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catalysts for social justice

SUBMISSION TO THE DEPARTMENT OF SOCIAL DEVELOPMENT

Draft Regulations for the Lodging and Consideration of Applications for Reconsideration of Social Assistance Application by the Agency and Social Assistance Appeals by the Independent Tribunal and Other Matters ("Draft Regulations")

Introduction

1. SECTION27 welcomes the opportunity to make this submission on the Draft Regulations.

2. SECTION27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights.

3. In April and May 2010, SECTION27 made oral and written submissions in respect of the Social Assistance Amendment Bill, 2010 to the Portfolio Committee on Social Development in the National Assembly.[1] The submissions dealt with, amongst other things, the appeal process proposed in the Bill and later included in section 18 of the amended Social Assistance Act ("the Act").

4. In our submissions to the Portfolio Committee we raised certain procedural and substantive concerns about the proposed appeal process. In large part, these concerns were not addressed. In particular, we recommended that Parliament should not adopt the double internal step requiring an aggrieved applicant to lodge an application for SASSA's reconsideration of its decision because currently, both the application process and the appeal process are lengthy and fraught with delays and

[1] The written submissions can be accessed from http://www.section27.org.za/2010/05/04/1545

difficulties for the applicants. While we stand by those submissions, we have restricted our comments to the Draft Regulations.

5. This submission is the latest stage in our participation in the legislative process. Our submission considers the Draft Regulations in light of the applicants' right to social assistance;[2] their constitutional entitlement to just administrative action that is lawful, reasonable and procedurally fair;[3] and their right of access to courts.[4]

6. In order to comply with its obligations in terms of section 27(1)(c) of the Constitution, the Department of Social Development (DSD) must take reasonable steps to ensure the existence of a social security system which meaningfully addresses people's needs and, in particular, ensures access to "appropriate social assistance".

7. As with other socio-economic rights, the right to social security must be understood in the light of the foundational values of the Constitution and as part of a web of mutually reinforcing rights. Under our Constitution, dignity is both an enforceable human right as well as a foundational constitutional value.

8. Treating people with dignity requires the state, amongst other things, to act in a reasonable manner towards those claiming social security rights. In particular, the state has a constitutional duty to assist those who are in need of social assistance in a manner that enables them to claim their constitutionally and statutorily guaranteed entitlements.

Summary of key recommendations

9. Our submission recommends a set of proposed amendments to the Draft Regulations, including the following:

   9.1. Regulation 2(2)(a) and (b) – which deal with required documentation to be submitted as part of an application for reconsideration – should be deleted;

   9.2. Regulation 3(3) – which deals with timelines in relation to applications for reconsideration – should be amended as follows:

[2] Section 27 of the Constitution.
[3] Section 33 of the Constitution.
[4] Section 34 of the Constitution.

"The Agency **[may]** must, within 90 days of receipt of an application contemplated in regulation 2 and after consideration of the application ...";

9.3. Regulation 13(1)(c) – which deals with requests for written reasons from the South African Social Security Agency (SASSA) – should be deleted;

9.4. Regulation 13(1)(g) – which deals with hearing postponements – should expressly be made subject to regulation 17(2);

9.5. Regulation 15(3) – which deals with a prohibition on producing new evidence or information at the appeal stage – should be deleted;

9.6. Regulation 19(11) – which deals with a medical report indicating that an applicant's or beneficiary's medical condition has degenerated to such an extent that he or she now qualifies for a disability grant – should be amended as follows:

"Where the medical examination report as contemplated in sub regulation (1) concludes that the applicant's or beneficiary's medical condition**[s]** has, since the rejection of the grant by the Agency, degenerated to such an extent that the beneficiary or applicant would have qualified for a grant had he or she applied thereafter, the Independent Tribunal must:

(a) **[confirm the decision of the Agency]** set aside the decision of the Agency and replace that decision with a decision to provide the relevant grant**[; and**

(b) **advise the applicant, beneficiary or the person acting on his or her behalf to reapply for a grant based on the latest medical report, provided that the medical report shall not be older than three months as contemplated in regulation 3(b) of the 2008 Regulations at the time when the applicant or beneficiary reapplies for a grant]**."; and

9.7. Regulation 20(d) – which deals with the Secretariat's powers to assess "the accuracy, validity and reliability of supporting documentation" – should be deleted.

Background

10. The Draft Regulations are being proposed by DSD in the context of a rising number of applications for social assistance and a significant backlog in the processing of appeals. According to SASSA, the number of people receiving social assistance in South Africa grew by 28.1% over the last four financial years and by 7.5% in the last financial year.[5] Currently over 14 million people in South Africa are receiving social assistance.[6]

11. It is public knowledge that the Independent Tribunal has been in existence for a number of years and has so far operated in the absence of empowering provisions. The Draft Regulations appear designed to give legal force to the existing structure in its current form. Yet there are significant concerns about the current structure, as outlined in our earlier submissions to Parliament and evidenced by the huge backlogs in the appeal system.

12. In our view, the regulation-making process should – in the first instance – evaluate the current system and then develop a model that responds to the identified needs. Consequently, although the process of regulation-making is already underway, we call on DSD to examine the existing structure and determine how it needs to be changed in order to work optimally for those in need of social assistance.

13. It is a matter of public record that there is a significant backlog of appeals in the social assistance system.[7] We note the recent settlement of the case dealing with the backlogs in appeals brought before the Eastern Cape High Court.[8] The applicants in that case sought to compel DSD to develop a programme to deal with the backlog in appeal cases. Many of the applicants had been waiting for their appeal applications to be finalised for extensive periods. In terms of the court order obtained by consent, DSD is obliged to develop a programme to address current and future backlogs. This indicates that something more than the status quo is needed to address the problems in the appeal system. A streamlined administrative structure for social grants and the

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[5] South African Social Security Agency Annual Report 2009/2010 at page 23 (available at http://www.sassa.gov.za/Portals/1/Documents/5a2418d2-5542-4b6f-bdab-547d742c1b9f.pdf).

[6] Ibid.

[7] The backlog of approximately 40 000 appeals was discussed by Ms Virginia Petersen (Deputy Director General: Appeals, Department of Social Development) in a briefing to the Portfolio Committee on Social Development on 31 August 2010. Minutes are accessible from http://www.pmg.org.za/report/20100831-independent-tribunal-social-assistance-appeals-itsaa-its-operational-.

[8] *Ntamo v Minister of Social Development* (Eastern Cape High Court, case number 689/2010).

appropriation of moneys for that purpose go a long way towards fulfilling the state's constitutional obligations but must go hand in hand with reasonable measures to make the system effective.

Application for reconsideration by SASSA

14. The Draft Regulations provide minimal guidance for the reconsideration by SASSA of a social assistance application. In our view, the process should expressly be set out in more detail and streamlined with the Tribunal appeal process.

15. In terms of Regulation 2(2), the applicant is obliged to make copies at his or her own cost of a proof of receipt issued by SASSA, as well as the letter of rejection or approval also issued by SASSA. In our view, requiring an applicant to provide copies of documentation generated by SASSA as part of the application process is unnecessary, burdensome to and has cost implications for applicants who – by definition – are in need of state assistance in order to meet their basic needs.

16. In the circumstances, requiring the applicant to provide a reference number or his or her identity number to SASSA should suffice to identify the application and the documents associated with that application. In this regard, we recommend the deletion of Regulation 2(2) and an amendment to Regulation 2(2)(a) and (b) requiring an applicant to provide the SASSA reference number or identity number on lodging an application for reconsideration.

17. With regard to the time periods for SASSA's reconsideration of the application, Regulation 3(3) provides that "[t]he Agency may, within 90 days of receipt of an application", either uphold or dismiss the application. The permissive language means that SASSA is not obliged to finalise the application within 90 days but may do so within its discretion. In our view, the provision should be peremptory rather than permissive. We therefore recommend that the word "may" in Regulation 3(3) be replaced with the word "must", in line with the corresponding provision for the finalisation of appeals by the Tribunal.[9]

[9] Regulation 17(2) of the Draft Regulations provides that "an appeal must be finalised within a period of 90 days from the date on which the appeal was received by the Independent Tribunal".

Appointment and composition of the Independent Tribunal

18. It is worth noting that the Tribunal is bound by the provisions of section 34 of the Constitution, which states that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum." It must therefore meet the criteria of independence and impartiality.

19. Regulation 5 empowers the Minister to appoint members of the Tribunal for a "specific period of time", but the term of appointment is not specified. This means, for example, that the Minister may appoint one legal practitioner in Limpopo for a period of six months and another legal practitioner in Gauteng for a period of two years. This possibility of appointing members of the panel for different terms may have an impact upon the independence and impartiality of the Tribunal.

20. In addition, the procedure for appointments is also not set out in the Draft Regulations. There is no requirement, for example, that there be a public call for nominations. Nor is there any requirement that the Minister should consult with or seek input from interested stakeholders before making appointments.

21. We recommend that the Draft Regulations be amended to deal expressly with these and other questions relating to the appointment process. In our view, a public and transparent procedure for appointments of members of the Tribunal is important to promote its independence and impartiality.

22. It is also unclear how many panels are envisaged and if they will be based in the provinces or centralised. Further, the Draft Regulations give no indication of how many lawyers, doctors and civil society members will be appointed to the Tribunal at any given time. In our view, sufficient panels must be established to enable the Tribunal to complete its work within the prescribed timeframes.

23. In our view, the terms and conditions of appointment of each category of members should be specified in the Draft Regulations and must be consistent for all members. In other words, the Draft Regulations must set out in detail how many members constitute a specific panel, where they will be based and whether those members are appointed for a fixed renewable or non-renewable term, as well as some indication of their remuneration structure.

24. Lastly, the role of the member of civil society in the appeal process is vague. According to Regulation 12, the role of the civil society member is to "advise the Tribunal on the socio-economic aspects of the applicant or the beneficiary". While we recognise the value of including a person who has experience and an understanding of such issues in determining appeals, we are of the view that the provisions relating to the civil society member's involvement do not seem to achieve this purpose.

25. Limiting such a person's involvement to a mere advisory role – without the power to participate in decision-making – undermines his or her role and makes it less than meaningful. In order to ensure that the member of civil society is able to play a meaningful role in the appeal procedure, we recommend that the requisite experience and knowledge expressly be included in Regulation 9 as part of the criteria for the appointment of a member of civil society to the Tribunal – and that such a person be appointed as a full member.

26. In addition, more details are needed on how the civil society member will obtain the relevant information. For example, will he or she be required to do his or her own investigation into the applicant's particular socio-economic circumstances?

Powers of the Independent Tribunal

27. In considering an appeal, the Tribunal may require further information, and may request such information from the parties in terms of Regulation 13. In terms of regulation 13(1)(c), the Tribunal may request SASSA to provide written reasons for its decision for rejecting the request for reconsideration "if it is not satisfied by the reasons provided by the Agency for rejecting the beneficiary's or applicant's request for reconsideration, request the Agency to provide written reasons for its decision for rejecting the request for reconsideration in terms of section 18(1) of the Act".

28. This provision is unclear. It either suggests that SASSA's written reasons will not automatically form part of the appeal record, or it provides SASSA with an opportunity to supplement its original reasons. Both scenarios are problematic.

29. The Tribunal will only be in a position to adjudicate an appeal fairly and reasonably if it is in possession of the appeal record in its entirety – including SASSA's reasons. Thus in the first instance, SASSA must provide reasons as a matter of course in every

application, as required by section 5 of the Promotion of Administrative Justice Act, 3 of 2000. In accordance with the principles of administrative justice, those reasons must be placed before the Tribunal on appeal.

30. A more likely interpretation of Regulation 13(1)(c) provides that in considering an appeal the Tribunal can call for additional reasons from SASSA that did not form part of its original decision. This is contrary to the principles of administrative justice as SASSA cannot be entitled to justify its decision with new reasons retrospectively.

31. While the Tribunal is entitled to call for more information for the purpose of deciding the appeal, it cannot call for further reasons from SASSA – it is bound by its reasons and the Tribunal must assess the correctness of SASSA's reasoning without considering any additional reasons it may advance in the face of an appeal. The Tribunal must assess a SASSA decision on the merits of its reasoning and on the basis of the evidence and information before it. We therefore recommend that Regulation 13(1)(c) be deleted.

32. A further concern in respect of the powers of the Tribunal relates to the power to postpone a hearing. Regulation 13(1)(g) provides that the Tribunal may postpone the hearing of an appeal "to such date as it may determine". In light of the requirement of regulation 17(2) to finalise appeals within 90 days, we recommend that regulation 13(1)(g) is specifically made subject to regulation 17(2).

Lodging of an appeal

33. According to Regulation 15(3), the applicant may not produce any new information concerning his or her circumstances on appeal. Like in court proceedings, the applicant should be afforded the right to reply to the reasons advanced by SASSA. In other words, the applicant must be entitled to meet the case of SASSA and respond with whatever information is available to him or her, otherwise he or she is effectively deprived of the ability to make the representations necessary to challenge SASSA's decision successfully. In this regard, we recommend deleting Regulation 15(3).

34. A further concern relating to the lodging of an appeal is the requirement to produce the following documents as part of the appeal application: "any document provided by

the Agency as proof of receipt of an application for social assistance" and "a copy of a letter of rejection or approval of social assistance application by the Agency".

35. According to Regulation 22(1), failure to provide these documents is fatal to the appeal application. In other words, the applicant's failure to provide documents already in the possession of the SASSA means that the application will simply be thrown out by the Secretariat without ever reaching the Tribunal for adjudication. In our view, the consequences of failing to provide the information required by regulation 2(2) will, in many instances, have the effect of depriving an applicant of his or her entitlement to social assistance – without good cause.

36. As discussed above, the relevant information can easily be accessed by the Secretariat on the lodging of an appeal. The requirement should be no more than providing a reference number or identity number to the Tribunal upon lodging an appeal.

37. For the reasons advanced above and in relation to the reconsideration application in paragraphs 15 and 16 above, we recommend that Regulation 2(2)(a) and (b) be deleted.

Consideration of an appeal

38. In terms of Regulation 17(1) a), the appeal is to be conducted "in the absence of the applicant". This is contrary to section 34 of the Constitution, which requires a "fair public hearing". Given the nature of these applications, disputes of fact may be impossible to resolve without oral evidence. Furthermore it may be easier and more appropriate for the applicant to articulate his or her case in an oral hearing rather than in writing.

39. We therefore recommend that, at the very least, the Tribunal be given the power to hear oral evidence should the need arise in order to resolve disputes of fact. The Secretariat should facilitate this process, for example, by notifying the applicant to appear on the date of the oral hearing and providing whatever assistance the applicant may require in order to attend the hearing.

40. In considering an appeal, the Tribunal is entitled to call for a second independent medical examination or opinion in terms of Regulation 19(1). In circumstances where

the second medical examination concludes that the applicant's medical condition has degenerated to such an extent that the applicant now qualifies for a grant, the Tribunal is obliged to confirm SASSA's decision to reject the grant application and then advise the applicant to re-apply for a grant on the basis of the second medical examination.

41. In our view, this is an insufficient remedy for a person whose medical condition is clearly deteriorating rapidly and who is desperately in need of and entitled to social assistance. It is untenable to require a person who is poor and disabled as a result of his or her medical condition to go through the entire process again, particularly when the legal practitioner and medical practitioner have determined that the person in fact qualifies for the relevant grant. In our view, this is also a violation of the right of access to social assistance in terms of section 27(1) (c) of the Constitution.

42. We therefore recommend the amendment of Regulation 19(11) as follows:

> "Where the medical examination report as contemplated in sub regulation (1) concludes that the applicant's or beneficiary's medical condition**[s]** has, since the rejection of the grant by the Agency, degenerated to such an extent that the beneficiary or applicant would have qualified for a grant had he or she applied thereafter, the Independent Tribunal must:
>
> (a) **[confirm the decision of the Agency]** <u>set aside the decision of the Agency and replace that decision with a decision to provide the relevant grant</u>**[; and**
>
> (b) **advise the applicant, beneficiary or the person acting on his or her behalf to reapply for a grant based on the latest medical report, provided that the medical report shall not be older than three months as contemplated in regulation 3(b) of the 2008 Regulations at the time when the applicant or beneficiary reapplies for a grant].**"

Administrative support

43. According to Regulation 20, the Tribunal is to be supported by a Secretariat that is in the full-time employ of DSD, reporting to the Minister. Some provisions governing the proposed Secretariat raise concerns about the independence of the Tribunal. For

example, Regulation 20(d) provides that the secretariat "must assess the accuracy, validity and reliability of supporting documentation".

44. While the extent of what the above assessment entails is unclear, at minimum it gives some discretion to the Secretariat to make certain findings about the merits of the applicants' application. It is completely inconsistent with the requirements of administrative justice for the secretariat – which is intended to provide administrative support to an independent institution – to play a substantive role in an appeal process. This seriously undermines the purported independence of the Tribunal, contrary to the Act and the Constitution.

45. Furthermore, in our view, the Tribunal is the institution vested with the delegated authority to decide appeals. It would therefore be unlawful for the Secretariat to exceed the scope of a purely administrative support role in the appeal process. We therefore recommend the deletion of regulation 20(d) of the Draft Regulations.

46. To ensure the Tribunal's independence, DSD may wish to consider the implications of the Secretariat's location within the department. In terms of the Draft Regulations, the Tribunal will not have any direct control over the Secretariat. For example, the Tribunal will not be able to discipline Secretariat employees for misconduct or non-performance but will have to rely on DSD to do so. We propose that the structure and role of the Secretariat be addressed in detail by the Draft Regulations, in particular the relationship between the Tribunal and the Secretariat.

Issues that should be regulated but are not

47. The following are some additional issues that are not considered by the Draft Regulations but in our view should be addressed:

    47.1. A process for the removal of Tribunal members from office – there must be clarity with regard to the circumstances under which a member of the Tribunal may lawfully be removed from office (for example, on the grounds of misconduct, incapacity or incompetence);

47.2. The remuneration of Tribunal members – the question of the full-time or part-time nature of the appointment will have a bearing on this and clarity is needed on both;

47.3. A public procedure for the appointment of members of the Tribunal; and

47.4. A procedure for the Tribunal to hear oral evidence should the need arise in order to resolve disputes of fact.

Conclusion

48. SECTION27 once again thanks DSD for the opportunity to make this submission. Should DSD have any questions on this submission, please contact Umunyana Rugege at rugege@section27.org.za or 011 356 4100.

49. This submission is endorsed by the Legal Resources Centre, a human rights organisation that uses the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances.

[ENDS]

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