

Where to next for the NHI?

accreditation

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The NHI has been one of the most controversial pieces of legislation passed in 30 years.

Now, government is planning more consultation on its final form.

Meanwhile, court action to strike down some of its provisions continues.

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Although the National Health Insurance (NHI) is a hot issue and the state of public health care is a burning one, it could be many months before the future size and shape of the NHI is decided.

NHI Act not yet in effect

The first important time stamp to note is that although President Cyril Ramaphosa signed the National Health Insurance (NHI) Bill, making it law three months ago, no part of the Act has yet been promulgated. This means that while it is law, it is not yet in force.

What was the significance of the recent court ruling?

Last month's high court case, which struck down the requirement that medical practitioners require a certificate of need – essentially a licence — from the Department of Health to set up a health business, was not a ruling against the NHI Act. The ruling struck down certain sections of the National Health Act, passed in 2003, but not fully promulgated. The Gauteng High Court in Pretoria ruled this provision conflicted with the Bill of Rights and was unconstitutional. This judgment must still be endorsed by the Constitutional Court.

While the NHI Act does not have the same clause, it presupposes a centrally planned accreditation system for healthcare providers, which will effectively allocate them to areas of need. This is why trade union Solidarity, which initiated the court application on the National Health Act and some medical schemes, has said that "a pillar of the NHI" has been struck down.

More legal challenges are on the way

The NHI Act is the subject of two court challenges. Although these were initiated in March shortly after the bill was passed, neither has progressed beyond the first stage. The applicants have filed their founding affidavits, but neither the Minister of Health Aaron Motsoaledi nor President Cyril Ramaphosa, the first respondent, have filed opposing affidavits yet and have requested extensions from the courts.

The Board of Healthcare Funders

The Board of Healthcare Funders (BHF), representing the medical scheme industry, brought

the first case. The BHF's founding affidavit details the numerous incidences in which stakeholders have written to President Cyril Ramaphosa, appealing to him not to sign the NHI Bill over concerns that it is unconstitutional.

The objective of the BHF's founding affidavit is to extract the Record of Decision from Ramaphosa. In terms of the Constitution, on receiving legislation from Parliament, the president must satisfy himself that it is constitutional. The president is obliged to do this diligently and in a way that passes the test of rationality. The BHF is asking – in terms of the uniform rules of court – that Ramaphosa share the process he followed in deciding. Once this is received, the BHF says it will supplement the grounds for review.

The position of the Treasury

One of the key documents featured in the BHF papers is a letter written in 2018 from the National Treasury to the Presidency alerting it to several constitutional concerns with the NHI Bill. Among other things, the Treasury warns that as health is a provincial competency in the Constitution, the NHI usurps the powers of the provinces, which is unconstitutional.

It is an open secret that the Treasury has opposed the NHI in its current form. Because of the 2018 letter, the Treasury cannot credibly file an opposing affidavit and will, therefore, abide by the court's decision.

Solidarity

Trade union Solidarity brought the second application to strike down the NHI Act. In its founding affidavit, Solidarity takes the "kitchen sink" approach and throws every argument available at the court. The strongest ground against unconstitutionality is the controversial Section 32, which states that medical aids may not reimburse members for services once these become available on the NHI. This limits individual choice and infringes on the rights of medical schemes to do business.

Other stakeholders – the DA and Business Unity SA (BUSA) — have previously threatened legal action against the NHI, but both have decided to wait and see whether a "negotiated settlement" under the government of national unity (GNU) can address their problems.

Ramaphosa's hint of a compromise

At the GNU lekgotla last month, DA leader John Steenhuisen told Ramaphosa that while the DA agreed with most of ANC policy it did not agree with aspects of the NHI. The DA says it supports "universal health coverage", a financing system that ensures that no citizen goes without health care because they cannot afford it. However, the DA and BUSA believe there are better ways to achieve this than the NHI in its present form. Rather, it advocates an arrangement in which the private sector supports the public sector with resources, facilities, and training, among other things.

In his opening address to Parliament, Ramaphosa hinted at this agreement, saying:

While there is much contestation around the NHI, there is broad agreement that we must draw

on the resources and capabilities of both the public and private sectors to meet the health care needs of all South Africans equally. In implementing the NHI, we are confident that we will be able to bring stakeholders together, resolve differences, and clarify misunderstandings.

Motsoaledi's roadshow

On Tuesday, Motsoaledi—who has been uncompromising on the size and shape of the NHI—announced that he would begin a process of consultation to learn the concerns of those who object to the act. His announcement came after an ANC policy and planning meeting.

As Motsoaledi pointed out, all those who have opposed the NHI claim that they support the principle and the policy of universal health coverage (UHC). UHC is essentially a financing system for healthcare that ensures that it is available to everyone, regardless of whether they can pay for it. The acceptance of UHC by political opponents like the DA and the business community and medical aid scheme industry is a major step forward and will help craft a compromise on NHI.

READ | Motsoaledi opens door for new consultation on NHI with 'massive roadshow'

At the same time as the consultation, Motsoaledi says he plans to begin implementing Section 57 of the NHI Act, which will establish the NHI's institutional structures.

What is the likely outcome?

Motsoaledi says that consultation will take the form of "a massive roadshow". However, a process of engagement between the ANC and DA, the government, and the business community will also be needed to craft a compromise.

The likely outcome is that SA will have an NHI, but it will not be entirely the same as the model in the NHI Act. In particular, it is anticipated that the section that seeks to restrict medical aids will be removed.

However, full agreement on all this will take time, and it's unlikely we will know what the final outcome will be before the end of 2024.