The Khosa case – opening the door for the inclusion of all children in the child support grant?

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1 Introduction

Section 27(1)(c) of the Constitution of the Republic of South Africa, 1996⁴ states that ‘everyone has the right to have access to social security,’⁵ including, if they are unable to support themselves and their dependants, appropriate social assistance’. Section 27(1)(c) is textually linked⁶ to section 27(2), which internally limits the obligation of the state such that it only needs to ‘… take reasonable legislative and other measures, within its available resources, to

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⁵Hereafter referred to as the Constitution.

⁶According to the Social Welfare White Paper (White Paper for Social Welfare GN 1108 in GG 18166 of 8 August 1997) Social security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual’s earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children. The domains of social security are: poverty prevention, poverty alleviation, social compensation and income distribution (Ch 7 para 1). The glossary in the Social Welfare White Paper identifies the following branches of social security and equates social security with social protection: ‘Policies which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes providing for their basic needs. State social assistance (grants) includes the following four categories of benefits: those associated with old age, disability, child and family care and poor relief’. The White Paper sets out the principles, guidelines, proposed policies and programmes for developmental social welfare in South Africa. As the primary policy document, the White Paper serves as the foundation for social welfare in the post 1994 era.

⁷As discussed in Minister of Health v Treatment Action Campaign 2002 10 BCLR 1033 (CC) (hereinafter TAC) para 30.
achieve the *progressive realisation* of [this] right*.4 Section 28(1)(c) further grants every child the right to social services. Section 27(1)(c) and 28(1)(c) can be categorised as socio-economic rights,5 similar to the right to have access to adequate housing, health care, sufficient food and water as well as the right of children to basic nutrition, shelter and basic health care services. They place positive obligations on government to take positive action to realise these rights.

In a number of cases6 the Constitutional Court dealt with these rights7 and concluded that they are indeed justiciable.8 The question facing the court with regard to socio-economic rights is not whether these rights are justiciable, but to what extent they are justiciable.9 In two recent cases, *Khosa v Minister of Social Development*10 and *Mahlaule v Minister of Social Development*11 the court addressed the constitutionality of some of the provisions in the Social Assistance Act12 and in effect addressed the requirements to qualify for some of the social assistance grants in the permanent grant administration process in South Africa.

The applicants in both cases are permanent residents. The applicant in the *Khosa* case challenged section 3(c) of the Social Assistance Act because it reserves grants for the elderly for South African citizens and thereby excludes permanent residents. In the *Mahlaule* case section 4(b)(ii) and 4(B)(ii)13 of the

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4Own emphasis.
5This categorisation is of course purely theoretical as the Bill of Rights follows a non-hierarchical approach to fundamental rights and makes no reference to the traditional division between first, second and third generation rights. It must further be recognised that these rights are all interdependent and mutually related; De Vos ‘Grootboom, the right of access to housing and substantive equality as contextual fairness’ (2001) 13 *SAJHR* 258.
7In particular the rights to adequate housing (s 26(1)) and health care services (s 27(1)(a)).
8In *Grootboom* (n 6) the court remarked: ‘Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state “to respect, protect, promote and fulfil the rights in the Bill of Rights” and the courts are constitutionally bound to ensure that they are protected and fulfilled’.
10CCT 12/03 heard on 13 and 30 May 2003 and decided on 4 March 2004. The Constitutional Court decided this case together with the *Mahlaule* matter (n 11). The judgment for both cases is reported as *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) (hereinafter *Khosa*).
11CCT 13/03 heard on 13 and 30 May 2003 and decided on 4 March 2004.
13Two remarks are important in respect to s 4B(b)(ii): Firstly, when *Khosa* was decided this section had not been enacted. S 4B(b)(ii) will be introduced by s 3 of the Welfare Laws
Social Assistance Act was challenged because it reserves child support grants and care-dependency grants for South African citizens, again excluding permanent residents. The applicants in both matters would have qualified for social assistance except for the fact that they did not meet the citizenship requirement. Because the two matters were related and involved similar considerations and arguments of law, they were heard together both in the High Court and the Constitutional Court. The Constitutional Court found the impugned provisions to be unconstitutional, emphasising the fact that permanent residents are a vulnerable group and that they need special constitutional protection.

The aim of this article is to examine the reasons why the court in Khosa declared the mentioned provisions of the Social Assistance Act unconstitutional and further to highlight the consequence of the court’s findings. The implications of this case for the new Social Assistance Act are also referred to. For purposes of this discussion I focus on children and their exclusion from the social assistance system because of their age. I argue that the exclusion presently of children from 12 to 18 years from the child support grant is unconstitutional, because children are a particular vulnerable group in

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14 Khosa (n 10) para 1.
15 Id para 3.
16 See (n 10).
17 The cases are discussed in detail below.
18 13 of 2004 (hereinafter the new Social Assistance Act). At the time of writing the new Act had not yet entered into operation.
society and it is the state’s constitutional duty to provide for these children where their parents do not have the means to do so. 19

Before discussing these cases I give a short background on social assistance grants in South Africa.

2 Social assistance legislation in South Africa

2.1 The current social assistance system in South Africa

Section 2 of the Social Assistance Act 20 as amended by the Welfare Laws Amendment Act 21 provides for grants to be paid to the following persons:

(a) social grants to – aged persons 22 and disabled persons 23 and to war veterans;

(b) in addition to a social grant, a grant-in-aid to or on behalf of any person referred to in paragraph (a) who is in such a physical or mental condition that he or she requires regular attendance by any person;

(c) in addition to social grants and grants-in-aid, supplementary grants to war veterans;

(d) a child-support grant to a primary caregiver of a child who is under the age of seven years or such higher age as the Minister may determine by notice in the Gazette; 24

(e) a foster child grant to a foster parent;

(f) a care-dependency grant to a parent or foster parent in respect of a care-dependent child. 25

Permanent social assistance grants in South Africa covers children from infancy to 10 years (Child Support Grant); children in foster care (Foster Child Grant); people with disabilities (Disability Grant); children with disabilities (Care-dependency Grant), the elderly (Old Age Grant) and war veterans. In addition to the Old Age, War Veterans and Disability Grant one can apply for

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19 Grootboom (n 6) para 78-79. See TAC (n 3) para 77-78.
20 (N 12).
21 (N 12).
22 Available for women from 60 and men from 65 years.
23 Persons over 18 years. ‘Disabled person’ means any person who has attained the prescribed age and is, owing to his or her physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance; s 1 of the Social Assistance Act (n 12) as amended by the Welfare Laws Amendment Act (n 12).
24 Government is in the process of extending the Child Support Grant (CSG) in phases to children under the age of 14 years over a period of 3 years. S 4(1) of the Social Assistance Act (n 12) as amended by the Welfare Laws Amendment Act (n 12). See R 460 in GG 24630 of 31 March 2003. See below for full discussion.
25 ‘Care-dependent child’ means a child between the ages of one and 18 years who requires and receives permanent home care due to his or her severe mental or physical disability. S 1 of the Social Assistance Act (n 12) as amended by the Welfare Laws Amendment Act (n 12).
a Grant-in-Aid. A Grant-in-Aid is available for a person who requires full time assistance from another person owing to his/her mental or physical disabilities, who is not in care of an institution. This entire grant system is subject to different strict means tests under the Social Assistance Act.

In the case of social grants for the elderly, war veterans and the disabled, these persons must be resident in the country, must (before Khosa) be South African citizens and must comply with the means test. They can also apply for grant-in-aid if they are in such a physical or mental condition that they require regular attendance by any person.

The Child Support Grant is payable to a primary caregiver of a child under the age of eleven years. Government is in the process of extending the child support grant in phases to children under the age of 14 years over a period of 3 years. The first phase was from 1st April 2003 to 31st March 2004. Primary caregivers of children under the age of 9 applied for the child support grant during this phase. The second phase is from April 2004 to 31st March 2005. Primary caregivers of children under the age of 11 may apply for the child support grant during this phase. The final phase will be from April 2005 to 31st March 2006. Primary caregivers of children under the age of 14 may apply for the child support grant at this stage. The primary caregiver and the child must both be resident in South Africa at the time of the application for the child support grant and (before Khosa) they must both be South African citizens.

The foster child grant is payable to a person in whose custody a foster child has been placed in terms of the Child Care Act 74 of 1983 or the Criminal Procedure Act 51 of 1977 or who is a tutor in terms of the Administration of

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26S 3 of the Social Assistance Act (n 12) and s 3 as it appears in the Welfare Amendment Act (n 12).
27S 2(b) of the Social Assistance Act (n 12) as amended by the Welfare Laws Amendment Act (n 12).
28The primary caregiver, ‘in relation to a child, means a person, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child, but excludes – (a) a person who receives remuneration, or an institution which receives an award, for taking care of the child; or (b) a person who does not have an implied or express consent of a parent, guardian or custodian of the child’. S 1 of the Social Assistance Act (n 12) as amended by the Welfare Laws Amendment Act (n 12).
29Child’ means any person under the age of 18 years. This is similar to s 28(3) of the Bill of Rights in the South African Constitution that defines a ‘child’ as a person under the age of 18 years.
30S 4(1) of the Social Assistance Act (n 12) as amended by the Welfare Laws Amendment Act (n 12).
32According to s 4(b)(ii) of the Social Assistance Act (n 12) as amended by the Welfare Laws Amendment Act (n 12).
In order to qualify for the foster child grant, both the foster parent and child must be resident in South Africa at the time of application and they must comply with prescribed conditions. The foster child grant is available to children from one year to 18 years, unless the child is still at school and under the age of 21. There is no requirement that the foster parent and the child must be South African citizens.

The last social grant is the care-dependency grant. As in the case of the child support grant, the care dependency grant (before Khosa) also required the applicant and the child to be South African citizens. The care dependency grant is payable to the legal parent, custodian, guardian or foster parent of a child from infancy to 18 years, that is so severely mentally or physically disabled, that the child must receive permanent home care. The parents of such a child as well as the care dependent child must be resident in South Africa at the time of the application.

From the above analysis it is clear that, before Khosa, non-citizens were excluded from the following grants:

- the Old Age Grant, War Veterans Grant, Disability Grant and additional to this the Grant in Aid;
- the Child Support Grant;
- the Care-dependency Grant.

### 2.2 The new Social Assistance Act

The new Social Assistance Act is aimed at consolidating legal requirements and provisions for social assistance in the Republic, and to create uniform norms and standards, which can apply countrywide. The new Act makes
provision for the following grants: child support grant, care dependency grant, foster child grant, disability grant, older person’s grant, war veteran’s grant and a grant-in-aid. The current system provides for exactly the same grants. The Department of Social Development in briefing the Portfolio Committee on Social Development indicated that it will not be making any policy shifts in the new Social Assistance Act and that the bill was tabled to remove the assignment to the provinces as indicated in the Memorandum.

To be entitled to one of these grants the new Act requires the person to be a South African citizen or a member of a group or category of persons prescribed by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette. In a Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Act referring to the then pending judgments in Khosa, it was proposed that permanent residents be afforded access to the grants.

The next step in this discussion is to establish why the court in Khosa declared the mentioned provisions of the Social Assistance Act unconstitutional.

3 The High Court Order

The case before the High Court was unopposed. The judge made an order without providing reasons. The order of the High Court was intended to oblige the state to provide social assistance under the Social Assistance Act to all ‘residents’ who qualify for such assistance, irrespective of their citizenship.

This order by the High Court may be considered controversial for a number
of reasons, first of all because the High Court referred to residents irrespective of whether they are permanent or temporary residents, thus further widening the scope of coverage of the social grant system. Secondly, the Court gave no reasons for the order of invalidity. Thirdly, and on a more technical level, the High Court declared a provision, namely section 4B(ii) of the Social Assistance Act as amended by the Welfare Laws Amendment Act, that had not yet come into force, unconstitutional.53

The order of the High Court had no force unless the Constitutional Court confirmed it.54 Because the High Court didn’t give reasons for its order, the Constitutional Court decided to deal with the matter and to provide reasons because of the importance of the matter and the far-reaching implications of the order.55 The Constitutional Court56 emphasised the urgency of the matter as follows:

Public interest dictates that there should be certainty as to the constitutionality of legislation, and the operation of an order of constitutional invalidity, a matter which falls squarely within the jurisdiction of this Court, should therefore not be held in abeyance for longer than is necessary. Here this concern was heightened by the fact that the applicants are indigent persons who find themselves in dire circumstances. There was therefore a need to bring these proceedings to a close.57

4 The Constitutional Court

4.1 Applicants’ arguments

The applicants based their arguments on the exclusion of ‘all non-citizens’ including permanent residents.58 They referred to the wording of section 27(1)(c) which expressly states that ‘everyone’ has the right to access to social security and social assistance and not ‘every citizen’, thereby arguing that excluding non-citizens infringed on their rights to access to social security and assistance (s 27(1)(c)), equality (s 9),59 life (s 11) and dignity (s 10). As far as their children are concerned they argued that in addition their rights under section 28 had been infringed.60

53This, according to the Court, is a wrong referral until the section is promulgated. However, for the sake of convenience, the Court decided to refer to the impugned section as s 4B(b)(ii), as it appears in section 3 of the Welfare Laws Amendment Act. Khosa (n 10) para 11.
54Where the High Court declares national legislation unconstitutional, the Constitutional Court must confirm an order of constitutional invalidity (S 172(2)(c) of the Constitution).
55Khosa (n 10) para 10.
56Id para 24.
57Own emphasis.
58Khosa (n 10) para 39.
59According to the applicants this was unjustifiable under the general limitation clause; ibid.
60Id paras 38 and 39.
4.2 Special approach

The Court referred to the foundational values in the Constitution, namely human dignity, equality and freedom. It recognised that all rights are interdependent, mutually related and equally important and emphasised that this specific case concerned intersecting rights which reinforce one another at the point of intersection. The implication of this remark in this particular case, is the fact that a number of rights are alleged to be infringed and this requires that the Court adopt a special approach. The Court recognised in a later comment that section 27(1)(c) and 27(2) are textually linked and comments that:

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

The Court remarked that where the state argues that they cannot afford to pay benefits to everyone entitled under section 27(1)(c) the criteria for excluding a specific group, for example permanent residents, must be consistent with the Bill of Rights as a whole. As indicated the state chose to differentiate between citizens and non-citizens in their social assistance legislation. The Court remarked that this differentiation must be constitutionally valid and cannot be arbitrary, irrational or manifest a naked preference:

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

4.3 Interpreting ‘everyone’

The Court used the purposive approach to interpretation to explain the meaning...
of ‘everyone’ in section 27(1). Referring to section 7(1) of the Constitution the Court came to the conclusion that it includes ‘all people in our country’.\textsuperscript{68} In examining the meaning of ‘everyone’ for purposes of this case, the Court further distinguished between non-citizens in South Africa who are supported by sponsors who arranged their immigration and those who acquired permanent residence status without having any financial support by way of sponsors in South Africa.\textsuperscript{69} The Court reasoned that it might be reasonable to exclude citizens from other countries, visitors and illegal residents, who have only a tenuous link with the country.\textsuperscript{70} However, permanent residents, the Court argued, reside in the country for some time, they have made South Africa their home and in most cases their children are born here and their families are with them. They have a right to work and they owe a duty of allegiance to the state. The Court, therefore, concluded that temporary residents are excluded from this case.\textsuperscript{71}

4.4 Reasonableness

In dealing with the issue of reasonableness, the Court remarked that context is all-important. In considering whether the exclusion of permanent residents from the social security scheme is reasonable, the court took the following factors into consideration: the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose. It is further necessary to have regard to the impact that this has on other intersecting rights. In the present case, where the right to social assistance is conferred by the Constitution on ‘everyone’ and permanent residents are denied access to this right, the equality rights entrenched in section 9 are directly implicated.\textsuperscript{72} The respondents implicated that the reason for the exclusion of permanent residents is that they have no legitimate claim of access to social security. This reason must comply with the standard of reasonableness set in section 27(2).\textsuperscript{73}

The Court referred to the stringent means test prescribed to comply with social grants and the fact that grants are made to those in need, especially targeting the vulnerable. The Court further referred to the testimony of the Director-General of the Department of Social Development that described the object of the social assistance legislation as a strategy to combat poverty, realise the objectives of the Constitution and the Reconstruction and Development Plan and comply with South Africa’s international obligations.\textsuperscript{74}

\textsuperscript{68}Id paras 46 and 47.
\textsuperscript{69}Id para 58.
\textsuperscript{70}Id para 59.
\textsuperscript{71}Ibid.
\textsuperscript{72}Id para 49.
\textsuperscript{73}Id para 50.
\textsuperscript{74}Id para 51.
The Court further remarked that the aim of social security and especially social assistance is to ensure that society values human beings by providing in their basic needs.\textsuperscript{75}

The Court came to the conclusion that to exclude permanent residents from the social assistance scheme because they lack citizenship is not reasonable as set out in section 27(2) of the Constitution.\textsuperscript{76} Excluding permanent residents limits their rights and fundamentally affects their dignity and equality.\textsuperscript{77}

4.5 Availability of resources and self-sufficiency

Regarding the argument about the availability of resources\textsuperscript{78} the respondents argued that the inclusion of permanent residents in the Social Grant System would impose an impermissibly high financial burden on the state.\textsuperscript{79} The respondents indicated a progressive trend in government expenditure on social security spending. For example, in the three preceding years, the spending on social grants (including administrative cost) increased from R16.1 billion to R26.2 billion and a further increase to R44.6 billion is estimated in the following three years.\textsuperscript{80} The respondents further estimated that there are about 260 000 permanent residents residing in the country. The respondents failed to furnish the court with statistical evidence on the number of permanent residents that might be eligible for social grants if the citizenship requirement is removed.\textsuperscript{81} In the absence of providing clear evidence of the additional cost in providing social grants to permanent residents, the respondents made some assumptions about the groups and numbers of eligible permanent residents, and came to the conclusion that this inclusion would additionally cost the state R243 million – R672 million per annum. The Court, taking above numbers into account, came to the conclusion that the cost of including permanent residents in the system will only be a small portion of the cost compared with the whole budget spent on social grants.\textsuperscript{82}

Another reason given by the respondents for excluding permanent residents from the social security scheme was the promotion of the immigration policy of the state, which seeks to exclude persons who may become a burden on the state and thereby to encourage self-sufficiency among foreign nationals.\textsuperscript{83} The Court acknowledged that limiting the cost of the social welfare budget and excluding people who may become a burden on the state is permissible as long as it is done within the boundaries set by the rights and values in the

\textsuperscript{75}Id para 52.
\textsuperscript{76}Id para 83.
\textsuperscript{77}Id para 84.
\textsuperscript{78}Id para 19.
\textsuperscript{79}Id para 60.
\textsuperscript{80}Ibid.
\textsuperscript{81}Id para 61.
\textsuperscript{82}Id para 62.
\textsuperscript{83}Id para 63.
The Court argued that through careful immigration policies it could ensure that those people who are admitted will not be a burden on the state. The Court noted that in this particular case they are concerned with the aged and children who are unlikely to be able to provide for themselves and that the self-sufficiency argument does not hold up in this case.

The Court held:

In my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies.

4.6 Unfair discrimination (s 9)

The Court had to establish whether the differentiation between citizens and non-citizens amounts to discrimination. Because citizenship is not one of the listed grounds in section 9(3) of the Constitution discrimination must firstly be established.

The Court referred to the Hugo case that required that in order to classify as a ground analogous to those listed in section 9(3) the classification must ‘have an adverse effect on the dignity of the individual, or some other comparable effect’. The Court then referred to the Larbi-Odam case where it found that discrimination on the basis of citizenship in the case of permanent employment amounted to unfair discrimination. The Court also concluded in the same case that permanent residents are vulnerable because they are foreigners and minorities and as such lack political muscle. Citizenship is not something that is within the control of such individuals. The Court concluded that citizenship is analogous to those grounds listed in section 9(3) and that

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84 Id para 64.
85 With respect, in the case of children it could be expected that their parents must be self-sufficient because it is the parents as primary care givers that are unable to support their children who would as a consequence apply for child support grants.
86 Khosa (n 10) para 65.
87 Id para 82.
88 This raises two questions. The first question is does the differentiation amount to discrimination? If it is on a specified ground listed in s 9(3), then discrimination will have been established. If it is not on a specified ground, discrimination will have to be established as in the above case. The second question then is to ask whether the discrimination amounts to unfair discrimination.
89 The grounds listed in s 9(3) are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
90 Khosa (n 10) para 68.
91 President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC) para 52.
92 Khosa (n 10) paras 69 and 70.
93 Larbi-Odam v Member of the Executive Council for Education (North-West Province) 1998 1 SA 745 (CC).
differentiation on the basis of citizenship amounts to discrimination.94

The next step was for the Court to determine whether this discrimination is unfair.95 One of the determining factors in determining unfairness is the impact it has on an individual. The Court96 came to the following conclusion:

There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance.97

Referring to the impact of the exclusion the Court also stressed the burden permanent residents without social assistance benefits place on other members of the community such as their families and friends and how this effects their dignity.98 This exclusion is unfair, because permanent residents are cast to the margins of society and are deprived of those rights, for example section 27(1)(c), that may be essential for them to enjoy their other rights in the Constitution.99 The Court further ruled that this unfairness would not be justified under the general limitation clause100 of the Constitution.101

Emphasising the special protection children deserve in the Constitution the Court referred to section 28(1)(c) and remarked that the denial of support to children in need infringes upon their rights.102

4.7 Remedy

The Constitutional Court did not confirm the order given by the High Court.103

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94Khosa (n 10) para 71.
95In this case there is no presumption in favour of unfairness because citizenship is not one of the listed grounds in s 9(3). S 9(5) sets the presumption for unfairness by stating: ‘Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair’.
96Khosa (n 10) para 74.
97Own emphasis.
98Khosa (n 10) paras 76, 80 and 81.
99Id para 77. See further para 81 where the Court remarked: ‘The denial of access to social assistance is total, and for as long as it endures, permanent residents unable to sustain themselves or to secure meaningful support from other sources will be relegated to the margins of society and deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution. Denying permanent residents access to social security therefore affects them in a most fundamental way.’
100S 36.
101Khosa (n 10) paras 80, 83 and 84.
102Id para 78.
103Id para 86.
They declared sections 3(c)\textsuperscript{104} prior to the amendment by the Welfare Laws Amendment Act,\textsuperscript{105} and 4(b)(ii)\textsuperscript{106} and 4(B)(b)(ii)\textsuperscript{107} of the Social Assistance Act inconsistent with the Constitution. Because of the urgency of the matter the Court decided that the most appropriate order to make was the ‘reading-in’ of the words ‘or permanent resident’ into the challenged legislation.\textsuperscript{108}

5 \hspace{1em} \textbf{Some of the implications of the Khosa decision}

- Although only old age grants, child support grants and care-dependency grants were contested in \textit{Khosa}, the consequence of reading the words ‘permanent residents’ into the relevant sections of the Social Assistance Act is that permanent residents also have access to disability grants, grants-in-aid and grants available for war veterans.\textsuperscript{109} As a result otherwise eligible permanent residents can apply for any social grant in South Africa. To illustrate this, section 3 of the Social Assistance Act as it appears in the Welfare Laws Amendment Act will now read as follows:

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

\begin{enumerate}
\item[(a)] is an \textit{aged or disabled} person or a war veteran;
\item[(b)] is resident in the Republic at the time of the application in question;
\item[(c)] is a South African citizen or permanent resident; and
\item[(d)] complies with the prescribed conditions.
\end{enumerate}
\end{quote}

In effect section 3(a) read together with section 3(c) allows permanent residents to apply for not only the old age grant but also the disability and war veterans grants. If section 3 is read together with section 2(a) and (b) it is further clear that persons that qualify for a social grant under section 3 may in addition to this grant apply for a grant-in-aid providing that he or she is in such a physical or mental condition that he or she requires regular attendance by any person.

- In \textit{Khosa} the Court stressed the importance of the values of human dignity,

\textsuperscript{104}Regarding old age grants.
\textsuperscript{105}The Welfare Laws Amendment Act will substitute the current s 3(c) with a new s 3(c). The wording of the current section is retained apart from the old usage of referring to the male gender. \textit{Khosa} (n 10) para 93. The Court also decided to change the wording of the new s 3(c) by reading-in the words ‘for permanent residents’. \textit{Khosa} (n 10) para 95.
\textsuperscript{106}Regarding child support grants.
\textsuperscript{107}Regarding the care-dependency grants. S 4(B)(b)(ii) of the Welfare Laws Amendment Act has not yet been brought into force. The Court referred to s 172(1) of the Constitution and argued that the Constitution does not distinguish between laws that have been brought into force and those that have not. The words ‘permanent resident’ were read into both the current provisions and the provision which has not came into force. See (n 13) above.
\textsuperscript{108}\textit{Khosa} (n 10) paras 92 and 95.
\textsuperscript{109}Own emphasis.
equality and freedom to all people in South Africa. The Court further stressed that by excluding permanent residents from the social assistance system their rights are limited and this fundamentally affects their dignity and equality. This statement of the Court is in line with the universal aim and basis for the existence of a social assistance system, namely to protect a person’s right to human dignity. Human dignity as a fundamental constitutional value as well as a fundamental right contained in the Bill of Rights, plays a very important role with regard to social security and social assistance rights, and the equal treatment of those who are particularly vulnerable. Without human dignity a person is excluded from society. A social security system aims to include an individual in society through measures or schemes such as a social assistance system, implemented by the state and/or civil society to show solidarity towards each individual.

In Khosa the Court emphasised the interrelatedness and mutual supportiveness of the rights in the Constitution. De Vos argues that there is a relationship between social and economic rights and the right to equality and that the transformative vision of the Constitution is one that is committed to remedying socio-economic inequality. However, it does appear that the Court, as in Grootboom, revealed a hesitant, context-sensitive approach to the transformative programme by taking the position of the weakest members of society into account when deciding whether policies of the government are reasonable. The court emphasised in

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110 This approach is in line with Grootboom (n 6) para 23 where the court held that: ‘There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in the Bill of Rights.’ (Own emphasis)
111 Khosa (n 10) para 84.
113 South African courts have consistently stated that there is close correlation between the right to equality and the protection of a person’s dignity; Hoffmann v SA Airways 2000 21 ILJ 2357 (CC), Walters v Transitional Local Council of Port Elizabeth 2001 [?] BCLR 98 (LC).
115 See also Jansen van Rensburg (n 9) 55-66. Leckie makes the following observation with regard to the interdependence, interrelatedness and mutually supportiveness of civil and political rights on the one hand and socio-economic rights on the other hand: ‘Equality and non-discrimination form the basis of human rights law, and although generally associated with civil and political rights, these principles have always had pertinence to economic, social and cultural rights’. Leckie ‘Another step towards indivisibility: Identifying the key features of the violations of economic, social and cultural rights’ (1998) 20 Human Rights Quarterly [author, first page referenced] 104-105.
116 De Vos (n 5) 258–276.
117 Khosa (n 10) para 77.
118 Grootboom (n 6) para 20.
that the exclusion of permanent residents is unfair, because they are cast to the margins of society and as a consequence of this they are deprived of their rights in the Bill of Rights.\[^{120}\]

- The new Social Assistance Act will have to be amended to make provision for all permanent residents as a result of *Khosa*.

### 6 Is the rest of South Africa’s social assistance legislation constitutional?

In *Khosa* the challenge to the social assistance scheme was aimed at the fact that it denies access to non-citizens. The applicants made no suggestion that the scheme is otherwise inappropriate or inconsistent with the Constitution.\[^{121}\]

Unfortunately, the question remains whether there are other vulnerable groups that are still excluded from the system and, if so, whether the state has a reasonable and justifiable reason for excluding these groups.

#### 6.1 Particularly vulnerable and marginalized groups identified in the fields of social security

In their most recent report to parliament the South African Human Rights Commission\[^{122}\] identified the following persons as particularly vulnerable and marginalised groups:

- the informally employed, the unemployed and the self-employed;
- non-citizens, refugees and asylum seekers;
- persons infected with HIV with a CD4 cell count below 500;
- children regardless of their age;
- children infected with HIV/AIDS;
- child-headed households;\[^{123}\]
- children living on streets; and
- extended families due to HIV/AIDS related deaths.

Therefore, the conclusion may be reached that permanent residents are not the only vulnerable group excluded from the social grant dispensation in South Africa and the constitutionality of the Social Assistance Act and the grant dispensation, as such, are highly questionable. It may be argued that all these groups mentioned above are indigent persons who find themselves in dire

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\[^{120}\] *Khosa* (n 10) para 77.

\[^{121}\] *Khosa* (n 10) para 79.


\[^{123}\] Urgent contingencies such as financial support for children orphaned by HIV/AIDS, and especially those living in child-headed households are not being addressed by the state. (South African Law Commission Discussion Paper 103 Project 110 *Review of the Child Care Act* 2002.)
circumstances. The Constitutional Court summarised the impoverished situation that most South Africans live in today in Soobramoney v Minister of Health, KwaZulu-Natal:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted. A commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

One of the reasons for, as the Court called it, inadequate social security, is the fact that the system excludes a large number of indigent people who cannot themselves provide for their or their families’ basic needs and as a consequence have no dignified existence. The inadequacy of the current social assistance system was highlighted by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa that indicated that 60% of the poor do not have access to any form of social security cash grants or benefits.

The system is highly categorised and no provision is made by way of the social assistance grant dispensation for people without disabilities from the age of 11 to 60 if you are a woman and 65 if you are a man. This implies that a large section of the population is still excluded from the social assistance programme which serves as the main safety net in South Africa if one is not contributing to the Unemployment Fund or the Compensation for Occupational Injuries and Diseases Fund (social insurance) or to any private scheme.

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124 Compare with the statement made by the Court in Khosa (n 10) para 24. See Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill (n 46).
125 (N 6) para 8.
126 Own emphasis.
127 Committee of Inquiry into a Comprehensive System of Social Security for South Africa Transforming the Present – Protecting the Future Consolidated Report March 2002 59. This Committee was appointed on the basis of a decision by the South African Cabinet and charged with developing recommendations on the establishment of a comprehensive social security system for South Africa.
128 As it currently operates under the Social Assistance Act and will operate under the Social Assistance Act.
129 Social insurance requires joint contributions by employers and employees to pension or provident funds, or to social insurance funds covering other unexpected events. Government may also contribute to social insurance covering accidents at work; Ch 7 para 2 of the Social Welfare White Paper (n 2). In the area of social insurance, the Unemployment Insurance Fund (established under the Unemployment Insurance Act 65 of 2001) pays out benefits to contributors and their dependants in the event of unemployment, illness, maternity and adoption. Employers and employees contribute on an equal basis to the Fund with practically no state contribution. Compensation for employment injuries and diseases is paid to employees and their dependants out of the Compensation Fund, to which employers contribute on the basis of industry-based risk assessments (established in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993).
Other reasons pointing to the inadequacy of the system are the inaccessibility of the grant process, the very complicated and strict means test and the administrative problems of the current system.

6.2 Exclusion of a particularly vulnerable group, namely children

The question may be asked whether the exclusion of children from the ages of (currently) 11 to 18 from the child support grant infringes on their rights to social assistance (s 27(1)(c)), human dignity (s 10), life (s 11) and equality (s 9).

The Constitutional Court recognised in Grootboom that if the state had better social assistance programmes available for the poor, there would be less pressure on the other socio-economic rights. This includes, for example, that the state must, by means of a social assistance programme for children and

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120 (2005) 20 SAPR/PL

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An example noted by the Department of Social Development to the South African Human Rights Commission (SAHRC (n 122) 29) is that beneficiaries of the Old Age Pension Grant wait for an average period of two hours at payout points before receiving their grants. 68% of payout points have no access to water, 64% have no toilet facilities and 79% have no facilities for persons with disabilities. This is a breach of the Batho Pele principles. A further example of inaccessibility of rights can be described with reference to the following: 1 208 105 beneficiaries were eligible for Disability Grants but 714 091 received the Disability Grant; 195 806 persons were denied access to the Old Age Pension Grant because only 1 936 553 of the 2 132 359 eligible persons received the grant; 1 574 927 children out of 3 308 467 eligible children received the Child Support Grant; 90 680 children out of 319 354 eligible children received the Foster Care Grant; and 42 474 children out of 276 776 eligible children received the Care-dependency Grants. (SAHRC (note 122) 29.) Other examples of the inaccessibility of the grant system is the unavailability of major banks in rural areas and the danger facing the grant holders to travel to other towns to fetch their grants. (SAHRC (n 122) 176.)

130 For example, in two cases, that of Mbanga v MEC, Health and Welfare, Eastern Cape 2002 1 SA 359 (SE) and Mahambehlala v MEC, Health and Welfare, Eastern Cape 2002 1 SA 342 (SE) the provincial government failed to process claims for social grants within a reasonable time. Mr Mbanga applied for a pension grant on 8 March 1998 and met all the requirements, while Mrs Mahambehlala applied on 7 March 2000 for a disability grant also meeting all the requirements. The court held in both cases that the applicants’ rights were infringed by the failure of the province to act within a reasonable time. The South African Human Rights Commission (SAHRC (n 122) 28) also reported that Limpopo and the Eastern Cape were provinces where grant beneficiaries were most affected by arbitrary administrative action. In Limpopo, 92 000 welfare recipients of pension and disability grants were unfairly terminated by the province’s welfare department. In the Eastern Cape, applications for social assistance were often lost without any trace and pensioners waited more than a year before they could receive financial assistance from government. See De Villiers ‘Social grants and the Promotion of Administrative Justice Act’ (2002) 18 SAJHR 320-349 where the author describes the way the disability grant system is administered crudely in breach of the fundamental right of administrative justice.

131 As referred to by the Court in Khosa (n 10) para 51. See Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill (n 46).

132 Grootboom (n 6) para 30.
parents who are unable to provide for themselves, assist them by means of, for example, child support grants.134

‘Child’ is defined in the Constitution,135 social assistance legislation136 and international documents137 to mean a person under the age of 18 years.

The current legislation differentiates between children from the age from infancy up to 10138 and 11 to 18. If the state is confronted with this apparent arbitrary differentiation it will most probably argue that it cannot afford to extend the child support grant to children from the ages 11 to 18 and alternatively that they are phasing-in the grants progressively.139

To deal with the above question, the approach by the court in Khosa could be used. The Court in Khosa140 remarked that when the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness. In this way the Court indicated that the availability of resources will play a role in considering reasonableness.141

The Court in Grootboom142 further stated that, when determining reasonableness, it would not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. According to this statement, the court will not enquire if the current child support grant is appropriate for South Africa or ask if better measures should be put in place. For example the court will not replace the new child support grant and reinforce the old child maintenance grant or create a new grant that currently does not exist.143

The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would

134Id para 51.
135S 28(3).
136Social Assistance Act, the Welfare Laws Amendment Act and the new Social Assistance Act.
137South Africa ratified the United Nations Convention on the Rights of the Child on 16 June 1995. A child, as defined in this Convention, is any human being under the age of 18.
138A child must be under 11 years of age to qualify for the grant. The second phase of extending the grant is from April 2004 to 31st March 2005. Primary care-givers of children under the age of 11 may apply for the CSG during this phase. S 4(1) of the Social Assistance Act as amended by the Welfare Laws Amendment Act. See R 460 in GG 24630 of 31 March 2003. See (n 24 and 31).
140Khosa (n 10) para 44.
141Compare Grootboom (n 6) para 46.
142Id para 41.
143This is quite unfortunate because as it will be indicated later on even if the current grant is extended to children under 18 it still does not address the problem of child poverty sufficiently.
meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.\textsuperscript{144} With respect to the child support grant the court will look at the following factors: the purpose served by social security and especially the child support grant; the relevance of the age requirement to that purpose; and the impact of the exclusion on children from 11 to 18. It is further necessary to have regard to the impact on other intersecting rights. With regard to the exclusion of children from 11 to 18, where, according to the Constitution children are defined as any person under 18, the equality rights entrenched in section 9 are directly implicated.\textsuperscript{145}

It is submitted that the purpose of the child support grant is mainly to alleviate child poverty, indirectly to enable a child to live with human dignity\textsuperscript{146} and to ensure that society value human beings (and in this instance children) by providing in their basic needs.\textsuperscript{147} The following reasons may highlight the impact and unreasonableness of this exclusion:

- In 2002, it was estimated that 11 million children (between the ages of 0-18) are living in dire poverty in South Africa on less than R200 per capita per month (R245 in 2002 real terms). These children therefore live on less than half the minimal R400 per capita per month required to meet their basic needs. In total, 14.3 million children live in poverty on less than R400 per capita per month (R490 in 2002 terms). Child poverty is also on the increase. Between 1995 and 1999 the rate of child poverty in South Africa on a poverty line of R400 per capita per month increased from 64.7% to 75.8% and the rate of children in dire poverty calculated on a poverty line of R200 per capita per month increased by 19.2% from 38.9% to 58.1%.\textsuperscript{148}

- As already indicated, children are a particularly vulnerable group in South Africa. One may even go so far to say that children are the most vulnerable members of society. They are not in the position to fend for themselves and they are dependant on parents, family members and other people in society to provide them with food, shelter and to see to their most basic needs. It is submitted that children are the weakest members of society and that a court, as in \textit{Grootboom},\textsuperscript{149} will give priority to them when deciding whether policies of the government are reasonable or not. The impact of the exclusion of children from 11 to 18 years because of their age on these children is fundamental for a number of reasons,\textsuperscript{150} but most importantly because these excluded children are a vulnerable group and in effect they are relegated to the margins of society. Due to this negative impact it can

\textsuperscript{144}\textit{Grootboom} (n 6) para 41.
\textsuperscript{145}\textit{Khosa} (n 10) para 49.
\textsuperscript{146}\textit{Id} para 49 and section 4 above.
\textsuperscript{147}\textit{Khosa} (n 10) para 52.
\textsuperscript{148}Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill (n 46).
\textsuperscript{149}\textit{Grootboom} para 20.
\textsuperscript{150}Given above.
further be argued that differentiating between children from 1 to 10 years and 11 years to 18 years is unfair and that the state acts unreasonably in doing so. In the light of the above, children’s basic human dignity and other fundamental rights are denied. Believing that children are the nation’s future, it is necessary to put children and their interests at the forefront of the fight against poverty. 151 As the Court acknowledged in Khosa, the denial of support to children in need trenches upon their rights. 152

- Poverty has wide-ranging and often devastating effects on children. Many of its effects, such as homelessness and malnutrition, result directly from having too little income or too few resources. Some of the effects of poverty may include malnutrition and starvation, exposure to the elements, mental illness and drug dependency. Certain studies have also concluded that children who live a life of poverty are more susceptible to an adult life of crime and other problems such as depression, which can contribute to criminal behaviour. Furthermore, poverty tends to perpetuate itself. In many cases, poor children have become accustomed to the mindset that keeps them from getting out of poverty. These children then grow up to be poor adults earning lower than average incomes. 153

- In Khosa 154 it was accepted that one of the objects of social assistance legislation is to comply with South Africa’s international obligations. South Africa ratified the United Nations Convention on the Rights of the Child and is therefore internationally obligated to comply with this document. 155 On 25 and 26 January 2000, the Committee on the Rights of the Child considered South Africa’s first report and adopted concluding observations on South Africa’s compliance with the Convention. 156 The Committee criticised the South African government on, amongst others, the current child support grant. The Committee proposed that the child support grant be expanded to include children up to the age of 18 years, who are still in school.

- The South African Law Commission 157 in drafting a Child Care Bill also took into account the exclusion of children depending on age from the child support grant. The Commission recommended a new system of grants for children to address specifically children that are currently excluded from the

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152Khosa and Mahlaule case (n 14) para 78.
154Khosa (n 10) para 51.
156Committee on the Rights of the Child Concluding observations 2000 CRC/C/15/Add122.
157(N 123) 333-338.
Unfortunately, the proposed system, which included a child grant that was not subjected to a means test, was not included in the new Draft Children’s Bill. The Department has reported that these provisions are better placed within the Social Assistance Act. None of these provisions, however, are incorporated in the new Social Assistance Act.

S 27(1)(c) and s 28(1)(c).

SAHRC (n 122) 227-229.

See above text accompanying (n 154-156).

Great concern was expressed about the exclusion of children in the new Social Assistance Act by the following interest groups: the Alliance for Children’s Entitlement to Social Security (ACCESS); the Children’s Institute (UCT); Black Sash; the Gender Advocacy Programme; the Socio-Economic Rights Project; Community Law Centre (UWC); the Congress of South African Trade Unions (COSATU); the National Education, Health and Allied Workers Union (NEHAWU); the National Association of Democratic Lawyers (NADEL); the Treatment Action Campaign (TAC); Rapcan Southern African Catholic Bishop’s Conference; the South African Council of Churches; the Women’s Legal Centre. Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Act (n 46).

Khosa (n 10) para 45.

Committee of Inquiry into a Comprehensive System of Social Security for South Africa (n 127) 38.

It is clear from the above that the state is acting unreasonably towards children over the age of 11 and is therefore not fulfilling its constitutional duty towards the poorest of poor children. As indicated by the South African Human Rights Commission, the South African Law Commission, the United Nations Committee on the Rights of the Child and several other interest groups working with children in South Africa, children are a particularly vulnerable group and denying them their rights are an infringement on their human dignity and other rights. It is further clear that the extent of child poverty in South Africa is tremendous and considering the effects thereof it is an urgent matter to address.

The possible argument of the state that it does not have the available resources to extend the child support grant immediately and is doing so progressively must be addressed. It is predicted that this will also be given as the (rational) reason why children from 11 to 18 years are excluded from the child support grant. The Court in Khosa remarked that where the state argues that they cannot afford to pay benefits to everyone entitled under section 27(1)(c) the criteria for excluding a specific group, for example permanent residents, must be consistent with the Bill of Rights as a whole. The Committee of Inquiry into a Comprehensive System of Social Security for South Africa also remarked that the age limit has no real rational basis and is not consistent with the Constitution’s definition of a child, that is, those under 18 years of age.

Given the above arguments and the particular vulnerability of these children the ‘available resources’ and ‘progressive realisation’ arguments will not be
acceptable. Firstly, as in the case of permanent residents, children are part of a vulnerable group in society and are worthy of constitutional protection. Secondly, and again as in the case of permanent residents, the denial of children above a certain age from the child support grant is ‘is total, and for as long as it endures’. This is worsened by the fact that children are ‘unable to sustain themselves or to secure meaningful support from other sources’. This has the effect that these children are ‘relegated to the margins of society and deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution’.

Finally, it is submitted that the fact that children of different ages are treated unequally amounts to unfair discrimination. This will require having a look at the intersecting right of equality. Because age is one of the listed grounds in section 9(3) of the Constitution discrimination is established. The next step is to establish whether the differentiation is unfair. Because age is one of the listed grounds in section 9(3) there is a presumption in favour of unfairness and the unfairness in the case of children older than 11 years will be presumed.

This prevailing manifestation of poverty in the form of the exclusion of children from 11 to 18 from the child support grant, needs to be addressed effectively and it is submitted that the extension of the child support grant to children up to 18 years will help to alleviate this situation.

7 A new approach to social assistance?

Although the extension of the current child support grant will help to alleviate the situation, it is still not the solution to the prevailing problem of child poverty in South Africa.

One of the problems with the child support grant is that it is complicated by a strict means test. A primary care giver will only qualify for the means test if the primary care giver and child

(i) live in a rural area in either a formal or informal dwelling and the personal income of the primary care giver and his or her spouse is below R13 200 per annum;
(ii) live in an urban area in an informal dwelling and the personal income is below R13 200 per annum or
(iii) live in an urban area in a formal dwelling and the personal income is below R9 600 per annum. The amount of R9 600 is only applicable to a primary care giver and child living in an urban area and who occupy a brick/concrete or asbestos house.

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166 Khosa (n 10) para 74.
167 Id para 77.
168 Ibid.
169 Ibid.
170 R 16(2) of GN R418 in GG 18771 of 31 March 1998.
As a consequence there are many poor children between the ages of 1 and 18 years whose caregivers do not pass the means test. The means test does not take account of the number of people living off the income or the extra vulnerabilities faced by the family such as HIV/AIDS. Furthermore, the means test threshold has not increased since 1998 despite increases in inflation and the cost of living.\footnote{Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill (n 46).}

Another problem with the child support grant (and the care dependency grant) is the unavailability thereof to child-headed households, children whose parents have died and who are being cared for by extended family members, children without adult caregivers, children with moderate disabilities and chronic illnesses who need assistance and children living with HIV and AIDS.\footnote{Ibid. See South African Law Commission (n 123) 333-338.}

Proposals made by the Committee of Inquiry\footnote{Committee of Inquiry into a Comprehensive System of Social Security for South Africa (n 127) 42-43.} for a comprehensive social protection package, including a basic income grant, income generating opportunities and free basic services to those in need may address this problem of child poverty more appropriately. The Committee proposed a minimum level or measure of provision made available to everyone. This \textit{inter alia} includes the immediate extension of the child support grant to gradually cover children under the age of 18. The scrapping of the means test across the board is also recommended.\footnote{Other elements of the package include, amongst others, free health care (the Committee advocates the eventual introduction of a National Health Insurance system), free primary and secondary education, free water and sanitation (up to a certain basic level), free electricity (up to a certain basic level), access to affordable and adequate housing, access to jobs and skills training, and a reformed disability grant, foster care grant and child dependency grant. Committee of Inquiry into a Comprehensive System of Social Security for South Africa (n 127) 42-43. See also Olivier and Jansen van Rensburg ‘Addressing the alleviation of poverty through social welfare measures’ (2002) Paper presented at a joint session of CROP and the International Sociological Association (ISA) Research Committee on Sociology of Poverty, Social Welfare and Social Policy at the XV$^{\text{th}}$ World Congress of Sociology, entitled ‘Issues in pro-poor policy in non-OECD countries’ in Brisbane, Australia, 7-13 July 2002 36.} However, the Committee did not propose a comprehensive social security package for children, arguing that the South African Law Commission will make provision for that in the Child Care Act.\footnote{Committee of Inquiry into a Comprehensive System of Social Security for South Africa (n 127) 61.} \footnote{(N 123) 333-338.}

The South African Law Commission\footnote{Committee of Inquiry into a Comprehensive System of Social Security for South Africa (n 127) 61.} in drafting a new Child Care Act also recognised the inability of the current social grant system to address the needs of children. The Commission differed from the Committee of Inquiry by...
recognising that although means testing is not ideal, it should be retained for all the grants except the child grant. The Commission opined that taking limited resources into account, all the grants and subsidies should be targeted

only at the poorest of the poor to enable those children to survive.

The Commission recommended the introduction of the following social security scheme for children: a child grant; a foster care and court-ordered kinship care grant; an adoption grant; an informal kinship care grant; an emergency court grant; a supplementary special needs grant; a subsidy to enable children with disabilities to obtain assistive devices; subsidies to NGOs contracted to the State to implement programmes and projects giving effect to the Child Care Act; fees to NGOs, FBOs and welfare organisations that carry out services on behalf of the State; and a subsidy to encourage the provision of early childhood development services.

Unfortunately, the social security scheme for children proposed by the Law Commission was not included in the new Draft Children’s Bill. The Department has reported that these provisions are better placed within the Social Assistance Act. Except for the gradual extension of the Child Support Grant, none of the proposals made by the Committee of Inquiry or the Law Commission regarding children’s grants are incorporated in the new Social Assistance Act for reasons set out above. It is submitted that the state is

177The Commission recommends that the amount of the foster care, court-ordered kinship care and the adoption grant be set at the same level. This would remove the current financial incentive to keep children in long-term foster care.

178There is justification for setting a lower grant amount in the case of informal kinship care as the State on a narrow interpretation has no constitutional obligation to care for children in informal kinship care. This is in stark contrast to foster care and court-ordered kinship care where state intervention has caused the child to be removed and placed in alternative care.

179In the case of the supplementary special needs grant, the Commission is of the opinion that this grant should be payable only to children with chronic illnesses, including HIV/AIDS, and children with moderate to severe disabilities. Furthermore, the supplementary special needs grant should be payable only after the degree of the child’s chronic illness or disability has been assessed in terms of an objectively prescribed assessment procedure.

180The Commission recommends that subsidies be paid to enable children with disabilities to obtain assistive devices such as wheel-chairs. Such subsidies are to be paid on presentation of an invoice substantiating the purchase. A means test will apply.


182The Department of Social Development in briefing the Portfolio Committee on Social Development indicated that it will not be making any policy shifts in the new Social Assistance Act and that the bill was tabled to remove the assignment to the provinces as indicated in the

183The Commission opined that taking limited resources into account, all the grants and subsidies should be targeted only at the poorest of the poor to enable those children to survive.

failing in fulfilling its constitutional obligations towards the most vulnerable part of our society, namely the poorest of poor children.

8 Conclusion

The Khosa case is the first case before the Constitutional Court where the right to social security and social assistance as guaranteed in section 27(1)(c) of the Constitution was alleged to be infringed. What makes the case particularly interesting is the fact that the Court dealt with a particular vulnerable group and the unequal treatment of this group by the state. The equality clause along with section 27(1)(c) as a socio-economic right had to be addressed.

What is clear from the decision is that the aim of the social security and especially social assistance is to ensure that society values human beings by providing in their basic needs. If this is not done it fundamentally infringes on a person or persons human dignity. The unequal treatment of persons in a social assistance system will also be unfair and unjust if it impacts on a group in such a way that it denies that group the enjoyment of their other rights guaranteed in the Constitution.

Similar to permanent residents, children from the ages 11 to 18 are a vulnerable group in our society and deserve equal protection to that provided to children from infancy to 10 with regard to the child support grant. It is submitted that in line with the Grootboom judgment the Constitutional Court will give priority to the most vulnerable when deciding whether policies of the government are reasonable or not. Children may be considered as the most vulnerable members of society. They are dependant on parents, family members and other people in society to provide them with food, shelter and their most basic needs. There is no rational reason why this differentiation exists. It is purely a policy decision by government that is in violation of sections 9(1), 27(1)(c), 27(2), 28(c) of the Constitution as well as the age limit set for a child by the Constitution (§ 28(3)) and other national and international documents.

It is submitted that a fresh approach is needed to address the basic needs of children by way of a social assistance system. Proposals made by the Committee of Inquiry and the South African Law Commission to extend the current child support grant to children up to 18 years, to do away with the means test in the case of the child support grant and to introduce new grants to take account of the special needs of vulnerable children – for example a supplementary special needs grant – are be welcomed.

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Memorandum. Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill (n 46).

184 And international.

185 Committee of Inquiry into a Comprehensive System of Social Security for South Africa (n 127) 42-43.

186 (N 123) 333-338.
None of these recommendations have been included in the Draft Children’s Bill or the new Social Assistance Act. In the absence of the state taking steps to realise the social assistance rights of children and in effect to address their most basic needs, one is left with the question what can be done for this vulnerable group. The Human Rights Commission, a Committee appointed by Cabinet, the South African Law Commission, the United Nations Committee on the Rights of the Child and several other interest parties amongst others, have emphasised the need to address the needs of these children by way of an adequate social assistance system for children. Regardless of these recommendations the state is failing to fulfil its constitutional obligations.

One of the most drastic measures to take in order to address this urgent situation is to approach the Courts and to argue that the current social assistance grant system is in violation of the social assistance rights of all children. It is submitted that the Court will have to be persuaded to examine the current grant, the inadequacy thereof, and the effect of the current grant on the exclusion and unequal treatment of many poor and vulnerable children. It may also be argued, referring to the Law Commission’s suggestions, that new policy arrangements already exist that will address the problem in a more adequate way. However, it is doubtful that the Court will order the state to implement a specific policy or take specific policy measures.

If the Court chooses to declare the social assistance grants of children invalid, it will also have to give appropriate relief. If the Court decides that the social assistance system with regard to children is inadequate, the order will not be so easy. They may refer the impugned sections of the Social Assistance Act back to the legislature to amend. This may take considerable time and the matter of child poverty and the denial of their right to social assistance as indicated above is fundamental and an urgent matter to address. It is proposed that the Court extend the current child support grant and scrap the means test for a period until the legislature comes up with a better policy to incorporate all vulnerable children in the permanent social assistance system.

To conclude, the Khosa and Mahluale case opened the door for marginalised and vulnerable groups to be included in the safety net of the social assistance system in South Africa. The Court afforded special constitutional protection to permanent residents because they are vulnerable and unequally treated. The same may be said of children. However, in the case of children the current system is inadequate and cannot address the needs of all vulnerable children. To address the social assistance rights of children and to transform South African society by addressing the needs of its weakest members, an urgent shift in government policy is needed.

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187 The Committee of Inquiry into a Comprehensive System of Social Security for South Africa.
188 See (n 163).
189 Ss 172(1) and 38 of the Constitution.