

## XX. Protecting Livelihoods in the COVID-19 Crisis: The South African Experience

*Letlhokwa George Mpedi*

### 1. Introduction

#### a) COVID-19 as a Global Pandemic

The World Health Organization (hereinafter the WHO) assigned the designation Coronavirus of 2019 (hereinafter COVID-19) to the disease caused by the novel coronavirus SARS-CoV2. The WHO declared COVID-19 a global pandemic.<sup>1</sup> In a speech delivered on 11 March 2020, the WHO Director stated that: “WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction. We have therefore made the assessment that COVID-19 can be characterized as a pandemic. Pandemic is not a word to use lightly or carelessly. It is a word that, if misused, can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death. Describing the situation as a pandemic does not change WHO’s assessment of the threat posed by this virus. It doesn’t change what WHO is doing, and it doesn’t change what countries should do. We have never before seen a pandemic sparked by a coronavirus. This is the first pandemic caused by a coronavirus.”<sup>2</sup>

COVID-19 has since impacted every facet of life the world over.<sup>3</sup> Furthermore, as the virus lingers on and presents itself in waves, its negative effects on, *inter alia*, lives and livelihoods promise to be felt for years to come.<sup>4</sup>

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1 See, for further reading, Cucinotta D and Vanelli M “WHO Declares COVID-19 a Pandemic” (2020) 91 *Acta Biomed* 157.

2 World Health Organization “[WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020](#)” (accessed on 10 January 2022).

3 Statistics South Africa COVID-19 Pandemic in South Africa Demography Volume (Statistics South Africa (2020)) iii.

4 See, for example, Statistics South Africa Business Impact Survey of the COVID-19 Pandemic in South Africa (Statistics South Africa (2020)), Statistics South Africa

b) COVID-19 Statistics in South Africa

The Republic of South Africa (hereinafter South Africa), just like many countries of the world, has not been spared the virus. That country confirmed its first case of the virus on 5 March 2020.<sup>5</sup> As shown in *Table 1* below, the COVID-19 statistics have grown exponentially since the first case was reported.

*Table 1: COVID-19 Statistics in Soutg Africa as of 28 January 2022*

Tests conducted	Positive Cases			Recoveries		Deaths	
	Active	New	Total	Rate	Total	Daily	Total
22 195 053	67 178	3 789	3 598 288	95.5%	3 436 326	133	94 784

Source: “Update on Covid-19 (Friday 28 January 2022)” (accessed on 29 January 2022).

c) Legal Basis for Measures to Restrict COVID-19 in South Africa

It was acknowledged at the onset of the pandemic that: “The coronavirus is spread by contact between people. If people do not travel, the virus does not travel.”<sup>6</sup> To curb the spread of the virus and enable key sectors such as health to prepare adequately,<sup>7</sup> South Africa, similarly to many other countries all over the world,<sup>8</sup> declared a national state of disaster on 15 March 2020 and a national lockdown that commenced on 26 March 2020.<sup>9</sup> Although the *Constitution of the Republic of South Africa, 1996* (here-

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Results from Wave 2 Survey on Impact of the COVID-19 Pandemic on Employment and Income in South Africa (Statistics South Africa (2020)) and Statistics South Africa Social Impact of COVID-19 (Wave 3): Mobility, Migration, and Education in South Africa (Statistics South Africa (2020)).

- 5 National Institute for Communicable Diseases “[First Case of COVID-19 Coronavirus Reported in SA](#)” (accessed on 10 January 2022).
- 6 President Cyril Ramaphosa: “[South Africa’s Response to Coronavirus COVID-19 Pandemic, 23 April 2020](#)” (8 January 2022).
- 7 Disaster Management Act, 2002: Declaration of a National State of Disaster, 2020 (Published under No. 313 in GG 43096 of 15 March 2020).
- 8 See, for example, Bjørnskov C and Voigt S “[This Time is Different? – On the Use of Emergency Measures During the Corona Pandemic](#)” (2021) European Journal of Law and Economics (published online: 27 July 2021).
- 9 It is worth noting that at that stage a total number of confirmed cases of COVID-19 had spiralled from 61 to 402 cases in eight days. The national lockdown, in a nutshell means, among others, that individuals are confined to their

inafter the Constitution) does make provision for the declaration of the state of emergency,<sup>10</sup> it does not provide for the national state of disaster. That said, the legal rules and regulations dealing with COVID-19 must be consistent with the Constitution which is the supreme law of the country.<sup>11</sup> The declaration of the national state of disaster is provided for as part of the powers and duties of the national government<sup>12</sup> in Section 27 of the *Disaster Management Act* 57 of 2002. The COVID-19 rules and regulations, which are largely based on the *Disaster Management Act*, are therefore framed in law. This makes the COVID-19 legal restrictions, to some extent, accessible and predictable.<sup>13</sup> Another important point to note is that the restrictions can be challenged in a court of law.<sup>14</sup> The Constitution makes provision for the right of access to courts<sup>15</sup> and the enforcement of rights.<sup>16</sup>

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places of residence (except under certain limited circumstances such as seeking medical attention, purchasing food, medicine, and other similar supplies), inter-provincial travel was banned, except in certain limited instances such as travel to attend a funeral; and the sale of alcohol and tobacco products was prohibited. The national lockdown was introduced by the *Disaster Management Act* 57 of 2002. These regulations limit some basic rights and freedoms (Section 27(2) of the *Disaster Management Act*).

10 Section 37 of the Constitution.

11 Sections 1(c) and 2 of the Constitution.

12 Part of the *Disaster Management Act* 57 of 2002.

13 See, for a discussion on the effectiveness and predictability of law from a social security perspective, Mpedi LG “The Effectiveness and Predictability of Social Security Law: Constitutional Perspectives from the Republic of South Africa” in Ndulio M and Emezie C (eds) *The Routledge Handbook of African Law: A Historical, Political, Social, and Economic Context of Law in Africa* (Routledge (2022)) 264.

14 Rautenbach IM “Unruly Rationality: Two High Court Judgments on the Validity of the COVID-19 Lock-Down Regulations” (2020) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 825.

15 Section 34 of the Constitution provides 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.”

16 According to Section 34 of the Constitution: “Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are – (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.”

d) *Economic and Social Measures in Response to COVID-19*

The restrictions flowing from the lockdown of the country were bound to impose some suffering of one form or another on natural and juristic persons. It was, for example, anticipated that “[d]uring this period of lockdown, companies will have to shut down and employees laid off temporarily.”<sup>17</sup> COVID-19 worsened the persistent and rampant unfavourable socio-economic factors, such as inequality, abject poverty, unemployment, an ailing economy and diseases, issues that had plagued South Africa even before the advent of COVID-19.<sup>18</sup> This point was aptly summed up in *The South African Economic Reconstruction and Recovery Plan* as follows: “The outbreak of the Covid-19 pandemic in March, 2020, found a vulnerable South African economy. In fact, at the time [the] pandemic reached our shores, the South African economy had experienced two consecutive quarters of a recession. As a result, the Covid-19 pandemic deepened the economic crisis. Many people lost their jobs, many have gone without income for extended periods, and many are going hungry every day. Inequality is expected to widen and poverty to deepen. [...] The stagnation of the economy for a long period coupled with the Covid-19 crisis has also led to low levels of capacity utilization in the various sectors of the South African economy. This trend is projected to continue; painting a dire picture for gross fixed capital formation. A significant reduction in the gross fixed capital formation variable is a troubling development; given that this variable is critical in sustaining and growing the productive base of the economy.”<sup>19</sup>

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17 Preamble of the COVID-19 Temporary Employee/Employer Relief Scheme (C19 TERS), 2020 (Directive by the Minister of Employment and Labour in Terms of Regulation 10(8) Issued by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002)).

18 Mubangizi JC “Poor Lives Matter: COVID-19 and the Plight of Vulnerable Groups with Specific Reference to Poverty and Inequality in South Africa” (2021) 65 *Journal of African Law* 237, Du Plessis M “Police and Power in a Pandemic: Reflections on the Rise of Police Brutality during COVID-19 and its Implications on Social Justice in South Africa” (2021) 15 *Pretoria Student Law Review* 31 at 43–44, Ranchhod V and Daniels RC Labour Market Dynamics in South Africa in the Time of COVID-19: Evidence from Wave 1 of the NIDS-CRAM Survey (Southern Africa Labour and Development Research Unit (2020)).

19 The South African Economic Reconstruction and Recovery Plan (accessed on 16 January 2022).

Consequently, the government announced some economic and social measures to counter COVID-19. This, it is argued, is a direct response to the reality articulated by President Cyril Ramaphosa that: "Our people need to eat. They need to earn a living, companies need to be able to produce and to trade, they need to generate revenue and keep their employees in employment."<sup>20</sup> The government response is bifurcated into three phases<sup>21</sup> as shown in *Table 2* below:

*Table 2: Three Phases of the Government's COVID-19 Response*

Phases	Explanation
<i>First phase</i>	Measures to mitigate the worst effects of the pandemic on business, on communities and individuals (e.g., tax relief, the release of disaster relief funds, emergency procurement, wage support and funding to small businesses).
Declaring COVID-19 a national disaster	
<i>Second phase</i>	Economic response to stabilise the economy, address the extreme decline in supply and demand and protect jobs.
Economic response	
<i>Third phase</i>	Economic strategy to drive the recovery of the economy as the economy emerges from the pandemic.
Economic strategy	

The COVID-19 relief measures are largely underpinned by a ZAR 500 billion<sup>22</sup> COVID-19 fiscal package<sup>23</sup> consisting of *income support measures, credit guarantee schemes, wage protection and main or direct budget funding*. The COVID-19 fiscal package is divided as follows:

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20 "President Cyril Ramaphosa: South Africa's Response to Coronavirus COVID-19 Pandemic, 23 April 2020" (accessed on 8 January 2022).

21 Statement by President Cyril Ramaphosa on Further Economic and Social Measures in Response [to] the COVID-19 Pandemic, Union Buildings, Tshwane, 21 April 2020.

22 1 EUR = 17.3814 ZAR (as on 30 January 2022).

23 This is approximately 10 per cent of the gross domestic product of South Africa (Statement by President Cyril Ramaphosa on Further Economic and Social Measures in Response to [the] COVID-19 Pandemic, Union Buildings, Tshwane, 21 April 2020).

Table 3: Composition of the ZAR 500 Billion Relief Package

ZAR 500 Billion COVID-19 Fiscal Package			
ZAR 70 billion Measures of income support (tax relief)	ZAR 200 billion Credit guarantee scheme	ZAR 40 billion Wage protection	ZAR 190 billion Main or direct budget funding
Temporary tax relief such as tax deferrals and postponement of some payments to South African Revenue Service (e.g., employee tax).	Scheme to provide private bank loans, guaranteed by the government, to eligible businesses.	Temporary employee/employer relief scheme benefit, funded by Unemployment Insurance Fund surplus funds, to employees and employers who have closed operations or part thereof because of COVID-19.	Budget allocations to national, provincial, and local government.

Source: Auditor-General (South Africa) *First Special Report on the Financial Management of Government's Covid-19 Initiatives* (Auditor-General (South Africa) (2020) 8.

The COVID-19 relief package is essential for the fulfilment of fundamental rights, particularly among the vulnerable and marginalised members of society, during the pandemic. This assertion should be understood from the perspective that the Constitution makes provision for everyone's right to have access to health care, food, water and social security.<sup>24</sup> The state must "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."<sup>25</sup> In addition, every child<sup>26</sup> in South Africa has "the right to basic nutrition, shelter, basic health care services and social services."<sup>27</sup> The aforementioned rights, which are enforceable,<sup>28</sup> are not absolute. They can be limited under the limitation clause.<sup>29</sup> Furthermore, Section 41(1)(b) of the

24 Section 27(1) of the Constitution.

25 Section 27(2) of the Constitution.

26 Section 28(3) of the Constitution defines a 'child', for the purpose of this section, as "a person under the age of 18 years."

27 Section 28(1)(c) of the Constitution.

28 Section 38 of the Constitution.

29 Section 36 of the Constitution. This section provides that: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose. (2) Except as provided in Subsection (1) or in any other

Constitution dictates that: “All spheres of government and all organs of state within each sphere must secure the well-being of the people of the Republic [of South Africa].”<sup>30</sup>

## 2. *Jobs and Income Protection*

The COVID-19 restrictions negatively impacted jobs and the income of many workers in South Africa.<sup>31</sup> Some workers had their salaries reduced. In addition, some unfortunate workers were laid off temporarily<sup>32</sup> while others were retrenched. This eventuality was foreseen by the government and countered by introducing the *COVID-19 Temporary Employee/Employer Relief Scheme (C19 TERS)*, 2020.<sup>33</sup> The scheme was established to pay “benefits to the contributors who have lost income due to COVID-19 pandemic”<sup>34</sup> and “minimise [the] economic impact [of] the loss of em-

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provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.” Also see Van Staden M “Constitutional Rights and their Limitations: A Critical Appraisal of the COVID-19 Lockdown in South Africa” (2020) 20 African Human Rights Law Journal 484.

- 30 Section 239 of the Constitution defines an ‘organ of state’ as “(a) any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution – (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer.”
- 31 This should be understood from the context that South Africa subscribes to the common law principle of ‘no work, no pay.’ In addition, the South African labour law does make provision for the dismissal of employees for economic reasons (Section 189 of the Labour Relations Act 66 of 1995). These are dismissals due to no-fault of a worker.
- 32 Article 1.1.6 of the COVID-19 Temporary Employee/Employer Relief Scheme (C19 TERS), 2020 (hereinafter the C19 TERS Directive) defines ‘temporary lay-off’ as “a temporary closure of business operations due to [the] COVID-19 pandemic for the period of the National Disasters.”
- 33 Notice 215 of 2020. According to the preamble of the C19 TERS Directive: “During this period of lockdown, companies will have to shut down and employees laid off temporarily. This means that employees are compelled to take leave, which is not out of choice. We therefore anticipate that employees may lose income. Employers are encouraged to continue to pay employees, but where this is not economically possible; we have created a special benefit under the Unemployment Insurance Fund as per the Directive Covid-19 Temporary Employee/Employer Relief Scheme.”
- 34 Article 2.1.1 (a) of the C19 TERS.

ployment of the COVID-19 pandemic.”<sup>35</sup> *C19 TERS* is a wage protection benefit to employees and employers who have closed operations or part thereof due to COVID-19.<sup>36</sup> It is funded to the tune of ZAR 40 billion through the Unemployment Insurance Fund (hereinafter the UIF) surplus funds. It is important to note that these benefits are delinked from the UIF’s regular benefits<sup>37</sup> (i.e., unemployment benefits,<sup>38</sup> illness benefits,<sup>39</sup> maternity benefits,<sup>40</sup> parental benefits,<sup>41</sup> adoption benefits,<sup>42</sup> commissioning parental benefits,<sup>43</sup> and dependant’s benefits<sup>44</sup>). They only pay for the cost of salary for the employees during the temporary closure of the business operations.<sup>45</sup> The salary benefits are capped at a maximum of R17,712 per month and per employee.<sup>46</sup> In addition, an employee is paid in accordance with an income replacement rate sliding scale (38%-60%).<sup>47</sup> It should be noted that “any remuneration received for work performed by the employee in any period shall not exceed 100% of the remuneration that the employee would ordinarily have received for working during that period.”<sup>48</sup> This entails that “[i]f the remuneration earned plus the sliding scale benefit is more than the ordinary salary, the benefit is reduced accordingly.”<sup>49</sup> To qualify for the relief provided under *C19 TERS*, the company must show that it is registered with the UIF, it complies with

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35 Article 2.1.1 (b) of the *C19 TERS*.

36 See COVID-19 Temporary Relief Scheme, 2020 (Published under GenN 215 in GG 43161 of 26 March 2020 as amended by GenN 240 in GG 43216 of 8 April 2020, GN R486 in GG 43265 of 4 May 2020, GN R541 in GG 43330 of 15 May 2020, GN R595 in GG 43353 of 26 May 2020, GN R878 in GG 43611 of 13 August 2020, GN R968 in GG 43693 of 7 September 2020 and as corrected by GN R486 in GG 43265 of 4 May 2020).

37 Article 3.2 of the *C19 TERS*.

38 Section 12(1)(a) of the Unemployment Insurance Act 63 of 2001 (hereinafter the *UIA*).

39 Section 12(1)(b) of the *UIA*.

40 Section 12(1)(c) of the *UIA*.

41 Section 12(1)(cA) of the *UIA*.

42 Section 12(1)(d) of the *UIA*.

43 Section 12(1)(dA) of the *UIA*.

44 Section 12(1)(e) of the *UIA*.

45 Article 3.3 of the *C19 TERS*.

46 Article 3.4 of the *C19 TERS*.

47 Ibid. Also see Schedule 3: Scale of Contributor’s Entitlement to Benefits of the *UIA*.

48 Article 5.3 of the *C19 TERS*.

49 Unemployment Insurance Fund “[Frequently Asked Questions](#)” (accessed on 1 April 2022).

the application procedure for the financial relief scheme, and its closure is directly linked<sup>50</sup> to the COVID-19 pandemic.<sup>51</sup>

The isolation of persons is being used throughout the world as one of the measures aimed at curbing the spread of the coronavirus. Accordingly, an employee who is in quarantine<sup>52</sup> for fourteen days due to the COVID-19 pandemic qualifies for the pre-existing illness benefit in terms of Part C of the UIA.<sup>53</sup> This is subject to the following conditions: “4.2 Confirmation from both the employer and the employee must be submitted together with the application as proof that the employee was in an agreed pre-cautionary self-quarantine for 14 days. 4.3 In this instance, the confirmation letters from the employer and employee shall suffice. 4.4 Should an employee be quarantined for more than 14 days, a medical certificate from a medical practitioner must be submitted together with [a] continuation form for payment.”<sup>54</sup>

To avoid double-dipping, an employee who is being paid by the employer during the period of quarantine is not entitled to the TERS benefit.<sup>55</sup> Despite the foregoing, the COVID-19 TERS experienced a series of challenges.<sup>56</sup> These include the following: concerns with supporting documents and banking details; non-qualifying individuals (e.g., the incarcerated and deceased) drawing TERS benefits;<sup>57</sup> payment challenges (e.g., overpayments and underpayments, duplicate payments and unsubstantiated payment made);<sup>58</sup> mismanagement (e.g., non-compliance with the instruction note, discrepancies relating to the appointment of service providers

50 There are different ways in which companies can show that their financial distress is directly linked to COVID-19. These include liquidation proceedings initiated by creditors. See, for further reading, De Hutton J “[COVID-19: Financial Distress – Insolvency and Restructuring](#)” (accessed on 1 April 2022).

51 Article 3.7 of the C19 TERS.

52 According to Article 1.1.4 of the C19 TERS, ‘quarantine’ means “separating a symptomatic individual potentially exposed to a disease from non-exposed individuals in such a manner so as to prevent possible spread infection or contamination.”

53 Article 4.1 of the C19 TERS.

54 Articles 4.2–4.4 of the C19 TERS.

55 Article 5.3 of the C19 TERS.

56 See Auditor-General South Africa First Special Report on the Financial Management of Government’s Covid-19 Initiatives (Auditor-General South Africa (2020)) and Auditor-General South Africa Second Special Report on the Financial Management of Government’s Covid-19 Initiatives (Auditor-General South Africa (2020)).

57 Ibid.

58 Ibid at 45-46.

and the unfair awarding of contracts);<sup>59</sup> applicants below the legal age of employment;<sup>60</sup> <sup>61</sup> double-dipping;<sup>62</sup> application verifications issues<sup>63</sup> (e.g., lack of verification of the applicants representing employers, incorrect system calculations of TERS benefit payment in first lockdown period, inadequate verification of employer details; inadequate system functionality for bank confirmation of uploaded documents, lack of consideration of salary portion paid by the employer in the calculation of pay-out in first lockdown period; and lack of verification of employee salaries submitted during benefit claims); and companies failing to pay the benefits to the employees.<sup>64</sup>

### 3. Supporting the Economy

#### a) Measures of Income Support

These measures, which were first announced on 21 April 2020,<sup>65</sup> consist of four-month skills development levy holiday contributions starting from 1 May 2020,<sup>66</sup> fast-tracking of value-added tax (VAT) refunds, payment

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59 Ibid at 47.

60 Auditor-General South Africa First Special Report on the Financial Management of Government's Covid-19 Initiatives (Auditor-General South Africa (2020)) 43.

61 The general rule is that the employment of children under the age of fifteen or under the minimum school leaving age is prohibited in South Africa (Section 43(1)(a)-(b) of the Basic Conditions of Employment Act. In addition, South Africa has ratified on 30 March 2000 the International Labour Organisation Minimum Age Convention 138 of 1973). Section 28(1)(e) of the Constitution provides every child in South Africa with a right "to be protected from exploitative labour practices" and the right "not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age; or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development" (Section 28(1)(f) of the Constitution).

62 Auditor-General South Africa First Special Report on the Financial Management of Government's Covid-19 Initiatives (Auditor-General South Africa (2020)) 43.

63 Ibid 41.

64 Department of Employment and Labour "UIF Appoints Forensic Auditors to Start the 'Follow the Money Project' for Covid-19 TERS Payments" 7 November 2020.

65 Statement by President Cyril Ramaphosa on Further Economic and Social Measures in Response to [the] COVID-19 Pandemic, Union Buildings, Tshwane, 21 April 2020.

66 Section 10 of the Disaster Management Tax Relief Act 13 of 2020.

deferral for exercise taxed on alcoholic beverages and tobacco products; deferral for filing and first payment of carbon tax liabilities for three months i.e., 31 July to 31 October 2020), postponing the implementation of certain 2020 *Budget Review* measures (e.g., measures to broaden the corporate income base by restricting net interest expense deductions to 30 per cent of earnings), increasing the expanded employment tax incentive amount, increasing the proportion of tax to be deferred and the gross income threshold for automatic tax deferrals, and case-by-case application to SARS (South African Revenue Services) for waiving of penalties.<sup>67</sup>

*b) Credit Guarantee Scheme*

The credit guarantee scheme provides private bank loans, guaranteed by the government, to qualifying businesses.<sup>68</sup> The funds borrowed through this scheme can be utilised to cover operational expenses (e.g., salaries, rent and lease agreements and contracts with suppliers).<sup>69</sup> The banks are not under any obligation to provide COVID-19 loans.<sup>70</sup> They are at liberty to utilise their regular risk-evaluation and credit-application processes.<sup>71</sup> In addition, they may require business owners to sign surety for the loan.<sup>72</sup> Only one COVID-19 loan can be provided per business.<sup>73</sup> The COVID-19 loan is offered at a single agreed lending rate and interest as well as capital

<sup>67</sup> National Treasury (Republic of South Africa) [Economic Measures for COVID-19](#) (National Treasury (Republic of South Africa) (2020) (accessed on 31 January 2022).

<sup>68</sup> A ‘qualifying business’ is defined as businesses in good standing with their banks at 31 December 2019, registered with SARS and financially distressed as a result of the Covid-19 outbreak and subsequent lockdowns (National Treasury (Republic of South Africa), South African Reserve Bank and The Banking Association of South Africa Answering your Questions about the COVID-19 Loan Guarantee Scheme (National Treasury (Republic of South Africa), South African Reserve Bank and The Banking Association of South Africa (2020)) 3).

<sup>69</sup> National Treasury (Republic of South Africa), South African Reserve Bank and The Banking Association of South Africa Answering your Questions about the COVID-19 Loan Guarantee Scheme (National Treasury (Republic of South Africa), South African Reserve Bank and The Banking Association of South Africa (2020)) 1.

<sup>70</sup> National Treasury (South Africa) [Economic Measures for COVID-19](#) (National Treasury (South Africa)) (accessed on 23 January 2022).

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

repayments start after six months, and businesses have a maximum of 60 months to repay the loans.<sup>74</sup>

c) *Main or Direct Budget Funding*

The national, provincial<sup>75</sup> and local governments<sup>76</sup> experienced a decline in revenue due to COVID-19. Notwithstanding the decline in revenue, these spheres of government have a pivotal role in the fight against the pandemic. By way of an example, provincial governments oversee a sizeable component of the public health system that is responsible for caring for COVID-19 patients.<sup>77</sup> Local governments are accountable for the delivery of access to water and sanitation, temporary shelter for the homeless people and sanitising public transport infrastructure.<sup>78</sup>

Through the main or direct budget funding, which consists of budget allocations, the national, provincial, and local governments were empowered to deal with the pandemic in their spheres of responsibility. For example, the government spending on health care and related services

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74 Ibid.

75 According to the National Treasury (Republic of South Africa) (National Treasury (Republic of South Africa) Supplementary Budget Review 2020 (National Treasury (Republic of South Africa) (2020)) 19): “Provinces are anticipating a decline in their own revenues of approximately R4 billion, or 18.7 per cent of the amount tabled in the 2020/21 budgets. Tax receipts from casinos and horse racing have declined. Fees paid for public health services have also fallen, as fewer patients are accessing non-COVID-19-related health services.”

76 The National Treasury (Republic of South Africa) (National Treasury (Republic of South Africa) Supplementary Budget Review 2020 (National Treasury (Republic of South Africa) (2020)) 19) reported the revenue challenges facing the local governments as follows: “Municipalities, which depend largely on their own revenues, face significant financial stresses. Metropolitan municipalities reported that their revenue collected in April fell by about 30 per cent on average. This decline is due to a combination of lower demand for services such as electricity and water, and significantly higher non-payment rates for municipal bills. The extent to which municipal bills are paid in the months ahead will depend on the duration of restrictions on economic activity, the pace of recovery and the application of revenue collection measures. Many local governments were already in financial distress. Now the risks posed by their failure to adhere to funding benchmarks – such as retaining one to three months’ worth of cash coverage – are materialising.”

77 National Treasury (Republic of South Africa) Supplementary Budget Review 2020 (National Treasury (Republic of South Africa) (2020)) 18.

78 Ibid at 19.

was expanded to cover the costs associated with “the treatment of those affected by the disease, as well as efforts to manage its spread through the population including mass testing and contact tracing, and the procurement of personal protective equipment.”<sup>79</sup>

#### 4. Social Protection

##### a) Social Assistance

To alleviate the plight of those individuals that are most severely affected by COVID-19, the government augmented the value of the tax-financed social grants<sup>80</sup> as follows:

*Table 4: Adjustments to Social Grant Spending (2020/2021)*

	Baseline per month (Rand)	Number of beneficiaries	Top-up (Rand)	Top-up %
Child support	445	12,811,209	300	67.4%
Old age	1,860	3,672,552	250	13.4%
Disability	1,860	1,045,388	250	13.4%
Foster care	1,040	339,959	250	24.0%
Care dependency	1,860	155,094	250	13.4%

Source: National Treasury (Republic of South Africa) *Supplementary Budget Review 2020* (National Treasury (Republic of South Africa) (2020)) 15.

In addition, the government introduced two new social assistance grants (see *Table 5* below), i.e., the COVID-19 Social Relief of Distress (hereinafter the SRD)<sup>81</sup> and a caregiver allowance that replaces the child support grant top-up.<sup>82</sup> All existing caregivers automatically qualified and

79 National Treasury (South Africa) *Economic Measures for COVID-19* (National Treasury (South Africa)) (accessed on 23 January 2022).

80 See, for further reading, Bhorat H, Oosthuizen M and Stanwix N “Social Assistance amidst the COVID-19 Epidemic in South Africa: A Policy Assessment” (2021) *South African Journal of Economics* 1.

81 Article 3(k)(viii)(cc) of the Amendment to the Directions Issued in Terms of Regulation 4(5) of the Regulations Made under Section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002): Measures to Prevent and Combat the Spread of COVID-19 of 9 May 2020.

82 Article 3(k)(vii)(hh) of the Amendment to the Directions Issued in Terms of Regulation 4(5) of the Regulations Made under Section 27(2) of the Disaster

received the caregiver allowance together with their existing monthly benefit.<sup>83</sup> The COVID-19 SRD was provided to distressed “(i) South African Citizens, Permanent Residents or Refugees registered on the Home Affairs databases; (ii) currently residing within the borders of the Republic of South Africa; (iii) above the age of 18; (iv) unemployed; (v) not receiving any form of income; (vi) not receiving any social grant; (vii) not receiving an unemployment insurance benefit and do not qualify to receive an unemployment insurance benefit; (viii) not receiving a stipend from the National Student Financial Aid Scheme and other financial aid; (ix) not receiving any other government COVID-19 response support; and (x) not a resident in a government-funded or subsidised institution.”<sup>84</sup> Notwithstanding the aforementioned eligibility requirements, it was established by the Auditor-General of South Africa that non-qualifying applicants were approved and paid the special COVID-19 SRD grant.<sup>85</sup>

Table 5: New Social Assistance Grants

	Amount per month (Rand)	Number of beneficiaries
Social Relief of Distress	350	700,000 - 8 million
Caregiver allowance*	500	7,167,022

\*Replaces child support grant top-up from the second month.

Source: National Treasury (Republic of South Africa) *Supplementary Budget Review 2020* (National Treasury (Republic of South Africa) (2020)) 15.

The South African Social Security Agency has the discretion to determine the most suitable method for disbursing the abovementioned social grants.<sup>86</sup> Depositing the COVID-19 SRD grant into a beneficiary’s bank

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Management Act, 2002 (Act No. 57 of 2002): Measures to Prevent and Combat the Spread of COVID-19 of 9 May 2020.

83 Ibid.

84 Article 3(k)(viii)(cc) of the Amendment to the Directions Issued in Terms of Regulation 4(5) of the Regulations Made under Section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002): Measures to Prevent and Combat the Spread of COVID-19 of 9 May 2020.

85 Auditor General (South Africa) First Special Report on the Financial Management of Government’s COVID-19 Initiatives (Auditor-General (South Africa) (2020)) 30.

86 Article 3(k)(viii)(ff) of the Amendment to the Directions Issued in Terms of Regulation 4(5) of the Regulations Made under Section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002): Measures to Prevent and Combat the Spread of COVID-19 of 9 May 2020.

account is the most convenient way to transmit the grant. However, this is easier said than done considering large numbers of unbanked and underbanked members of the South African population.<sup>87</sup> The South African Post Office (SAPO) was used as temporary means to disburse the grant. Given, *inter alia*, the fact that post offices are widespread in the country, SAPO became “the de-facto payment channel.”<sup>88</sup> This resulted in overcrowding at the post office, which is not ideal under COVID-19 circumstances that require social distancing. Another important point to be noted is that the COVID-19 SRD grant: “[...] has uncovered the pitfalls of disjointedness and questionable integrity of the state’s databases. The grant has sharply pushed all stakeholders to think of [the] government’s service provision data as a single data ecosystem. Therefore, the improvement of the special COVID-19 SRD grant will mainly be premised on the integration of [the] government’s service provision data ecosystem.”<sup>89</sup>

### *b) Public Health*

The implementation of a lockdown at the onset of the pandemic slowed the spread of COVID-19 in South Africa.<sup>90</sup> The health sector interventions implemented at this stage were “focussed mainly on behaviour change (for example, social distancing, wearing masks and not going to work when sick), early detection of cases through community screening and testing, contact tracing, disease surveillance and public health campaigns to reduce transmission of the virus in communities.”<sup>91</sup> An amount of R21 billion was reprioritised to public health services.<sup>92</sup> The key spending areas included public health interventions (e.g., testing and supporting the National

87 The goal articulated in the National Development Plan (National Planning Commission (Republic of South Africa) National Development Plan 2030: Our Future – Make it Work (National Planning Commission (Republic of South Africa) (2012)) 150) to increase the proportion of the population that is banked to 90 per cent by 2030 is to be welcomed.

88 Department of Social Development “[Minister Lindiwe Zulu: Update on Social Development intervention during COVID-19, 26 February 2021](#)” (6 February 2022).

89 “[Minister Lindiwe Zulu: Socioeconomic Interventions to Mitigate Impact of Coronavirus COVID-19 Pandemic, 30 July 2020](#)” (accessed on 23 January 2022).

90 National Treasury (Republic of South Africa) Supplementary Budget Review 2020 (National Treasury (Republic of South Africa) (2020)) 14.

91 Ibid.

92 Ibid.

Institute for Communicable Diseases); expanding hospital capacity; and acquiring personal protective equipment, supplies (e.g., hospital beds, linen, oxygen and ventilators) and hiring additional personnel.<sup>93</sup> It is regrettable that some of the monies that were meant to strengthen the public health services in the fight against the pandemic ended up being lost to, among others, fraud and corruption.<sup>94</sup>

c) *COVID-19 Vaccine Injury No-Fault Compensation Scheme*

The COVID-19 Vaccine Injury No-Fault Compensation Scheme (hereinafter the Scheme) has been established as an integral component of the COVID-19 vaccination roll-out.<sup>95</sup> The objective of the Scheme is to “provide expeditious and easy access to compensation for persons who suffer harm, loss or damage as a result of vaccine injury [...] caused by the administration of a COVID-19 vaccine [...] at a facility within the Republic [of South Africa...].”<sup>96</sup> The Scheme and its funds<sup>97</sup> are administered by the National Department of Health.<sup>98</sup> Eligibility to compensation under the Scheme extends to a “person who has suffered harm, loss or damage caused by a vaccine injury [...] resulting from the administration of a COVID-19 vaccine [...] at a facility within the Republic [of South Africa]”<sup>99</sup> as well as “a dependant of a deceased person, who has suffered harm, loss or damage caused by the death of the deceased person, whose death was caused by a vaccine injury [...] resulting from the administra-

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93 Ibid.

94 See, for example, Auditor-General (South Africa) First Special Report on the Financial Management of Government’s Covid-19 Initiatives (Auditor-General (South Africa) (2020)).

95 Regulation 89(1) and (2) of the Regulations Issued in terms of Section 27(2) of the Act 57 of 2002 of 29 April 2020.

96 Regulation 89(3) of the Regulations Issued in terms of Section 27(2) of the Act 57 of 2002 of 29 April 2020.

97 The Scheme is funded through “funds appropriated by an Act of Parliament to the vote of Health or from contingencies in terms of appropriation legislation or the Public Finance Management Act; and (b) funds donated to the Scheme” (regulation 91(1) of the Regulations Issued in terms of Section 27(2) of the Act 57 of 2002 of 29 April 2020).

98 Regulation 90(1) of the Regulations Issued in terms of Section 27(2) of the Act 57 of 2002 of 29 April 2020.

99 Regulation 93(1) of the Regulations Issued in terms of Section 27(2) of the Act 57 of 2002 of 29 April 2020.

tion of a COVID-19 vaccine [...] at a facility within the Republic [of South Africa].”<sup>100</sup> This Scheme, which is not unique to South Africa,<sup>101</sup> is an essential component of measures aimed at addressing vaccine hesitancy<sup>102</sup> by improving public trust in the vaccine.<sup>103</sup>

## 5. Outlook

### a) Economic Reconstruction and Recovery Plan

The South African Economic Reconstruction and Recovery Plan (hereinafter the Plan) is a strategy that has been developed by the government to address the socio-economic challenges faced by the country which were compounded by, among others, the COVID-19 pandemic. The Plan is based on a clear understanding that: “A response to the economic impact of COVID-19 calls for interventions that also address the structural problems that beset the South African economy prior to the impact of the coronavirus. This means crafting interventions that bring about an outcome that decisively deals with the impact of the coronavirus on the South African economy and the last standing structural challenges that have been inhibiting the type inroads that we needed to have made as an economy and a people.”<sup>104</sup>

The Plan is based on the following cornerstones:

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100 Regulation 93(2) of the Regulations Issued in terms of Section 27(2) of the Act 57 of 2002 of 29 April 2020.

101 See D’Errico S et al “First do no harm”. No Fault Compensation program for COVID-19 Vaccines as feasibility and wisdom of a policy instrument to mitigate vaccine hesitancy” (2021) 1116 Vaccines 1.

102 *Ibid* at 8.

103 Mungwira RG et al “Global landscape analysis of no-fault compensation programmes for vaccine injuries: A review and survey of implementing countries” (2020) 15 PLoS ONE 1.

104 [The South African Economic Reconstruction and Recovery Plan](#) (accessed on 16 January 2022).

Table 6: Cornerstones of the Reconstruction and Recovery Plan

Principles	Protection for low-income workers, the unemployed and vulnerable workers; enhancement of the capacity of the economy to grow and create decent jobs; ensuring that local communities, particularly historically marginalised communities, are removed from the vicious cycle of under-development; strengthening the productive capacity of the economy; maintaining the planned levels of investment in public sector infrastructure; ensuring localised procurement of key inputs, to strengthen and deepen backward and forward linkages within the domestic industrial base; strengthening the capacity of the state to intervene in the economy and to deliver on social services; and crafting employment-intensive ways in which a turnaround can be achieved.
Focus areas	Infrastructure roll-out, localisation through industrialisation, energy security, food security, support for tourism, green economy interventions, public employment programmes, and macro-economic policy interventions.
Enablers	Ensuring optimal revenue collection, fiscal sustainability, improved efficiency of spending, elimination of wastage and corruption and improved state capacity to collect revenue; increased access to finance, ensuring expanded access to the R200 billion COVID-19 credit facility; establishment of a state bank and the amendment of Regulation 28 of the Pension Funds Act in order to unlock funding for long-term infrastructure projects and high-impact capital projects, as well as facilitate direct access to the pension funds pool of resources by Development Finance Institutions (DFIs); increased issuing of green infrastructure bonds as a critical step in reducing the carbon footprint and in order to secure the funding of infrastructure at concessional cost (increased capacity for project preparation to develop projects to bankability); regulatory changes to reduce the cost of doing business and facilitate ease of doing business; building a state that is equipped to deliver; a social compact for fair choices and sustainable trade-offs; skills development and a population that is equipped for the new normal; communications and the digital economy; and economic diplomacy and further integration into the African continent.

Source: [The South African Economic Reconstruction and Recovery Plan](#) (accessed on 16 January 2022).

While the plan is to be welcomed, it has been criticised for its lack of funding details.<sup>105</sup> In addition, it has been accused of being “off to a rocky start with a limited number of its three-month targets achieved, or showing little signs of progress.”<sup>106</sup>

<sup>105</sup> Merten M “SA’s Economic Reconstruction and RecoveryP: The Devil is in the Details and with the National Command Council”, Daily Maverick, 11 October 2020 (accessed on 19 February 2022).

<sup>106</sup> De Villiers J “[Ramaphosa’s Economic Plan: 26 Targets in Three Months – But Only Five Met](#)”, News24, 8 February 2021, (accessed on 19 February 2022).

b) *Empowering the Vulnerable Groups*

It is abundantly clear that COVID-19 impacts people differently.<sup>107</sup> The ability of individuals and their families to fathom life under COVID-19-imposed hardships varies from one person to another.<sup>108</sup> COVID-19 accentuated the plight of the vulnerable and marginalised groups and categories of persons who are, notwithstanding the various previously mentioned government interventions, in more ways than one at the mercy of the pandemic. These groups, which suffer(ed) the most, include the urban and rural poor,<sup>109</sup> informal sector workers,<sup>110</sup> the unemployed,<sup>111</sup> and migrant workers.<sup>112</sup> This is largely due to the precarious position of these groups and categories of persons in the labour market, the social protection system and life in general. Accordingly, South Africa needs to, *inter alia*, intensify efforts to extend social protection coverage in terms of access and the quality of benefits to these groups and categories of persons. The social protection interventions should, as illustrated in *Diagram 1* below, consist of preventative, compensatory and reintegrative measures. Therefore, it is pleasing to note that the South African “[p]ost-COVID-19 recovery strategies have converged around job-creation and income support.”<sup>113</sup>

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107 Devereux S and Cuesta J “Urban-Sensitive Social Protection: How Universalised Social Protection can Reduce Urban Vulnerabilities post-COVID-19” (2021) *Progress in Development Studies* 1 at 5.

108 Mubangizi JC “Poor Lives Matter: COVID-19 and the Plight of Vulnerable Groups with Specific Reference to Poverty and Inequality in South Africa” (2021) 65 *Journal of African Law* 237.

109 Devereux S and Cuesta J “Urban-Sensitive Social Protection: How Universalised Social Protection can Reduce Urban Vulnerabilities post-COVID-19” (2021) *Progress in Development Studies* 1.

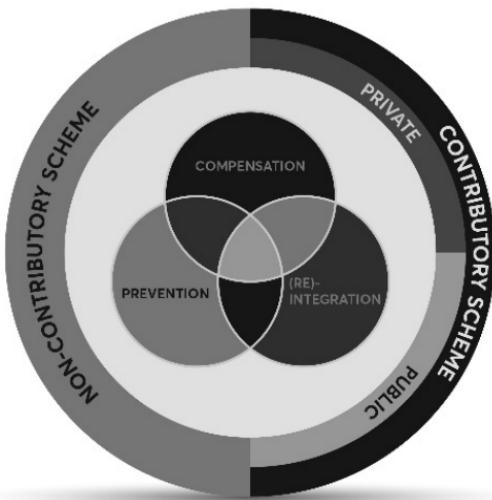
110 See, for example, Bassier I et al *Locked Down and Locket Out: Repurposing Social Assistance as Emergency Relief to Informal Workers* (Southern Africa Labour and Development Research Unit (2020)) and Mpedi LG “COVID-19 and Social Protection in SADC: Impact, Responses and Lessons” in Olivier M, Smit N and Kalula E (eds) *Liber Amicorum: Manfred Weiss* (Juta (2021)) 233 at 240 – 242.

111 See, for example, Mpedi LG “Commentary on the Unemployment Insurance Act and the Unemployment Insurance Contributions Act” in Thompson C and Benjamin P *South African Labour Law* (Juta (2021)) J1-(i).

112 See, for example, Mpedi LG “COVID-19 and Social Protection in SADC: Impact, Responses and Lessons” in Olivier M, Smit N and Kalula E (eds) *Liber Amicorum: Manfred Weiss* (Juta (2021)) 233 at 242 – 244.

113 National Treasury (Republic of South Africa) *Budget Review: 2022* (National Treasury (Republic of South Africa (2022)) 11.

Diagram 1: Social Protection Programmes and Objectives



Source: Mpedi LG “Law and Industry 4.0 in South Africa: A Social Security Perspective”, paper presented at the University of Johannesburg, Faculty of Law Indaba, 30 August 2018.

c) *Equitable Access to Healthcare*

Access to healthcare is entrenched in the Constitution as a fundamental right.<sup>114</sup> Nevertheless, such a right is nothing more than a pipe dream for many South Africans. On the one hand, the indigent members of society are compelled to rely on the under-resourced and deteriorating public health services.<sup>115</sup> On the other hand, the affluent have the privilege of utilising world-class private health facilities.<sup>116</sup> While any person can contract COVID-19 and, in some unfortunate cases, perish from it, the

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<sup>114</sup> Section 27(1)(a) of the Constitution provides that: “Everyone has the right to have access to health care services, including reproductive health care.”

<sup>115</sup> See Strban G and Mpedi LG “The right to healthcare: Slovenian, South African and cross-border perspectives” in Fourie E and Škerl JC Universality of the Rule of Law: Slovenian and South Africa Perspectives (Sun Press (2021)) 165 at 172 – 176.

<sup>116</sup> *Ibid.*

virus can to a certain degree be regarded as a poor person's disease. This assertion stems from the fact the poor invariably lack the means to afford nutritious food, medication, and health services.<sup>117</sup> Apart from COVID-19, many poor persons must contend with other diseases that were prevalent even before the arrival of the pandemic such as human immunodeficiency virus and acquired immunodeficiency syndrome (HIV/AIDS), malaria and tuberculosis.<sup>118</sup> Accordingly, the efforts which commenced before the advent of COVID-19 to introduce a National Health Insurance system in South Africa are to be welcomed. *National Health Insurance Bill 11* of 2019 sets out a legislative framework for the achievement of universal access to quality health care services in South Africa in line with the right of access to healthcare as contained in the Constitution.<sup>119</sup>

#### *d) Basic Income Grant Debate*

The uneven impact of the pandemic, especially on the poor and marginalised members of society,<sup>120</sup> gave new impetus to the calls for the introduction of a Basic Income Grant (hereinafter the BIG) in South Africa.<sup>121</sup> These calls were bolstered by the overall impact of the COVID-19 SRD<sup>122</sup> on the poor and vulnerable groups and categories of persons.<sup>123</sup> It is argued that the COVID-19 SRD, which has been extended

117 See Statistics South Africa Social Impact of COVID-19 (Wave 3): Mobility, Migration and Education in South Africa (Statistics South Africa (2020) 11.

118 See Staunton C, Swanepoel C and Labusgaigne M "Between a Rock and a Hard Place: COVID-19 and South Africa's Response" (2020) *Journal of Law and the Biosciences* 1.

119 Preamble of the National Health Insurance Bill 11 of 2019.

120 Mubangizi JC "Poor Lives Matter: COVID-19 and the Plight of Vulnerable Groups with Specific Reference to Poverty and Inequality in South Africa" (2021) 65 *Journal of African Law* 237.

121 Devereux S and Cuesta J "Urban-Sensitive Social Protection: How Universalised Social Protection can Reduce Urban Vulnerabilities post-COVID-19" (2021) *Progress in Development Studies* 1 at 15-17.

122 See Department of Social Development (South Africa) *The Rapid Assessment of the Implementation and Utilisation of the Social COVID-19 SRD Grant* (Department of Social Development (South Africa) (2021)).

123 In announcing a further extension of the COVID-19 SRD, President Cyril Ramaphosa, during the State of the Nation Address which took place in Cape Town on 10 February 2022, remarked that: "Since the onset of COVID-19, the Social Relief of Distress Grant has provided support to more than 10 million unemployed people who were most vulnerable to the impact of the pandemic.

on several occasions since it was launched in 2020, should be converted into a BIG to support persons aged 18 to 59<sup>124</sup> who are without or little income.<sup>125</sup> There is a dire need for a social protection measure in South Africa to address the gap currently covered by the COVID-19 SRD. This lacuna has been acknowledged at Cabinet level by President Cyril Ramaphosa<sup>126</sup> and the Minister of Social Development, Lindiwe Zulu.<sup>127</sup> Only time will tell whether the COVID-19 SRD will be replaced by the BIG or not.

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Some people used that money to start businesses...As much as it has had a substantial impact, we must recognize that we face extreme fiscal constraints. A fiscal crisis would hurt the poor worst of all through the deterioration of the basic services on which they rely.”

- 124 It should be mentioned that this age group is currently not covered by the tax-financed social assistance scheme.
- 125 See Senona E, Torkelson E and Zembe-Mkabile W Social Protection in a Times of COVID Lesson for Basic Income Support (Blacksash (2021)) 51-52.
- 126 President Ramaphosa reported during the 10 February 2022 State of Nation Address that: “Mindful of the proven benefits of the grant, we will extend the R350 SRD Grant for one further year, to the end of March 2023. During this time, we will engage in broad consultations and detailed technical work to identify the best options to replace the grant. Any future support must pass the test of affordability, and must not come at the expense of basic services or at the risk of unsustainable spending. It remains our ambition to establish a minimum level of support for those in greatest need.”
- 127 She asserted that: “As much as we are meticulously noting what works with the COVID-19 SRD grant, we are equally welcoming and encouraging deeper public discourse that is centred at innovating sustainable social protection coverage solutions that are targeted at addressing poverty and inequality by developing our society: the world’s most unequal society! Therefore, every South African must contribute towards meaningfully defining the paths that will engineer our society into the new normal wherein, as we envisaged in the National Development Plan (NDP), the social protection coverage is extended to the missing middle parts of our population. Therefore, we call upon each South African to bring their innovative, ingenious, creative solutions to the possibilities, design and scale of the BIG solution” (“Minister Lindiwe Zulu: Socioeconomic Interventions to Mitigate Impact of [the] Coronavirus COVID-19 Pandemic, 30 July 2020” (accessed on 23 January 2022)).