

NHI might not pass constitutional muster - legal expert

The NHI might not pass constitutional muster if people are forced to join and pay for it, says a legal expert

If South Africans are compelled to join the proposed National Health Insurance (NHI), the scheme might not pass constitutional muster (withstand a legal challenge on Constitutional grounds), a legal expert said this week.

Following the publication of the White Paper on the scheme last year, Neil Kirby, the director of health care and life sciences law at Werksmans Attorneys, wrote an analysis on implications of the NHI.

"The concept of a NHI, which is premised on universal healthcare coverage, means that every South African will be required to join the NHI whether they wish to or not," he said.

"In addition, with what appears to be a reduced role for private healthcare funding, as stated in the White Paper, there may not be a choice but to join the NHI. Such a mandate may not pass constitutional muster in so far as the Bill of Rights is concerned."

He said section 18 of the Bill of Rights guarantees every person the right to freedom of association.

"Therefore, forcing one to belong fundamentally to a national healthcare club may unfairly and unduly limit one's right to decide with whom to associate – being the NHI or a medical scheme, for purposes of securing healthcare funding and assistance."

Kirby said while the White Paper dealt with the financing of the NHI, no particular payment system was identified to support the scheme. The options examined including direct taxation, an increase in value added tax, a payroll deduction by employers, and the imposition of premiums.

The problem of forcing people to join a "healthcare club" was thus further compounded by forcing people to pay for it.

This contradicted one of the NHI's objectives, stated as improving equity in financing, reducing fragmentation in funding pools, and making healthcare more affordable and accessible.

He said the White Paper did not address how funding the NHI would affect the average South African's pocket, or the country at large given the current economic climate.

Without significant improvements in the quality of healthcare services at public facilities, there would be resistance to the implementation of an NHI, regardless of its constitutional or legal basis.

According to the White Paper, when the NHI was fully implemented the number of medical schemes would decrease from 83 to a "much smaller number".

Kirby said this effectively removed a scheme's ability to provide and charge for benefits, which might be an unlawful infringement of a medical scheme's right to property. This was prohibited by section 25 of the Bill of Rights.

The public had three months to comment on the White Paper, following its publication on December 11.

According to the White Paper, the NHI was a policy shift that would contribute towards poverty reduction and addressing past inequalities. It was a reflection a society based on the values of justice, fairness, and social solidarity.

"Implementation of NHI is consistent with the global vision that healthcare should be seen as a social investment and therefore should not be subjected to market forces where it is treated as a normal commodity of trade."

The NHI was intended to eliminate out-of-pocket payments. Even medical scheme members were denied access to health care when their benefits were exhausted.