NHI will not achieve universal access to healthcare, says Solidarity in legal challenge

Union heads to court in bid to get single-payer scheme declared unconstitutional and invalid

26 May 2024 - 21:15BY ISAAC MAHLANGU

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Solidarity says the country's public healthcare system has failed, leading to inequality in access to medical care which the NHI will not be able to fix.
Image: *123RF/HXDBZXY*

Failures in the South African public health system have led to inequality in access to healthcare which the National Health Insurance (NHI) Act will not be able to fix.

This is one of the arguments advanced by labour union Solidarity in papers filed on Friday in the Pretoria high court, where it is asking for the law to be declared unconstitutional and invalid.

Several other organisations have already indicated they are working on legal challenges to the NHI Act, which was signed into law by President Cyril Ramaphosa two weeks ago.

Solidarity's CEO of legal matters, Jasper van der Bijl, says in his founding affidavit that the "feasibility and sustainability of the scheme under the NHI Act is dependent on a money bill which is yet to be introduced and passed by parliament".

"[A]ll evidence has shown that such a bill is not feasible and will have disastrous consequences for the economy," Van der Bijl said.

He also argued that ordinary South Africans' lack of access to timely and high-quality healthcare interventions had been caused by public health system failures.

"The public and private health systems developed in tandem and, taken together, enable universal access to healthcare. However, the public health system is marred by tolerance of ineptitude; leadership, management and governance failures; [and the] lack of a fully functional district health system," said Van der Bijl.

He attached an article written by Laetitia Rispel of the Centre for Health Policy at the School of Public Health in the Faculty of Health Sciences at Wits University in which the author found that failures in the public health system had worsened access to healthcare.

He argued that the new law "necessitates massive reorganisation of the current health-care system" and would "require material structural change, at significant cost".

"Millions of South Africans who presently enjoy access to healthcare in both the public and private sectors are faced with uncertainty [about] how the NHI Act will impact the levels of access to healthcare they currently enjoy," said Van der Bijl.

He said the NHI Act had been drafted as if it were a policy document, "with proposed implementation over what some say may be decades just [adding] to the vagueness and uncertainty".

"Central to the vagueness concern is section 33 of the NHI Act, which allows for the health minister, at his or her discretion, to make a declaration on when the NHI is 'fully implemented', by consequence of which medical schemes will then only be allowed to provide 'complementary' cover," said Van der Bijl.

He said it remained unclear under the NHI Act whether any private medical institution or healthcare provider not contracted with the NHI Fund, either by choice or exclusion, might be prohibited from rendering healthcare services to the public.

“The adoption of legislation that mandates the assumption of responsibility for the purchase of all healthcare services by the state (through the NHI Fund) without a sustainable funding model cannot possibly achieve the stated governmental purpose,” said Van der Bijl.

The health department’s deputy director-general, Nicholas Crisp, who is tasked with overseeing the establishment of the NHI Fund, said the issues raised by Solidarity had already been addressed in parliament.

“The department responded [to the issues raised in Solidarity’s papers] when requested to do so by the portfolio committee,” Crisp said.

In November last year, Crisp told the committee most of the feedback on NHI had related to clarity about the source of income for the scheme and potential tax increases, as well as objections to the introduction of a personal tax that may detrimentally affect already overburdened taxpayers.

Crisp said section 49(2)(a) of the bill provided for sources of funding, including the additional sources that will need to be mobilised to fund the scheme.

He said South Africa spent 8.5% of its GDP on health, with 4.2% spent in the public sector, which served more than 85% of the population, and 4.3% expended in the private sector, which served less than 15% of the population.

The 8.5% of GDP spent on health was far more than other countries of similar economic development put towards healthcare. Section 49 also provided a framework outlining various funding options the government could follow in raising revenue for the NHI Fund, using a mandatory prepayment system.

Crisp and health minister Joe Phaahla were responding to questions raised in the select committee on health and social services on the bill.

Phaahla told the committee that provincial legislatures had held 60 public hearings on the bill in all nine provinces between July 28 and October 30 2023, where various organisations had made substantial submissions and raised similar concerns that had already been addressed to the health portfolio committee.

However, despite criticism of the bill, a number of organisations including Business for South Africa, rather than immediately going to court, say they will work with the government to correct provisions it believes are unworkable.

“None of us have a choice. We need to fix and address defects in the legislation and ensure it is fit for purpose. Currently it is not. The best way to achieve that is to engage openly and transparently to ensure we accommodate all perspectives in determining the correct outcome, and that we manage expectations and build confidence in the process,” Martin Kingston of Business for South Africa said.

Medical schemes including Momentum and Discovery said they will also continue to engage with government to establish an NHI offering to benefit SA.