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NO MANDATORY REQUIREMENT FOR SOUTH AFRICANS TO JOIN FUND UNDER NHI BILL AS CURRENTLY PROPOSED

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The publication of the National Health Insurance Bill [B11-2009] has resulted in much public comment as to the future of healthcare in South Africa. The National Health Insurance Bill or NHI Bill, as it is colloquially known, proposes a Fund to purchase healthcare services on behalf of those persons eligible to join the Fund. The question that must be asked is whether or not all South Africans are compelled to become members of the Fund as it is proposed in the NHI Bill?

This is an important question in so far as the proper application of the NHI Bill is concerned as well as the future construction of the healthcare sector, both public and private, in South Africa. There are also important implications for purposes of applying the Bill of Rights to the Fund, more particularly, the provisions of section 18 of the Constitution of the Republic of South Africa, 1996 which provides that "[e]veryone has the right to freedom of association." Therefore, on the face of section 18, all South Africans have the right to choose with whom to associate including whether or not to belong a National Health Insurance Fund.

In terms of the NHI Bill, a "user" is simply defined as "a person registered as a user in terms of section 5." Accordingly, clause 4 of the NHI Bill deals with the persons who are eligible to join the Fund. The list includes South African citizens, permanent residents, refugees, inmates and certain categories of individual foreigners as determined by the Minister of Home Affairs after consultation with the Ministers of Health and Finance. However, importantly, the NHI Bill does not contain a clause that compels any of the categories of persons, referred to in clause 4, to belong to the Fund. Therefore, on the face of the NHI Bill, as it is currently proposed, there is no mandatory requirement for South Africans, or any other person to join the Fund. This is a departure from previous iterations of the NHI Bill in which an express requirement existed both to become a member of the Fund as well as to make a payment in respect of that membership. On that basis, there would be an argument to be made that the Fund is to be established only for those who wish to join it and those who wish to continue with current funding models for obtaining their healthcare services would be entitled to do so. But is that position both tenable and viable for purposes of maintaining the Fund where only, potentially, a few members of the population elect to join the Fund?

Perhaps the fact that the NHI Bill is silent as to mandatory membership of the Fund is not necessarily an indication of the manner in which the NHI Bill intends to operate, which, once again, implicates the freedom of association provisions in the Bill of Rights. Therefore, two sections of the NHI Bill may provide us with an indication of what, actually, is intended in respect of membership of the Fund, being:

- clause 33, which purports to limit the benefits available from a medical scheme in so far as "medical schemes may only offer complementary cover to services not reimbursable by the Fund"; and
- clause 49, which outlines the chief sources of income of the Fund, including general tax revenue, payroll tax and a surcharge on personal income tax.

Currently, medical schemes are able to provide a range of medical benefits to members as determined in the Medical Schemes Act, 1998. Such benefits are wide-ranging and include numerous primary healthcare offerings as well as more sophisticated benefits, which are required in times of need. In so far as the NHI Bill prohibits medical schemes from offering benefits otherwise provided by the Fund, this will mean that members of a medical scheme who currently enjoy particular benefits from that medical scheme, more particularly primary healthcare benefits, which are arguably used the most in so far as one consults more often with a general practitioner than a specialist

provider, will mean that in order to obtain such benefits, one would *have* to be a member of the Fund. Therefore, and indirectly, clause 33 of the NHI Bill operates on the basis of a mandatory membership of the Fund (for those persons eligible to join the Fund).

In addition, due to the funding of the Fund, as contemplated in clause 49, all South Africans, in one form or another, make payment for the establishment and maintenance of the Fund. Therefore, whilst a "membership fee" will not be levied, amounts will be deducted from tax-paying South Africans in order to provide income for the Fund. Therefore, indirectly, tax-paying South Africans, at least, will be paying a membership fee or contribution to the Fund.

Whether or not mandatory membership of the Fund is desirable, will have to be tested against section 18 of the Bill of Rights.

The overall implications of the NHI Bill, from a membership point of view, will have to be understood in the fullness of time and through the process of obtaining public comments on the NHI Bill as is currently envisaged through the Parliamentary process through which the NHI Bill must pass in order to become law.

One further outlier, in respect of compulsory membership of the Fund arises in respect of the provisions contained, currently in clause 8(2) of the NHI Bill. On its face, clause 8(2) provides for instances in which the Fund will not provide payment for services obtained by a user. One of the instances in which the Fund will not be obliged to recover the costs of health services obtained by a user is where the user "fails to comply with referral pathways prescribed by healthcare services provider or health establishment."

In so far as a person elects not to be registered as a member of the Fund, arguably, that user will never be in a position to obtain healthcare services in terms of prescribed referral pathways. According to clause 8(2), where a user is not entitled to have the costs of the healthcare services that he or she has obtained paid by the Fund, the user may then obtain payment "through a voluntary medical insurance scheme or through any other private insurance scheme". Practically, where a person is not a user, for purposes of the Fund and is thus not obliged to follow prescribed referral pathways, for purposes of obtaining healthcare services, then that user is entitled to obtain assistance in order to defray healthcare-related expenditure from a voluntary medical insurance scheme. Whether or not such a situation is plausible or even permitted under the NHI Bill is one that will have to be determined and tested, in due course. However, the NHI Bill would also have to tread carefully around the property rights of medical schemes in so far as clause 33, dealt with above, effectively removes the rights of medical schemes to offer particular and existing products to members of the public in return for the payment of a premium or contribution as is currently the case in terms of medical schemes legislation.

Constitutional questions therefore arise in light of the current provisions of the NHI Bill, which are important considerations to take into account when evaluating the overall impact and effect of the NHI Bill on the current architecture of, at least, the private healthcare sector in South Africa.

Similar implications also arise in respect of the proposed amendments to the Health Professions Act, 1974 in so far as the amendments purport to prohibit registered medical practitioners from providing services "which are not covered by the National Health Insurance Fund established by section 9 of the National Health Insurance Act, 2019".

Whether or not the State, in the form of the Department of Health, can simply take away the rights of both medical practitioners and medical schemes to provide certain services to the patients, in return for payment for those services, remains a contentious issue from a constitutional perspective in so far as the NHI Bill is concerned.

Whilst there is no debate about the desirability of the existence of universal healthcare services, as is recognised in the preamble to the NHI Bill and the various international covenants and agreements to which the Republic is a party, the Constitution remains the supreme law of the land and all laws, irrespective of their intent, must be consistent with the Constitution. Accordingly, rejigging the rights of the proposed participants to the Fund – users, medical schemes, healthcare providers and certain state functionaries – must be tested against the existing provisions of the Constitution in order to pass legal muster and to ensure that any universal healthcare coverage system is consistent with the constitutional prerogatives to which our society has elected to adhere.

The debate will, no doubt, rage on as to the most appropriate scheme for South Africa in order to achieve universal healthcare coverage and improve the provision of healthcare services for all of those within its borders. How the Constitution will view the ultimate scheme selected remains an interesting debate but one that must be had in order to introduce lawfully and maintain properly any proposed national health insurance scheme.



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