

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO.: 32799/22

In the matter between:

**TRUSTEES FOR THE TIME BEING
OF THE BLACK SASH TRUST**

Applicant

and

MINISTER OF SOCIAL DEVELOPMENT

First Respondent

MINISTER OF FINANCE

Second Respondent

SOUTH AFRICAN SOCIAL SECURITY AGENCY

Third Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Fourth Respondent

FOUNDING AFFIDAVIT

S.T.K.
[Signature]

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I, the undersigned,

RACHEL BUKASA,

state under oath that:

INTRODUCTION

- 1 I am the National Director of the Black Sash Trust ("*Black Sash*").
- 2 As National Director, I am authorised to bring this application on behalf of the Black Sash and to depose to this affidavit. The resolution recording my authorisation is attached as annexure "FA1".
- 3 The facts deposed to herein are, save where the contrary appears from the context or is stated otherwise, within my personal knowledge and are both true and correct to the best of my belief.
- 4 When I make submissions of a legal nature, I do so on the advice of Black Sash's legal representatives, which I accept as correct. I do not intend thereby to waive any privilege attached to such advice.

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PARTIES AND STANDING

- 5 The applicants are the trustees for the time being of the Black Sash. The Black Sash is a non-party political and non-profit organisation. The Black Sash's Gauteng Regional Office is at Khotso House, 8th Floor, 62 Marshall Street, Johannesburg. The registered address and principal place of business is at Elta House, 3 Caledonian Street, Mowbray, Cape Town.

- 6 The Black Sash seeks to ensure that poor, vulnerable and marginalised people who are the recipients of social grants are treated with dignity, efficiency and due regard to their constitutional and statutory rights.

- 7 For many years, the Black Sash has been engaged in social security and protection, including ensuring that applicants for social grants receive the grants and benefits they are entitled to, timeously. The Black Sash seeks to ensure that the procedures followed by the administration and corporate entities are fair and comply with the requirements of the Constitution, the Social Assistance Act 13 of 2004 ("SAA"), the Social Assistance Regulations, the South Africa Social Security Agency Act 9 of 2004 ("SASSA Act") and the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

- 8 This application is also informed by the Black Sash's ongoing work with the Department of Social Development and the South African Social Security Agency ("SASSA") to ensure the constitutional right to social security and social protection, emphasising social assistance through advocacy, community-based monitoring, research, education and training.

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- 9 The Black Sash seeks the relief in the notice of motion in its own interest in terms of section 38(a) of the Constitution and in the public interest in terms of section 38(d) of the Constitution. The Black Sash also acts in the interests of its members, as contemplated in section 38(e) of the Constitution.
- 10 I submit that the Black Sash has the requisite legal standing to launch this application and seek the relief in the notice of motion.
- 11 The **first respondent** is the Minister of Social Development. She is cited in her official capacity. She and her Department are responsible for the management and oversight of social security, including the provision of social assistance in terms of the SAA and as the Minister that promulgated the Regulations in issue. The address of the first respondent is HSRC Building 134 Pretorius Street, Pretoria. This application will also be served on the Office of the State Attorney, Pretoria, Ground Floor, SALU Building, 316 Thabo Sehume Street, Gauteng.
- 12 The **second respondent** is the Minister of Finance. The Minister of Finance is cited in his official capacity as the head of National Treasury, the department in government responsible for managing South Africa's national government finances. The Minister of Finance's address is 40 Church Square, Pretoria. This application will also be served on the Office of the State Attorney, Pretoria, Ground Floor, SALU Building, 316 Thabo Sehume Street, Gauteng. No relief is sought against the Minister of Finance, and its offices are cited simply because it has an interest in the outcome of this application. The Black Sash will however seek costs against the Minister of Finance if the Minister of Finance chooses to oppose the application.

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- 13 The **third respondent** is the South African Social Security Agency (“SASSA”). SASSA is a juristic entity established in terms of section 2 of the SASSA Act to be the agent to ensure the efficient, effective management, administration and payment of the various social grants created by the provisions of the SAA. SASSA is cited in its capacity as the agency, which, in terms of section 3 of the SAA Act, is responsible for the administration and payment of social security. SASSA’s head office and principal place of business is at SASSA House, 501 Prodinisa Building, corner of Steve Biko and Pretorius Street, Pretoria. No relief is sought against the third respondent, and it is cited simply because it has an interest in the outcome of this application.
- 14 The **fourth respondent** is the President of the Republic of South Africa. The President is cited as the head of state and head of the national executive and the person on whom the executive authority of South Africa is vested. The Minister of Social Development performs executive functions, including implementing legislation and passing of regulations, on the President’s behalf. The President announced that the COVID-19 SRD grants would be available until March 2023. The President’s address is Union Buildings, Government Avenue, Pretoria. This application will also be served on the Office of the State Attorney, Pretoria, Ground Floor, SALU Building, 316 Thabo Sehume Street, Gauteng.
- 15 No relief is sought against the Presidency, and its offices are cited only because it has an interest in the outcome of this application. The Black Sash will however seek costs against the Presidency if the Presidency chooses to oppose the application.

JURISDICTION

16 I respectfully submit that this Honourable Court has jurisdiction to hear the matter because the principal cause of action arises within the jurisdiction of this Honourable Court, where the office of the Minister is situated.

17 This application will also be served on the Office of the State Attorney having jurisdiction in this Court area.

ESSENCE OF THE APPLICATION

18 The Minister of Social Development passed Regulations under section 32 of the SAA to provide for the application for and payment of social assistance grants for social relief of distress caused by a disaster and the requirements or conditions about the eligibility for the social assistance grants (“SAA Regulations”). A copy of the SAA Regulations is attached as annexure “FA2”.

19 The SAA Regulations contain *inter alia* the empowering provisions for the COVID-19 Social Relief of Distress grant of R350.00 (“COVID-19 SRD grant”) which grant was established by the Minister in 2020 and extended over time, including by the President in his State of the Nation speech of 10 February 2022. The current iteration of the grant subsists until end March 2023.

20 This is an application to declare unlawful, review and set aside regulations 2(4), 2(5), 3(2) and 6(c) of the SAA Regulations.

21 The SAA Regulations are unlawful mainly for four reasons:

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- 21.1 **First**, regulation 2(5) of the SAA Regulations reduced the income threshold to qualify for the COVID-19 SRD grant from R595 under the Disaster Management Regulations to R350 under the SAA Regulations. The effect of the reduction is that significant numbers of poor and vulnerable people that received the COVID-19 SRD grant under the Disaster Management Regulations between May 2020 and April 2022 will no longer qualify for the COVID-19 SRD grant under the SAA Regulations. The reduction was not in the draft regulations of February 2022 (*“draft SAA Regulations”*). There was no public consultation on the reduction of the income threshold.
- 21.2 **Second**, regulation 2(4) of the SAA Regulations unfairly prefers information gleaned by SASSA through a *“bank verification”* process over any other information, when assessing an application for receipt of the COVID-19 SRD grant;
- 21.3 **Third**, regulation 3(2) of the SAA Regulations states, *“An application for the Covid-19 Social Relief of Distress must be lodged on the electronic platform”*. This unfairly discriminates against those that qualify in other respects but cannot access electronic appliances, in favour of those who have such access; and
- 21.4 **Fourth**, regulation 6(c) of the SAA Regulations precludes an applicant for a COVID-19 SRD grant from submitting *“any evidence or information which was not provided to the Agency at the time of the application”* when appealing any refusal of that application. This constitutes an unfair process.

22 Consequently, regulations 2(4), 2(5), 3(2) and 6(c) of the SAA Regulations are unlawful and invalid, and I humbly pray this Honourable Court to order as such on the terms outlined in the notice of motion. I now turn to address the relief that the Black Sash seeks in this application. Before doing so, I will demonstrate that this application is inherently urgent and should be heard and decided urgently.

URGENCY

23 This application is inherently urgent and is thus brought on an urgent basis. Significant numbers of poor and vulnerable people will not receive the COVID-19 SRD grant until the application is determined. These include people who would have qualified if the income threshold remained at R595, if the threshold had not been unlawfully and irregularly reduced.

24 If the Black Sash were to seek relief in the ordinary course, significant numbers of poor people would have their constitutional right to social security infringed for longer than is necessary. The Black Sash and the affected beneficiaries will not be afforded substantial redress at a hearing in due course. The continuing infringement of the people's rights is unexplained and unjustified. Significant numbers of people are being deprived of the minimal reprieve for which the monies are meant to provide. The grants are aimed at providing the requisite relief from the sheer deteriorating economic hardship and suffering, particularly experienced by the poor, vulnerable and marginalised of our society, and all of which have been occasioned by the pandemic generally referred to as COVID-19.

- 25 In such circumstances, reducing the income threshold is a regressive measure and should not be allowed.
- 26 For all these reasons, the Black Sash submits that this application should be determined urgently. The Black Sash has elected to proceed in terms of Rule 6 of the Uniform Rules of Court to preclude the long periods associated with a Rule 53 review. I record that the Minister has not furnished the Black Sash with a record of proceedings in relation to the decision to pass the SAA Regulations as contemplated in paragraph 2(3)(a) of the Administrative Review Rules.
- 27 Some periods in Rule 6 have had to be shortened to ensure that the application is determined expeditiously. Black Sash has afforded the respondents slightly less than the regular time periods afforded to them by Rule 6 to give their notices of intention to oppose and file their answering affidavits.
- 28 I submit that the Black Sash acted with the due expedition in launching this application. The Minister published the SAA Regulations on 22 April 2022. Black Sash engaged in correspondence with the Minister: the Black Sash's attorneys of record, the Centre for Applied Legal Studies ("CALS"), addressed a letter to the respondents setting out the irregularities of the SAA Regulations on 26 April 2022 and requested the Minister to cure the irregularities by 6 May 2022. A copy of the letter is attached as "FA3". CALS sent another letter to the respondents on 6 May 2022. A copy of the letter is attached as "FA4".
- 29 The Minister did not respond to any of the Black Sash's correspondence.


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- 30 The Minister has still not responded to the Black Sash's correspondence. It has become apparent that regardless of the glaring unlawfulness of the SAA Regulations and the regressive effect of the SAA Regulations, the Minister was intentional in to proceeding to implement the SAA Regulations.
- 31 The Black Sash accordingly instructed its legal representatives to launch this application. The Black Sash also required and procured input from its internal and external technical experts. The application will be launched on 17 June 2022, approximately six weeks from when it became apparent that the Minister would not respond to the Black Sash's correspondence.
- 32 In any event, it is apparent that the state has, as at the date of signing this affidavit, still not begun the roll-out of the iteration of the COVID-19 SRD grant which is empowered in the SAA Regulations. There is accordingly no prejudice to the respondents.
- 33 In the circumstances, the Black Sash humbly requests that this Court grant prayer 1 of the notice of motion, declaring that the matter is heard urgently and that any truncation of time periods be condoned.
- 34 The Black Sash will seek a direction from the Honourable Deputy Judge President that this matter is set down as a special motion on a date determined by him. The papers are likely to be voluminous, and the issue is of great importance and consequence for significant numbers of people on a daily and continuing basis.

THE BACKGROUND

The need for and purpose of social grants

- 35 Social assistance is a crucial lifeline that the government provides to protect the poor and vulnerable. The popular definition of social assistance is that it refers to government programmes that provide a minimum level of income support to individuals and households living in poverty. These programmes lend support either in the form of direct cash transfers or through a variety of in-kind benefits like food stamps, rent subsidies, and so on. More than 18 million people, or a third of the South African population, receive social grants.
- 36 Since the onset of the COVID-19 pandemic and the national lockdown imposed to curb its spread, South Africa has experienced a heightened economic and inequality crisis.
- 37 According to the government, there are 13.4 million people with no income and 18.3 million people living below the food poverty line. Unemployment is 35.3% (7.9 million people) for the narrow definition and 46.2% (11.7 million people) for the expanded definition. There are 13.6 million people who are not economically active.
- 38 The COVID-19 SRD grant has brought some economic relief for those with no or little income, especially Black women who have been able to acquire some economic independence.

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The COVID-19 SRD grant

- 39 On 15 March 2020, the Minister of Cooperative Government and Traditional Affairs declared the COVID-19 pandemic a national state of disaster in terms of the Disaster Management Act 57 of 2002 (“DMA”).
- 40 On 30 March 2020, the Minister of Social Development in terms of Regulations issued under the DMA issued directions to, in terms of paragraph 3.3 of the directions “. . . provide for measures necessary to manage COVID-19”. In terms of paragraph 3.3 the measures adopted in the directions “are valid for the duration of the declared national state of disaster or any extension thereof”. The directions established *inter alia* an *ad hoc* Social Relief of Distress Grant of R350.00.
- 41 The purpose of the March 2020 directions was to prescribe measures or steps necessary to manage COVID-19 in order to reduce its impact on the country and to provide directions to officials of the Department of Social Development and other organs of state responsible for the implementation of the Social Development mandate.
- 42 The Minister extended the term of the COVID-19 SRD grant on multiple occasions since March 2020. These extensions are in recognition of the fact that the economic crisis stemming from the global COVID-19 pandemic persists.
- 43 On 10 February 2022, President Ramaphosa announced that the COVID-19 SRD grant had been extended to the end of March 2023 in the State of the Nation Address. A copy of the announcement is attached as “FA5”.

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- 44 The COVID-19 SRD grant is however only available to persons who are not already receiving any other form of social grant or social assistance from the State, other than those persons receiving a child support grant as the parent/guardian of a child.
- 45 On 4 April 2022, the Regulations under the DMA were amended to reflect, *inter alia* that, in the event of the termination of the State of Disaster, the Directions governing the COVID-19 SRD grant would nevertheless subsist for one month thereafter. These Regulations are attached as annexure “FA6”. The state of disaster was then terminated.
- 46 This grace period allowed the Department of Social Development to promulgate its own Regulations, under the SAA, empowering the COVID-19 SRD grant going forward.
- 47 The Minister published the draft SAA Regulations under the SAA dated 22 February 2022. A copy of the draft SAA Regulations is attached as annexure “FA7”.
- 48 The Minister invited interested parties to comment on the draft Regulations. CALS and the Black Sash submitted comments on those draft Regulations in March 2022. Those comments are attached as annexures “FA8” and “FA9”, respectively.
- 49 The Minister passed the SAA Regulations on 22 April 2022.
- 50 The SAA Regulations provide that applications for the COVID-19 SRD grant must be submitted anew.

51 The Black Sash considers that the following regulations are unlawful and regressive:

51.1 Regulation 2(4) of the SAA Regulations provides:

“If the results from the bank verification referred in sub-regulation (3)(c)(ii) contradicts the results from the data checks referred to in sub-regulation (3)(c)(i), the results from the bank verification must be used to make the final determination.”

51.2 Regulation 2(5) of the SAA Regulations states: *“The income threshold for insufficient means, contemplated in this regulation, is R350 per person per month”.*

51.3 Regulation 3(2) of the SAA Regulations: *“An application for the Covid-19 Social Relief of Distress must be lodged on the electronic platform”.*

51.4 Regulation 6(c) of the SAA Regulations: *“when lodging an appeal, the applicant or the person acting on his or her behalf may not submit any evidence or information which was not provided to the Agency at the time of the application”.*

52 A copy of the SAA Regulations is already attached as annexure “FA2”.


STATUTORY SCHEME

53 Section 27(1)(c) and (2) of the Constitution provide:

“(1) Everyone has the right to have access to—

...

- (c) *social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.*
- (2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*

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- 54 The regime by which the state realises the rights to social assistance as set out in section 27 is the SAA and the SASSA Act as contemplated in section 27(2) of the Constitution.
- 55 The SAA provides for the Minister's powers when deciding to grant social assistance grants.
- 56 In relation to determining eligibility for a social assistance grant, section 5(2) of the SAA provides for the requirements as follows:

“(2) The Minister may prescribe additional requirements or conditions in respect of—

- (a) income thresholds;*
- (b) means testing;*
- (c) age limits, disabilities and care dependency;*
- (d) proof of and measures to establish or verify identity, gender, age, citizenship, family relationships, care dependency, disabilities, foster child and war veterans' status;*
- (e) forms, procedures and processes for applications and payments;*
- (f) measures to prevent fraud and abuse.”*

GROUNDINGS OF REVIEW

- 57 I am advised that making regulations by a Minister constitutes administrative action under PAJA.
- 58 In this case, we are dealing with a decision which was taken by the Minister (an organ of state) exercising a public power or performing a public function in terms of legislation (the SAA) which adversely affects the rights of persons and which has a direct, external legal effect on individuals including beneficiaries of the COVID-19

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SRD grant who qualified under the previous threshold; beneficiaries who currently qualify for the COVID-19 SRD grant but cannot apply online; and rejected applicants for the COVID-19 SRD grant who seek to appeal that rejection. These persons are adversely affected by the Minister's decision because they will now not be able to receive the COVID-19 SRD grant.

59 Regulations 2(4), 2(5), 3(2) and 6(c) of the SAA Regulations are reviewable under PAJA on at least these grounds:

59.1 **First**, the Minister failed to conduct meaningful consultation about the new income threshold under regulation 2(5). This tainted the SAA Regulations with procedural unfairness under PAJA or with procedural irrationality under the principle of legality.

59.2 **Second**, regulations 2(4), 2(5) and 3(2) of the SAA Regulations are irrational:

59.2.1 The regulations are not rationally connected to the purpose for which they were promulgated: providing social assistance for people with insufficient means.

59.2.2 Preferring information obtained through a bank verification process over other information an applicant provides is unreasonable.

59.2.3 Regulations 2(4), 2(5), and 3(2) are accordingly reviewable in terms of sections 6(2)(f)(ii)(aa) and (bb) of PAJA.

59.3 **Third**, the new threshold is unreasonable. The new threshold is thus reviewable in terms of section 6(2)(h) of PAJA. The new income threshold

under regulation 2(5) is arbitrary. Accordingly, regulation 2(5) is reviewable in terms of section 6(2)(e)(vi) of PAJA.

59.4 **Fourth**, regulations 2(4) and 3(2) unfairly differentiate between qualifying beneficiaries who require social grant assistance but do not have access to electronic technology facilities and those that qualify and have the electronic means. The differentiation is unjustifiable and an unreasonable contravention of sections 9(1) and 9(2) of the Constitution. This renders the decision reviewable in terms of section 6(2)(i) of PAJA).

59.5 **Fifth**, the prohibition against applicant beneficiaries submitting new material relevant to their application on appeal in terms of regulation 6(c) is unreasonable and an unjustifiable limitation of an applicant's right to a full merits review of a decision.

60 I am advised that the Black Sash will supplement these grounds of review once the Minister complies with paragraph 2(3)(a) of the Administrative Review Rules and provides a record.

61 I describe these grounds of review in more detail under the headings that follow.

The Minister failed to consult about the reduction of the income threshold

62 Regulation 2(5) of the SAA Regulations says: "*The income threshold for insufficient means, contemplated in this regulation, is R350 per person per month*".

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- 63 Before the SAA Regulations, the COVID-19 SRD grant was available to people who qualified with an income threshold of below R595 per month. The new threshold of R350 is significantly lower.
- 64 The Minister did not include the reduced income threshold in the draft SAA Regulations. The public, including the Black Sash and CALS, was not afforded an opportunity to comment on the issue. The Minister also did not make the changes which the Black Sash and CALS proposed in their written submission on the SAA Regulations.
- 65 The Minister should have made provision for comment on regulation 2(5) of the SAA Regulations.
- 66 Section 4 of PAJA provides notice and comment procedures to be followed or public inquiries to be held where administrative action “*materially and adversely affects the rights of the public*”. The departure from the notice and comment procedure was not reasonable and justifiable in the circumstances. The amendment has far-reaching adverse consequences for the most financially vulnerable people in South Africa.
- 67 The SAA Regulations are accordingly, among other things, unfair and retrogressive.

Regulations 2(4), 2(5), (3(2) and 6(c) are irrational and arbitrary

- 68 The stated purpose of the COVID-19 SRD grant is to provide social assistance to people with insufficient means – which the government found to be people earning less than R595 per month. The SAA Regulations reduced the income threshold for

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determining whether applicants lack sufficient means and qualify to claim the COVID-19 SRD grant from R595 to R350. There is no explanation for the reduction, especially in the light of intervening circumstances that have resulted in an increase in the cost of living caused by, amongst other factors, inflation since the advent of the COVID-19 SRD grant.

- 69 The reduction is not connected to the purpose of the SAA Regulations, namely to provide social assistance to people with insufficient means.
- 70 The introduction of digital technology in the administration of social assistance can and will continue to entrench economic and racial inequality if not managed carefully and balanced with the issues of access.
- 71 Some qualifying beneficiaries and recipients do not own or have access to digital technology, including devices (i.e., laptop, desktop, cell phone); interconnectivity (i.e., WIFI, modems and opportunities to hotspot) or data to participate and access the social grants for which they are eligible. Nor do they have email accounts. For example, information or digital technology in rural communities and villages and townships is almost non-existent. Other hindrances or barriers confronting poorer and economically challenged persons are the high data costs and the lack of digital literacy.
- 72 It is not rational – nor is it even reasonable – to expect people who earn this little to have the necessary digital technology, including devices (i.e., laptop, desktop, cell phone); interconnectivity (i.e., WIFI, modems and opportunities to hotspot) or data to participate and access the social grants for which they are eligible.

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- 73 The SAA Regulations should provide for the choice to access SASSA's facilities in person to submit an application, lodge a complaint or access payment and recourse. SASSA offices must be open to all beneficiaries, and prospective beneficiaries must have access to front-line services.
- 74 The right to social security must prevail over electronic tools, which might have the unintended effect of diminishing this right. Furthermore, electronic tools must not diminish the right to administrative justice (and recourse).
- 75 Furthermore, most people cannot afford bank accounts for various reasons, including the inability to pay the costs of retaining such a bank account: they do not have enough means to survive.
- 76 The new income threshold and the differentiation are also arbitrary. The decision to reduce the income threshold is accordingly reviewable in terms of section 6(2)(e)(vi) of PAJA.
- 77 This ground of review can also be accommodated under the principle of legality.
- 78 Regulation 2(4) privileges the results of a "*bank verification*" of a grant applicant's means over any other information provided by the applicant to assess whether the applicant qualifies as a beneficiary of the COVID-19 SRD grant. This constitutes, among other things, unfair discrimination on an arbitrary basis.

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- 79 The SAA Regulations are also so unreasonable that no reasonable person could have taken the decision in those terms, and the decision falls to be reviewed and set aside in terms of section 6(2)(h) of PAJA.
- 80 This ground of review can also be accommodated under the principle of legality. Appropriate legal argument will be made in support of these legal submissions at the hearing of this application.
- 81 As a result of the irrationality of the new income threshold, the Minister's decision to pass the SAA Regulations falls to be reviewed and set aside in terms of sections 6(2)(f)(ii)(aa) and (bb) of PAJA.
- 82 This ground of review can also be accommodated under the principle of legality.

Regulations 2(4) and 3(2) are otherwise unconstitutional or unlawful

- 83 Regulations 2(4) and 3(2) have the effect of differentiating between qualifying beneficiaries that do not own or have access to digital technology, including devices (i.e., laptop, desktop, cell phone); interconnectivity (i.e., WIFI, modems and opportunities to hotspot) or data to participate and access the social grants for which they are eligible nor do they have an email account, on the one hand, and those that do. Further it is not clear whether access to the benefits is strictly on the basis that **all** the requirements must be met. For example, it appears to be clear that the impugned decision contemplates that all the requirements must be met – access through technological devices, bank account, and so on – and that access would not be achieved even if the only condition that was not met was, for example, the lack of a

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banking account, even if all the other requirements have been met. For that, the decision falls to be set aside as being unreasonable and or unlawful under the legality principle.

84 The differentiation occurs without any rational connection to a legitimate governmental purpose. The differentiation is unfairly discriminatory; it is an unjustifiable and unreasonable contravention of section 9(1) of the Constitution.

85 The Black Sash submits that the differentiation is discrimination as contemplated in section 9(2) of the Constitution, and the discrimination is unfair. The substantively unfair discrimination is on the grounds of gender and race because the majority of the beneficiaries of the COVID-19 SRD grant beneficiaries are Black and/or women. The differentiation is irrational and unreasonable: it is discrimination against women because of their gender. The COVID-19 SRD grants have been a critical intervention that has helped millions of families put food on the table in a period of massive job losses and humanitarian crisis. The exclusion of Black persons and/or women from benefiting from this much-needed relief is unjustified and violates women's right to social assistance.

86 Regulation 3(2) states that "*An application for the Covid-19 Social Relief of Distress must be lodged on the electronic platform*". An exclusively electronic application system unfairly discriminates against grant applicants who cannot access the online platform, and this was highlighted as an issue in the Black Sash's prior correspondences with the Minister.

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87 Accordingly, regulations 2(4) and 3(2) are reviewable in terms of section 6(2)(i) of PAJA. This ground of review can also be accommodated under the principle of legality.

Regulation 6(c) unjustifiably breaches the right to a full merits review of a decision

88 An appeal of a refusal to accept and approve an applicant beneficiary's application is a "*wide appeal*". The appeal to an Independent Tribunal is a complete re-hearing or reconsideration of the application on appeal. The merits of SASSA's administrative decision to refuse the application are reconsidered and re-determined by the Independent Tribunal at the request of an aggrieved person. The appeal involves a *de novo* reconsideration of the matter as if there had not been a previous decision by SASSA, with no restrictions on the material which the Independent Tribunal may consider and no restriction on the type of decision which the Independent Tribunal may make.

89 A right to a full merits review of a decision is the right of an applicant to put any relevant material whatsoever before a review body which has the power to substitute its own decision for that of the original decision-maker. The Independent Tribunal should accordingly be allowed to consider any evidence that may assist it to come to a just and factually sound outcome. The applicant beneficiary on appeal should thus be allowed to present new evidence, especially evidence about the change in the applicant beneficiary's financial circumstances. Most of the applicant beneficiaries are employed or trade in the informal sector or have temporary employment, both of which are sporadic and may change at short notice, rendering an otherwise ineligible person now eligible for the COVID-19 SRD grant. It is thus possible that new

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evidence that would confirm the applicant beneficiary's eligibility may be relevant for determining that applicant beneficiary's application, which new evidence should accordingly be admissible on appeal.

- 90 The prohibition in regulation 6(c) is unreasonable and an unjust limitation of an applicant beneficiary's right to a full merits review of a decision.

REMEDY

- 91 The primary remedy that the Black Sash seeks is the setting aside of regulations 2(4), 2(5), 3(2) and 6(c) of the SAA Regulations. I aver that this would be just and equitable because regulations 2(4), 2(5), 3(2) and 6(c) of the SAA Regulations constitute an unjustifiable and unconstitutional limitation of the right to social assistance that serve no legitimate purpose.
- 92 In the alternative, and only if the Court is not inclined to set aside regulations 2(4), 2(5), 3(2) and 6(c) of the SAA Regulations in their entirety, I submit that this Court should declare that regulations 2(4), 2(5), 3(2) and 6(c) of the SAA Regulations are invalid.
- 93 I am advised that if the Court finds that the regulations 2(4), 2(5), 3(2) and 6(c) of the SAA Regulations are unconstitutional, the Court has the discretion to make any appropriate order that is just and equitable in the circumstances. Full argument will be advanced at the hearing of this application.
- 94 The appropriate remedial measure is to read words into regulations 2(4), 2(5), 3(2) and 6(c) of the SAA Regulations to replace the income threshold with the old threshold of

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R595; provide for submitting applications in various ways other than electronically; not privilege bank verification information; and allow rejected grant applicants to submit new documents and information on appeal. The impugned SAA Regulations should thus be read to include beneficiaries that previously qualified and in a manner that avoids the irregularities raised in this application.

95 The Black Sash does not ask for an order setting aside the SAA Regulations in their entirety because of the adverse consequences that a lacuna would create to millions of COVID-19 SRD grant beneficiaries.

96 The Black Sash asks that the Court should order that the significant numbers of poor and vulnerable people that did not receive their COVID-19 SRD grants as a result of the unlawful requirements in the SAA Regulations should receive payment of the COVID-19 SRD grants for the months they did not receive the COVID-19 SRD grants: from when beneficiaries that previously qualified last received their COVID-19 SRD grants to the date of the order of this Court. The payments should be made with interest at the prescribed legal rate of 7.25 % per annum *a tempore morae*. This would be a just and appropriate remedy in the circumstances and would not place an undue burden on the state in the light of the low value of the grants the beneficiaries would have obtained.

CONCLUSION

97 I am advised that the applicant should have launched the proceedings seeking to review the Minister's decision within a reasonable time from when the decision was made.

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98 The Minister passed the SAA Regulations in April 2022. The Black Sash launched this application within a reasonable time. Most importantly, the Black Sash launched within 180 days from when the Minister took the irregular decision.

99 Therefore, I submit that regulations 2(4), 2(5), 3(2) and 6(c) of the SAA Regulations are unlawful and invalid and should be set aside.

100 The Court should order the respondents to pay the Black Sash's costs, including the costs of two counsel.

101 If the Black Sash is unsuccessful and the application is dismissed, the *Biowatch* principle should apply: the Black Sash should not be ordered to pay the respondents' costs because the application seeks to vindicate constitutional rights and is brought in the public interest. Each party must then pay its own costs as no exceptional circumstances warrant ordering the Black Sash to pay the respondents' costs.

WHEREFORE, the Black Sash prays for the relief set out in the notice of motion.


RACHEL BUKASA

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is, to the best of the deponent's knowledge, both true and correct. This affidavit was signed and sworn to before me at Mowday on this the 16 day of **JUNE 2022**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as

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amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

Project 11-0
1/12/12-12/12/12
COMMISSIONER OF OATHS
Full names: *K. M. T. S. S. K. M. S. N. M. S. P. P.*
Address: *22 Mowbray*
Capacity: *Constable*



SK