

The NHI Act: Will it survive?

In my previous editorial^[1] I asked the question whether President Ramaphosa would find his pen to sign the National Health Insurance (NHI) Bill into an Act. He did locate his pen, and the Bill was signed on 15 May 2024 and gazetted into an Act on the 16 May. It is without doubt that the rushed signing was a pre-election strategy. The question now hinges on what the approach after the elections will be with regard to implementing an Act that many consider unimplementable.^[2]

Within a few days of signing the Bill into law, the President's spokesperson announced that Ramaphosa was considering engagement and collaboration with business, labour and social partners, and stated that the Act could be amended. This was possibly due to the huge backlash that followed the signing.^[3] There were at least six legal challenges to the Bill being planned before it was signed. These include challenges from the Board of Healthcare Funders, the South African Health Professionals Collaboration, the South African Medical Association and the Health Funders Association.^[4] There will probably be more now.

The challenges are on several legal grounds. Precedent already exists, with the Constitutional Court striking down legislation where the state has failed to effectively take into account the results of public consultation. The NHI Bill was finalised without adequate evidence of change after a comment period. The Promotion of Administrative Justice Act No. 3 of 2000 underscores that there must be proper consideration of input received. Hence public consultation is not limited to procedure only.^[4] At a National Business and Civil Society Summit on NHI on 24 May, many different groups reported that none of their submissions on the Bill had been responded to, let alone acknowledged by the state. They highlighted that they had provided substantive considerations to Parliament, which were completely ignored.^[5] It is not surprising that there is vast scepticism around Ramaphosa's sudden olive branch. How can he be trusted to work in collaboration now when he totally disregarded input during the consultation period? Given that he recognises that there are shortcomings in the Act, should he have rushed to sign it, just to say a few days later that the Act could be amended?

Other aspects of unconstitutionality include section 33, which stipulates that no medical aid will be able to cover any health service provided for by the NHI, the right to freedom of association if people are forced to register as NHI users, unfair and unreasonable limitations to a person's rights to access healthcare services where there are viable and available alternatives, infringing the rights of foreign nationals and asylum seekers by granting them access

to only limited access to healthcare services, and documentation being required for registration to the NHI.^[4] It is our lived reality that a substantial number of people in the country, including South Africans, do not have identity documents.^[6] The state's law adviser has stated that the NHI Act will pass constitutional muster. He has said this about several other pieces of legislation, only for the courts to have proven him wrong in the past.^[4]

Funding of the NHI is of major concern, as the Act is feeble on detail in this context. The Act has been passed without knowledge on how the NHI will be funded. What the Act does do is create an NHI Fund. We have seen how difficult it is to govern the Road Accident Fund because of logistical difficulties and corruption. We have also seen how the National Student Financial Aid Scheme has been mismanaged and is currently being investigated by the Special Investigating Unit. Without ethical leadership and governance, what assurance do we have that the NHI Fund will not plunge down that deep abyss of corruption?

There is no doubt that there is a definite need for reform in the health sector. The Health Market Inquiry recommendations have yet to be implemented, and inefficiencies, mismanagement and corruption have to be rooted out. Access and equity is what we all should be striving for. With the uncertainties and flaws in the NHI Act, the limitations with regard to ethical leadership and governance, and the fact that it is on a collision course with the Constitution, will it survive or will it be certified dead soon after arrival?

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