The National Health Amendment Bill 2008 and governmental policy reform: how far is too far?

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1 INTRODUCTION

The public health sector is constantly at pains to provide adequate basic healthcare in many areas of South Africa.[1] However, despite the difficulties faced by the state in this regard and the sharp criticism levelled at it for its failure to ensure a high standard of basic public healthcare, the state has taken it upon itself to draft legislation, in the form of the National Health Amendment Bill 2008 (the Bill),[2] enabling it to regulate the pricing of private healthcare. Has the long arm of the law perhaps stretched too far by attempting to regulate the private healthcare industry? Are these measures reasonable in the state's ongoing battle for progressive realisation of the right to healthcare? I will endeavour to answer these questions, as well as suggest possible alternatives to achieve what the Bill sets out to do. The purpose of this article is, however, not to examine the nature and extent of any possible infringements the Bill may bring about with regard to the right to access to healthcare expressly, but to examine the Bill against the pretext of governmental policy in promoting or realising this right.

2 PLACING THE NATIONAL HEALTH AMENDMENT BILL IN CONTEXT

Private healthcare institutions are in reality nothing more than profit driven enterprises, and are duly registered as such.[3] The profit motive of such private institutions can be seen as a guarantee of quality medical care. The mere fact that private hospitals function as normal businesses means that the product or services they provide should naturally be of the highest quality, so as to have an advantage over their competitors. Quality of healthcare and the price paid therefor are, therefore, big factors in this discussion. It is in fact the great

1 A lack of funding, facilities, technology, qualified nursing staff and doctors, especially specialists, is at the heart of the problem. See Olivier, Smit, Kalula and Mhone *Introduction to social security* (2004) 241.
2 *Government Gazette* 30985 of 18 April 2008.
3 Carstens and Pearmain *Foundational principles of South African medical law* (2007) 234.

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divide between public and private healthcare. Quality private healthcare is expensive and available to an exclusive few in this country.[4]

The Bill is the latest attempt by the Department of Health to regulate the cost of healthcare in general. In April 2004 the Department of Health introduced pricing regulations in order to curb the escalating costs of pharmaceuticals.[5] These regulations were met with resistance, and so in 2006 a new dispensing fee was included under the amended regulations.[6] Pursuant to addressing the cost of high pharmaceuticals, the then Minister of Health, Dr M Tshabalala-Msimang, has plainly denounced the high costs associated with the private healthcare industry. Contribution rates per medical scheme beneficiary have rocketed from R3 423 in 1998 to a staggering R7 807 in 2005,[7] whilst there has also been a significant increase of 121% in expenditure on private hospitals from R8 billion in 1997 to R17,7 billion in 2006/7.[8]

It should be clear from the foregoing that it is becoming, or has become, increasingly difficult to belong to medical schemes. Dr. Tshabalala-Msimang, who is no stranger to controversy, has, therefore, argued, that in order to make private healthcare more accessible to the general public, there should be some form of governmental intervention in the pricing practices of private hospitals.[9] This was, as expected, met with harsh resistance from private healthcare institutions, who were quick to point out that the Minister's powers were curtailed and limited only to the public health sector.[10]

3 THE NATIONAL HEALTH AMENDMENT BILL

3.1 Objects and aims

The Bill seeks to amend the National Health Act[11] by the insertion of Chapter 10A. It aims to introduce a framework for the regulation of the Cost of

4 The private health care sector provides for about seven million people, or close to 15% of the South African population. See the statement by the Minister of Health to Parliament on private health sector costs on 12 March 2008. Available at www.doh.gov.za/docs/sp/2008/sp0312.html (accessed 2008-07-30).

5 Regulations relating to a transparent pricing system for medicines and scheduled substances Government Notice R553 of 2004-04-30. See also Williams "Pharmaceutical price regulation" (2007) 23 *SAJHR* 1. These were no doubt implemented due to the stark contrast in pharmaceutical costs between the public and private sectors. In 2000 an average of R59.36 was spent on drugs per person in the public sphere, as opposed to R800.29 per person in the private sector. See www.southafrica.info/about/health/health.htm (accessed 2008-07-30).

6 Regulations relating to a transparent pricing system for medicines and scheduled substances: amendment Government Notice R1210 of 1 December 2006.

7 Minister of Health, Dr. Tshabalala-Msimang's opening address at the Private Health Sector Indaba, 21 September 2007, Midrand, Gauteng, South Africa; See also www.hst.org.za/news/20041850 (accessed 2008-07-30).

8 Minister of Health (see fn 7 above).

9 Minister of Health (see fn 7 above): "I believe private healthcare sector (sic) also needs a coherent regulatory framework to ensure that it operates in the best interests of all the citizens of the country, not just its shareholders."

10 See Pillay "Manto sticks to her guns". Available at www.news24.com/news24/South_Africa/News/0,,2-7-1442_2337587,00.html (accessed 2008-07-30); see also www.hst.org.za/news/20041850 (accessed 2008-07-30).

11 Act 61 of 2003. The National Health Act repealed the Health Act 63 of 1977 when it came into operation on 2 May 2005.

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Prescribed Minimum Benefits (PMBs).[12] The objects of the Bill are, *inter alia,* to improve transparency in the determination of costs and prices; ensure accountability for the cost of healthcare; ensure that healthcare providers prevent unjustified cost escalations; ensure the removal of unfair, collusive and undesirable business practices; and, generally, ensure the affordability of healthcare.[13]

3.2 The Facilitator for Health Pricing

The Bill empowers the Minister of Health to appoint a Facilitator for Health Pricing (the Facilitator) who will, *inter alia,* annually convene and chair negotiations with stakeholders in order to establish a schedule of fees; hear and resolve disputes in relation to pricing; record the schedules of fees agreed upon individually and collectively; and advise the Minister on the compilation and publication of information, reports and statistics about health pricing.[14] Furthermore, the Facilitator must ensure that the negotiations are conducted in a transparent and open manner; that transparency on costs that form the basis for prices is improved; and that prices are reduced where costs have been reduced.[15] Should the negotiating parties be unable to agree on a schedule of fees, the Facilitator shall refer the matter to the Health Pricing Tribunal (the Tribunal) for a final determination of the schedule of fees.[16] The Facilitator is, however, subordinate to the Minister, who has been granted the power to make rules pertaining to the achievement of the objects of this Chapter.[17]

3.3 Health Pricing Tribunal

The Tribunal will be established in terms of section 89F(1). Though not expressly stated in the Bill, it would seem as though the duties of the Tribunal relate to the final determination of a schedule of fees, [18] as well as any contravention of the Bill in general.[19]

4 ANALYSIS OF THE BILL

4.1 The socio-economic framework

Section 27(1) of the Bill of Rights in the South African Constitution imposes a positive obligation on the state to implement effective strategies for the progressive realisation of so-called second generation rights, such as, the right

12 See www.doh.gov.za/docs/pr-f.html for the press release (accessed 2008-07-30).
13 Section 89B of the Bill.
14 *Section* 89C of the Bill.
15 *Section* 89C of the Bill.
16 Section 89D(1) of the Bill.
17 See Section 89C(6) of the Bill in detail.
18 Section 89C(6) of the Bill.
19 Section 89D(5) of the Bill.

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of access to healthcare.[20] Such an obligation is, however, not an unqualified one, and regard must, therefore, be had to three important elements, namely, the obligation to take *reasonable* legislative and other measures; to achieve the *progressive realisation* of the right; and to do so within *available resources*.[21] The Constitutional Court has commented on reasonableness in respect of measures aimed at progressive realisation of a right in *Government of the Repubic of South Africa and Others v Grootboom and Others*[22](*Grootboom*) as follows:

> "The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the State has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the State are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."[23]

and further:

> "The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation."[24]

From the aforementioned it should be clear that the concept of "reasonableness" is a changeable one, and, as such, cannot be accurately pinned down.[25] In a sense this is ideal, since it allows for interpretation and application on a case by case basis, as opposed to setting a strict norm by which to abide.[26] It is, however, relatively simple to be critical of such an approach. Having governmental policy measured against a standard of reasonableness is always an ex post facto operation, and usually only ever done in the event

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20 See further, s 27(2) of the South African Constitution; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); *Minister of Health and Others v Treatment Action Campaign(TAC) and Others* 2002 (5) SA 713 (CC). See also Currie and De Waal *The Bill of Rights handbook* (2005) 568.

21 Own emphasis added to s 27(2) of the South African Constitution. See further s 7(2) of the South African Constitution which mandates the state to "respect, protect, promote and fulfil the rights in the Bill of Rights"; Carstens and Pearmain (see fn 3 above) 55; Currie and De Waal (see fn 20 above) 577; Liebenberg "The right to social assistance: the implication of *Grootboom* for policy reform in South Africa" (2001) 17 *SAJHR* 238; Bilchitz "Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *SAJHR* 3.

22 2001 (1) SA 46 (CC).

23 Para 41 (per Yacoob, J). See also Liebenberg (see footnote 21 above) 250 *et seq*.

24 Para 42 (per Yacoob, J).

25 See Liebenberg (see fn 21 above) 238.

26 See Bilchitz (see fn 21 above) 10.

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of an aggrieved party approaching the courts for assistance.[27] However, on the flip side of the coin, it leaves the government with no definite parameters within which to gauge its own measures before implementing them. The measures adopted by the state to implement the progressive realisation of a right should, *inter alia*, be flexible; should address short, medium and long term needs; and not exclude a significant sector of society.[28] Such a plan will be deemed to be reasonable.

4.2 The good, the bad and the ugly

As mentioned before, the unchecked escalation of the cost of private healthcare is clearly an area of concern for the Department of Health. The Bill, therefore, has a noble motive, in that it attempts to make private healthcare affordable to more South Africans.[29] This would then, it is hoped, have a knock-on effect on the public healthcare system, as the burden placed on the state to provide healthcare may be alleviated. More lower middle class people would then be able to afford private healthcare and be able to help themselves.[30] With limited state funding and the currently thinly stretched infrastructure which is also used by lower middle class people, the Bill would then be able to cater for the "poorest of the poor", who really cannot afford the luxury of private healthcare. If this was indeed the thinking behind the Bill, it should be commended, since it is no secret that the largest part of the population, around 85%, relies solely on the public healthcare system.[31]

However, for all its good intentions, the Bill sits uncomfortably. As mentioned earlier,[32] private healthcare institutions are in reality nothing more than private enterprises. In my view, government interference with the private sphere is bad for business, since instituting a cap on a profit driven industry has its drawbacks. A decrease in profits will, logically, significantly lower the quality of care in such private institutions, since highly skilled medical practitioners who were being paid top dollar at private institutions will probably have to be satisfied with state level salaries. This type of government interference in the private sphere has more in common with the

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27 It is submitted that the Constitutional Court has its role to play in being more pro-active in the realisation of the right to social security. Mere adjudication of socio-economic policies of the government is insufficient when considering South Africa's current situation. It has been suggested by Mia Swart that a re-thinking of remedies available to the courts could be the starting point. See Swart "Left out in the cold? Crafting constitutional remedies for the poorest of the poor" (2005) 21 *SAJHR* 215.

28 Bilchitz (see fn 21 above) 4; *TAC* para 68; *Grootboom* para 42.

29 See fn 4 above. See also Dekker "Mind the gap: suggestions for bridging the divide between formal and informal social security" (2008) 12 *Law, Democracy & Development* 117.

30 Liebenberg (see fn 21 above) 250.

31 See the statement by the Minister of Health, Dr Tshabalala-Msimang, to Parliament on private health sector costs on 12 March 2008, available at www.doh.gov.za/docs/sp/2008/sp0312.html (accessed 2008-07-30). However, as Carstens and Pearmain (see fn 3 above) 234 point out, the private healthcare industry is limited, in the sense that, once a person's medical aid provisions have been depleted, that person is forced to seek healthcare from the public healthcare sector. Therefore, it is essential to have a public healthcare sector which functions optimally to cater for the needs of all people within the borders of South Africa.

32 See part 2 above.

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activities of a socialist state than with a programme of progressive realisation of a right in a democratic dispensation. South Africa is not a socialist state.

Furthermore, the Bill ignores the principles laid down in *Grootboom*. As stated earlier, the measures taken by the state in achieving the progressive realisation of socio-economic rights will be judged against the standard of reasonableness.[33] According to Liebenberg, a key principle which was established in *Grootboom* was that, for the measures to be reasonable, they must provide relief for people who are in desperate need and living in conditions of intolerable existence.[34] As Liebenberg states:

> "The test of reasonableness will not be met if a social programme giving effect to socio-economic rights fails to cater for people in this situation even if it is 'capable of achieving a statistical advance in the realisation of the right'."[35]

It is submitted that Liebenberg's view is correct. Accordingly, it can be argued that the Bill itself strives to provide access to private healthcare not to those in desperate need of social assistance, but to the lower middle class who may be able to afford it. The argument that making private healthcare more accessible to the lower middle class population will enable the state to focus more on those in desperate need is not convincing when one considers Liebenberg's contention quoted above. It is, therefore, my opinion that this Bill is not aimed at those in desperate need, and, as such, does not comply with the test for reasonableness set out in *Grootboom*.

Looking closer at the Bill itself, it is interesting to note section 89C(6)(viii) which states:

> "(6) The Minister may make rules relating to –
>
> (viii) any other matter incidental to the achievement of the objects of this chapter."[36]

Giving the Minister such a wide discretion to exercise his or her powers is an untenable position. Such a provision would then enable the Minister to promulgate any rules, which would also usurp any ruling the Facilitator may have made regarding pricing, in order to achieve the objects of the Bill.

It is my view, then, that the Bill is not reasonable in either its concept or operation. The legislature has attempted to draft a bold piece of legislation which allows for government intervention in the private sphere, giving the Minister almost unlimited power in relation to the achievement of the objects of the Bill.

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33 See part 4.1 above; *Grootboom* para 44.
34 Liebenberg (see fn 21 above) 251.
35 Liebenberg (see fn 21 above)253. See also in this regard Bilchitz (see fn 21 above) 9.
36 It should be noted that this particular provision, namely section 89C(6), is very poorly drafted, in that there are two subparagraphs numbered (viii). The provision quoted above should have been numbered (xii).

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4.3 Brief alternative policy proposals for the realisation of the right of access to healthcare

It goes without saying that the obligation imposed on the state to take reasonable legislative and other measures to promote the progressive realisation of socio-economic rights is a daunting one. South Africa, being a Third World country for the most part, is unique in many respects with regard to poverty, class and demographics.[37] It is, therefore, understandable that the government is under immense strain to meet its positive obligations under sections 26 and 27 of the Constitution. The Bill, for the reasons set out above, does not meet the standard of reasonableness despite its prima facie good intentions. However, it appears as though the Bill is an attempt at a quick fix to alleviate the burden on public healthcare facilities, and, as such, ended up being too drastic. Dekker has addressed the issue of lightening the state's burden by suggesting the implementation of an informal social security system to supplement a formal one.[38] The author suggests that mutual health insurance schemes have worked well in other developing countries, because of the fact that a formal system of social security was combined with an informal one.[39] In the discussion below I suggest more alternatives for the state to consider, as opposed to the Bill in its current form.

4.3.1 Proper management of state funds

An increased allocation of appropriate funding by the state will allow for the availability of more resources in order to meet the constitutional obligations placed upon it. As Liebenberg states, it seems rather illogical that the state is allowed to determine the extent of its own obligations through its macro-economic and budgetary policies.[40] Viewed from this perspective, it would seem as though the enforcement of socio-economic rights would become futile since the state determines exactly how much to allocate to, for example, the health sector. Accordingly, the state is very much the architect of its own programme of progressive realisation of rights, determining the amount that should be allocated to the progressive realisation of certain rights, and, therefore, also the speed at which such progressive realisation will occur. Thus, it is proposed that the state increase the amount of money and resources available to public healthcare.[41] In some instances it may be necessary to do a complete reassessment and restructuring of the budget, because it would

37 Olivier *et al,* (see fn 1 above) 2-10; Dekker, Jansen van Rensburg, Liffman, Thompson and Van der Walt "Social security: a conceptual view" (2000) 4 *Law, Democracy & Development* 3.

38 Dekker (see fn 29 above) 117, and especially 123, where the author argues that South Africa should aim to expand the social security system, and applauds the inclusion of domestic workers and high income earners as "contributors" for purposes of the Unemployment Insurance Act as an example of such.

39 Dekker (see fn 29 above) 127.

40 Liebenberg (see fn 21 above) 255.

41 See Maasdorp "Socio-economic rights, macro-economic policy and the budget" *ESR Review* (March 1999) 17.

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seem that the current resources available to the public health sector are grossly insufficient.[42]

4.3.2 Job creation as a tool for the collection of state revenue and access to occupation based medical insurance

A less immediate plan, but definitely one to be looked at seriously by the government as a long term solution to many socio-economic problems, is job creation. It is no secret that unemployment is, or at least should be, a major concern for governmental policymakers.[43] The creation of jobs results in an income for the worker, but also means that the state will be allowed to claw back certain taxable amounts.[44] The funding raised from taxation will enable the state to bestow more money and resources upon the most pressing needs at present, such as, healthcare, housing, food etc. A second advantage of the creation of jobs is the concomitant creation of access to occupation based medical insurance.[45] These occupation based medical insurance opportunities relate to the private healthcare industry, and, as such, formally employed people will be able to make use of medical aid. Thus, with more jobs being created, more people will have access to private healthcare, which will in turn lift some of the burden from the already ailing public healthcare system. Baskin has examined the difficulty of responding to a changed labour environment, and the problems of creating jobs therein.[46] He states that:

> "when it comes to job creation, macro-economic factors and other non-labour policies are more important than labour market changes. The primary terrain for promoting job growth is sound economic policy, increased growth rates, and more investment, especially labour absorbing investment."[47]

It would seem then that the task of simply creating more jobs is not so simple, requiring the co-operation and team work of various state departments. However, factors that could be taken into consideration during a proposed program of job creation could be the following: political stability, the relaxation of certain government policies,[48] and perhaps even an increased interaction between the private and public spheres.[49]

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42 See McIntyre and Thielde "Healthcare financing and expenditure" in *South African Health Review 2007* 35 *et seq*. Available at http://www.hst.org.za/uploads/files/chap3_07.pdf (accessed 31 March 2009). See also the *General Household Survey 2007* 5, available at http://www.statssa.gov.za/publicationshtml/p0318july2007/html/p0318july2007_13.html (accessed 30 March 2009).

43 According to the *General Household Survey 2007*, in July 2007 the unemployment rate stood at 24.8%. See also Baskin "South Africa's quest for jobs, growth and equity in a global context" (1998) 27 *ILJ* 986.

44 See for instance Dekker *et al* (see fn 37 above) 7.

45 Olivier *et al* (see fn 1 above) 41; Liffman, Malazi, Moore, Ogunrombi and Olivier "Those who have and those who don't: an investigation into the limited scope of application of social security in South Africa" (2000) 4 *Law, Democracy & Development* 19-20; 23.

46 Baskin (see fn 43 above) 990.

47 Baskin (see fn 43 above) 991.

48 Such as, affirmative action policies. Baskin (see fn 43 above) 995-996 states that employment flexibility is key, and that society must analyse whether the employment created for some, places a barrier to employment for others.

49 Such as, corporate social responsibility.

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5 CONCLUSION

The National Health Amendment Bill 2008 seeks to regulate the private healthcare industry. While the lack of access to healthcare is a very real and pressing problem in South Africa, and certainly one which needs to be addressed, it is my view that the measures proposed in the Bill are unjustifiably restrictive. It is clear that the government's main reasoning behind this piece of legislation is the improvement of access to private healthcare, so as to alleviate the burden placed on the public sector. Some may view this proposed legislature as no more than an elaborate attempt by the government to shirk responsibility for the provision of public healthcare to all people within South Africa's borders. Whatever its intention, aside from the fact that it is poorly drafted, the Bill falls foul of meeting the standard of reasonableness as set out in *Grootboom*. Other possible means of improving the right of access to healthcare, both public and private, have been put forward above. One can only hope that these proposals, perhaps after a little refinement, will be taken seriously enough to warrant discussion by the relevant persons in the public service.

Bibliography

Legislation

The Constitution of the Republic of South Africa, 1996

The National Health Amendment Bill 2008

The National Health Act 61 of 2003

Cases

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 271 (CC)

Journal Articles

Baskin "South Africa's quest for jobs, growth and equity in a global context" (1998) 27 *ILJ* 986

Bilchitz "Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *SAJHR* 1

Dekker, Jansen van Rensburg, Liffman, Thompson and Van der Walt "Social security: a conceptual view" (2000) 4 *Law, Democracy and Development* 1

Dekker "Mind the gap: suggestions for bridging the divide between formal and informal social security" (2008) 12 *Law, Democracy and Development* 117

Liebenberg "The right to social assistance: the implication of *Grootboom* for policy reform in South Africa" (2001) 17 *SAJHR* 232

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Liffman, Malazi, Moore, Ogunrombi and Olivier "Those who have and those who don't: an investigation into the limited scope of application of social security in South Africa" (2000) 4 *Law, Democracy and Development* 15

Swart "Left out in the cold? Crafting constitutional remedies for the poorest of the poor" (2005) 21 *SAJHR* 215

Williams "Pharmaceutical price regulation" (2007) 23 *SAJHR* 1

Books

Carstens and Pearmain *Foundational principles of South African medical law* (2007)

Currie and de Waal *The Bill of Rights handbook* (2005)

Olivier, Smit, Kalula and Mhone *Introduction to social security* (2004)

Internet

www.doh.gov.za/docs/sp/2008/sp0312.html (accessed 2008-07-30)

www.southafrica.info/about/health/health.htm (accessed 2008-07-30)

www.hst.org.za/news/20041850 (accessed 2008-07-30)

www.news24.com/news24/South_Africa/News/0,,2-7-1442_2337587,00.html (accessed 2008-07-30)

www.doh.gov.za/docs/pr-f.html (accessed 2008-07-30)

www.hst.org.za/uploads/files/chap3_07.pdf (accessed 2009-03-31)

www.statssa.gov.za/publicationshtml/p0318july2007/html/p0318july2007_13.html (accessed 2009-03-30)

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