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HEALTHCARE & LIFE SCIENCES

Current status: National Health Insurance Scheme

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Notwithstanding the attention that has come to be focused on the prevailing COVID-19 pandemic, preparations continue in respect of the implementation and establishment of a National Health Insurance Scheme or NHI in South Africa. In this regard, we are guided by the provisions of the National Health Insurance Bill [B11-1019] ("the Bill").

Whilst the Bill remains a Bill and is not enforceable as a matter of law, the Bill contains various transitional arrangements, which are set out in clause 57 of the Bill. The transitional arrangements are divided into two Phases. There is arguably not much time within which to substantively achieve the requirements that are described in the Bill for the completion of Phase 1.

In terms of clause 57(2)(a) various tasks are set out in respect of what must be achieved during the course of Phase 1. These particular tasks are described as follows:

"(i) continue with the implementation of health systems strengthening initiatives, including alignment of human resources with that which may be required by users of the Fund;

(ii) include the development of National Health Insurance legislation and amendments to other legislation;

(iii) include the undertaking of initiatives which are aimed at establishing institutions that must be the foundation for a fully functional Fund; and

(iv) include the purchasing of personal healthcare services for vulnerable groups such as children, women, people with disabilities and the elderly."

Provisions of the Bill

It is not clear from the provisions of the Bill how one is to measure the successful implementation of the tasks or initiatives set out in clause 57(2)(a), more particularly, with reference to the relatively vague wording used in the clause. In this regard, if one is to have regard to the wording used in clause 57(2)(a), then one is required to have a clear understanding of, at least, the following concepts:

- the "strengthening initiatives" that are currently in place, the structure of those initiatives and the goals that such initiatives are arguably required to attain;
- the current status of other pieces of legislation that are to be amended so as to facilitate the existence of a National Health Insurance Scheme and the nature of the amendments concerned with reference to the provisions of those pieces of legislation and the provisions of the Bill;
- the particular institutions that are to be the foundation of a fully functioning National Health Insurance Scheme, more particularly, with reference to the committees that are referred to in clause 57(3) of the Bill and dealt with in more detail below;
- the particular human resources that are required for purposes of operating a substantively successful National Health Insurance Fund, based on what will be required by users of the National Health Insurance Scheme and, more particularly, with reference to what it is that users will be able to access in terms of healthcare services provided by the proposed National Health Insurance Scheme.

Clause 57(3) of the Bill

Clause 57(3) of the Bill deals with what interim committees are to be established to advise the Minister of Health on the implementation of a National Health Insurance Scheme. These so-called interim committees are described as the National Tertiary Health Services Committee, the National Governing Body on Training and Development, the Ministerial Advisory Committee on Healthcare Benefits for National Health Insurance and the Ministerial Advisory Committee on Health Technology Assessment for National Health Insurance. Each of the committees is afforded a mandate in clause 57(3) of the Bill. However, the various committees are described as interim committees in the Bill and are thus intended to be precursor committees to final committees to be established presumably once the Bill becomes an Act.

Clause 57(4) of the Bill

Clause 57(4) of the Bill sets out certain objectives that must be met during the course of Phase 1 and therefore on or before 31 December 2021. Primarily, the objectives are concerned with the structuring of certain components of the National Health Insurance Scheme, which are arguably designed to create the foundation of such a Scheme. All in all, there are eight objectives to be achieved during the course of Phase 1. These objectives include the following:

- the migration of central hospitals that are otherwise funded, governed and managed nationally to so-called "semi-autonomous entities" – albeit that the term "semi-autonomous entities" is not defined in the Bill and the precise intended status of central hospitals is therefore largely unknown;
- the structuring of the Contracting Unit for Primary Health Care at a district level "in a co-operative management arrangement" with the relevant district hospital/s, which hospital/s is/are, in turn, linked to a number of primary healthcare facilities. The precise terms and conditions of a "co-operative management arrangement" are not detailed in the Bill;
- the establishment of the National Health Insurance Fund including its governance structures – bearing in mind that the National Health Insurance Fund is to be established in terms of clause 9 of the Bill which, in turn, contemplates that, in order for the Fund to be established, the Bill will have to become effective legislation, which is not one of the objectives contemplated during the course of Phase 1;
- the Health Patient Registration System needs to be established as contemplated in clause 5 of the Bill and, once again, one is required to have clause 5 of the Bill enacted into law in order for its provisions to take effect legally and for the proposed registration system to be established in accordance with the principles of legality that emerge from the Constitution of the Republic of South Africa, 1996 and various pronouncements by the Constitutional Court;
- the process for the accreditation of healthcare providers who are to provide services to users of the National Health Insurance Scheme, which also includes the requirement of the inspection and certification of health establishments by the Office of Health Standards Compliance but, once again, the process for accreditation of both health establishments and healthcare providers, for purposes of providing services to users of the Fund, is a feature of the Bill that will be required to become effective law in order for the particular objective to be achieved;
- the purchasing of healthcare services benefits by the Fund. Such services are described in the Bill as both primary healthcare services and hospital services as well as other clinical support services. The particular primary healthcare services that are referred to in clause 57(4)(f) of the Bill include maternity and child healthcare services, which include school health services, health services for the elderly and people with disabilities and those in rural communities. Such services are to be provided by contracted healthcare providers, whom are described as general practitioners, audiologists, oral health practitioners, optometrists, speech therapists and other designated providers at a primary healthcare level "focusing on disease prevention, health promotion, provision of primary healthcare services and addressing critical backlogs". Particular hospital services and other clinical support services are also dealt with in clause 57(4)(g) where there is an implied indication that the purchasing of hospital services and other clinical support services will be an expansion of those services referred to in the Bill as primary healthcare services;
- various pieces of legislation are to be amended. These pieces of legislation, which are currently in effect, are identified in clause 57(4)(h) of the Bill and include legislation such as the Medical Schemes Act No. 131 of 1998, as amended, the Traditional Health Practitioners Act No. 22 of 2007 and the Medicines and Related Substances Act No. 101 of 1965, as amended.

NHI objectives to be achieved in Phase 2

Of interest and importance to potential users of the National Health Insurance Scheme is clause 57(5) that contemplates that the objectives that are to be achieved in Phase 2, which is described as operating from 2022 to 2026, must be achieved on the basis of a system of mandatory pre-payment. It is unclear from the provisions of the Bill when a system of mandatory pre-payment by users will be implemented – bearing in mind that the term "mandatory prepayment" is not defined in the Bill. Presumably, in order to achieve the particular objectives, which are included in Phase 2, a system of mandatory prepayment may have to be introduced sooner rather than later, in order to secure the requisite funds prior to the commencement of Phase 2 on 1 January 2022. However, the Bill is largely silent on when the particular steps, contemplated in Phase 1, are to be taken and the consequences, should the time periods stipulated for Phases 1 and 2, not be met as a result of various external factors including prevailing pressure on the Department of Health in order to deal with the COVID-19 pandemic and a successful rollout of an appropriate vaccination program for the entire country.

The Bill remains alive and we should be keenly watching the developments that occur in order to achieve the objectives of Phase 1 ahead of the commencement of Phase 2 during the course of next year. However, there are many i's to be dotted and t's to be crossed, from a legal perspective, in order for the Bill to become law, more particularly, a law that is consistent with existing pieces of healthcare legislation and, more importantly, the legality provisions imposed by the Constitution of the Republic of South Africa, 1996 – a process that, within and of itself, cannot be rushed nor manipulated no matter how laudable the objectives of the Bill may be.

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