

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

Case No:

In the matter between:

BLACK SASH TRUST

Applicant

and

SOUTH AFRICAN SOCIAL SECURITY AGENCY

First Respondent

**THE CHIEF EXECUTIVE OFFICER OF THE
SOUTH AFRICAN SOCIAL SECURITY AGENCY**

Second Respondent

THE MINISTER OF SOCIAL DEVELOPMENT

Third Respondent

THE MINISTER OF FINANCE

Fourth Respondent

**THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

Fifth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

LYNETTE MAART

do hereby affirm and state:

- 1 I am an adult female employed as the National Director of the applicant. I was appointed as the Director on 1 September 2013. My principal place of business

for the purposes of these proceedings is the Black Sash head office at Elta House, 3 Caledonian Street, Mowbray, Cape Town.

- 2 In my capacity as National Director, I am authorised to bring this urgent application on behalf of the Black Sash and to depose this affidavit. The facts contained herein fall within my personal knowledge and are true and correct unless where otherwise stated or where the contrary appears from the context.
- 3 Where I make legal submissions, I do so on the advice of my legal representatives, which advice I accept as correct.
- 4 Given the urgency with which this application is brought and the short time frames within which this affidavit was prepared, the applicant reserves its rights to file a supplementary affidavit with the leave of this Honourable Court should the need so arise.

Parties

- 5 The applicant is the Black Sash Trust, a non-profit organisation established in 1955. The applicant's mission is to work towards the realisation of socio-economic rights as outlined in the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"), with emphasis on social security and social protection for vulnerable groups including women and children with a view to reducing poverty and inequality. **The applicant is actively engaged in social security and protection, including ensuring that people who apply for social grants receive the grants and benefits that they are entitled to.** The applicant's registered address and principal place of business is at Elta House, 3 Caledonian Street, Mowbray,

Cape Town. The applicant brings this application in its own capacity, in terms of section 38(a) of the Constitution, as a non-governmental organisation (“**NGO**”) with a specific mandate to protect and enforce the social security entitlements of vulnerable groups including women and children. It also brings this application in the public interest in terms of section 38(d) to enforce the rights and entitlements of beneficiaries of the COVID-19 Social Relief of Distress (“**SRD**”) Grant for Caregivers (“**the caregivers’ grant**”).

- 6 The first respondent is the South African Social Security Agency (“**SASSA**”), an agency established in terms of section 2 of the Social Security Agency Act, 9 of 2004 (“**SSA Act**”). SASSA is cited in its capacity as the agency, which in terms of section 3 of the SSA Act is responsible for the administration and payment of social security. SASSA’s head office is SASSA House, 501 Prodinsa Building, Corner Steve Biko and Pretorius Streets, Pretoria.
- 7 The second respondent is the Chief Executive Officer of SASSA, Busisiwe Memela-Khambula. She is cited in her official capacity as the person who authorised the decision to stop the caregivers’ grant. Her principal place of business is the same as that of the first respondent.
- 8 The third respondent is the Minister of Social Development, Ms Lindiwe Zulu (“**the Minister**”). She is cited in official capacity as the Minister who issued the directions that created the caregivers’ grant, with her principal place of business at 134 Pretorius Street, HSRC Building, Pretoria.

- 9 The fourth respondent is the Minister of Finance, Tito Titus Mboweni. He is cited in his official capacity as the Minister who is responsible to allocate the funds to be used for the caregivers' grant and his principal place of business is at Department of National Treasury, 40 Church Square, Old Reserve Bank Building, Pretoria. No relief is sought against the fourth respondent and he is cited simply because he has an interest in the outcome of this application.
- 10 The fifth respondent is the President of the Republic of South Africa. He is cited in his official capacity as the President of the country, whose offices adopted and will implement the Economic Reconstruction and Recovery Plan. The President's head office and principal place of business is at the Office of the Presidency located at Unions Buildings, Government Avenue, Pretoria, 0002. No relief is sought against the Presidency, and its offices are cited simply because it has an interest in the outcome of this application.

This Application

- 11 This is an application for an urgent interim order to interdict the first and second respondents from implementing its decision of 23 October 2020. In terms of that decision, the first respondent communicated on its official Twitter account that *"[a]ll the top up amounts for the social grants (Old Age, Disability, War, Veterans, Child Support, Foster Child and Care Dependency) have come to an end"*. The tweet goes on to state that *"[t]he grant amounts as from November will revert to pre-covid amounts. There is no extension to the top up amounts"*. The tweet communicating the decision is attached hereto as "LM1". The Black Sash seeks to interdict the termination of the caregivers' grant, which is being implemented as a R500 additional payment to persons who qualify for the Child Support Grant

payable in terms of Chapter 2 of the Children's Act, 38 of 2005 (**"the Children's Act"**).

- 12 The applicant seeks an order that the decision to end the top-up amounts, in relation to the caregivers' grant, and revert to pre-covid amounts is interdicted. The order is sought pending the outcome of Part B, which seeks to review and set aside the decision of 23 October 2020, and have it declared unlawful. **The urgency of the application is premised on the termination of the top up caregivers' grant, which will take effect on Saturday, 31 October 2020.**
- 13 **The relief is sought also because the payment of the top-up caregivers' grant is a relief measure indelibly linked to the declaration of the national state of disaster. By Ministerial directive it is a new form of social security that cannot be terminated at least for as long as the state of disaster abates or alternatively, until the devastating impacts of the disaster are meaningfully ameliorated.** This date is certainly not Saturday, 31 October 2020 and with it looming, the applicant has had no option but to bring this application.

Scheme of this Affidavit

- 14 In what follows, I deal first with why this application is urgent. This is followed by a brief discussion on the impact of the COVID-19 pandemic and the legal framework leading to the adoption of the directions that created the top up amounts in respect of the various grants. Thereafter, I turn to why the applicant has made a case for the grant of an urgent interdict.

Urgency

- 15 I am advised that two requirements must be met before this Court will decide to determine this matter urgently. First, the Black Sash must set forth explicitly the reasons why the application is urgent. Second, it must explain why substantial redress in due course is not possible.
- 16 The urgency of the application is premised on the fact that the top grants will end on Saturday, 31 October 2020. This decision was made on 23 October 2020, as appears from “**LM1**” hereto. As I have explained in the section dealing with the relevant facts, the applicant has since 12 October 2020 sought clarity from the first, second and third respondents on whether the top up monies, in respect of caregivers’ grants in particular, would be paid beyond October 2020. None of these letters were responded to.
- 17 Instead, the first respondent communicated via its official twitter account on 23 October 2020 that the top up amounts would be terminated at the end of October 2020 and the ‘pre-covid amounts’ reverted to. This decision and its definitive implementation on 31 October 2020 have made it necessary to bring this application on such severely truncated time periods. There has been no time to revert back to the first, second and third respondents on its decision and request an undertaking that the decision is not implemented.
- 18 This is because first, letters addressed to these state parties, as I set out more fully in the section dealing with the material facts, are invariably not answered and second, there was just no time to seek an undertaking since, in under a week, the decision is likely to be implemented, unless it is interdicted. Given how

late the decision was taken, coupled with the unresponsive demeanour of the first, second and third respondents in respect of answering letters, the applicant could not run the risk of losing time and proceeded with haste to bring this application.

19 The applicant will simply not obtain substantial relief in due course if this matter is heard after Saturday, 31 October 2020. If the applicant were to approach this Court later millions of beneficiaries, some of whom have reached out to the applicant for assistance, and who receive the top up grants will, whilst the state of disaster remains extant, be deprived of the minimal reprieve the top up monies are meant to provide from the sheer economic hardship and suffering brought on by the pandemic.

20 In short, there is no rational reason for the termination of the top up grant to precede either the end of the state of disaster or alternatively, abruptly stop when the deleterious impact of the state of disaster on the most vulnerable – women and children – continues to wreak havoc on basic social security, such as access to food, childcare and shelter, among others. Moreover, there is no empowering legislative mechanism authorising the first respondent to terminate the top-up grant, intrinsically linked as it is to the state of disaster. The first respondent's role is administrative in nature. It is an implementing agent who cannot take an executive decision of this nature. For this reason, too the decision of 29 October 2020 is unlawful and should be interdicted, and ultimately set aside on review.

21 Thus, the application is urgent. Beneficiaries cannot be denied access to top up benefits meant to ameliorate the impact of the state of disaster when the state of

disaster has not come to an end and whilst its pervasive hardships on social security stubbornly abide. Moreover, such a decision cannot be unilaterally taken by the first respondent when it is at odds with the Minister's directions of May 2020 that the top up amounts are to be paid.

Brief Synopsis

22 This matter arises as a result of the current COVID-19 pandemic. On 15 March 2020, the Minister of Cooperative Government and Traditional Affairs ("**Minister of CoGTA**") declared the COVID-19 pandemic a national state of disaster in terms of the Disaster Management Act 57 of 2002. The government gazette notice to this effect is annexed as "**LM2**".

23 On 25 March 2020, the Minister of CoGTA declared a national lockdown. The government gazette is annexed as "**LM3**". In this period, there is a restriction of movement in order to ensure that as a nation we curb the spread of the COVID-19 virus.

24 On 14 October 2020, the Minister of CoGTA extended the national state of disaster to 15 November 2020. This government gazette notice is annexed as "**LM4**".

Background Facts

25 On 30 March 2020, the Minister of Social Development in terms of Regulations issued under the Disaster Management Act 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 March 2020 directions are attached hereto as “**LM5**”. In terms of clause 4 the directions “apply to all Department of Social Development, South African Social Security Agency and National Development Agency’s managed and mandated programmes and projects. SASSA, as the implementing agent of the Department of Social Development’s (“**the DSD**”) constitutional mandate is thus bound by the directions. Paragraph 6(h) of the March 2020 directions relates to Social Relief of Distress. It contains four sub-paragraphs, (i) – (iv), which articulate how social relief of distress must be provided for the duration of the pandemic. It starts off by stating that Social Relief of Distress must continue to be provided and then records how during the state of disaster, new applications are to be processed and how existing applications will be managed.

- 26 The purpose of the March 2020 directions was to prescribe temporary measures or steps necessary to manage COVID-19 in order to reduce its impact in the country and to provide directions to officials of the DSD and other organs of state responsible for the implementation of the Social Development mandate.
- 27 On 9 May 2020, the Minister published further directions amending the 30 March 2020 directions. They are attached hereto as “**LM6**”. Paragraph 3(k) of the May 2020 directions added sub-paragraph (vii) to 6(l) of the March 2020 directions. The new amendment, paragraph 6(l)(vii) made provision for when additional forms of Social Relief of Distress would be payable. The payment provisions are as set out hereunder:

(vii) The COVID 19 additional form of Social Relief of Distress will be payable as follows:

(aa) Temporary disability grants which lapsed in February and March 2020, must be reinstated and continue to be paid from the date they were suspended until end of October 2020;

(bb) Temporary disability grants which did not lapse during April 2020, as contemplated in subparagraph (l)(v) must continue to be paid until end of October 2020;

(cc) Temporary disability grants which are due to lapse in May 2020 and June 2020 must continue to be paid until end of October 2020;

(dd) Care dependency and foster care grants which lapsed during the period beginning from February 2020 to April 2020 must be reinstated and continue to be paid until end of October 2020;

(ee) Care dependency and foster care grants which lapsed during May 2020 or are due to lapse when the care dependent child turns 18 years of age, will not lapse until the end of October 2020 and must continue to be paid until end of October 2020;

(ff) The top up amounts will be paid in accordance with the table in Annexure A to these Directions;

(gg) Payments will follow the usual grant payment mechanisms requiring no additional application processes; and

(hh) A special COVID-19 Social Relief of Distress for Caregivers of R500 per month per Child Support Grant caregiver will be provided. All existing caregivers will automatically qualify and receive this benefit along with their existing monthly benefit.

[Emphasis added.]

- 28 What appears from the above is that in terms of the May 2020 directions, the amended paragraph 6(l)(vii)(hh) created a special COVID-19 Social Relief of Distress grant of R500 per month per Child Support Grant caregiver. The directions stated that the grant would be given to all caregivers and they would automatically qualify and receive this benefit along with their existing monthly benefit which they receive under the relevant provisions of the Social Assistance Act. Thus, it is a top-up grant.
- 29 A further sub-paragraph, viii, was added to 6(l), which went on to create an additional special COVID-19 Social Relief of Distress of R350 per month (“**the SRD Grant**”). This, together with the caregivers’ grant constituted newly created vehicles of social assistance. The only difference between the two was that the caregivers’ grant was paid to caregivers as an additional amount where they received Child Support Grants under the Social Assistance Act, effectively giving them new rights to additional social assistance to alleviate the impact of COVID-19. These entitlements, in terms of the March 2020 directions, cannot be

impeded for as long as the state of disaster prevails or its impact on social security has not abated. The SRD grant on the other hand vests social security rights in beneficiaries who did not qualify, directly or indirectly for any form of social security in terms of the Social Assistance Act.

30 On 6 August 2020, the Minister further amended the directions. The August 2020 amendments are attached hereto as “**LM7**”. The directions add an additional subparagraph dealing with the reassessment process where applications for the SRD grant are refused. A further amendment attached hereto as “**LM8**” was issued on 7 October 2020. The Minister issued further amendment to the directions and extended care dependency grants until 31 December 2020. However, the October directions were silent on the extension of the caregiver’s grant prompting the applicant, through its attorneys of record, the Centre for Applied Legal Studies (“**CALS**”) to address a letter to the Minister on 12 October 2020. The letter is attached hereto as “**LM9**”.

31 The letter of 12 October 2020 queried the status of the extension of the special COVID-19 Social Relief of Distress Grants. In particular, CALS, on behalf of the applicant asked the Minister whether both the caregivers’ and SRD grants would be extended beyond October 2020, and if not, requested the reasons for the termination. CALS sought an answer by 15 October 2020 in the hope that stakeholders would be engaged so that this application would not be necessary.

32 Regrettably, the letter of 12 October 2020 did not receive a substantive response. Then, on 14 October 2020, the Minister of CoGTA extended the state of disaster until 15 November 2020 as can be seen from “**LM4**”.

- 33 On 15 October 2020, the date on which the applicant was expecting a response to its letter of 12 October 2020, the Honourable President delivered his Economic Reconstruction and Recovery Plan. In the speech, the President stated that the government will be extending the Special COVID-19 Grant until 31 January 2020. The address is attached hereto as “**LM10**”. However, it was not clear from the President’s speech which grant was extended as both the caregivers’ grant and the SRD grant are referred to as a special COVID-19 Social Relief of Distress grant in the 9 May 2020 directions, as amended. The relevant part of the speech is annexed as “**LM11**”.
- 34 On 19 October 2020, the applicant’s attorneys sent a letter to the President, the first respondent, the Parliamentary Portfolio Committee on Social Development, the second respondent, the third respondent, the fourth respondent, the Parliamentary Portfolio Committee on Finance and the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs. The purpose of the letter was to seek clarity on which of the COVID-19 Social Relief of Distress grants would be extended until 31 January 2020. Again, this was done to obviate the need for this application. To date, no substantive response has been received to this letter, which I have attached hereto as “**LM12**”.
- 35 Instead, on 23 October 2020, the first respondent sent out a communication on its Twitter timeline, a social media platform, that all top up amounts for social grants, including the caregivers’ grant have come to end. It further stated that “*the grants as from November will revert to pre-covid amounts. There is no extension of top up amounts*”. The screenshot of the tweet is annexed as “**LM1**”.

36 It was a result of this communication and the lack of response from any of the respondents on the extension of the caregivers' grant that the applicant was left with no option but to approach this court on an urgent basis for an order interdicting the termination of the top up payment in relation to the caregivers' grant in October 2020.

37 I turn next to discuss why the applicant has made a case for the grant of an interim order.

PART A – The Applicant has made a case for an Urgent Interim Interdict

38 I am advised that the applicable legal test requires that an applicant for an interim interdict establish (a) a *prima facie* right; (b) a reasonable apprehension of irreparable harm and imminent harm to that right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other remedy. Further submissions will be made at the hearing of Part A of this application demonstrating that each element has been met by the applicant.

39 I briefly address each element below

Prima facie right

40 The 7.1 million beneficiaries of the caregivers' grant, many of whom have accessed social security with the applicant's assistance, have a statutory entitlement to the top up funds. This right was accorded to them by the creation of the new social security interventions. The newly acquired right is to an

increased amount of social security which stems from the Disaster Management Act read together with the relevant provisions of the Social Assistance Act. Section 26(2)(b) of the Disaster Management Act enjoins the national executive in dealing with a national disaster, where a state of disaster has been declared, in terms of existing legislation and contingency arrangements as augmented by regulations or directions issued in terms of section 27(2) of the Disaster Management Act.

- 41 The May 2020 directions issued in terms of Regulations promulgated by the CoGTA Minister under section 27(2) of the Disaster Management Act augments the existing social security interventions contained in the Social Assistance Act. This it does by giving social security in an amount of R500 to all beneficiaries of child support grants. In terms of section 6 of the Social Assistance Act, "*a person is ... eligible for a child support grant if he or she is the primary caregiver of that child*". Primary caregivers are now also given R500 social security by the directions by virtue of their status as caregivers under the Social Assistance Act. The aim again is to ameliorate the economic hardship caused by the state of disaster and moreover, for as long as the state of disaster prevails, there is no lawful basis on which they can be deprived of this entitlement.
- 42 This is exactly what the first and second respondents intend to do on 31 October 2020 when they terminate the caregivers' grant. In a time of economic crisis this conduct, depriving existing beneficiaries of much needed money is a breach of the right of access to social security because it is a deliberate retrogressive measure for which absolutely no justification has been offered. On this basis alone, the decision ought to be interdicted because not only has no justification

been given, there is also no explanation on why the grant is being terminated well before the state of disaster has come to an end and whether all other options have been considered.

43 Moreover, the applicant has a right to just, lawful and proper administrative action as envisaged in section 33 of the Constitution. This right includes procedural as well as substantive fairness and lawfulness. The decision to stop the caregivers' grant was made in the absence of any public participation process and without consulting relevant parties on the impact of the newly created social assistance and the consequences of its discontinuation.

44 The *prima facie* right of the applicant and the many beneficiaries who turn to it for assistance has been breached also by the fact that the conduct of the first and second respondent is just plainly unlawful. There is no empowering provision authorising SASSA as an implementing agent to take a decision clearly at odds with a regulatory framework that has deliberately created the caregivers' grant as a new form of social assistance to address the impact of the pandemic. In the absence of any authority to make an executive decision of this nature combined with the fact that the decision is at odds with the law, the first and second respondents' wholly irrational decision has breached the rights of social security of caregivers, many of whom have turned to the applicant for assistance.

45 As I show below, the applicant has reasonable prospects of success of persuading the court that the impugned decision is unlawful and ultra vires and that there is no rational basis on which SASSA could have made the decision to stop the caregivers' grant.

Irreparable Harm to the Applicant and caregivers' grant beneficiaries

46 Unless the interim relief sought in Part A of this application is granted, the impugned decision will remain in effect. If the impugned decision is enforced prior to the determination of Part B of this application, the beneficiaries of the child support grant will suffer irreparable harm in that they will not be receiving the monthly amount of R500 as the caregivers' grant. This will happen in circumstances where the state of disaster and its concomitant economic devastation are a daily reality for the beneficiaries of this grant.

47 The harm to be suffered is untold. The beneficiaries of the caregivers' grant have come to rely on it to weather the storm that is COVID-19. Indeed, this is the very reason why the grant was created. I have had insufficient time since the decision to stop the grant to approach clients of the Black Sash to illustrate the many ways in which the caregivers' grant has alleviated their plight. With respect, I ask that this Court take judicial notice of the fact that since the aim of the grant has been to address the impact of COVID-19, the distribution of these funds has achieved its desired impact. To terminate the caregivers' grant now, whilst as a nation we are still in the eye of the COVID-19 storm is to deprive caregivers of the very protections that the social development directions seeks to accord them, i.e. financial reprieve and some form of income stability whilst they cannot with certainty rely on their own resources to do so. To stop the caregivers' grant before the state of disaster ends will result in unimaginable hardship and all of this in circumstances where no explanation at all has been given for its termination.

- 48 Beyond this, the beneficiaries will suffer harm in that they will not be receiving their top up grant in circumstances that have remained the same. The COVID-19 pandemic is still ongoing. The Minister of CoGTA has still declared a state of disaster.
- 49 COVID-19 has underscored the critical role of adequate social assistance. The pandemic has intensified existing structural inequality. The termination of the caregivers' grant will cause enormous harm to families that rely on social assistance for their livelihood.
- 50 The caregivers' grant was created to be of assistance to caregivers. The termination without proper consultation infringes their rights and by extension the rights of the children in respect of whom they receive children's grants because invariably children rely also on the grants their caregivers receive. The rights of children to basic social services, which are important especially in a pandemic cannot be infringed in this callous and unjustifiable manner.
- 51 All of the harm is irreparable and imminent or reasonably apprehended in light of what is set out above. Conversely, there is no countervailing harm to the other parties to this application.

Balance of Convenience

- 52 The balance of convenience plainly favours the granting of the relief, if the interim relief is not granted and the applicant is later successful in Part B, it will have suffered irreparable harm in the interim, which I have explained above.

- 53 The first and second respondents on the other hand will not suffer any harm on the grant of the order. First, SASSA as an implementing agent has no authority to make an executive decision stopping a social grant. Its role is simply to administer the payment of grants. Second, SASSA certainly has no authority to act beyond the scope of the directions promulgated by the Minister. The Minister has authorised the payment of the caregivers' grant. SASSA has no powers to act in breach of that directive.
- 54 Thus, the first and second respondents in particular will not suffer any harm on the grant of an interim order precluding the implementation of their decision of 23 October 2020. They were not authorised to make the decision and cannot act against Ministerial directives.
- 55 Since the interdict sought is against a state entity, it is necessary that I place on record that the interdict will not intrude into SASSA terrain to administer grants or the Minister's policymaking prerogatives. This is so because the order sought seeks simply that SASSA gives effect to its statutory function by paying the caregivers' grant in accordance with the directions of the Minister. Since the impact of the order will be to give effect to the Minister's directions, her prerogative powers under the Constitution and the relevant legislative framework are not being intruded upon.
- 56 What is more, the applicant has demonstrated a clear case in terms of the entitlement to the relief sought. That case rests upon the breach of the right to social security where vested rights to a grant are terminated by an administrative agency with no policy making powers in breach of Ministerial directions on the

payment of the grant. There can be no more certain a case for the grant of the order interdicting the first and second respondent from acting upon its unlawful decision.

The Absence of an Alternative Remedy

57 SASSA made the announcement on 23 October 2020 to implement its decision by 31 October 2020, which is just over one week.

58 The applicant has no alternative remedy but to interdict the implementation of the decision. If the interim relief is not granted, the beneficiaries of the caregivers' grant will be left out in the cold and fall victim to an unlawful decision.

Part B

The Impugned Decision is Ultra Vires

59 In addition to the fact that SASSA has no authority to stop the grant, the decision to stop the caregivers' grant is unlawful and should be set aside because it is ultra vires the directions adopted by the Minister. The unlawfulness stems from the fact that the decision does not accord with the wording on the directions. The directions published on 9 May 2020, create the caregivers' grant. The wording creating the grant appears as follows –

“A special COVID-19 Social Relief of Distress for Caregivers of R500 per month per Child Support Grant caregiver will be provided. All existing caregivers will automatically qualify and receive this benefit along with their existing monthly benefit.”

- 60 The wording creating the caregivers' grant does not indicate that there is an end date and by implication a termination date of the grant. This is apparent from the plain reading of the provision and reading in context of the amending paragraph. The provision was drafted intentionally by the Minister indicating the caregivers' grant was for the duration of the state of disaster. The state of disaster has not ended, and the Minister has not issued new directions amending the relevant paragraph.
- 61 This reading of the direction is supported by other provisions in the same amendment. For example, the directions pertaining to the SRD Grant expressly highlighted that the SRD Grant would start in May and end in October 2020. I understand now that the SRD Grant, according to the President's speech of 15 October 2020 will be extended for a further 3 months to 31 January 2020.
- 62 All the grants, excluding the caregivers' grant, included in this amending paragraph envision a termination date. This is perhaps because they are existing social interventions catered for in the Social Assistance Act. This formulation indicates, at the least, that the third respondent in drafting the directions was intentional to craft the provision as it stands, i.e. to ensure the indefinite payment of the caregivers' grant as a new social intervention not catered for in the existing legislation so that its lifespan could endure for the period of the state of disaster and perhaps even until its economic devastation is a thing of the past.
- 63 Whilst Annexure A to the directions indicates that the amounts to be paid for the caregivers' grant will end in October 2020, I am advised with respect that the directions must first, be read holistically and second, an annexure cannot be

used to interpret the plain language of the provision in context. Contextually, the plain text of the directions evince an intention on the part of the Minister that the caregivers' grant, applying as it does to a new category of beneficiary and to deal specifically with the impact of COVID-19, will not terminate, at least whilst the country remains in a state of national disaster.

64 To this end, the decision by the second respondent is unlawful as it is ultra vires the directions. This decision was made unilaterally without any form of public participation. The applicant believes that the decision to stop the caregivers' grant has enormous consequences for caregivers and as such should have been subjected to a public participation process. Social assistance has a material impact in reducing poverty and inequality. It gives effect to the core constitutional values of dignity, equality and freedom. Any decision that fundamentally impacts the livelihoods of millions of people should be subject to a proper public participation process, especially in a global pandemic when it is uncertain when things will go back to some form of normalcy.

65 It bears emphasising that the pre-existing social and economic inequality in South Africa was compounded by the pandemic. The disparities are glaring and unavoidable hence the Minister undertook to provide the social relief for distress pursuant to meeting the government's constitutional obligation of social assistance.

66 The Constitution provides that everyone has the right to have access to social security, which includes appropriate social assistance. This obligation for social assistance is more pivotal in the current circumstances in which the country finds

itself. The COVID-19 pandemic has had a huge impact on the economic lives of people in South Africa. The Department of Social Development acknowledges that social assistance continues to be at the centre of South Africa's socio-economic response to the pandemic.

67 The decision to terminate the caregivers' grant with only a week until the beginning of the month is prejudicial to the millions of South Africans who have relied on this social assistance, especially in cases where unemployment rates are high. This is a retrograde measure.

68 The decision is irrational and invalid owing to the fact that country is still engulfed by the pandemic and the state of disaster has been extended to 15 November 2020.

Unfair Discrimination

69 The caregivers grant and SRD grant were created to ameliorate the economic impact of COVID-19. Yet, only the SRD grant was extended by the President for a further 3 months to 31 January 2020 and, as "LM1" shows SASSA made a decision to terminate the caregivers' grant at the end of October. There is no rational basis to the differential treatment accorded to the SRD and caregivers' grants. Both are new forms of social assistance creating categories of beneficiaries harshly impacted by COVID-19 but who, under the existing legislative framework, did not qualify for social assistance. To state it plainly caregivers do not qualify for social assistance independently under the Social Assistance Act. They access a Child Support grant meant for children with whose upbringing they are legally charged. The SRD grant too applies to a

category of beneficiaries for whom no social assistance exists under the Social Assistance Act. Yet, the one grant has been continued through Presidential prerogative power and the other cancelled. What is more the terminating entity, SASSA, has no legislative authority to terminate the grant, and in doing so is contravening the Minister's decision, as reflected in the May 2020 directions that the caregivers' grant be paid indefinitely.

70 Because, in the experience of the Black Sash beneficiaries of the caregivers' grant are in the main women, the vast majority of whom are Black and hail from impoverished communities, the decision to terminate the caregivers' grant and continue the SRD grant also contravenes the right to equality for unfairly discriminating on the basis of sex and gender.

71 Additionally, the termination of the caregivers' grant will impact children as the caregiver's grant is created to simultaneously benefit children. The impugned decision not only impact the caregivers of the child who receives the caregivers' grant, it also materially impacts the children as the caregiver will not have the top-up amount to take care of the child.

72 I am advised that, where it can even be shown that SASSA has the authority to terminate the caregivers' grant, in order for that decision to be lawful, it must meet the minimum threshold of rationality and be taken in pursuit of the purpose of the powers conferred on SASSA by the SSA Act. In that sense it must be rationally related to SASSA's powers under the SSA Act otherwise it will be arbitrary. As I have said SASSA has no policy making powers to determine the creation of new social assistance and when such assistance should be stopped.

All that SASSA can do, in terms of section 4 of the SSA Act is administer social security and perform any function delegated to it under the Social Assistance Act. The Social Assistance Act has not delegated any policy making powers to SASSA. Essentially, as section 4 of the SSA Act mandates, SASSA collects, collates, maintains and administers information necessary for the payment of social grants.

73 But even if it could terminate the caregivers' grant, the constitutional directive of equality enjoins it to rationally differentiate between SRD and caregivers grants, both of which as new forms of social assistance are aimed at alleviating the plight of people who ordinarily do not qualify for social assistance under the Social Assistance Act (despite the Constitution not drawing such distinctions). Thus, SASSA would have to show that there is a rational reason for treating caregiver beneficiaries differently from SRD beneficiaries and that they suffer less or no comparative prejudice on the termination of their grant.

74 With respect, this threshold simply cannot be met. First, the newly created grants are by Ministerial directive meant to apply for as long as the nation is in a state of disaster. That situation will prevail at least until 15 November 2020. Second, given the comparative and accepted disadvantage of historically disadvantaged women and their children, who are largely the predominant beneficiaries of the caregivers' grant, it cannot be rational to discriminate against them by unilaterally depriving them of a vested constitutional right, whilst continuing to extend the right to SRD beneficiaries. This amounts to discrimination based on sex and gender, a clear breach of section 9 of the Constitution.

- 75 In short, the termination of the caregivers' grant amounts to unfair discrimination on the basis of gender as it is predominantly women who as caregivers are the beneficiaries of the grant. Furthermore, it indirectly discriminates against children on the basis of age. On the other hand, the SRD grant given to adults who are unemployed, has been extended for a further 3 months, while the caregivers' grant, given to caregivers who get the child support grant, was terminated without much ado. Notably, the beneficiaries of the caregivers' grant are precluded from benefiting from the SRD grant. Given the short period of time in which this affidavit was prepared the applicant reserves the right to make further submissions on why it is unfair discrimination to single out only the caregivers' grant for immediate termination.
- 76 The caregivers' grant was introduced to curb the harsh economic impact of COVID-19 on the lives of caregivers who qualify to receive Child Support Grants under the Social Assistance Act. SASSA's conduct in terminating the caregivers' grant in October whilst the Presidency has extended SRD grant is not rational and is unfairly discriminatory.
- 77 SASSA has not given an explanation for the termination apart from the communication of the termination of the caregivers' grant. Further, SASSA has not provided a rationale for the termination of the caregivers' grant and proffered a legitimate government purpose to validate it.
- 78 The State is responsible to assist families to meet their socio-economic needs when they are unable to do so owing to structural historical and social forces. The termination of the caregivers' grant goes against this obligation.

79 Further, the unfair discrimination cannot be justified under section 36 of the Constitution.

Conclusion

80 In all of the above circumstances the applicant has made out a case for the urgent interim interdict that it seeks in Part A of the notice of motion, and thus seeks an order in terms thereof together with costs occasioned on the employment of two counsel.

LYNETTE MAART

The deponent has acknowledged that she knows and understands the contents of this affidavit which was signed and sworn to before me at _____ on this _____ day of _____ 2020, the Regulations contained in Government Notice No. 1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 17 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS