

COVID-19 and the ruling party's policy on the NHI

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The COVID-19 virus has challenged if not crippled healthcare systems worldwide, which, consequently, has brought universal access to healthcare services back into the spotlight. This is no different in South Africa where the quest for access to universal health services is currently contained in the National Health Insurance ("the NHI") Bill [B11— 2019] ("the NHI Bill").

Legislatively, no further steps have been taken in respect of the NHI Bill pursuant to the end of the period within which comments were submitted by the public and the provincial public participation processes.

In response, however, to the COVID-19 pandemic and subsequent to the declaration of a state of disaster in South Africa, the ruling party, issued a statement, on 8 May 2020 on the outcomes of the special session of the National Executive Committee ("NEC") ("the statement").

The NEC, as set out in the statement, in respect specifically of the NHI, resolved that:

- "Support for the approach to lay the foundations for implementation of the National Health insurance (NHI), by channelling expenditure to adding capacities to existing and newly built health care facilities, rather than only on temporary field hospitals for COVID-19."; and
- "The need to move swiftly towards implementation of ANC Conference resolution, and the African Union Pharmaceutical Manufacturing Action Plan, to build a national pharmaceutical company. ..."

Health care services in a pandemic

The NHI is intended to provide primary health care services and in so doing, and in theory, prevent secondary and tertiary illnesses from occurring and thus avoiding burdening the healthcare sector. Thus, the term "health care services" covered by NHI is currently defined as –

- health care services, including reproductive health care and emergency medical treatment, contemplated in section 27 of the Constitution;
- basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution;
- medical treatment contemplated in section 35(2)(e) of the Constitution; and
- where applicable, provincial, district and municipal health care services.

Arguably communicable diseases such as COVID-19 do not fall within the following categories referred to in the definition quoted above –

- reproductive health care;
- basic nutrition; or
- medical treatment for every sentenced prisoner, as contemplated in section 35(2)(e) of the Constitution of the Republic of South Africa, 1996

In respect of whether or not the treatment of COVID-19 may be considered to be an “emergency treatment”, as included in the definition of “health services” quoted above, and thus be covered by the NHI, in terms of the latest amendment to the Medical Schemes Act No. 131 of 1965, as amended, and published on 7 May 2020, COVID-19 is identified as a prescribed minimum benefit includes screening, diagnostic tests, medication, hospitalisation and the treatment of complications. Accordingly, in so far as the NHI Bill defines “emergency medical services” as “services provided by any private or public entity dedicated, staffed and equipped to offer *pre-hospital acute* medical treatment and transport of the ill or injured” (emphasis added), the screening, testing, and hospitalisation for COVID-19 would not be covered in so far as such services would not be considered to be “emergency medical services” based on the proposed definition of that term.

Alternatively, communicable diseases, such as COVID-19, may fall within what is defined as “complementary cover” in the NHI Bill, which is cover that may be provided, by medical schemes, or it may be argued that the term “health care service” is a broad term that may include all health matters, including communicable diseases. However, such an interpretation is, arguably, not supported by the provisions of the NHI Bill in so far as there are “personal health care service benefits” (a term which is not defined in the Bill), which the NHI does not intend to fund. Thus, interpreting “health care services” to mean that all health issues are covered by the NHI is not, in our opinion, what is envisaged by the NHI Bill.

Peculiarly, the NHI Bill contains a definition of “comprehensive health care services” which is defined as “health care services that are managed so as to ensure a continuum of health promotion, *disease prevention, diagnosis, treatment* and management, rehabilitation and palliative care services across the different levels and sites of care within the health system in accordance with the needs of users” (emphasis added). The NHI Bill states, at clause 15(3)(b), that the NHI Board must fund the purchase of “comprehensive health care services”. However, the NHI does not make provision for how “users”, as defined in the NHI Bill, will be provided with “comprehensive health care services” as it simply reverts to the term “health care services” in the definition of “comprehensive health services”, which, once again, arguably restricts the ambit of the health care services covered, as discussed.

The question that then arises is whether or not “users”, would have been covered for treatment of COVID-19 under the NHI as proposed or even how the NHI would have dealt and coped with such a pandemic.

Ultimately, the advent of COVID-19 has produced a litmus test for assessing the efficacy of and approach to designing a NHI in circumstances that arguably were never before properly considered.

Given the fact that all citizens will be contributing to the NHI fund, not everyone will be able to afford both the expenses associated both with contributions to the NHI and private medical cover for “complementary services”. Therefore, with no assistance from the NHI or the financial means to obtain complementary cover, citizens may be obliged to pay for the requisite health care services as an out-of-pocket of expense, alternatively, citizens may have no recourse in the event that the State does not intervene to assist.

In respect of the healthcare costs associated with COVID-19, the Minister of Health has, through an amendment of the Medical Schemes Act No. 131 of 1998, as amended, declared COVID-19 as a prescribed minimum benefit but only in certain circumstances (“the amendment”). Such an amendment thus, obliges medical schemes, in certain instances, to pay in full for the treatment for COVID-19 for all members of medical schemes.

The amendment has, arguably, offered financial relief to the Department of Health in so far as the costs for the treatment, of certain members, are now the responsibility of medical schemes. However, as publicized, the most prominent feature of the NHI is the potential reduction in the services that may be offered by medical schemes as complementary to those offered by the NHI. Therefore, in the event that, with the advent of the NHI, the State removes prescribed minimum benefits from medical scheme offerings under NHI, the relief that the Minister might have found in the amendment will no longer be available.

Pharmaceutical services in a pandemic

In respect of the African Union Pharmaceutical Manufacturing Action Plan, the aforementioned plan is largely dependent on the co-operation of countries participating in the Union and may not, arguably, align with the time periods set in the NHI Bill. The South African Government does, however, own a pharmaceutical company that currently manufactures medicines only for the treatment of HIV/AIDS, tuberculosis and malaria, being Ketlaphela Pharmaceutical SOC Limited.

Thus, reliance on the African Union Pharmaceutical Manufacturing Action Plan should, in our opinion, be replaced with an action plan to expand the already established South African pharmaceutical manufacturing company to develop medical devices, such as, *inter alia*, ventilators in so far as COVID-19 has made us aware of the need for of medical supplies in South Africa.

In respect of the NEC resolution to channel “expenditure to adding capacities to existing and newly built health care facilities, rather than only on temporary field hospitals for COVID-19”, one of the more fundamental concerns regarding the introduction of the NHI is the readiness and ability of public health establishments to cater for both public and previously privately funded citizens in public health emergencies and national or provincial states of disaster. These concerns have been met with responses from the Department of Health confirming that public health establishments are, in fact, ready and able to treat the population at the same standard as private health establishments.

The establishment of the temporary health establishments is necessary in so far as COVID-19 is a communicable virus, thus, measures to prevent the spread of the virus, such as the treatment of affected persons separately, are indeed needed.

However, the diversion of funds from the improvement of existing health establishments, in preparation for the NHI, to funding of temporary hospitals, may cause a further delay in the implementation of the NHI as it is proposed in the NHI Bill.

COVID-19 has highlighted certain shortcomings in the current draft of the NHI Bill in respect of a proposed public healthcare service offering, where that offering does not take the occurrence of catastrophic events into account such epidemics and pandemics.



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