme to redress the management of social assistance in the Eastern Cape, which bore some fruit. But generally, criticism alone is not sustained and is often simply not brought to the attention of the relevant officials. An essential feature of this approach is that the criticism must be coupled with broadcasting or other measures to ensure appropriate shaming. These could include public shaming, or referrals to agencies such as those referred to in Vumazonke. It goes without saying that, at the very least, these sorts of judgments must be brought to the active attention of the official concerned in the context of an environment where shaming is effective: all too often it remains in the State Attorney’s file or in an in-tray or is seen as a slap on the wrist from a bench that is a far remove from the state’s own structures.

Another strategy has been to order the payment of interest on arrear social grant payments. A line of cases have held that the state is liable for interest at the prescribed rate where it fails to pay or approval of a grant application is unreasonably delayed. Interest arising from a delayed payment will be payable from the date on which the applicant was advised of the outcome of his or her application for social assistance. The further interest accruing from the date of application has been awarded as appropriate constitutional damages. The financial incentives to avoid interest on large amounts of arrear monies would normally be sufficient to prod an institution into action. The state does not implement these orders either — again Socpen can apparently not process them — and because the amounts in each individual case remain relatively small, there is insufficient motive for applicants to press for payment.

The most successful intervention to date appears to be in KwaZulu-Natal where Combrink J, exasperated by the effect of thousands of routine applications compelling the state to perform the most basic of administrative justice functions, in addition to a number of specific orders to redress the administrative problems in his department, ordered the responsible Member of the Executive Committee to appear before

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71 As in the widely read and reported Ngxuza judgment of the SCA (note 53 above).
72 Other possible agencies that may be of assistance in relation to social assistance include the President, the Parliamentary Portfolio Committee on Social Development, the Office of Disabled Persons, the Public Protector, opposition parties, talk radio and investigative television, international agencies such as the International Labour Organisation and the African Union.
73 Hlengani Samson Sithole v Superintendent-General of the Health And Welfare of the Northern Province Government, unreported full bench Transvaal Provincial Division judgment in case number A 870/99; Mahambelhala v MEC for Welfare, Eastern Cape 2002 (1) SA 342 (SE); Mbanga v MEC for Welfare, Eastern Cape 2002(1) SA 359 (SE); Member of the Executive Council for Welfare, Eastern Cape v Kate unreported SCA case number 580/04.
74 Kate (SCA) (ibid).
him and explain why he should not be ordered to personally bear the
costs of the matters on the roll on that day. Costs de bonis propriis are
payable where there has been mala fides, unreasonableness or negligence
such that the actions of a person acting in a representative capacity fall
outside the scope of the authority that attaches to his office. There was a
significant improvement in the department. Personal liability and an
individualised focus appears to be the effective cause of this improve-
ment.

In Kutumela, despite the initial delay due to much the same causes, the
policy guidelines are now proceeding to training and implementation. It
has been important in the Kutumela case to be able to compel compliance
with the court order using internal pressure such as the provisions of the
Public Finance Management Act. The PFMA requires an accounting
officer of a department to take measures to contain expenditure,
including measures to effectively manage risk and ensure internal
control. He or she is expected to take ‘effective and appropriate steps’
to prevent unauthorised, irregular and fruitless and wasteful expenditure’
and to report in writing to the treasury on any such expenditure. He or
she is also required to take disciplinary steps against any official
responsible for such expenditure. Gross or wilful non-compliance with
these provisions is a criminal offence. Personal liability for compliance
or cost orders could be structured in this manner. In future public interest
or class actions, it would be wise to ensure that there are adequate orders
to cover each phase of the implementation, and that offices such as the
Auditor General or Public Service Commission be used to enforce
personal liability and monitor implementation by incorporating the
accounting officer’s duties under the PFMA in the order or, if necessary,
using the court to supervise compliance.

Personal accountability could also be achieved using the common law
rule that officials are guilty of the civil crime of contempt of court where
they have wilful caused the state to not pay its judgment debts. An
official who is cited nominally is not liable to be incarcerated where the

75 Machi and others v the Member of the Executive Committee for Social Welfare and Population
Development, KwaZulu-Natal, unreported NPD case number 4392/04.
76 As stated in the judgment by the SCA following the MEC’s appeal against this order. See
MEC for the Province of KwaZulu-Natal Responsible for Social Welfare and Development
v Machi and others unreported SCA judgment in case number 333/05, para 11.
77 Section 38(1)(a) of the PFMA.
78 Section 38(1)(g).
79 Section 38(1)(h)(i).
80 Section 86(1).
81 Member of the Executive Council: Welfare v Kate (SCA) (note 73 above) para 30.
state fails to comply with the judgment. 82 Imprisonment by the specifically responsible official may be an appropriate remedy if the failure is intransigence, but more often it is habituated inattentiveness and incompetence rather than the intransigence required to establish a willful refusal. 83

A fourth strategy has been to require the responsible official to report to court on progress in implementing the judgment so that the court can exercise supervisory jurisdiction. 84

The duty to report to court is only equitable in certain circumstances; typically where non-compliance can be anticipated, where even bona fide non-compliance will be particularly serious and where the terms of the order as so vague that a further process to clarify their content is required. 85 Where the state has consented to an order, or where there is no history of non-compliance in relation to the particular order, the court is unlikely to resort to supervision and this would not have been an appropriate remedy in the Mashishi, 86 Sibuye 87 and Manganye 88 cases. Where the reporting is likely to entail considerable detail or large volumes of data, such as thousands of applications for social grants, the court is likely to be reluctant to assume supervisory functions if an alternative process is available. A possible remedy in such circumstances lies in the state’s own processes of performance management or internal discipline, with the court merely supervising that the state exercises its duty to be accountable and responsive.

(c) The need to integrate court orders into internal management

Appropriate relief calls for a balancing of various interests that may be affected by the remedy. This balancing process must address the wrong in question and ‘strike effectively at its source.’ 89 The methods discussed above amount to little more than making the judgment real for officials who operate in a system that is structurally distant from the courts. If the root cause of the failure of the court orders to redress the difficulties in

82 Jayiya v MEC for Welfare, Eastern Cape Provincial Government 2004 (2) SA 611 (SCA) held that this was not possible on the particular facts before the court, but does not close the door to such a remedy on better facts. See also W Trengove ‘What if the Government Spurns Court Orders?’, paper presented at a conference on ‘A Focus on the Past Ten years of Democracy’, Foundation for Human Rights and the South African Human Rights Commission, Durban, January 2004.
83 See Kent Roach & Geoff Budlender ‘Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?’ (2005) 122 SALJ 325, 346 for a recommended gradation of remedies to suit the nature of the non-compliance.
84 See for example, State v Z and 23 others 2004 (4) BCLR 410 (E).
85 Roach & Budlender (note 83 above) 333.
86 Note 11 above.
87 Note 17 above.
88 Note 18 above.
89 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 96; Hoffman v South African Airways 2001 (1) SA 1 (CC) para 45.
the administration of social grants in the Eastern Cape and KwaZulu-Natal lies in misadministration that can be remedied by discipline or performance management, then a remedy that mobilises these internal procedures would strike effectively at the source of the problem.

If judgments and orders were integrated into state performance management systems, or if officials were disciplined for any non-compliance, it is likely that the level of non-compliance seen in regard to the multitude of cases in the Eastern Cape and KwaZulu-Natal would not occur to the same extent. Perhaps future structural injunctions need to consider methods of introducing the standards of administrative justice laid down by courts into performance management systems or internal discipline. These standards already form part of the state's existing management system. Section 195(1) of the Constitution incorporates administrative justice into its principles governing public administration: the administrative justice obligation to timeously consider applications for social assistance and the corresponding breach of s 6(2)(g) of PAJA (failing to take a decision within a reasonable time) is simultaneously a breach of the principle in s 195(1)(e) of the Constitution that ‘people’s needs must be responded to’ or the principles that public administration must be accountable. The failure to apply procedural fairness in terms of s 3(2)(b) of PAJA, or a decision to stop grants arbitrarily, is a breach of the principle that ‘services must be provided fairly’ in s 195(1)(d) of the constitution.

In addition, these principles form part of the state's own internal management vision. ‘Batho Pele’, a series of service orientated principles that underpin the state's delivery ethic, are premised on the notion that the citizen is a ‘customer’ of the state. The failure to implement court orders timeously breaches, at the very least, the principle that if the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy. These principles also support remedial action where there has been a failure of lawful, reasonable and fair administrative action to a

90 White Paper on Transforming Public Service Delivery (1997) (Batho Pele White Paper). Batho Pele means ‘People First’. The principles are: (1) Citizens should be consulted about the level and quality of the public services they receive and, wherever possible, should be given a choice about the services that are offered. (2) Citizens should be told what level and quality of public services they will receive so that they are aware of what to expect. (3) All citizens should have equal access to the services to which they are entitled. (4) Citizens should be treated with courtesy and consideration. (5) Citizens should be given full, accurate information about the public services they are entitled to receive. (6) Citizens should be told how national and provincial departments are run, how much they cost, and who is in charge. (7) If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response. (8) Public services should be provided economically and efficiently in order to give citizens the best possible value of money. See also s 1(d) of the Constitution.
degree that constitutes more than bona fide and reasonable mistake, or that is repeated.

If the values are shared, why are judgments not routinely integrated into the state’s internal management and control systems? No doubt there are a range of reasons, including that judgments do not always come to the attention of superiors, are not always interpreted as requiring remedial action, or the superiors cannot always isolate a particular staff member as responsible. Moreover, there is no existing practice whereby superiors record the judgments on the file of the responsible official for consideration at the time of merit appraisals or with a view to remedial measures. There probably is no better explanation than that these simple steps do not take place, partially at least because the problem is either so widespread as to have become the habitual practice of the administration, or the problem lies in the lack of adequate systems to manage the caseload of social grant applications and it is recognised that it would not be fair to isolate individual officials for remedial action. All these causes revolve around the absence of a structural link between judicial pronouncements and the responsible official within an environment that will enforce the judgment. If, when determining an appropriate remedy, the court is to ‘carefully analyse the nature of the constitutional infringement, and strike effectively at its source’, it is this link that must be established and asserted, where that is possible. Although the form of such an order will vary according to the precise circumstances, its essence is that the order will compel the administration to apply its internal remedial systems. This may take the form of an analysis indicating that the administration has applied its mind, or it may be more specific in referring an issue to the Auditor General for investigation.

That the state supervises its own management before the court does so is inherent in the proper separation of powers. A court will not wish to deny the executive a margin of discretion to adopt a reasonable policy or procedure for ensuring internal compliance. But the necessity for an outcome that reflects full compliance with the court order is not a matter of policy and the court is obliged to ensure that implementation is effective. To require the state to exercise its discretion to investigate, discipline or assess merit does not offend against the court’s deference to the executive, and the state retains its discretion on the substance of any remedial action. The court merely incorporates the state’s processes into its order.

There are multiple benefits to this type of order. Requiring the state to take steps to investigate the issue internally and report to the court places

91 Fose (note 89 above) para 96; Hoffman v South African Airways (note 89 above) para 45.
93 Pieterse (ibid) 408.
a substantial degree of pressure on the incompetent official within a work environment that is of direct personal importance to him or her and contributes to a culture of accountability, responsiveness and openness. For the director-general to answer to the Auditor-General, or a line-functionary to answer to his superior in a merit assessment sets the scene for a remedial investigation with institutionalised, and hence more sustainable, follow-up procedures. Thirdly, the court can avoid an unduly intrusive order, or the difficulties of the polycentric impact of complex structural injunctions, because the state implements its own control through its existing mechanisms.

It may not be sufficient to order the state to apply its own internal systems. Because such systems are internal, they cannot be readily monitored. By coupling such an order on the responsible official to report to court, the court could compel the state to comply with it. If this were coupled to some form of personal liability, such as Combrink J ordered in the Machi case or the Public Finance Management Act provides, the best-placed official could be compelled to apply his mind to the root cause of the problem in the most cost-effective and efficient manner. An order requiring the state to apply its mind to internal discipline or performance management and report on it would have the further benefit of providing the information necessary for a further round of more carefully structured orders, and compel the state to address its internal culture and systems.

IV CONCLUSION: THE BENEFITS OF NEGOTIATED SETTLEMENTS IN SOCIO-ECONOMIC RIGHTS LITIGATION

Some of the settled cases discussed in this article indicate that there are benefits to negotiation as a strategy to develop the substantive content of socio-economic rights. As a discourse, litigation is aimed at a definitive judicial pronouncement on the facts and the law. Reasonableness operates within such a system of administrative law negatively, merely allowing the court to negate an unacceptable or unjustifiable substantive outcome that the executive has adopted. While it is obviously necessary in some instances to curb unreasonable actions, the use of reasonableness in this manner is generally speaking a weak form of leverage where the real issue is to develop the content of the state’s socio-economic programme. But once the door to negotiation is opened by litigation on socio-economic rights, reasonableness then takes on a different meaning in the ensuing negotiations and the litigator can now motivate for improvements to the programme based on practical logistics and desired outcomes. Litigation can thus provide access to the state’s logistical and policy discourses, provided it can be converted into negotiation.

The ability of the litigation to provide this sort of platform is increased by bringing it as a class action. The parties are then more likely to focus
on general outcomes, where policy and logistical considerations are more dominant. It also helps to frame the relief sought in detail, so that the minds of the parties are focused on practical dynamics and the door is opened to use positive reasonableness as a standard.

Settled class actions also ensure better implementation. They may be less publicised since the state has not ‘lost’ a court case but has created space to be seen to have incrementally adapted and developed its poverty alleviation programme at its own initiative. Even where negotiated gains are sometimes modest, their proper implementation within a coherent state programme can secure a more lasting benefit to the beneficiaries of the system than an empty, impractical court ‘victory’.

Some of the cases discussed in this article demonstrate this shift of discourse from litigation to negotiation, and its benefits. This is essentially true of *Mashishi*, 94 where the state quite quickly removed the discourse from the judicial arena and set up a national task team to generally revise its notification and appeal procedures. In *Kutumela*, 95 the judicial discourse likewise gave way to a policy and logistical discourse on reasonable methods of accommodating people in desperate need within the social assistance system, with an impact considerably beyond what would have been accomplished by a disputed court order.

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94 Note 11 above.
95 Note 28 above.