

# An analysis of the South African social assistance system as it applies to children in rural communities: A perspective from the *Grootboom* case

Gugulethu Nkosi\*

## 1 Introduction

The pre-democratic laws regulating social security benefits favoured white children.<sup>1</sup> When the democratic government came into power in 1994 it was concerned about the racial disparities evident in the distribution of social security benefits and the large-scale nature of poverty, particularly amongst black children.<sup>2</sup> The government's response was to entrench social security and social assistance provisions in the Constitution.<sup>3</sup> Further, the government introduced various social assistance measures to accommodate the diverse needs of South African children irrespective of race. The magnitude of the right of access to social security, including social assistance, is apparent. Section 27(1) of the Constitution<sup>4</sup> provides that everyone has the right to have access to health care services,<sup>5</sup> sufficient food and water,<sup>6</sup> and social security, including appropriate social assistance if they are unable to support themselves and their dependants.<sup>7</sup>

---

\*BProc LLB (UDW now UKZN); LLM (Wits). Senior Lecturer, Department of Jurisprudence, Unisa.

<sup>1</sup>Coloured children also benefited from social assistance. African women were largely excluded from accessing the SMG. An African woman was eligible for this means-tested grant if she applied for financial support from her partner or the father of her children through a magistrate's court, and had been unable to obtain it, or if she was widowed or deserted. See Republic of South Africa *Report of the Lund Committee on Child and Family Support* (August 1996), available at <http://www.info.gov.za/otherdocs/1996/lund.htm> (accessed 2009-11-4). See also Liebenberg and Tilley 'Poverty and inequality hearings, social security theme' (1998) *South African Human Rights Commission for Gender Equality* 4.

<sup>2</sup>Olivier and Kalula 'Scope and coverage' in Olivier, Smit and Kalula (eds) *Social security: A legal analysis* (2003) 143.

<sup>3</sup>See Davis 'Socioeconomic rights: Do they deliver the goods?' (2008) 6 *I-CON* 687, available at <http://icon.oxfordjournals.org/contents> (accessed 2010-11-04).

<sup>4</sup>The Constitution of the Republic of South Africa 1996 (hereafter the Constitution).

<sup>5</sup>Section 27(1)(a).

<sup>6</sup>Section 27(1)(b).

<sup>7</sup>Section 27(1)(c).

The role of social assistance is to alleviate poverty. It is therefore important to understand what it entails, especially in light of the relationship that is being forged between social assistance and other socio-economic rights, particularly the right to education. The Social Assistance Act Regulation that came into effect on 1 January 2010<sup>8</sup> creates a link between social assistance, specifically the child support grant, and education.<sup>9</sup> The connection between social assistance, as advanced in the Social Assistance Act<sup>10</sup> and the Social Assistance Regulations, will be discussed against the background of the landmark case of the *Government of the Republic of South Africa v Grootboom*.<sup>11</sup>

Although the deliberations in the *Grootboom* case concerned section 26 of the Constitution which provides for the right to housing, the case successfully sets the pace for how a discourse on socio-economic rights should be approached. The aim of this paper is to establish whether linking social assistance to education is significant to the realisation of the right to education.

This paper will first analyse the standard for the realisation of the right of access to adequate housing as set out in the *Grootboom* case. Secondly, it will investigate the government's constitutional mandate with regard to realising the right to social assistance as provided for in section 27(1) and (2). The provisions of section 27 will be discussed against the *Grootboom* standard and an inference will be drawn with regard to children who reside in rural areas. Finally, I will draw some conclusions on the link created between social assistance and the right to education for children residing in rural areas.

Before expounding on the significance of the *Grootboom* case to social assistance, it is important first to explain the concept of social assistance.

## 2 Social assistance – definitions and historical perspective

Social assistance<sup>12</sup> is generally viewed as a component of the broader system of social security. Social security is not a fixed concept. From the constitutional point of view, it is said to be an umbrella concept into which social assistance is integrated.<sup>13</sup>

---

<sup>8</sup>Social Assistance Act Regulations no 32853.

<sup>9</sup>In terms of the Social Assistance Act Regulations a primary caregiver in receipt of a child support grant for the benefit of a child between the ages of seven and eighteen, is required to ensure that such child attends school. Such primary caregiver is accountable to the Director-General of the National Department of Social Development for the schooling of such child. The relationship between social assistance and education will be discussed later in the article.

<sup>10</sup>Social Assistance Act 13 of 2004, hereafter referred to as the Social Assistance Act.

<sup>11</sup>*Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C). *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC). Hereafter referred to as the *Grootboom* case.

<sup>12</sup>Social assistance is also referred to as social welfare or social protection.

<sup>13</sup>Olivier 'The concept of social security' in Olivier, Smit and Kalula (eds) *Social security: A legal analysis* (2003) 24.

Social security is designed for the purposes of poverty prevention, poverty alleviation, social compensation and income distribution, and among the mechanisms used to realise the right to social security is social assistance.<sup>14</sup> Institutions through which social assistance is implemented are: the South African Social Security Agency, which is responsible for the administration of social grants; non-governmental organisations, which are responsible for the provision of welfare services; and the National Development Agency, which mobilises civil society.<sup>15</sup>

A social security system, similar to the conventional South African social security system, subsists in indigenous African communities. This system is regulated in accordance to indigenous African law and is generally employed by indigenous African communities, particularly those residing in rural areas. It does not, however, form part of the formal social security system and, hence, is generally referred to as informal social security.<sup>16</sup> Contingencies addressed through informal social security are broad and vary from economic interests to fostering the psychological well-being of others.<sup>17</sup>

The structures within which this type of social security operates are remarkably organised. They are born from the principle of collective solidarity and are largely influenced by the manner in which families were traditionally arranged. For instance, people who bear the same kin name formed a community and regarded themselves as part of one another.<sup>18</sup> They relied on one another for socio-economic needs, including child rearing and child socialisation.<sup>19</sup> Regrettably, indigenous African social security measures are not strengthened through legislative and other means. They operate in isolation from the conventional social security system and strive against the current difficult socio-economic challenges.

The Social Assistance Act explains social assistance as 'a social grant including social relief of distress'.<sup>20</sup> The component of social assistance provided for in the legislation takes the form of social grants.<sup>21</sup>

---

<sup>14</sup>Mirugi-Mukundi *Realising social security rights of children in South Africa, with particular reference to the Child Support Grant* (2009) Research Report written for the Socio-economic Rights Project of the Community Law Centre 2.

<sup>15</sup>Report of the Southern African Departments and Ministries of Social Development and Social Affairs Regional Social Policy Round Table 2009-11-22/25, Livingstone, Zambia 22.

<sup>16</sup>De Koker, De Waal and Vorster 'A profile of social security beneficiaries in South Africa' 2006 (3) *Data Desk, Stellenbosch University* 507.

<sup>17</sup>See Ade Ajayi 'Solidarity in African society crisis' in *Towards solidarity in the management of African societies: Misgivings and certitudes* (Proceedings of an African symposium on African Societies and the Solidarity Contract) (1984) 8-9. See also Nkosi "'It takes a village to raise a child": Accessibility of social assistance benefits in indigenous African communities' (2010) 22 *SA Merc LJ* 346-359.

<sup>18</sup>*Ibid.*

<sup>19</sup>*Ibid.*

<sup>20</sup>Section 1.

<sup>21</sup>Section 1 of the Social Assistance Act 13 of 2004 defines a social grant as a child support grant, a care dependency grant, a foster child grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid.

Scholars like Olivier and Kalula<sup>22</sup> align with the view that the concept of social assistance does not have a uniform definition. They assert that social assistance rests on two pillars, namely, the provision of various kinds of social services and the payment of social grants. Other scholars<sup>23</sup> define social assistance as a 'range of benefits and services available to guarantee [a] minimum (however defined) level of subsistence to people in need, based on the test of resources ...'. Elsewhere, social assistance benefits are said to be income tested 'safety net' cash benefits, sometimes called 'welfare benefits', which are paid in order to bring incomes up to some minimum level. They are also referred to as income maintenance.<sup>24</sup> The Asian Development Bank refers to social assistance as social protection and defines it as: 'a set of policies or programs designed to reduce poverty and vulnerability by promoting efficient labor markets, diminishing people's exposure to risks, and enhancing their capacity to protect themselves against hazards and interruption/loss of income (Ortiz 2001)'.<sup>25</sup>

Prior to the democratic regime, the social assistance system that was in operation was racially biased. Mainly white children benefitted from the system.<sup>26</sup> When the democratic government came into power, it phased out the main social assistance grant which was in place at the time, namely, the state maintenance grant. This grant had three major shortcomings. First, it was accessible mainly to white people; second, the family model upon which it operated did not represent the meaning of family as understood in African communities; third, it was not aligned with the needs of African children and their living conditions.<sup>27</sup>

In an effort to introduce a system that responds to the needs of the country as a whole, the government introduced various social assistance grants, aimed at benefitting a spectrum of society, regardless of race.<sup>28</sup> Grants aimed at benefitting children directly are the following:

First, the *child support grant* that is provided for in sections 4 and 6 of the Social Assistance Act. It is payable to a needy<sup>29</sup> primary caregiver of a child for the benefit of that child. The aim of this grant is to support primary caregivers of children by making a contribution to supplementing their resources to use towards

<sup>22</sup>Olivier and Kalula (n 2).

<sup>23</sup>Eardley, Bradshaw, Ditch, Gough and Whiteford *Social assistance in OECD countries* (1996) Department of Social Security Research Report 46 at 4.

<sup>24</sup>Cappellari and Jenkins 'The dynamics of social assistance benefit receipt in Britain' (2009) *Institute for Social and Economic Research* 3.

<sup>25</sup>Bloom, Mahal, Rosenberg, and Sevilla 'Social protection and conditional cash transfers' in Handayani and Burkley (eds) *Social assistance and conditional cash transfers: The proceedings of the regional workshop* (2009) 12.

<sup>26</sup>Olivier and Kalula (n 2).

<sup>27</sup>See Republic of South Africa *Report of the Lund Committee on Child and Family Support* (August 1996), available at <http://www.info.gov.za/otherdocs/1996/lund.htm>. See also Nkosi (n 17).

<sup>28</sup>Chapter 2 of the Social Assistance Act.

<sup>29</sup>The child support grant is means tested. A primary caregiver is eligible for the child support grant if his/her income falls within specified amounts. Different regulations apply for urban and rural dwellers.

providing for the adequate growth and development of children.<sup>30</sup>

Second, the *foster care grant*. Once a child has been found to be in need of care and protection in terms of section 150 of the Children's Act<sup>31</sup> and has been placed in the care of a foster parent by a court of law, that parent becomes eligible to apply for a foster care grant in terms of the Social Assistance Act Regulation.<sup>32</sup> One of the conditions to be met in order to qualify for a foster care grant is that the foster parent and the child must reside in South Africa at the time of the application.<sup>33</sup>

Thirdly, the *care-dependency grant*<sup>34</sup> intended for parents or foster parents of children under the age of 18 who require and receive permanent home care due to severe mental and/or physical disability.<sup>35</sup>

Of these three grants, the child support grant will receive further attention because unlike the other two grants, the child support grant was developed for the sole purpose of alleviating poverty amongst children. Further, the child support grant is said to be a gateway to other benefits.<sup>36</sup> For instance, a beneficiary of a child support grant is entitled to automatic fee waivers for schooling and to free health care.

A number of factors are said to have informed the formulation of the child support grant. These include HIV/AIDS and its effects on health and welfare, and the anticipated crisis of care for those affected by this pandemic and the subsequent stress on family life.<sup>37</sup> There are, however, many other crucial factors

<sup>30</sup>Meintjes, Budlender, Giese and Johnson 'Children in "need of care" or in "need of cash"? Questioning social security provisions for orphans in the context of the South African AIDS pandemic' (2003) *Joint Working Paper of the Children's Institute and Centre for Actuarial Research*. See also Goldblatt and Liebenberg 'Giving money to children: The state's constitutional obligation to provide child support grants to child headed households' (2004) 20 *South African Journal on Human Rights* 152.

<sup>31</sup>In terms of section 150 of the Children's Act a child is said to be in need of care and protection if the child:

- (a) has been abandoned or orphaned and is without any visible means of support;
- (b) displays behaviour which cannot be controlled by the parent or care-giver;
- (c) lives or works on the streets or begs for a living;
- (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
- (e) has been exploited or lives in circumstances that expose the child to exploitation;
- (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
- (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
- (h) is in a state of physical neglect; or
- (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

<sup>32</sup>Regulation 7(a) of the Social Assistance Regulations.

<sup>33</sup>Regulation 7(c) of the Social Assistance Regulations.

<sup>34</sup>Other grants are: the old-age grant, the disability grant, the war veteran's grant and the grant-in-aid.

<sup>35</sup>See SASSA 'You and your grants' available at <http://www.sassa.gov.za> (accessed 2010-06-10).

<sup>36</sup>Republic of South Africa The Presidency 'Situation analysis of children in South Africa' (2009) 22 available at <http://www.thepresidency.gov.za/docs/pcsa/gdch/situation-analysis.pdf> (accessed 2010-06-10).

<sup>37</sup>Lund *Changing social policy: The Child Support Grant in South Africa* (2008) 111-112.

that should have been considered in formulating the child support grant. These include the existing models of child care; the role and extent of women's unpaid work in providing health and welfare services; how households form and re-form in response to the life cycle and in response to different types of social provision; the links between social spending and educational outcomes; the life cycle effects of different types of social spending; and the match between poorer people's skills and what is needed to set up small enterprises.<sup>38</sup>

Incorporation of the factors listed above into the child support grant is crucial. These factors were arrived at as a result of an investigation of circumstances of beneficiaries and potential beneficiaries of the child support grant. Their incorporation therefore allows the child support grant to respond to the identified needs of its beneficiaries. While other factors are not prominent in the regulation of the child support grant, the notion of education is explicitly stipulated. The significance of incorporating education into social assistance will be explored.

### 3 The standard set for social assistance by the *Grootboom* case

In the *Grootboom* case the court had to interpret section 26 of the Constitution in order to arrive at a decision on whether or not the government had met its constitutional mandate relating to housing rights towards Grootboom and others. Section 26 of the Constitution provides that everyone has the right to have access to adequate housing.<sup>39</sup> It further provides that the State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.<sup>40</sup>

In brief, the *Grootboom* case pertains to Grootboom and other members of the Wallacedene community who vacated their settlement and moved to a piece of land adjacent to that settlement. The settlement that they occupied was not serviced by the municipality. It had no sewage facilities and poor drainage during heavy rains made the area partially waterlogged. Unfortunately, the owner of the land to which they relocated obtained an eviction order and they were evicted. Grootboom and the others had nowhere to go. They then launched an urgent application in the Cape High Court and based their argument firstly, on section 26 which provides for the right to adequate housing; and secondly, on section 28 (1)(c) which provides for the children's right to shelter.

The High Court rejected the first argument stating that the government's housing programme was rational and met the constitutional obligation. Regarding the second argument the court said that section 28(1)(c) places an obligation

---

<sup>38</sup>*Ibid.*

<sup>39</sup>Section 26(1).

<sup>40</sup>Section 26(2).

upon government to provide shelter for children in an event where parents are unable to do so themselves, as was the case with Grootboom and the others.

The government took the decision of the High Court on appeal to the Constitutional Court. The Constitutional Court said that the government housing programme fell short of its constitutional obligation because it fails to provide relief to people in desperate need.<sup>41</sup> Section 26 therefore places a positive responsibility upon the government to realise the said right.<sup>42</sup>

When the *Grootboom* case reached the courts, the government had already adopted legislation and strategies to strengthen its commitment to the realisation of the right of access to adequate housing. The Housing Act of 1997<sup>43</sup> promotes non-discriminatory access to housing and security of tenure and equal access to all.<sup>44</sup> It also enables accessibility to housing through a series of interventions to improve the supply of affordable housing and facilitates monitoring and evaluation of homelessness and inadequate housing.<sup>45</sup>

Amongst its very first strategies was the Reconstruction and Development Programme (commonly known as the RDP) through which over 1.1 million houses were built for the poor.<sup>46</sup> Other strategies include: the Bulk Connector Infrastructure Grant, which aims at providing subsidy for housing projects;<sup>47</sup> and the Special Integrated Presidential Projects, which focused on developing communities affected by political violence prior to the advent of democratic government.<sup>48</sup>

---

<sup>41</sup>Paragraph 95.

<sup>42</sup>Paragraph 45.

<sup>43</sup>Act 107 of 1997.

<sup>44</sup>Section 2(1)(e)(vi) of the Housing Act provides that the national, provincial and local spheres of government must promote measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in the housing development process.

<sup>45</sup>See 'Breaking new ground: A comprehensive plan for the development of sustainable human settlements' (2004) (author not specified) available at [http://abahlali.org/files/Breaking%20new%20ground%20New.Housing\\_Plan\\_Cabinet\\_approved\\_version](http://abahlali.org/files/Breaking%20new%20ground%20New.Housing_Plan_Cabinet_approved_version) (accessed 2010-06-10). According to this policy document the following interventions were introduced in an effort to improve the supply of affordable housing: Employer assisted housing schemes, where employers take an active role in the housing process for low to moderate income earners. Project management and other support, where a portion of the capital budgets is to be made available for operational expenses and outsourcing project management and social facilitation to the private sector to ensure delivery in the short-term. The provision of housing finance which incorporates, amongst other things, application of fixed interests rates and monitoring lending trends and enforcing the Financial Services Charter.

<sup>46</sup>The Reconstruction and Development Programme is a policy framework which was implemented by the government in 1994 to redress the inequalities brought about by the apartheid government. The programme puts mechanisms in place which address the issue of poverty in the country. Provision of housing is part of the programme.

<sup>47</sup>Radikeledi 'An analysis of the South African government low-cost housing provision strategy' (2005) Paper presented at the Economic Society of South Africa Biennial Conference 21 available at <http://www.essa.org.za/download/2005conference/Radikeledi.pdf> (accessed 2010-06-10).

<sup>48</sup>*Ibid.*

In the midst of the advancements made by the government in meeting its constitutional mandate, persuasive arguments were brought forth in favour of *Grootboom* to show that the government had to do more to work towards the realisation of the right of access to adequate housing.<sup>49</sup> The *Grootboom* case sets the standard that has to be met in realising the right of access to adequate housing through the interpretation of section 26. The standard is as follows:

- (1) *Reasonable legislative and other measures* – it is crucial that a programme implemented for realisation of the right to housing ‘be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A program that excludes a significant segment of society cannot be said to be reasonable.’ Further, such measures, even if statistically successful, may not pass the reasonableness test if they fail to respond to those in desperate need.<sup>50</sup>
- (2) *Progressive realisation of the right* – The term ‘progressive realisation’ shows that it was contemplated that the right could not be realised immediately. Further, ‘housing must be made accessible not only to a larger number of people but to a wider range of people as time progresses’.<sup>51</sup>
- (3) *Within available resources* – the qualification ‘available resources’ does not require the State to do more than its available resources permit.<sup>52</sup>

As indicated above, section 27 is phrased in a similar manner as section 26. It provides that everyone has the right to have access to health care services;<sup>53</sup> sufficient food and water;<sup>54</sup> and social security, including appropriate social assistance if they are unable to support themselves and their dependants.<sup>55</sup> Section 27 also provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of the said rights.<sup>56</sup> However, it is clear from the provisions of section 27 that the realisation of the said rights cannot be immediate, but the state is obliged to progressively work towards their realisation.<sup>57</sup>

<sup>49</sup>In *Grootboom* (n 11).

<sup>50</sup>*Grootboom* (n 11) para 43-44. This position was affirmed in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 504 (CC) para 74.

<sup>51</sup>*Grootboom* (n 11) para 45.

<sup>52</sup>*Grootboom* (n 11) para 46. In *Khosa* (n 23) para 83 the court said that the state’s obligation in respect of sections 26 and 27 of the Constitution does not go further than requiring the state to take ‘reasonable legislative and other measures within its available resources to achieve the progressive realisation’ of the said rights.

<sup>53</sup>Section 27(1)(a).

<sup>54</sup>Section 27(1)(b).

<sup>55</sup>Section 27(1)(c).

<sup>56</sup>Section 27(2).

<sup>57</sup>Brennan ‘To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option’ (2009) 9/1 *QUT Law and Justice Journal* 67.



In the discussion that follows, an attempt will be made to evaluate the impact that the child support grant has had in alleviating poverty in general; and its impact specifically in the realisation of the right to education. This evaluation will be conducted against the standard set in the *Grootboom* case.

#### 4 Realisation of the right of access to social assistance through the child support grant

Statistics show that 54.1% (an equivalent of almost 10 million) of South African children live in rural areas.<sup>58</sup> In comparison to urban areas, where 48.6% (an equivalent of approximately 4 442 491 million) children live in poverty, it is estimated that 82.8% (an equivalent of approximately 7 376 451 million) of children in rural areas live in poverty.<sup>59</sup> The child support grant is therefore making a remarkable contribution in alleviating poverty amongst these children.

On the basis of the latest statistics, one can safely submit that the right of access to social assistance is being progressively realised. Since the decision of the *Grootboom* case, statistics show that by the end of 2007 over eight million children received the child support grant, including children in the most remote and impoverished parts of the country.<sup>60</sup> By 31 January 2010, R 9, 351, 988 has already been dispensed through the child support grant.<sup>61</sup> Barriers of access to the child support grant are being addressed.<sup>62</sup> For example, age restrictions have been removed. Like the foster child grant, the child support grant is now accessible to children until they reach the age of 18 years.<sup>63</sup> The amount received through the child support grant is increased annually.<sup>64</sup>

School enrollments have increased since the implementation of the child support grant.<sup>65</sup> Research shows that since the introduction of the child support

<sup>58</sup>Katharine Hall 'Housing and services: Urban-rural distribution' (2009) *Children's Institute, University of Cape Town*.

<sup>59</sup>Streak, Yu and Van der Berg 'Measuring child poverty in South Africa' (2008) 6/4 *HSRC Review* 1.

<sup>60</sup>Republic of South Africa The Presidency (n 36) 15.

<sup>61</sup>See South African Social Security Agency Statistical Report on Social Grants (2010) 35 available at [http://www.sassa.gov.za/STATISTICAL-REPORTS/STATISTICAL\\_REPORTS](http://www.sassa.gov.za/STATISTICAL-REPORTS/STATISTICAL_REPORTS) (accessed 2010-09-07).

<sup>62</sup>Van der Berg, Siebrits and Lekezwa 'Efficiency and equity effects of social grants in South Africa' A Working Paper of the Department of Economic Research at the University of Stellenbosch (prepared for the Financial Fiscal Commission (FFC) 2010/11) 21.

<sup>63</sup>See South Africa Government Information available at <http://www.info.gov.za/speech/DynamicAction> (accessed 2010-09-07).

<sup>64</sup>However, discrepancies relating to amounts of money received through the child support grant and foster child grant still prevail. The child support grant is R250 a month and the foster care grant is R710 a month. See Government Services *Social benefits* available at <http://www.services.gov.za> (accessed 2010-09-07).

<sup>65</sup>Republic of South Africa The Presidency (n 36) 17. See also Biyase 'A simple analysis of the impact of the child support grant on the fertility rate in South Africa' Paper presented at the Economic Society of South Africa Biennial Conference (2005) 4 available at <http://www.essa.org.za/download>

grant, the financial burden relating to school transport expenses has been eased.<sup>66</sup> Research also shows that the child support grant is, to an extent, used to purchase school necessities.<sup>67</sup>

## 5 Realisation of the right of access to social assistance through the child support grant and education

The logic of linking social assistance to education can be deduced from the fact that education creates prospects for children to escape from poverty and enables them to become responsible for their own social and economic upliftment.<sup>68</sup> The link between the child support grant, which is the main poverty alleviation mechanism, and education, which equips beneficiaries to become economically independent, is therefore likely to yield positive results.

In terms of the Social Assistance Act Regulation, accessibility of the child support grant is directly linked to the child's right to education.<sup>69</sup> The regulation requires a primary caregiver who receives a child support grant for the benefit of the child to provide proof that the child for whom the grant is received is enrolled at a school or an educational institution and that the child actually attends.<sup>70</sup> It further provides that in the event of failure by the child to attend school, notice of this failure should be furnished to the Director-General of the National Department of Social Development by the primary caregiver of the said child.<sup>71</sup> Upon receipt of such notification the Director-General will cause a social worker to investigate the situation.<sup>72</sup>

The Social Assistance Act makes caregivers of children who receive the child support grant accountable for the education of the children in their care.<sup>73</sup> They are accountable for the child's enrollment at a school and the child's school attendance. This approach of delegating accountability is necessary. It alerts authorities when and if a child is not enrolled at a school or fails to attend school. It creates an environment for stakeholders to debate the dynamics involved in educating a child that benefits from a child support grant.

---

/2005conference/Biyase.pdf (accessed 2010-09-07).

<sup>66</sup>Delany, Ismail, Graham and Ramkisoorn 'Review of the Child Support Grant: Uses, implementation and obstacles' (2008) *United Nations Children's Fund* 15 and 31 available at [http://unicef.org/southafrica/SAF\\_resources\\_childsupport.pdf](http://unicef.org/southafrica/SAF_resources_childsupport.pdf) (accessed 2010-09-07).

<sup>67</sup>*Ibid.*

<sup>68</sup>Committee on Economic, Social and Cultural Rights, General Comment 13, The Right to Education (Twenty-First Session 1999 available at <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> (accessed 2010-09-07).

<sup>69</sup>Social Assistance Act Regulations no 32853.

<sup>70</sup>Regulation 5(a) and (b).

<sup>71</sup>Regulation 5 (d).

<sup>72</sup>Regulation 7(a).

<sup>73</sup>Regulation 5(a), (b) and (d).

Further, children benefitting from the child support grant are entitled to a range of other benefits. For instance, such children qualify for automatic fee waivers for schooling up to Grade 12.<sup>74</sup> Such children are also integrated into the National School Nutrition Programme. Through this programme needy children are provided with at least one meal daily.<sup>75</sup>

An analysis of the effectiveness of the child support grant which does not acknowledge all these advancements would be inaccurate.<sup>76</sup> As stated above, section 27(2) of the Constitution sets the degree of the government's obligation in realising the right of access to social assistance.

Thus, through social assistance alone, the government has made remarkable strides in providing for the basic needs of the poor. If the realisation of the right to social assistance is measured independent of the right to education, it can be accepted that the standard set in the *Grootboom* case is satisfied. However, if the realisation of the right of access to social assistance as linked to education is measured against the standard set in the *Grootboom* case, the standard cannot be satisfied without pondering on a number of issues.

Before it can adequately test the link between social assistance and education against the *Grootboom* standard, the government must first and foremost have a precise understanding of the hardships endured by children residing in rural areas. Secondly, there must be mechanisms in place to address those hardships.<sup>77</sup> Unless there are clear targets in place, the outcomes of the evaluation process are likely to be abstract and to lose direction.

Making education accessible requires more than mere school attendance, important as it is. The government's measure of success in meeting its constitutional mandate is not limited to increasing school enrollments. For the right to education

---

<sup>74</sup>Republic of South Africa The Presidency (n 36) 17.

<sup>75</sup>Republic of South Africa The Presidency (n 36) 73.

<sup>76</sup>In her paper 'The child's right to social security: South Africa's non-compliance with its constitutional and international duties' (Paper presented at the 4<sup>th</sup> World Congress on Family and Children's Rights, Cape Town 2005, available at <http://www.childjustice.org/docs/vanrensburg> (accessed 2010-09-07), Linda Jansen van Rensburg refers to the provisions of the United Nations Convention on the Rights of the Child (CRC) which South Africa ratified in 1995. In terms of the CRC,

state parties are requested to provide relevant information, including the principal legislative, judicial, administrative or other measures in force; the institutional infrastructure for implementing policy in this area, particularly monitoring strategies and mechanisms; and factors and difficulties encountered and progress achieved in implementing the relevant provision of the convention, in respect of:

- (a) survival and development (article 6, paragraph 2);
- (b) disabled children (article 23);
- (c) health and health services (article 24);
- (d) social security and child care services and facilities (articles 26 and 18, paragraph 3);
- (e) standard of living (article 27, paragraphs 1-3).

Jansen van Rensburg affirms that these provisions give rise to various derivative social security rights, such as the right to health care necessary for survival, and a standard of living that meets the needs for food, clothing, shelter and education.

<sup>77</sup>Brennan (n 57) 71.

to be meaningful, the manner in which it is enforced has to be relevant to the particular community. The condition placed upon the receipt of the child support grant, namely, that the child must be at school, does not in itself provide the framework that enables the child to actually benefit from being at school. Ensuring that a child does not miss school is not sufficient because the challenges involved in acquiring an education, especially for children in rural areas, are complex.<sup>78</sup> These include challenges related to safe transportation to school and dilapidated school buildings, among others, are prevalent in rural areas and prevent children from attending school and benefitting from that attendance.

There are also challenges related to accessing education once within school premises and social assistance provisions do not incorporate mechanisms that encourage meaningful participation and engagement in the education process. For instance, there is no additional funding made available to support children in ordinary schools who have learning barriers.<sup>79</sup> While the law places responsibility on primary caregivers to ensure that children enroll at and attend school, it has not made government's responsibility for putting the necessary infrastructure in place obvious. The child support grant contributes to meeting basic needs of the children in the programme, however, it cannot be convincingly argued that any failures or inadequacies of the mechanisms promoting access to other socio-economic rights, including the right to education, can be accounted for in the social assistance system. Does this provision imply that failure of a child to attend school due to deficiencies in the infrastructure create accountability on part of the government?

The government's accountability for the child support grant is more apparent and relates to the amount of the grant, payable on a monthly basis.<sup>80</sup> On the other hand, the government's accountability in relation to the other benefits that accrue through the child support grant is not as obvious. This makes the response to whether the right to education is being realised through social assistance fragmented.<sup>81</sup> In the context of accessibility of education in rural areas, where both external<sup>82</sup> and internal

---

<sup>78</sup>Challenges facing children include: psychological challenges (in general, rural schools do not have psychological and social work services), learning challenges, for example, dyslexia (there are generally no remedial/special education services), challenges regarding transport to school, health related problems and hunger. These challenges impede a child from actually benefitting from the education system. See also Committee on Economic, Social and Cultural Rights (n 68).

<sup>79</sup>Country Policy Brief 'Educational access in South Africa' (2008) *Consortium for Research on Education, Access, Transitions and Equity* available at [http://www.create-rpc.org/pdf\\_documents/southafricaCARpolicybrief.pdf](http://www.create-rpc.org/pdf_documents/southafricaCARpolicybrief.pdf) (accessed 2010-09-07).

<sup>80</sup>The child support grant rests more on the pillar of dispensing money in the form of a grant than on the other pillar(s) discussed above. See subheading 2, Social assistance – definitions and historical perspective, discussed above.

<sup>81</sup>'Fragmented' in the sense that a child's right to education can be partly enforced through social assistance, and it can be enforced only to the point provided for by the Social Assistance legislation.

<sup>82</sup>Challenges related to reaching schools, for example, a lack of public transportation systems.

challenges<sup>83</sup> are prevalent, a framework is firstly required even before an assessment can be made as to whether these rights are being realised. Putting basic services in place<sup>84</sup> does not amount to the progression envisaged by the Constitution and the *Grootboom* judgment. These are *basic* tools that should be there to enable a child to access education. We cannot say, therefore, that because a child does not miss school, that the child is enjoying the right to education in its fullest sense. The enjoyment of the right to education does not only depend on school attendance, but also on mechanisms put in place to ensure that such education is attainable. In terms of section 29 of the Constitution everyone, including children, has the right to basic education, including adult basic education,<sup>85</sup> and to further education. The right to further education is qualified by the provision that the state, through reasonable measures, must make the right progressively available and accessible.<sup>86</sup> Although the right to basic education is not qualified, it is accepted that the state has a primary duty to provide support, facilities and services for the realisation of this right.<sup>87</sup>

It will be particularly beneficial to children schooled in rural areas for government to recognise the importance of clearly defining the significance of the child support grant and education. Government will be obligated to address the needs of such children in a structured way and within the realities of their context. The case of *Centre for Child Law v MEC for Education*<sup>88</sup> serves as a good example of where government was ordered to address the specific needs of children in specific circumstances. Although the case does not deal with the relationship between social assistance and education,<sup>89</sup> but with children in need of care who had been placed at an industrial school, it clearly illustrates the gaps that exist between realising the right to education and the government's accountability for bridging those gaps. In this case the applicants were concerned firstly about the physical conditions at the hostels where the children were housed. The children slept in dormitories without heating or adequate bedding which exposed them to unbearable cold in winter. Further, there were broken windows and broken ceiling boards in the dormitories which compounded the cold and rundown living conditions.<sup>90</sup> Secondly,

---

<sup>83</sup>Challenges which inhibit the learning process, such as dyslexia, speech disorders and other psychological disorders such as depression.

<sup>84</sup>The framework, in this context, would include transportation systems and tools aimed at addressing learning barriers, etc.

<sup>85</sup>Section 29(1)(a).

<sup>86</sup>Section 29(1)(b).

<sup>87</sup>See Robinson 'Children's rights in the South African Constitution' available at <http://www.puk.ac.za/opencms/export/PUK/html> (accessed 2010-09-07).

<sup>88</sup>2008 1 SA 223 (T).

<sup>89</sup>Therefore not based on ss 26 and 27 of the Constitution which have internal limitations, and not subjected to 'availability of resources and legislative measures for their progressive realisation'. See page 7 para 15. The case is based on ss 28(1)(b)-(c); 28(2); 10; 12(1)(c) and 12(1)(e) of the Constitution. See (n 83-86).

<sup>90</sup>Page 5 paras 10-20.

they were concerned about the lack of access control at the school. The premises were not secured. Access and exit were not carefully monitored and controlled. Children could walk off the school grounds and any person could walk onto the school grounds.<sup>91</sup> Finally, the absence of proper psychological support and basic health care was also a cause for concern. Uncontested evidence showed that there were instances where children became disturbed, depressed and even suicidal.<sup>92</sup> The court held that the provisions of sections 28(1) (b) and (c);<sup>93</sup> 28(2);<sup>94</sup> section 10;<sup>95</sup> 12(1)(c) and (e)<sup>96</sup> of the Constitution were violated.<sup>97</sup> The court directed the respondent to supply the pupils with sleeping bags with a temperature rating of at least five degrees Celsius.<sup>98</sup> It further directed the respondent to devise plans to implement perimeter and access control at the school.<sup>99</sup> Finally the court ordered the respondent to put in place support structures that would properly provide for the psychological and therapeutic needs of the children.<sup>100</sup>

As stated earlier, in this case the constitutional right to adequate school conditions for the purposes of accessing education is discussed outside the scope of section 27 of the Constitution, but the case reflects how the same right could be deliberated in the context of social assistance.

## 6 Recommendations and conclusion

As stated earlier, the incorporation of education into social assistance is welcome. It is not a new phenomenon for social assistance to be used as a vehicle for accessing other socio-economic rights. For instance, children who are beneficiaries of social assistance have a right of access to health care services and many other services.<sup>101</sup> Social assistance therefore can be effectively used for the purposes of realising the right to education.

---

<sup>91</sup>Page 9 paras 5-10.

<sup>92</sup>Page 10 paras 15-20.

<sup>93</sup>Section 28(1)(b) to (c) of the Constitution provides that every child has the right to family care or parental care, or appropriate alternative care when removed from the family environment; and to basic nutrition, shelter, basic health care services and social services.

<sup>94</sup>Section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child.

<sup>95</sup>Section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected.

<sup>96</sup>Section 12(1)(c) and (e) provide that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources; and not to be treated or punished in a cruel, inhuman or degrading way.

<sup>97</sup>Page 12 para 15.

<sup>98</sup>Page 12 para 20.

<sup>99</sup>Page 13 para 25.

<sup>100</sup>Page 14 paras 5-15.

<sup>101</sup>UN Committee on Economic, Social and Cultural Rights, General Comment 19, the Right to Social Security, Thirty-Ninth Session, 2007 available at <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> (accessed 2010-09-07).

Further, the link between social assistance and education allows a broad conceptualisation of social assistance which has much merit for South Africa's development. This broad conceptualisation of social assistance has to manifest itself in a meaningful engagement on issues pertaining to children in rural communities. A regulation which aims at merely propelling and monitoring school attendance can easily give the impression that challenges on gaining access to education can be more or less be addressed through enforcing school attendance. It should be acknowledged, having said that, that government has made a start in broadening the concept of social assistance in order to further the interests of the poor and the vulnerable, particularly children.

It must, however, at all times be borne in mind that in the rural areas, the challenges around gaining access to education are complex. There is therefore a need for a clearly collated system aimed at addressing these challenges and the extent of the government's accountability in this regard should be clear. As stated above, the extent of the government's accountability in addressing these challenges through social assistance is not obvious. For example, the government has introduced feeding schemes at schools aimed at curbing hunger and malnutrition amongst school-going children living in poverty, but the nature of government's accountability in providing these benefits is not clear. It is not clear if the government's accountability falls within the scope of social assistance, or if it is independent of the social assistance system. This position compromises the enforceability of the right to social assistance.

It is important to provide specifically for social assistance benefits. Treating social assistance as a gateway to other benefits creates difficulties in quantifying what comprises social assistance. Further, it becomes difficult to ascertain which body of law is accountable for the enforcement of the right.

Ideally, our social assistance should specifically cater for its own programmes as opposed to using social assistance as a gateway to other programmes. For an example, in order to get around the challenge of transportation to schools, either due to affordability or lack of infrastructure, social assistance programmes should also provide boarding facilities for children who reside in remote areas to ensure that schools are easily and safely accessible to such children.<sup>102</sup>

In addition, social assistance programmes should make provision for specific needs such as school uniforms, toiletries, clothing, tuition in private and vocational schools, civilian clothing or "civies", payment of additional fees required by the schools such as touring fees, sports fees, development fees and other incidental expenses.<sup>103</sup>

---

<sup>102</sup>Tshireletso 'Issues, dilemmas and prospects on the state provision of education to traditional hunter-gatherer societies of Botswana' (2001) *African Study Monographs* 26 at 171.

<sup>103</sup>Botswana Federation of Trade Unions (BFTU) 'Policy position paper on Social Security and Social Protection in Botswana' (2007) 7 available at <http://library.fes.de/pdf-files/bueros/botswana>.

Putting the social assistance benefits suggested above in place does not guarantee that the standard set in the *Grootboom* case will be met. However, incorporating explicit benefits to social assistance will create certainty of what the system is comprised. It will also create an enabling environment to evaluate the effectiveness of our social assistance system, particularly in accordance with the standard set in the *Grootboom* case.