

**INTERPRETATION OF THE RIGHT TO HEALTHCARE IN TERMS OF SECTION 27 OF THE
CONSTITUTION**

by

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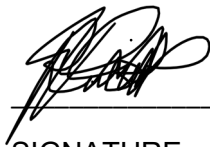
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ABSTRACT

In the advent of the current dispensation South Africa's Constitution provides under section 27 (3), everyone with the right to access to healthcare. In light of this contention, the study begs to claim that the implementation of this right has been interrupted by the corruption and mismanagement of state funds by the country's own government. Despite a Constitution and various healthcare legislature that seek to prohibit any kind of discrimination, the presence of an untrustworthy government whose annual financial reports often portray wasteful expenditure and missing state funds, will undermine the country's mission of equality for everyone.

The object of this study is to investigate and expose the impact of corruption and mismanagement of state funds on the South African healthcare system. This study includes arguments in favour of and against the National Health Insurance draft Bill. There will also be a brief comparison between the South African healthcare system and the Germany healthcare system. The current covid – 19 pandemic will also be included to determine its impact on the South African healthcare crisis. This entire study will rely on relevant draft Bills, legislature, case law, media and various journal articles.

Key Terms

Constitution

Discrimination

Non – Derogatory Rights

Right to Access to healthcare

Universal Access to healthcare

Healthcare system

Equality

National Health Insurance Bill

Covid – 19

Corona

Corruption

Mismanagement of state funds

Implementation

South Africa

Germany

List of Abbreviations

ANC	African National Congress
DOH	Department of Health
HIV	Human Immunodeficiency Virus
MTCT	Mother-To-Child-Transmission
NHI	National Health Insurance Bill
PHC	Primary Health Care
SCA	Supreme Court of Appeal
UDHR	Universal Declaration of Health Rights
UN	United Nations
WHO	World Health Organisation

CHAPTER 1

1.1 INTRODUCTION

The Constitution¹ of South Africa provides for the rights of access to healthcare, this includes reproductive healthcare. Section 27(3) places an obligation on the state to take reasonable legislative and other measures to achieve the progressive realisation of this right.² Over the years the state has managed to fulfil only the first part of its obligation being; legislative and policy measures towards the Constitutional mandate on the progressive realisation of the right,³ this includes; the National Health Act,⁴ Patients' Rights Charter,⁵ Medical Schemes Act⁶, the White Paper for the Transformation of the Health System in South Africa⁷ and the National Health Insurance Bill.⁸ In addition other initiatives were put in place of the effective realisation of the right; In 2012, the Gauteng Department of Health launched the, "Gauteng Turnaround Strategy: Towards Effective Service Delivery, Strengthening Primary Health Care and a Clean Audit in 2014", which set out the challenges experienced in the healthcare system, but failed to give guidelines on how the plan would be implemented.⁹ An example is that regarding emergency medical services where the solution was to develop a plan, but no aspects of the plan were included or timeframes or responsibilities included.¹⁰ The plan was never implemented, finding the state to be inconsistent in complying with its constitutional obligations which require implementation measures. Rather than implementing measures

¹ The Constitution of the Republic of South Africa Act, 108 of 1996.

² S 27.

³ Dhai A and S Mohamed S "Healthcare in crisis: A shameful disrespect of our Constitution" 2018 *SAJBL* 10.

⁴ National Health Act Number 61 of 2003.

⁵ Patients' Rights Charter, <http://www.kznhealth.gov.za/Patientcharter.htm> accessed on 6 April 2019.

⁶ Medical Schemes Act Number 131 of 1998.

⁷ White Paper for the Transformation of the Health System in South Africa, <https://pmg.org.za/committee-meeting/6088/> accessed on 6 April 2019.

⁸ National Health Insurance Bill number 42598 of 26 July 2019.

⁹ "The Gauteng health system in crisis, Section 27, 5 March 2013, page 3, <https://www.politicsweb.co.za/documents/the-gauteng-health-system-in-crisis--section27> accessed on 6 April 2019.

¹⁰ *Ibid.*

to realise access to healthcare as provided in section 27 of the Constitution, the state is mismanaging public funds and partaking in corrupt activity¹¹ which negatively impacts the healthcare system in respect of providing quality patient care,¹² and maintenance of equipment, infrastructure and adequate human resources.¹³ Corruption has been defined as, ‘the abuse of resources, power and or connections for private gain.’¹⁴

The investigation into certain affairs of the Gauteng Department of Health report dated 29 March 2017 provides proof of how the state caused the budgetary crisis through its mismanagement and corruption which lead to the infringement of various human rights, such as, the right to dignity and life. The investigation was done by the Special Investigation Unit.¹⁵ Amongst many other findings the Special Investigation Unit found the following (this not being an exhaustive list); irregular expenditure amounting to R 799 500.00 and wasteful, irregular, fruitless expenditure amounting to R 470 807 868.73 which involved lack of transparency.¹⁶ Most of the other provinces have also made the headlines of the public press for reported state management failures and misuse of government funds.¹⁷ The Auditor General Reports revealed a worsening trend in audit outcomes across the nine provinces related to corruption by the state.¹⁸

The Covid – 19 pandemic has allowed corruption cases to increase globally.¹⁹ While the South African government was pre- occupied with working out ways to curb the spread

¹¹ “The Gauteng health system in crisis”, Section 27, 5 March 2013 3, <https://www.politicsweb.co.za/documents/the-gauteng-health-system-in-crisis--section27> accessed on 6 April 2019.

¹² Pillay P and Mantzaris EA “Corruption in the Health Sector in South Africa and India, some considerations and reflections” 2017 *AJPA* 57.

¹³ *Ibid.*

¹⁴ Witswaterand University, The Centre for Health policy and systems Research, Policy brief, January 2016, ‘Exploring corruption in the South African health sector’ 1.

¹⁵ The Gauteng health system in crisis, Section 27, 5 March 2013, page 13. <https://www.politicsweb.co.za/documents/the-gauteng-health-system-in-crisis--section27> accessed on 17 May 2019.

¹⁶ Special Investigation Unit, Investigation into certain affairs of the Gauteng Department of Health, Proclamation R21 of 2010, 14 May 2010, page iii, <https://www.corruptionwatch.org.za/wp-content/uploads/2018/06/SIU-Report-on-Proclamation- R21-of- 2010-002.pdf> accessed on 17 May 2019.

¹⁷ South African Health Review 2017, Published by Health Systems Trust 3.

¹⁸ *Ibid* 11.

¹⁹ Vladyslav T, Yevheniia D, Volodymyr K, Nataliia K and Oleksandr M, Corruption and Strengthening anti- corruption efforts in healthcare during the pandemic of Covid – 19”, 2021,

of covid – 19, some state officials took this as an opportunity for self-enrichment through corrupt ventures.²⁰At the beginning of the pandemic, South Africa reported cases of corruption among municipal officials which involved paying certain suppliers more than the price that was agreed on in the award letter and not following the correct procedure when awarding some tenders, resulting in tender awards being given to suppliers who were not on the Central Supplier Database approved by the National Treasury. ²¹

The president of South Africa, Mr. Cyril Ramaphosa, at the Launch of Health Sector Anti-Corruption Forum stated the following, “It pained me, as it should every citizen of this country, to hear how this most fundamental of rights, of access to health care services, has been impacted by the stench of corruption.”²² In *Government of the Republic of South Africa and others v Grootboom*,²³ the Constitutional Court stated that “Legislative measures by themselves are not likely to constitute constitutional compliance.”²⁴ Yacoob J brings out the point that simply coming up with brilliant ideas in the form of policies is not enough if such ideas cannot be implemented in our country and if the leadership lacks the country’s constitutional spirit and purport to ensure that all state monies are channeled towards the progress of the country’s healthcare system. The state should orchestrate reasonable measures which can be implemented at a reasonable time and ensure that all departments adhere to the rules in allowing for such implementation.²⁵

Volume 89(1), Medico Legal Journal, page 25.

²⁰ <https://journals.sagepub.com/doi/pdf/10.1177/0025817220971925>, accessed 16 June 2021.

Masuku M, “Governance, corruption and covid – 19: the final nail in the coffin for South Africa’s dwindling public finances”, 2020, Journal of Public Finances and Management. Page 549.

²¹ <https://openscholar.ump.ac.za/handle/20.500.12714/355?mode=full>, accessed 16 June 2021.

Mantzaris E and Ngcamu B, “Municipal corruption in the era of a Covid – 19 pandemic: four South African case studies”, 2020, Volume 55 Number 3 (1), Journal of Public Administration, Page 431

²² <https://journals.co.za/doi/pdf/10.10520/ejc-jpad-v55-n3-1-a4>, accessed on 16 June 2021.

South African Government www.gov.za, “President Cyril Ramaphosa launches Health Sector Anti-Corruption Forum,” 1 October 2019, <https://www.gov.za/speeches/president-cyril-ramaphosa-launch-health-sector-anti-corruption-forum> accessed on 17 May 2019.

²³ 2000 (11) BCLR 1169 (CC), para 42.

²⁴ Para 42.

²⁵ *Ibid.*

1.2 PROBLEM STATEMENT

As stated above, legislative measures have been put in place towards the realisation of the right of access to healthcare. The problem however is the corruption found among the leadership and ineffective management leading to inadequate implementation of what are often good policies and legislature in respect of the right of access to healthcare.²⁶ South Africa is ranked by the World Health Organisation among the poorest performing countries when it comes to healthcare service delivery.²⁷ Corruption and Mismanagement of funds by the state have been identified as the cause of lack of implementation, if properly managed such funds can ease the burden of implementation of this right. The failure of the state to effectively implement the right of access to healthcare has led to various consequences suffered by both citizens and foreigners residing in South Africa. One such direct consequence is on non-derogable rights which are rights described in the Constitution and under Article 4 of the International Covenant on Civil and Political Rights²⁸ as so important that they should not be easily infringed.²⁹ These rights include the right to human dignity,³⁰ the right to life,³¹ freedom and security of the person which entails the right not to be treated in a cruel, inhuman or degrading manner and the right to not be tortured in anyway.³² An example of this consequence was illustrated in the Life Esidemeni³³ matter where the state's lack of management interventions and misuse of

²⁶ Coovadia MD "The health and health system of South Africa: historical roots of current public health challenges, series 1, 2009, *Lancet* 817.

²⁷ Moyakhe NP "Quality healthcare: An attainable goal for all South Africans?" 2014 *SAJBL* 82.

²⁸ "List of Non-Derogable Rights and Freedoms under Article 4 of the International Covenant on Civil and Political Rights", Available from <https://www.legislationline.org/documents/id/7775> accessed 17 May 2019.

https://unterm.un.org/UNTERM/Display/record/UNHQ/nonderogable_right/D4DBB9694E5B40DA8525751B0077E882 accessed on 18 May 2019.

³⁰ S 10.

³¹ S 11.

³² S 12(1)(d) and (e).

³³ In the Arbitration between Families of Mental Health Care users affected by Gauteng Mental Marathon Project and National Minister of Health of the Republic of South Africa, Government and Others before Justice Dikgang Moseneke, paragraph 23, www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf accessed on 5 May 2019. Life Esidemeni is a fully owned subsidiary of the Life Healthcare group in South Africa which delivered healthcare and related services to the public sector, under a contract with the Department of Health for over

state funds led to many patients being denied access to quality health care, by being negligently removed from the Life Esidemeni institution and taken to various institutions, if any, which lacked resources and eventually leading to many unnecessary deaths and missing patients.³⁴ In this matter one finds that the state breached section 195(1)a of the Constitution in that they showed a lack of professional ethics in dealing with the matter entirely. The state should have applied a high standard of professional ethics and ensured that transparency was fostered by providing the public with timely, accessible and accurate information to weigh its options and come up with a better decision.

Another problem found in the South African healthcare system is the discrimination of migrant patients and other foreign national patients especially those from African countries, who are discriminated against based on their origin or ethnicity.³⁵ The Bill of Rights affords equal rights for everyone including migrants, particularly section 27(3), because it is unequivocal in its terms and does not refer to South Africans only. Accordingly, the court in *Khosa and Others v Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* held that the word “everyone” in section 27 “cannot be construed as referring only to South African “citizens””.³⁶

30 years. The Gauteng Department of health terminated the care contract with the Centre using the excuse of wanting to “save money” and give effect to a policy that would deinstitutionalise psychiatric patients, wherein it was discovered during the arbitration that this was not the case but rather the state did all this for corrupt reasons. This termination then led to the transfer of patients to non- government organizations and hospitals handpicked by the department of health. According to the arbitration there is no objection to the fact that the result of this transferring of the patients out of Life Esidemeni facilities was the death of 144 patients which could have been prevented by proper management by the state, while 1418 were exposed to trauma and morbidity and the whereabouts of 44 patients.

³⁴ *Ibid.*

³⁵ Willie N “Ensuring health and access to health care for migrants: A right and good public health practice” 1 July 2018, <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1422-ensuring-health-and-access-to-health-care-for-migrants-a-right-and-good-public-health-practice> accessed on 1 June 2019.

³⁶ Sterne A “Health care for all? Asylum seekers, refugees and health care.”, DR, March 2013:30-32 *De Rebus* 42. <http://www.saflii.org/za/journals/DEREBUS/2013/42.html> accessed on 30 July 2019.

1.3 RATIONALE FOR THE STUDY

In view of the fast growing population in South Africa where the state has an obligation to provide healthcare access to as many as 71.5% of the country's population.³⁷ This number has increased due to the continuous influx of foreign nationals and procreation, it is necessary to investigate the extent to which the South African healthcare system can raise much emphasis for the state to prioritise the right to access to healthcare regardless of the financial challenges the country may face, because this right has a direct impact on other rights. Considering the case of Life Esidemeni and other similar cases that continue to occur more than two decades into a democratic South Africa, it is important to critically analyse the failures by the state in implementing laws and policies in such a manner that the right to access to healthcare can be realised. To also find a possible solution that will bring an end to the infringement of section 27(3) and the non-derogable rights.

Furthermore, it is necessary to investigate whether the argument by the state that lack of funds is the cause of the current challenges in realising the right to healthcare in South Africa, is a valid argument. It will be argued that the state's argument, considering the importance and the number of people depending on the state for healthcare cannot be accepted as an obstacle to realising access to healthcare.³⁸ Also because the lack of funds is due to their own misuse of the funds and corruption.

1.4 RESEARCH QUESTION

Considering the above, the following research questions are investigated and addressed in this dissertation:

³⁷ Stats SA, <http://www.statssa.gov.za/publications/P0318/P03182018.pdf> accessed on 5 August 2019.

³⁸ Chapter 1(a) of the Constitution of the Republic of South Africa, 1996.

- i. What impact have the corruption and mismanagement of state funds by government officials had on the realisation of the right to access to healthcare in South Africa?
- ii. What effect does health legislation without implementation have on the number of patients who depend on state owned health institutions?

1.5 LITERATURE REVIEW

Scholars have differing views on the causes and solutions to the healthcare problem in South Africa. Their views are discussed next;

Ames explains the fact that the South African healthcare system has failed in ensuring that the progressive realisation of the right is met and instead caused an experience which involves a progressive infringement of the right.³⁹ She adds that the state has the required resources to ensure better healthcare services, but has failed to deliver because of the incompetent management, corruption and lack of accountability. Her solution to the problem is a call for collective action by practitioners which involves the South African Nursing Council, the Health Professions Council of South Africa, The South African Medical Association and other professional bodies to advocate for a realisation of section 27.⁴⁰

Moyakhe asserts that, "I believe that it is a crime against human rights to allow people's financial means to determine the level of healthcare provision they receive".⁴¹ The National Health Insurance Bill has been proposed to resolve current issues with the South African healthcare system and Moyakhe supports the enactment of the Bill and views it as a method that will ensure that all South Africans are provided with quality healthcare. She also recommends a solution to the healthcare crisis that entails united means by the

³⁹ Dhai A "A health system that violates patients' rights to access health care" 2012 *SAJBL* 2.

⁴⁰ *Ibid.*

⁴¹ Moyakhe NP "Quality healthcare: An attainable goal for all South Africans?" 2014 *SAJBL* 80- 83, 355, <http://www.sajbl.org.za/index.php/sajbl/article/view/355/363> accessed on 17 May 2019.

government, health professionals and civil societies.⁴² These united means comprise of efforts being made by all leaders to leave no room for further inequalities and imbalances amongst patients in South Africa, this can be done where non- discriminatory policies are put in place and all health professionals ensure that they always promote these policies. Sekhejane calls for people to be mindful of the prospects and challenges that comes with the implementation of the National Health Insurance Bill number 42598 of 26 July 2019⁴³ to be a success, even though its implementation is anticipated to bring a radical transformation to the South African healthcare system.⁴⁴ He highlights how expensive its implementation promises to be, approximately R 336 billion by 2025.⁴⁵ Sekhejane mentions how excellent the objectives of the National Health Insurance Bill are in ensuring universal access to health care, but he raises a concern about the actual treatment to patients by health care providers, will this National Health Insurance Bill bring a magical change in the corrupt and or cruel behavior by medical professionals?

Chiwire points out that even though the National Health Insurance Bill offers hope to the South African healthcare system its full effect or implementation will need time to be ready, leaving the healthcare system to continue with its issues of accessibility.⁴⁶ She calls for the government to become more proactive in its approach to the inequalities within the healthcare system. Amado also agrees that the implementation of the National Health Insurance is an idealistic stance which will address the inequalities of the healthcare resources in South Africa but points out to the fact that such a brilliant plan is threatened by corruption, where lack of transparency by the state has become an issue in the past.⁴⁷ This calls for transparency in the implementation process and running of the

⁴² Moyakhe *op cit* at 80- 83.

⁴³ National Health Insurance Bill number 42598 of 26 July 2019.

⁴⁴ Sekhejane PR “South African National Health Insurance Policy: Prospects and Challenges for its Efficient Implementation”, Policy brief, Africa Institute of South Africa, Briefing number 102, December 2013 1- 3.

⁴⁵ *Ibid.*

⁴⁶ Chiwire P “Factors influencing access to healthcare in South Africa”, Policies for equitable access to health, Daniele Dionisio, 25 October 2016, <http://www.peah.it/2016/10/factors-influencing-access-to-health-care-in-south-africa/> accessed on 5 May 2019.

⁴⁷ Amado L “National Health Insurance: A lofty ideal in need of cautious, planned implementation” 2012 *SAJBL* 4-10.

National Health Insurance to ensure that corruption will be excluded.⁴⁸ Sterne highlights the fact that section 27 of the Constitution applies to everyone including citizens and non-citizens.⁴⁹ This shows that the National Health Insurance needs to adhere to the Constitution and not exclude certain people due to their country of origin.

Pillay concentrates on the implementation aspect in accordance to the *Grootboom* judgment. She does this by carefully analyzing the broad principles enunciated in the judgment, which mainly looks at the extent to which the requirement that measures must be reasonably implemented has to be done and concludes by stating the need for the country to monitor the implementation of legislation, policies and programs,⁵⁰ but seems to give an excuse of lack of resources on behalf of the state.

Rispel, De Jager and Fonn, involves a penetrating research into reasons why some countries have a high rate of corruption within its health sector. One of the causes that they suggest for corruption by government officials is poor enforcement of rules and regulations and poor enforcement of anti-corruption legislation and policy.⁵¹ They suggest prerequisites in the fight against corruption which is one major impediment in South Africa fully realising the right to access to healthcare services. Snair provides an in-depth study in respect of the critical impacts of corruption.⁵² The fact that corruption in all its forms contributes to poor quality of health care worldwide, higher fees for healthcare services that should be free which in turn lead to declining trust in the government. He further provides some possible ways to decrease corruption in a country, such as, social accountability and transparency in pricing of medical supplies at hospitals. Pillay and Mantzaris similarly suggests that corruption derives mainly from human power

⁴⁸ Amado L “National Health Insurance: A lofty ideal in need of cautious, planned implementation” 2012 *SAJBL* 4-10.

⁴⁹ Sterne A “Health care for all? Asylum seekers, refugees and health care”, DR, March 2013:30-32 *De Rebus* 42. <http://www.saflii.org/za/journals/DEREBUS/2013/42.html> accessed on 5 August 2019.

⁵⁰ Pillay K, “Tracking South Africa’s progress on health care rights: Are we any closer to achieving the goal?” 2009 *Sabinet Gateway* 79.

⁵¹ Rispel LC, de Jager P and Fonn S, “Exploring corruption in the South African health sector” 2015 *Health Policy and Planning* 7.

⁵² Snair M “Crossing the Global Quality Chasm, improving health care worldwide”, chapter 6 <https://www.nap.edu/read/25152/chapter/1> accessed on 5 August 2019.

relationships as well as organisational, political and social realities that lead to lack of transparency and accountability.⁵³ They highlight how this corruption causes millions of patients to lose their lives and that there is unfortunately no end to this “vicious cycle”.⁵⁴ One way to defeat this corruption by state officials would be for the country to work out a system of finance transparency in all departments which would involve each department having an external overseer who receives weekly or monthly reports of the department’s spending patterns and make such reports available to the public for comments.

1.6 POINT OF DEPARTURE

There are many factors that explain why South Africa finds its healthcare in crisis after twenty-seven years into democracy, including overcrowding, shortage of human resources,⁵⁵ limited resources and management issues. Authors have explained how much of a crisis the South African healthcare system is in already. The assumption in South African law is that South Africa will realise the right to access to healthcare not just as far as the state can afford but more of as far as an individual can afford, thus giving the distinction between private and public healthcare.⁵⁶ Writers such as Moyo advocated for the fact that South Africa requires administrative and management systems to be adopted and implemented in order to ensure that everyone is given access to quality health services,⁵⁷ which this study concurs with and in addition emphasis how the image of the South African healthcare system has been tarnished by the corruption. Furthermore, the study stresses for a country that will choose to realise the right to access

⁵³ Pillay P and Mantzaris EA “Corruption in the Health Sector in South Africa and India, some considerations and reflections” 2017 *AJPA* 59-60.

⁵⁴ *Ibid.*

⁵⁵ Dhai A and Mohamed S “Healthcare in crisis: A shameful disrespect of our Constitution” 2018 *SAJBL* 8.

⁵⁶ *Soobramoney para 31.*

⁵⁷ Moyo K “Realizing the right to health in South Africa”, *Socio- economic Rights, “Progressive Realisation?* 375 to 456, 2016. <https://www.fhr.org.za/files/7215/1247/1732/Health.pdf> accessed on 1 August 2019.

to healthcare as a way to save it from creating a chain of infringing on other rights, more specifically the non-derogable rights.⁵⁸

South Africa having a fast-growing population, also amounting from the influx of migrants should not allow the state to escape from its constitutional obligation to ensure that reasonable measures are taken to ensure this right is adhered to. Perhaps the National Health Insurance Bill is the solution to the healthcare crisis since it highlights the issue of non-implementation by the other existing agencies and policies. It carries an objective of moving South Africa towards a universal health coverage,⁵⁹ perhaps it may be the solution that will ensure the realisation of section 27 and bring an end to corruption. However, the question lays in how possible it will be to ensure that the Bill receives adequate funding through the tax fund, in a country where the unemployment rate is high, and corruption continues to be on the rise.

The country has for too long fed on theoretical promises of how the healthcare system should be set up, it is now in need of a system or plan of action that will call for exact actions to assist in ensuring that the state implements improving tactics.

This research will be aligned to Dhai and Amado's⁶⁰ argument that for the right to access to health care to be fully realised the state and all relevant health providers must unite with the objective of sharing the same vision and goal which is to prioritise this right in a transparent manner. Once such a stance is adopted the corruption within the state will decrease and the objectives found in the National Health Insurance Bill will work as a catalyst in ensuring that this right is indeed prioritised.

This study concurs with the above writers in as far as they discuss corruption and some possible solutions to decrease corruption by state officials. It agrees with Sterne who elaborates the word "everyone" in section 27 of the Constitution does not only refer to South African citizens. Furthermore, the National Health Insurance Bill is lacking in ensuring that everyone is provided with healthcare services, because it excludes asylum seekers from certain services.

⁵⁸ Dhai A and Mohamed S 2018 *SAJBL* 9.

⁵⁹ Department of Health Act, 2003, National Health Insurance Policy Towards Universal Health Coverage 1.

⁶⁰ *Ibid.*

1.7 RESEARCH METHODOLOGY

The Research will be based on the collection of relevant literature available from legislation, Bills, textbooks, case law and journal articles. Relevant newspaper articles that have been published on the topic will also be consulted.

1.8 FRAMEWORK OF THE DISSERTATION

Chapter 2 reviews South Africa's current healthcare system through an analysis of historical factors that led to the Constitution and legislature, such as the National Health Act, governing it.

Chapter 3 will comprise of an analyses the interpretation of the constitutional rights pertaining to the right of access to healthcare. It evaluates how the state has managed to move or remain stagnant when dealing with the healthcare system during apartheid and twenty-five years later into our democracy.

Chapter 4 the National Health Insurance Bill will be analysed to determine whether it is well equipped to solve the issues of implementation by the corrupt state and ensure equal access to healthcare for all.

Chapter 5 will comprise recommendations and the conclusion on how to address the current healthcare crisis in South Africa.

1.9 PROJECTED TIME SCALE

The projected time scale for this research is for completion by November 2021.

CHAPTER 2

A HISTORICAL ANALYSIS OF THE HEALTHCARE SYSTEM IN SOUTH AFRICA

2.1 INTRODUCTION

South Africa stems from a history permeated by corruption, racial and gender discrimination, which had a negative impact on the health of certain citizens, black people in particular⁶¹.

This chapter provides a historical background of South Africa since contact with colonialism. It focuses on the effects of the corrupt political framework on the healthcare status of the country. The historical background will assist in understanding the reasons for legislation and behaviour that has resulted in current difficulties in the South African healthcare system.

The history of South Africa dates back to 06 April 1652 when the Dutch European settlement was established in the Cape of Good Hope.⁶² Due to their economic powers, the European settlers managed to forcefully dispossess the land and cattle of the Khoi, the San and Bantu tribes.⁶³ This resulted in the impoverishment of black people, affecting also the black people's healthcare. During this period, including the apartheid era, white people gained economic and health privilege, making it no surprise that multidrug-resistant tuberculosis and HIV became an added indicator of the longstanding poor health of the African majority despite the availability of medical treatment.⁶⁴ Generally the power that the settlers imposed on African people in respect of their possessions did not make the health sector an exception.⁶⁵ White people, due to their wealthy background were

⁶¹ Coovadia H, Jewkes R, Barron P, Sanders D and McIntyre D "The health and health system of South Africa: historical roots of current public health challenges" 2009 *Health in South Africa* 1, 374817; Delobelle P "The health system in South Africa. *Historical perspectives and current challenges*" 2013 *Journal: South Africa in focus: Economic, Political and Social Issues* 159.

⁶² Coovadia *et al* 818.

⁶³ Delobelle *et al* 159.

⁶⁴ Benatar S R, "The challenges of health disparities in South Africa" 2013 (3) *The South African Medical Journal* 154- 155.

⁶⁵ Van Rensburg HCJ and Fourie A "Inequalities in South African health care, Part 1. The

found to have the larger share of health insurance, therefore ensuring their preferential claim on the health care resources of South Africa. While black people, on the other hand, were generally placed in an unfavorable desperate socio- economic position, which gave them little purchasing power for private healthcare.⁶⁶ This differentiation in healthcare access and treatment due to the membership of a specific race or colour group constituted inequality in the healthcare, showing just how the black people's rights to healthcare were infringed.⁶⁷

In 1654, South Africa experienced an influx of slave imports into the Cape from West Africa, Mozambique, Madagascar, India and Indonesia.⁶⁸ These slaves were black people, while their masters were white people originating from Europe.⁶⁹ The slaves were placed on the settler farms in order to do work, usually being hard labour.⁷⁰ They were placed in unhygienic and crowded living conditions, causing various illnesses to infect them, with no medical attention available to them due to the unfair and corrupt political framework of that time.⁷¹

During 1713, 1755 and 1767 it was recorded that many poor people died in a smallpox epidemic. This was the partial reason for the high death rate amongst black people of up to 20- 30%, however the main cause was the unhygienic living conditions.⁷² These conditions involved dark, wet and dirty lodges with blankets that were hardly washed and no windows for ventilation.⁷³ Slaves were given limited rights which explains their poor health status and high death rates compared to the white people in charge of their livelihood and status.⁷⁴

problem- manifestations and origins" 1994(84) *The South African Medical Journal* 96.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Coovadia *et al* 818.

⁶⁹ *Ibid.*

⁷⁰ Worden N "The chains that bind us". A history of slavery at the Cape. Cape Town: Juta, 1996) 49.

⁷¹ Delobelle *Journal: South Africa in focus: Economic, Political and Social Issues* 165-166.

⁷² Coovadia *et al op cit* 818.

⁷³ Delobelle *Idem* at 165 and 166.

⁷⁴ South African History Online towards a people's history, 'History of Slavery and early colonisation in South Africa', 2 June 2011.

<https://www.sahistory.org.za/article/history-slavery-and-early-colonisation-s-africa>. Accessed 10 April 2020.

2.2 THE PERIOD BETWEEN 1800 TO 1910

During the 19th century a rise in epidemics of syphilis, tuberculosis, yellow fever, typhus, cholera, soil parasites and malnutrition were reported in South Africa.⁷⁵ Again these conditions were infecting the black population and not the white people. Hospital care was provided by Dutch East India Company, colonial governments and Christian missionaries, this out of fear prompted the state to, in 1807, see a need to pass the first health legislation and the establishment of supreme medical committee to oversee all health matters.⁷⁶

In 1883 the Public Health Act 4 of 1883 was enacted in response to the smallpox⁷⁷ epidemic making notification and inoculation of smallpox compulsory and missionaries provided orthodox medical health care for black people.⁷⁸ In 1910 South Africa became known as the Union of South Africa. Black people were however, still discriminated and considered as second-class citizens without any voting rights or privilege.⁷⁹

In 1948 the National Party came to power into South Africa, introducing the apartheid policy, making segregation between whites and black people stricter.⁸⁰ This policy was based on racial classification with white people at its apex. The classification determined

⁷⁵ Coovadia *et al* 2009 *Health in South Africa* 820.

⁷⁶ *Ibid.*

⁷⁷ [Encyclopedia Britannica](#), 'Smallpox disease', 20 July 1998.

<https://www.britannica.com/science/smallpox>, Accessed 14 April 2020.

'**Smallpox**, also called **variola major**, **acute infectious disease** that begins with a high **fever**, **headache**, and back **pain** and then proceeds to an eruption on the **skin** that leaves the face and limbs covered with cratered pockmarks, or pox. For centuries smallpox was one of the world's most-dreaded **plagues**, killing as many as 30 percent of its victims, most of them children. Those who survived were permanently immune to a second infection, but they faced a lifetime of disfigurement and in some cases blindness. But smallpox was also one of the first diseases to be controlled by a **vaccine**, particularly following the great experiments of English physician **Edward Jenner** in 1796. In 1967 the **World Health Organization** (WHO) began a global vaccination program against smallpox, and in 1980 the disease was officially declared **eradicated**.'

⁷⁸ Coovadia *et al* 2009 *Health in South Africa* 820.

⁷⁹ Lambert T, 'A brief history of South Africa.'2019, 3.
<http://www.localhistories.org/southafrica.html> Accessed 14 April 2020.

⁸⁰ Coovadia *et al* 2009 *Health in South Africa* 820.

where a person could live, go to school, whether they could vote, and the resources allocated to them in respect of education. More importantly for purposes of this study, provision was not made for the right to health care for black people as they received limited access to healthcare. This saw a rise in diseases among the black people, caused by overcrowding, poor sanitation and diet, stress, social disintegration, material mortality, lung disorders and mesothelioma in the mine workers.⁸¹ During this period there was a ratio of one doctor for every 308 people in Cape Town compared to one doctor for 22 000 to 30 000 people in the reserves.⁸²

In 1978 PW Botha became the prime minister and was determined to continue apartheid. He introduced a new Constitution in 1983 that represented all races except for black people.⁸³ The Constitution consisted of a tricameral parliament which meant that the parliament had three separately elected chambers, namely; a 178 member white House of Assembly; an 85 member coloured House of Representatives; and a 45 member Indian House of delegates.⁸⁴ Each of the three chambers had power over their own racial population group, while black people had no representative in parliament.⁸⁵ During the apartheid era in the 1980's the history of HIV/AIDS begun in South Africa. Botha subsequently held a conference to address the potential threat HIV/AIDS posed for the country.⁸⁶ In 1988 a structure called The AIDS unit and National Advisory Group was erected within the Department of Health to promote awareness about HIV/AIDS. These efforts by the apartheid administration remained at a minimum resulting in an estimate of 74 000 to 120 000 South Africans living with HIV in 1990.⁸⁷ Botha was replaced by Willem de Klerk in 1990, who pledged to end apartheid and provide rights for everyone regardless of race. Which lead to the first democratic elections in April 1994, electing Nelson Mandela

⁸¹ Coovadia *et al* 2009 *Health in South Africa* 820.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Beck RB "The history of South Africa", 2nd edition, The Greenwood Histories of the Modern Nations (2014) 178.

⁸⁵ Coovadia *et al* 2009 *Health in South Africa* 820.

⁸⁶ Eneanya AN "Human Rights, Public Values, and Leadership in Healthcare Policy" 2019 A volume in the Advances in Healthcare information Systems and Administration Book Series, 169.

⁸⁷ Jodi M "A history of official government HIV/AIDS Policy in South Africa.' <https://www.sahistory.org.za/article/history-official-government-hiv-aids-policy-south-africa> 14 June 2014, Accessed on 14 April 2020.

as the first black president. Subsequently to the ending of apartheid laws, the interim Constitution together with the 1996 Constitution were enacted and became paramount in ensuring equal rights to all. The interim Constitution provided in section 8(1) that, “every person shall have the right to equality before the law and to equal protection of the law.”⁸⁸ The 1996 Constitution included the Bill of Rights in its chapter two which consisted of section 9(1) stating that, “everyone is equal before the law and has the right to equal protection and benefit of the law.”⁸⁹

2.3 1994 TO DATE

From 1994 to date the health system experienced massive changes to adhere to the country’s new constitutional and political framework which emphasised ending racial discrimination and upholding wide ranging human rights.⁹⁰ One charge found in the inclusion of the Bill of Rights which, “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”⁹¹ Moreover the Constitution specifically gives the government a legal duty to respect, protect and promote everyone’s rights including rights to healthcare services in section 27.⁹² While more changes were promised in the Constitution it is no secret the democratic government, the African National Congress (hereinafter referred to as the ANC) inherited great inequalities in the healthcare system which included;

- The impact of diseases across races, where in white people experienced low levels of infectious or transmittable disease such as tuberculosis and diseases of poverty such as cholera or kwashiorkor.⁹³
- Access to health services but urban and rural areas, where doctors, dentists and pharmacists were not well or fairly distributed specially in the rural areas, and

⁸⁸ Act number 200 of 1993: Constitution of the Republic of South Africa, 1993.

⁸⁹ Act 108 of 1996: The Constitution of the Republic of South Africa.

⁹⁰ Coovadia *et al* 2009 *Health in South Africa* 817.

⁹¹ Hassim A, Geywood M and Berger J “Health and democracy: a guide to human rights, health law and policy in post-apartheid South Africa” Cape Town, South Africa, Siberlink 2007, Volume 6, chapter 1, 9.

⁹² Adila *et al* Health and democracy 9.

⁹³ Adila *et al* Health and democracy 16.

- The quality of health service in the public health system compared to the private health system, where in a huge inequality between health services was evident in the two sectors, having the public health sector suffering with less resources.⁹⁴

The ANC aimed to do away with the above inequalities and effects of the past by promising to fulfil the promises found in the Constitution Section 27(1)a of the Constitution, which provides for the right of access to healthcare services, giving the state an obligation to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of healthcare rights.⁹⁵ Several other legislation was passed and amended in order to adhere to the 1996 Constitution such as; Medicines and Related Substances Control Amendment Act 90 of 1997, Pharmacy Amendment Act 88 of 1997, Compensation for Occupational Injuries and Diseases Amendment Act 61 of 1997, Genetically Modified Organisms Act 15 of 1997, Sterilisation Act 44 of 1998; National Health Act 12 of 2013 and the National Health Insurance Bill number 42598 of 26 July 2019. However, many disputes as to whether the ANC government has been fulfilling its constitutional obligations in respect to the right of healthcare have occurred during its 27 years of power.⁹⁶ There have been a number of socio-economic right cases relevant to the minimum care debate, relating to the right of access to health care for the purposes of this study, three of the cases will be discussed herein under; namely the case of *Soobramoney v Minister of Health Kwa-Zulu Natal*,⁹⁷ *In Government of the Republic of South Africa and others v Grootboom*⁹⁸ and *Minister of Health v Treatment Action Campaign*.⁹⁹

⁹⁴ Adila *et al* Health and democracy 16-17.

⁹⁵ Pillay K "Tracking South Africa's progress on health care rights: Are we any closer to achieving the goal?" 2003 7(1) *Law Democracy and Development* 56.

⁹⁶ Pillay K "Tracking South Africa's progress on health care rights: Are we any closer to achieving the goal?" 2003 7(1) *Law Democracy and Development* 56.

⁹⁷ 1998 (1) [SA](#) 765 (CC), 1997 (12) BCLR 1696 (CC).

⁹⁸ 2000 (11) BCLR 1169 (CC).

⁹⁹ 2002 (5) SA 721 (CC).

2.4 SOOBARAMONEY V MINISTER OF HEALTH KWA-ZULU NATAL

In *Soobramoney* the claimant, Thiagraj Soobramoney suffered from chronic renal failure among other disease and was in desperate need of renal dialysis to prolong his life.¹⁰⁰ He could no longer afford dialysis from private hospitals so he approached a state owned (public) hospital in Durban.¹⁰¹ This refusal on its own by the hospital meant that *Soobramoney* would die sooner than he would have had he been granted access to dialysis treatment. However, *Soobramoney* was denied access due to him not meeting the hospitals eligibility criteria.¹⁰² The eligibility criteria provided that an applicant is not eligible for a transplant unless he or she is free of significant vascular or cardiac disease, also the guidelines provided that an applicant must be free of significant disease elsewhere for example, ischemic heart disease, cerebrovascular disease, peripheral vascular disease, chronic liver disease, chronic lung disease.¹⁰³ Since *Soobramoney* suffered from ischemic heart disease and cerebrovascular disease, he was not eligible for the kidney transplant as per the eligibility criteria.¹⁰⁴ This went to show that the medical treatment was available but not to certain members of society like *Soobramoney* due to their health status. This led *Soobramoney* bringing a constitutional application seeking an order for the hospital to grant him the access to dialysis treatment in order to prolong his life. The court held that Mr. *Soobramoney's* condition did not fall within the scope of emergency in terms of section 27(3), of the Constitution which states that, “No one may be refused emergency medical treatment”, and the court further held that *Soobramoney* could not succeed under section 27(1),¹⁰⁵ because the criteria applied by the hospital were reasonable due to the limited resources it had.¹⁰⁶

¹⁰⁰ 1998 (1) [SA](#) 765 (CC), 1997 (12) BCLR 1696 (CC), para 1.

¹⁰¹ *Ibid.*

¹⁰² 1998 (1) [SA](#) 765 (CC), 1997 (12) BCLR 1696 (CC, para 4.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ S 27(1)

States that everyone has the right to have access to— (a) health care services, including Reproductive health care; (b) sufficient food and water; and (c) social security, Including, if they are unable to support themselves and their dependents, appropriate social assistance.

¹⁰⁶ Lehmann *et al* 2006, “In defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core” 167 and 168.

The Constitution provides a platform to hold the state accountable for the adequacy and implementation of the health care policies, yet one finds in this case, the court being adamant to make further inquiry into whether the state was actually providing due recognition to the rights when making their decision to refuse *Soobramoney* or merely rushing to concur with the state's assertion that resources were limited.¹⁰⁷ One can argue that in a post-apartheid era wherein a country has adopted a Constitution which promotes equality and devoid any class of discrimination, the court in this matter failed to uphold the constitutional values, by claiming the larger needs of society over *Soobramoney's* individual plea for medical treatment which would prolong his lifespan.¹⁰⁸ The state relied on lack of resources and budgeting limited resources as their defense while it will be argued in the next chapter that lack of resources should not be a reason to limit a person's right to healthcare and right to life as it happened in *Soobramoney*. This is because resources are available but not enough of them are directed towards healthcare. The problem is therefore not lack of resources but the corruption and mismanaged of funds by state officials which leads to the country lacking in resources which preserve lives. If funds were sincerely channeled towards the health care system than self-enrichment and mismanagement, then law reform in South Africa would be able to achieve the constitutional mandate.

2.5 MINISTER OF HEALTH V TREATMENT ACTION CAMPAIGN

In the case of *Minister of Health v Treatment Action Campaign*¹⁰⁹ the state argued affordability once more. In this case a non-government organisation took the government of South Africa to court due to their failure to provide pregnant HIV positive women with drugs that could prevent the transmission of the virus to their child during labour.¹¹⁰ The case covered the situation of HIV/AIDS which had been an abandoned issue during the

¹⁰⁷ Charles N "Scope and limits of judicialization of the constitutional right to health in South Africa" 2013 14(2) *Journal of Health Law* 43, 53- 56.

¹⁰⁸ Para 31.

¹⁰⁹ 2002 (5) SA 721 (CC) para 1.

¹¹⁰ Kristin Bailey: BA (Hon) Philosophy, University of Western Ontario, JD Student, University of Toronto, *TAC v Minister of Health- A Case Study*. <https://library.law.utoronto.ca/sites/default/files/featured/CaseStudy%20%281%29.pdf> Accessed on 14 April 2020.

apartheid era. The disease was seen to continue more severely even during Nelson Mandela's presidency where HIV infection rates were seen to double every year.¹¹¹

Boehringer Ingelheim, one of the world's largest pharmaceutical companies with its headquarters in Germany, made an offer to supply the drug free of charge to the South African government for five years which would prevent mother to child transmission of HIV.¹¹² Doctors in private hospitals were reported to already be providing the drug to their patients while the government limited its availability to certain pilot sites in order to according to them, "gain better understanding of the operational challenges of introducing the intervention on a wider scale".¹¹³ In this case the Constitutional Court took a different approach from that in *Soobramoney* in that they found that the government violated section 27 and 28 of the Constitution through their failure to make the drug widely available to South Africa and their failure to provide a comprehensive plan for the gradual elimination of mother to child transmission of HIV.¹¹⁴ The Constitutional Court ordered that the government provide the drug to all public hospitals and clinics which had the necessary testing counselling facilities and ordered that they work out a comprehensive plan for the further reduction of mother to child transmission of HIV.¹¹⁵

2.6 AFFORDABLE MEDICINES TRUST V MINISTER OF HEALTH

In 2005 the case of *Affordable Medicines Trust v Minister of Health*¹¹⁶ the court ruled that the Minister of health was justified in making regularities that require doctors who dispense medicines to strictly have a license to do so.

From the above reported cases, it is apparent that the South African government has made some improvements in the health system, improvements which aim to do away with

¹¹¹ Kristin Bailey: BA (Hon) Philosophy, University of Western Ontario, JD Student, University of Toronto, *TAC v Minister of Health- A Case Study*. <https://library.law.utoronto.ca/sites/default/files/featured/CaseStudy%20%281%29.pdf> Accessed on 14 April 2020.

¹¹² Bailey K: BA (Hon) Philosophy, University of Western Ontario, JD Student, University of Toronto, "TAC v Minister of Health- A Case Study", 1 – 76. . <https://library.law.utoronto.ca/sites/default/files/featured/CaseStudy%20%281%29.pdf> (Accessed on 15 December 2020).

¹¹³ *Ibid.*

¹¹⁴ 2002 (5) SA 721 (CC) para 88.

¹¹⁵ Bailey *et al op cit* 20.

¹¹⁶ 2004 (6) SA 387 (T) para 27 and 28.

the past racial discrimination. However, it is no secret that much more work is required for a positive change in the healthcare system in order to uphold the constitutional obligations. Severe threats remain to people's rights of access to healthcare, which include the HIV/AIDS epidemic, the failure of the state to fulfil its legal duties and to ensure that the laws and policies it adopts pass the constitutional tests.¹¹⁷ While in the venture of doing away with the unfair laws of the past, new problems have occurred within the very trusted government due to greed and dishonesty, these involve lack of implementation due to corruption which involves mismanagement of funds and poor leadership, decades into a democratic state. Such conduct issues by government officials, are found to contribute to the inequitable healthcare system in a country where the health care system is divided between the public and private sectors with the public relying wholly on the government to provide health services to majority of the country's population, is seen to suffer the most.¹¹⁸ Corruption has proven to have a negative impact on healthcare system, accessibility, affordability, efficiency, and equity.¹¹⁹ Corruption also affects a country's budget, caused the government to fail in fulfilling its constitutional mandate to deliver quality healthcare¹²⁰ and can be deadly in some instances.¹²¹

2.7 COVID – 19 IN SOUTH AFRICA

A global pandemic that has infected over 177, 105, 204 people and close to 3, 829, 257 deaths,¹²² described as Coronavirus disease 2019 (commonly referred to as COVID – 19) which is an airborne condition due to severe acute respiratory syndrome having flue

¹¹⁷ Adila *et al* Health and democracy 25.

¹¹⁸ Rispel LC, de Jager P and Fonn S 'Exploring corruption in South African health sector,' Health Policy and Planning, 2016, Volume 31, number 2, 247.

¹¹⁹ Lewis M 2007, Informal payments, and the financing of health care in developing and transition countries. Health Affairs 26 984.
<https://www.healthaffairs.org/doi/full/10.1377/hlthaff.26.4.984>

¹²⁰ Winnie T Maphumulo, Busisiwe R Bhengu, 'Challenges of quality improvement in the healthcare of South Africa post-apartheid: A critical review', Curations, 42(1), 2019, page 5.

¹²¹ Transparency International 2006, Global Corruption Report 2006, London, Pluto Press.

¹²² Worldometer coronavirus,
https://www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1, Accessed 15 June 2021.

like symptoms, has currently reached South Africa.¹²³ During March 2020 the Minister of Health, Doctor Zweli Mkhize, reported that the Communicable Diseases confirmed the first case of COVID- 19 tested positive.¹²⁴ The rapidly spreading COVID -19 pandemic has exposed the capacity weaknesses in the healthcare sector,¹²⁵ but also the inequalities which continue to haunt South Africa. These inequalities speak to the existing injustices in South Africa which involve the racial gap in the poverty levels and class elements. These gaps and elements are associated with an accumulation of disadvantages in location, demographic structure, education, labour market outcomes and access to healthcare. This is most evident wherein the privileged class, who are the wealthy citizens including the white minority¹²⁶ in the country, can afford to comfortably stay home during all or most levels of the lockdown which came as a result of the COVID- 19 pandemic,¹²⁷ because they can afford to do so. While the less privileged citizens, which is majority of the South African population obviously reported to be mostly black people,¹²⁸ do not have an option but to leave their homes sooner to provide for their families and themselves, this includes street vendors. Even though some less privileged citizens remained in their homes during level 4 and 5, this did not guarantee their safety

¹²³ Dheda K, Jaumdally S, Davids M, Chang J. Gina P, Pooran A, Makambwa E, Esmail A, Vardas E and Preiser W “diagnosis of COVID- 19: considerations, controversies and challenges in South Africa” 2020 2(1) *Wits Journal of Clinical Medicine* 2 3.

¹²⁴ National Institute for Communicable Diseases, Division of the National Health Laboratory Service, “First case of COVID- 19 Coronavirus reported in SA”, 5 March 2020. <https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/#:~:text=This%20morning%2C%20Thursday%20March%205,Africa%20on%20March%201%2C%202020>. Accessed 15 April 2020.

¹²⁵ Dheda *et al op cit* at 7.

¹²⁶ Gradin C, “Poverty and Ethnicity among black South Africans. Wider Working Paper 2014/113. Helsinki: UN- WIDER 2014)1.

¹²⁷ Barbara Friedman, Cape Talk, “Lockdown Levels: Here’s what you need to know at a glance”, 30 April 2020. 12:01 <https://www.capetalk.co.za/articles/381781/lockdown-levels-here-s-what-you-need-to-know-at-a-glance>, Accessed 15 April 2020.

Level 5: Drastic Measures required, complete lockdown.

Level 4: Some activity can be allowed to resume subject to extreme precautions.

Level 3: Easing of some restrictions, including on work and social activities.

Level 2: Further easing of restrictions, but maintenance of physical distancing and restrictions on leisure and social activities.

Level 1: Most normal activity can resume with precautions and health guidelines followed at all times.

¹²⁸ *Ibid.*

due to the living conditions more specifically those living in informal settlements and some townships which are not kept clean and are usually crowded.¹²⁹

By 5 June 2020, the COVID- 19 statistics in South Africa recorded 820, 675 tests conducted, 40, 792 positive cases identified, 21, 311 recoveries and 848 deaths in the country.¹³⁰ In June 2021 the South African Covid – 19 statistics recorded 12, 586, 342 tests conducted, 1, 832, 479 positive cases, 1, 656, 680 recoveries and 58 795 deaths, to date.¹³¹ Vaccinations have been introduced and South Africa managed to administer up to 2, 144, 204 people during 2021.¹³² Africa may have under- detected outcomes related to the COVID- 19, making South Africa no exception due to lack of economic and medical resources.¹³³ The reported corruption cases in South Africa during this pandemic is a huge challenge. Africa consists of some corrupt government officials who to a large extent tend to be concerned about their health than that of their citizens, resulting in progressively weakening healthcare delivery systems which has been emphasised during the COVID- 19 pandemic.¹³⁴

2.8 DE BEER AND OTHERS V MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

In the pursuit to ensure that the risk of being infected with COVID- 19 is minimised and slowed down to prevent the overwhelming of the public healthcare facilities, public power imposed various regulations on South Africa and its inhabitants referred to as the “lockdown- regulations” or the “COVID- 19 regulations”¹³⁵ in the form of the Disaster

¹²⁹ Gradin *op cit* 1.

¹³⁰ COVID - 19 Corona Virus South African Resource Portal, <https://sacoronavirus.co.za/>, Accessed 15 April 2020.

¹³¹ COVID - 19 Corona Virus South African Resource Portal, <https://sacoronavirus.co.za/>, Accessed 22 June 2021.

¹³² Ibid.

¹³³ Alegbeleye B and Mohammed R “Challenges of Healthcare Delivery in the context of COVID- 19 Pandemic in Sub- Saharan Africa” 2020 *Iberoamerican Journal of Medicine* 103.

¹³⁴ Alegbeleye and Mohammed 2020 *Iberoamerican Journal of Medicine* 103.

¹³⁵ *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020), 2020 ZAGPPHC 184, 2 June 2020 para 2.

Management Act 2002 Regulations issued in terms of Section 27(2) of the Disaster Management Act 57 of 2002.¹³⁶ These regulations comprised of detailed restrictions imposed on the inhabitants of South Africa limited their constitutional rights, in particular one's freedom of movement at each level of lockdown, more specifically level 4 and 3.¹³⁷ Two examples of such restrictions mentioned in the level 4 lockdown involve, in section 16(2) (f) which states that, "A person may only leave their place of residence to walk, run or cycle between the hours of 06H00 to 09H00, within a five kilometer radius of their place of residence: provided that this is not done in organised groups"¹³⁸ and section 26(1) which states that, "the sale, dispensing and distribution of liquor is prohibited."¹³⁹ The constitutionality of these regulations in the Disaster Management Act 2002 was challenged by Reyno Dawid De Beer, Liberty Fighters Network and HOLA BON Renaissance Foundation in a recent High Court application, wherein relief was sought in their Notice of Motion that all the regulations promulgated by the Minister be declared unconstitutional, unlawful and invalid.¹⁴⁰ One quotation that was referred to by the applicants included;

"The exercise of public power must...comply with the Constitution, which is the supreme law and the doctrine of legality... The doctrine of legality, which is an incident of the rule of law, it is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principal of legality and provides the foundation for control of public power."¹⁴¹

¹³⁶ Disaster Management Act, 57 of 2002.

¹³⁷ Disaster Management Act, 57 of 2002, Regulations issued in terms of Section 27(2) of the Disaster Management Act 2002, Regulation 480, 29 April 2020, Section 16. https://www.gov.za/sites/default/files/gcis_document/202004/43258rg11098gon480s.pdf, Accessed 15 April 2020.

¹³⁸ Disaster Management Act, 57 of 2002, Regulations issued in terms of Section 27(2) of the Disaster Management Act 2002, Regulation 480, 29 April 2020, Section 16(2)(f).

¹³⁹ Disaster Management Act, 57 of 2002, Section 26 (1).

¹⁴⁰ *De Beer* para 3.

¹⁴¹ *De Beer* para 2.

The applicants in this case did not accept the rationality or constitutionality of the regulations and made this the basis of their attacks.¹⁴² The applicants showed the reason for not accepting the rationality of the regulations by applying the rationality test,¹⁴³ which is a test that is applied where there is a limitation of rights in law by analysing whether there is an acceptable reason for the limitation. “The rationality test is concerned with the evaluation of the relationship between means and ends.”¹⁴⁴ In this case the rationality test was applied in order to determine whether the rationality of some of the regulations were connected to the stated objectives of preventing the spread of the COVID- 19 infection.¹⁴⁵ This was done by looking at different regulations related to the limitation to the freedom of movement and applied the rationality test resulting in the High Court giving an order that the regulations in terms of Section 27(2) of the Disaster Management Act 57 of 2002 are declared unconstitutional and invalid, of which this declaration was suspended giving the Minister of Cooperation and Traditional Affairs time to review, amend and re- publish the affected regulations with due consideration to the limitation each regulation has on the Bill of Rights.¹⁴⁶

Although it has been twenty-six years into democracy and much has been done to do away with the injustices of the past, literature and media reveals that a larger portion of the South African the population still suffer preventable medical harm due to negligence and corruption by the government. Medical negligence litigation has increased post-apartheid both in frequency and in the size of damages incurred.¹⁴⁷ COVID- 19 cases continue to be on the rise testing the country’s readiness and exposing certain irregularities with government officials and the healthcare sector. Government needs to commit to stop or prevent corruption amongst state officials by monitoring areas of recruitment for positions and awarding of tenders for services.¹⁴⁸

¹⁴² *De Beer* para 3.

¹⁴³ *De Beer* para 6.

¹⁴⁴ *De Beer* para 6.3.

¹⁴⁵ *De Beer*, para 7.

¹⁴⁶ *De Beer* para 11.

¹⁴⁷ Maphumulo WT and Bhengu BR “Challenges of quality improvement in the healthcare of South Africa post-apartheid: A critical review” 2019 (42)1 *Curations* 7.

¹⁴⁸ Transparency International 2006, Global Corruption Report 2006, London, Pluto Press.

Chapter 3

ANALYSIS OF THE HEALTHCARE CRISIS

3.1 INTRODUCTION

Section 27 of the Bill of Rights affirms everyone's right to access to healthcare services, by putting an obligation on the state to take reasonable legislative and other measures to achieve the progressive realisation of this right.¹⁴⁹ However, South Africa finds itself experiencing widespread incidence of corruption, mismanagement and incompetence amongst government officials and employees, and this affects the state's duty to implement its obligation. Former Minister of Health, Dr Aaron Motsoaledi once acknowledged in an interview that the South African healthcare system was "very distressed".¹⁵⁰ The attributes of this "distress" comprised of the exponential growth of the burden of disease and the poor management skills found in most South African hospitals. Dr Motsoaledi further highlighted that the major problems include overcrowding, long waiting lists for treatment, irregular buying of goods, poor financial management and shortage of human resources.¹⁵¹ These problems mock a democratic state which has as its constitutional values; human dignity, the achievement of equality, and the advancement of human rights. It further undermines the rule of law, negatively impacts markets, finances organised crime or terrorist activities¹⁵² and at times lead to unnecessary deaths as found in the *Life Esidemeni* case.¹⁵³ Majority of the population in South Africa rely on the public healthcare sector since they cannot afford private

¹⁴⁹ Dhali A and Mahomed S "Healthcare in Crisis: A Shameful Disrespect of our Constitution" 2018 11(1) *South African Journal of Bioethics and Law* 9.

¹⁵⁰ Dr Aaron Motsoaledi (2018) 'Health Minister Aaron Motsoaledi on the healthcare system.' Interviewed by eNews Channel Africa, Vuyo Mvoko. 5 June 2018, 20H02. Available at: URL, <https://www.youtube.com/watch?v=taHvi-sHtq8>, Accessed on 9 September 2020.

¹⁵¹ *Ibid.*

¹⁵² Budhram T and Geldenhuys N "Corruption in South Africa: the demise of a nation? New and Improved strategies to combat corruption" 2018 31(1) *South African Journal of Criminal Justice* 26.

¹⁵³ See heading 1.2 above of chapter 1.

healthcare medical services. Unfortunately, the public healthcare sector continues to receive negative reports pertaining to patient treatment, shortage of resources, mismanagement, and overcrowding. This means the majority of South Africa's population is exposed to failing leadership, incompetent management, poor governance, legislative constraints and strikes amongst workers in essential services.¹⁵⁴ Poor people in South Africa are more vulnerable to a range of illnesses and are prone to experience poor healthcare because of lack of access to quality healthcare.¹⁵⁵

Corruption not only compromises the health care system, but the integrity of South Africa's criminal justice system, as it undermines the law enforcement efforts.¹⁵⁶ A number of government initiatives have been set up in the constitutional era aimed at promoting equality for everyone, however, none of these have effectively succeeded due to the corruption found within government officials who tend to delay the effectiveness of such initiatives.¹⁵⁷ This includes promulgation of the National Health Act 61 of 2003 and the drafting of the National Health Insurance Bill 11 of 2019¹⁵⁸ which is discussed in chapter 4, still the country's healthcare system continues to urgently need "rigorous resuscitation" due to the corruption and mismanagement of state funds.¹⁵⁹ This chapter reviews the right to healthcare in the context of the South African Constitution and relevant International laws. Secondly it analysis the state's failure to adhere to its constitutional obligation. Thereafter, the service gap between the public and private healthcare sector will be compared. Lastly reference is made to the impact of the current COVID- 19 pandemic on the South African healthcare system and how it has exposed the state's failed obligation in respect of section 27.

¹⁵⁴ Dhai and Mahomed *idem* at 8.

¹⁵⁵ Dhai and Mahomed *op cit* 6.

¹⁵⁶ Budhram and Geldenhuys *Idem* at 26.

¹⁵⁷ *Ibid.*

¹⁵⁸ National Health Insurance Bill number 42598 of 26 July 2019.

¹⁵⁹ *Ibid.*

3.2 THE CONSTITUTION AND ACCESS TO HEALTHCARE

The South African Constitution places the primary responsibility to fulfil the right to have access to health care services on the government.¹⁶⁰ Section 27(2) states that the state is obliged to respect, protect, promote and fulfil all rights in the Bill of Rights. This obligation means the state is not allowed to deny anyone access to the right to have access to health care. Furthermore, the obligation placed on the state requires it to take reasonable legislative and other measures within its available resources to ensure that everyone within the borders of South Africa has access to health care services.¹⁶¹ In doing so, the state must ensure that implementation is achievable.

Notwithstanding improvements such as the opening of clinics and public hospitals in each province since 1994 to date,¹⁶² there continues to be difficulties in adhering to the constitutional obligation due to corruption by state officials. Although laws have been passed based on the concepts of primary healthcare, the health status of the black population remains poor which impacts negatively on the healthcare system.¹⁶³ As a result of the aforementioned inconsistencies one finds a gap between the private and public health care sectors is widening.¹⁶⁴ Media reports, communities and a rise in healthcare related litigations has revealed that services in state owned health institutions are failing to meet basic standards of care and patient expectations, resulting in the public losing trust in the healthcare system.¹⁶⁵

¹⁶⁰ Pereira A “Live and let Live: Healthcare is a Fundamental Human Right Human Right” (2004) *Connecticut Public Interest Law Journal* 481.

¹⁶¹ S 27(2) of the Constitution.

¹⁶² See heading 2 of chapter 2.

¹⁶³ Brauns M and Stanton A “Governance of the Public Health Sector during Apartheid: The case of South Africa” 2016 (5)1 *Journal of Governance and Regulation* 29.

¹⁶⁴ Montgomery Young, “Private vs. Public Healthcare in South Africa” (2016), Honors Thesis Paper 2741 Western Michigan University 15.

¹⁶⁵ Maphumulo WT and Bhengu BR “Challenges of quality improvement in the healthcare of South Africa post-apartheid: A critical review” 2019 (42)1 *Curation Volume* 1.

The reference to “available resources” in section 27(2) of the Constitution is not limited to money but includes people, materials and technology. Implementation of most policies and legislation have proved to be problematic.¹⁶⁶

3.3 CORRUPTION

According to a study conducted by Siddle the lack of accountability coupled with corruption and misconduct among the department of health officials has contributed towards the failure by the state to fulfil its constitutional mandate to deliver quality healthcare to the public health sector.¹⁶⁷ Money continues to be lost due to poor decision making, neglect and inefficiencies by government officials. The Auditor General of South Africa for the year 2020, reported in the Consolidated General Report on National and Provincial Audit Outcomes for the 2018 and 2019 financial years, that the country continues to see a rise in government fruitless and wasteful expenditure amounting to R32 000 000 000.¹⁶⁸ South Africa has received poor audit reports yearly and continues to see a rise in such wasteful expenditure, exposing the corruption found within government officials who have a constitutional obligation of protecting the rights of everyone. The Consolidated General Report provides that there has been little improvement on district health services dealing with HIV/AIDS, TB as well as maternal and child health.¹⁶⁹ It included the following:

- Material irregularity in the Gauteng Province amounting to financial loss of R 148, 9 000.¹⁷⁰

¹⁶⁶ Baloyi JP “Health policy implementation challenges in the Capricorn District, Limpopo Province, South Africa,” 2011, Master of Public Health, University of Limpopo, chapter 1, <http://ulspace.ul.ac.za/handle/10386/611>, Accessed 5 September 2020.

¹⁶⁷ Siddle AM “Decentralisation in South African Local Government: A critical evaluation,” Degree of Doctor of Philosophy, Doctoral thesis, (University of Cape Town) 6, <https://open.uct.ac.za/handle/11427/10838> Accessed on 1 May 2020.

¹⁶⁸ Kimi Makwetu, Consolidated General Report on National and Provincial Audit Outcomes, PFMA 2018- 2019, Auditor- General South Africa, page 11. [19%20PFMA%20Consol%20GR.PDF](#), Accessed on 5 September 2020.

¹⁶⁹ *Ibid.*

¹⁷⁰ Coovadia *op cit* 31.

- At the Boitumelo regional hospital in Kroonstad, Free State, renovations and refurbishments which commenced in 2011, have not been completed despite the planned project duration being 36 months.¹⁷¹ The agreed contract value amounted to R 138 000 000, but the actual project expenditure as at 31 March 2019 amounted to R 209 000 000, which exceeded the original contract value by 51% due to delays in the project caused by the contractor and inadequate monitoring of the project by the Department of Health and the Public Works and Infrastructure.¹⁷²
- On 23 August 2019, a full-scale investigation was instituted in the Northern Cape in respect of payments which were made for radiology and mammogram services wherein the contract contained a mathematical error that resulted in overpayments made by the government.¹⁷³
- Kwa- Zulu Natal found that government officials awarded contracts for radiology equipment to bidders that did not score the highest points in the evaluation process. These bidders requested prices that were higher than those of the bidders that should have been awarded the contracts.¹⁷⁴
- In Mpumalanga, an alarming report stated that the government's budget for claims in 2018 and 2019 amounted to R 68 000 000, however the total claims paid out for the year amounted to R 499 000 000. Consequently, vacant positions for chief executive officers and nurses were not filled on time and the maintenance and purchasing of new ambulances were affected, resulting in a negative impact on the services rendered to hospitals.¹⁷⁵

Kon and Lackan argue that research is needed in order to understand health disparities and this can be done by exploring indicators of disadvantage such as race, housing, access to energy sources, water and sanitation, educational status, geographical location

¹⁷¹ Kimi *op cit* 55.

¹⁷² Coovadia *et al Idem* at 34.

¹⁷³ Siddle *op cit* 31.

¹⁷⁴ Baloyi JP "Health policy implementation challenges in the Capricorn District, Limpopo Province, South Africa," 2011, Master of Public Health, University of Limpopo, chapter 1, <http://ulspace.ul.ac.za/handle/10386/611>, Accessed 5 September 2020.

¹⁷⁵ Siddle *op cit* 46.

and fragmentation of the family within South Africa.¹⁷⁶ They add that if corruption and mismanagement of government funds could end, it would improve this health inequality by allowing more funds to be channeled towards improving public health care and ensuring that the same quality of healthcare is provided to everyone regardless of race and social status. One way to end corruption and mismanagement of government funds may include regular external audits done on all government department to ensure that corruption cases are dealt with quicker and more effectively.¹⁷⁷

3.4 THE GAP BETWEEN PUBLIC AND PRIVATE HEALTHCARE FACILITIES

It is argued that staff members based in public healthcare sectors, unlike the private healthcare sector have a tendency of mistreating patients due to the frustration found amongst them caused by their working conditions which involve overcrowding, lack of resources and lack of quality treatment. Mistreatment of patients is a concern because it further entails that the constitutional dispensation has not improved the apartheid system which favoured white people while racially discriminating black people. Majority of black people relied on the public healthcare sector but were discriminated against under apartheid. The private healthcare is available to people who can afford it and is convenient compared to the public healthcare sector in that patients are afforded shorter waiting time for medical attention, sufficient time is given to each medical case by doctors and nurses, availability of quality medical resources, the facilities are always kept clean, attractive and consist of better disease control and prevention practices.¹⁷⁸ The public healthcare sector on the other hand consists of long waiting times, rushed appointments, old facilities and poor disease control and prevention practices.¹⁷⁹

¹⁷⁶ Kon and Lackan 2008 *Am Journal Public Health*, December, page 2275.

¹⁷⁷ Amado LA "National health insurance: A lofty ideal in need of cautious, planned implementation" 2012 5(1) *South African Journal of Bioethics and Law* 9.

¹⁷⁸ Coovadia *et al Idem* at 34.

¹⁷⁹ Coovadia *et al Idem* at 34.

Private hospitals are not affordable to most South African citizens.¹⁸⁰ Approximately 84% of patients in South Africa, rely on public healthcare,¹⁸¹ some as a choice, for others due to unaffordability and unemployment. The fact that majority of the South African population are exposed to different medical treatment and facility which seems of low value when compared to the private healthcare facilities, is not consistent with the right to equality in terms of section 9 of the Constitution. Many public hospitals are in a state of crisis, with most of its infrastructure ran down and dysfunctional due to lack of funding, mismanagement, and neglect.¹⁸² An example of mismanagement of funds involves overspending of an amount of R 148, 9 000 000 for information technology infrastructure in the Gauteng Health department, where competitive cheaper bidders were available.¹⁸³ For South Africa to fully realise the right to access to health care it is important that this distinction is closed, and patients are afforded the same treatment. Perhaps once the corruption and mismanagement of funds by the state comes to an end then a plan such as the goals mentioned in the National Health Insurance Bill, which will be discussed in chapter 4, can be implemented fearlessly and effectively which will ensure equal access to the healthcare services for everyone in South Africa. The right to access to healthcare is not only a constitutional right but is a widely accepted international principle which should not be dependent on people's socio- economic status, race or geographical location. Therefore, it should be the state's priority to ensure that the country has equitable access to necessary healthcare services by simply affording all hospitals with all essential material and funding required for everyone within the borders of South Africa.

According to Brauns and Stanton although apartheid ended almost three decades ago, South Africa continues to grapple with massive health inequalities which includes racial

¹⁸⁰ Montgomery Young (2016) Honors Theses 9.

¹⁸¹ Dhai A and S Mohamed S "Healthcare in crisis: A shameful disrespect of our Constitution" 2018 (11)1 *SAJBL* 8.

¹⁸² Bongani M, Mayosi MB, Ch B, D Phil and Solomon R Benatar MB "Health and Health care in South Africa- 20 years after Mandela" 2014 *The New England Journal of Medicine* 346.

¹⁸³ Makwetu K Consolidated General Report on National and Provincial Audit Outcomes, PFMA 2018 2019, Auditor- General South Africa, page 11. <https://www.agsa.co.za/Portals/0/Reports/PFMA/201819/GR/2018-19%20PFMA%20Consol%20GR.PDF>, Accessed on 5 September 2020.

discrimination.¹⁸⁴ The past inequalities in access to health care resulted in the post-apartheid government raising an emphasis on equity by ensuring that public health services are often subsidised.¹⁸⁵ The majority black population continues to rely on this subsidised public health care while majority of the white population can afford better quality and organised health care from the private sector.¹⁸⁶ According to a study conducted by McLaren, Ardington and Leibbrandt 79% of the white population could afford to go to a private hospital compared to 46% coloreds and 35% of black Africans.¹⁸⁷ Furthermore the study points out that even under a democratic South African era, two thirds of white adults are covered by medical aid in contrast to less than one tenth of black Africans.¹⁸⁸ These findings also confirm the fact that the quality healthcare services available at most private hospitals targets the wealthier people who can pay for such services. This class differentiation goes against the founding provisions of the Constitution which provides as its values, “Human dignity, the achievement of equality and the advancement of human rights and freedoms.”¹⁸⁹ The blame lays mostly on corruption and mismanagement of funds by the government. South Africa thus needs to strive for a classless society which consists of a reliable and accountable government.

3.5 IMPACT OF COVID- 19 ON THE SOUTH AFRICAN HEALTHCARE SYSTEM

The COVID- 19 pandemic has exposed South Africa’s healthcare system crisis, more specifically revealing the inequalities in access to healthcare and means of protection.¹⁹⁰ South Africa finds that the most vulnerable to COVID- 19 are those people who live in overcrowded accommodation such as townships and informal settlements where many share single toilets in large numbers.¹⁹¹ This confirms how inequality continues to reign

¹⁸⁴ Brauns and Stanton *op cit* 29.

¹⁸⁵ McLaren Z, Ardington C and Leibbrandt M “Distance as a barrier to health care access in South Africa” 2013, A Southern Africa Labour and Development Research Unit Working Paper Number 97, Cape Town, SALDRU, (University of Cape Town) 2, <http://www.opensaldru.uct.ac.za/handle/11090/613> Accessed on 5 September 2020.

¹⁸⁶ Kon and Lackan *op cit* 2272- 2273.

¹⁸⁷ Bongani and Mayosi *op cit* 6.

¹⁸⁸ *Ibid.*

¹⁸⁹ Chapter 1 (a) of the Constitution.

¹⁹⁰ Ray SC “Editorial: Covid - 19 special collection” 2020 (12)1 *African Journal of Primary Health* 2.

¹⁹¹ Kon and Lackan *op cit* 2274.

the country. According to Ray, the fact is that most of the poor communities consist of people who know that if they or their family members get ill or are infected by COVID- 19, they will die, because even before the pandemic access to quality healthcare was often out of their reach and unaffordable.¹⁹² Furthermore issues such as hunger and unhygienic living conditions play a huge role in the chances of one being infected with any illness including COVID- 19, because health goes beyond merely taking medication, but health involves access to a balanced diet and clean environment.

The spread of COVID- 19 has overwhelmed the best resourced health care systems in the world.¹⁹³ Since South Africa experienced its first COVID- 19 case in 2020, politicians and healthcare planners have raised focus on saving lives by redirecting material and human resources to prevent the spread and treatment of COVID- 19.¹⁹⁴ This resulted in wards been cleared in order to cope mostly with COVID- 19 infected patients than those infected by other less fatal diseases.¹⁹⁵ It was already predicted that should South Africa experience the same overwhelming burden of patients requiring hospitalisation like Europe did, it will not have enough tests, beds, ventilators or health professionals to cope with the demands of the spread.¹⁹⁶ This prediction has become a reality, it is evident how the intense focus on COVID- 19 has resulted in a backlog of patients with non- COVID- 19 related illness, who are not able to access health care.¹⁹⁷ Patients with diabetes, asthma and other chronic illnesses have missed appointments and many are not able to access medication.¹⁹⁸ Such focus on COVID- 19 patients while neglecting other patients with different illnesses by the government goes against the constitutional goal of equality and against the right to healthcare for everyone.¹⁹⁹ As much as the COVID- 19 pandemic requires the implementation of extraordinary measures, which go beyond societal norms

¹⁹² Kon and Lackan *op cit* 2274.

¹⁹³ Taylor A, Taylor B, Parkes J and Fagan JJ “How should health resource allocation be applied during the COVID- 19 pandemic in South Africa” 2020 110i7 *South African Medical Journal* <https://doi.org/10.7196/SAMJ.2020> 561. Accessed on 1 September 2020.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

in order to curve the infection rate, this cannot be an excuse for compromising health care access to non- COVID infected patients.

It has taken a pandemic such as the COVID- 19 to cause the National Treasury to come up with the supplementary budget proposal which proposes R21, 5 000 000 000 towards COVID- 19 related healthcare spending.²⁰⁰ A further allocation of R12, 6 000 000 000 to services which are at the frontline of our response to the pandemic.²⁰¹ As much as this can be viewed as necessary, this money is not serving its purpose due to the corruption found within those in charge of it. The money is being looted. Furthermore, one may question where such funds were when certain citizens such as Soobramoney were denied access to dialysis treatment that could have prolonged his life, at a state-owned hospital, where lack of funds was cited as the reason not to afford him the necessary treatment.²⁰² Instead of billions being used for corrupt activities, many lives could have been prolonged and even saved such as the Life Esidimeni patients.

3.6 MEDICAL XENOPHOBIA'S IMPACT ON SECTION 27(2)

The other concerning issue with the South African healthcare system is the discrimination of non-South African citizens, such as refugees, who get discriminated against based on origin and ethnicity.²⁰³ Crush and Tawodzera describe this as medical xenophobia which refers to the negative attitudes and practices of health professionals and employees towards migrants and refugees based purely on their non- South African identity.²⁰⁴ It is argued that some South Africans and some health workers have a tendency to rationalise the mistreatment of migrants due to them not being entitled to anything.²⁰⁵ The South

²⁰⁰ Supplementary Budget Review 2020, National Treasury, Republic of South Africa, 24 June 2020, 3. Available at www.treasury.gov.za. Accessed 1 July 2020.

²⁰¹ *Ibid.*

²⁰² See heading 2.4 above of chapter 2.

²⁰³ Ncumisa W "Ensuring health and access to health care for migrants: A right and good public health practice" 1 July 2018, <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1422-ensuring-health-and-access-to-health-care-for-migrants-a-right-and-good-public-health-practice> accessed 1 July 2020.

²⁰⁴ Crush J and Tawodzera G "Medical Xenophobia and Zimbabwean Migrant access to public health services in South Africa" 2014(40)4 *Journal of Ethnic and Migration Studies* 1.

²⁰⁵ Crush and Tawodzera 2014 *JEMS* 28.

African Immigration Act 13 of 2002 does not discuss the health rights of migrants, which puts them in a vulnerable situation often exposing them to exclusion from the public health system.²⁰⁶ Refusing migrants from gaining access to healthcare by health care providers is not consistent with the internationally recognised right to access to healthcare.²⁰⁷ The International Covenant on Economic, Social and Cultural Rights, places an obligation on state parties to take steps through international assistance to achieving progressively the full realisation of the health rights.²⁰⁸ The committee emphasised that state parties must ensure that the right of access to health facilities, goods and services are made available to everyone on a non- discriminatory basis.²⁰⁹ Some examples of such cases of medical xenophobia involve the following;

- In 2010, a 27-year-old patient from Angola was denied cardiological treatment in Cape Town and lost his life, the cardiology unit explained that it was their understanding that they could not provide healthcare to a foreign patient until the Medical Superintendent had given approval.²¹⁰
- A lady named Joy aged 26, entered South Africa without legal documents, she was diagnosed with Kaposi Sarcoma cancer, a tertiary hospital administered her first round of chemotherapy, but denied her second treatment on September 2014, because the hospital administrator determined that Joy had “no papers”.²¹¹
- A 27-year-old Ethiopian man was refused dialysis at Helen Joseph Hospital in Johannesburg and sadly died thereafter due to his non- South African identity.²¹²
- A woman from Congo, named Francine Ngalula Kalala, gave birth on a train at Park station in Johannesburg after having been turned away from three hospitals,

²⁰⁶ Crush and Tawodzera 2014 *JEMS* 28.

²⁰⁷ *Ibid.*

²⁰⁸ Office of the United Nations High Commissioner for Human Rights, The Right to Health, Fact Sheet number 31, 22. <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf> , Accessed on 26 August 2020.

²⁰⁹ *Ibid.*

²¹⁰ Alfaro - Velcamp T “Don’t send your sick here to be treated, our own people need it more”: immigrants’ access to healthcare in South Africa” 2017(13)1 *International Journal of Migration Health and Social Care* 62.

²¹¹ Crush and Tawodzera *Idem* at 28.

²¹² *Ibid.*

because she was a foreigner.²¹³ The Gauteng Health Department responded to this matter by stating that Ngalula was not denied access to healthcare, but she refused medical advice to have a c- section.²¹⁴ The fact that the patient successfully delivered her baby naturally without the assistance of medical professionals after being prescribed a c- section, raises concerns pertaining to whether c- sections are necessary, where prescribed, or they merely constitute a form of wasteful expenditure by hospitals.²¹⁵

- A patient by the name of Shuvai points out that she was insulted and called derogatory names in reference to her non- South African status.²¹⁶ She noted that her experiences of medical attention was inferior compared to that afforded to South African citizens.²¹⁷ She highlighted how she was accused by the health workers of exhausting resources and bringing diseases to South Africa.²¹⁸

The Bill of Rights in the South African Constitution enshrines equal rights for everyone.²¹⁹ Foreign nationals are not excluded from protection provided by the Constitution, particularly section 27(3), because the right to access to health care is unequivocal in its terms and does not refer to South African people only. South Africa is also committed to the resolution on health of migrants adopted during the World Health Assembly which calls upon member states to promote equitable access to health promotion and care for migrants, while its employees continue mistreating such patients.²²⁰ According to the Limburg Principles, officials should move as expeditiously as possible towards the full realisation of the right and should take immediate steps to provide minimum care entitlements, this means that while dealing with access, the state should prioritise the realisation of the rights for the poorest and most vulnerable in society.²²¹ So any continued

²¹³ Somatosphere Science, Medicine and Anthropology, 25 October 2017, 09:13:16, Chekero T and Ross FC “On paper’ and ‘having papers’: migrants navigating medical xenophobia and obstetric rights, in South Africa”, page 2. <http://somatosphere.net/?p=13847> , Accessed on 1 September 2020.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ Chekero and Ross *Idem* at 2.

²¹⁷ Chekero and Ross *Idem* at 2.

²¹⁸ *Ibid.*

²¹⁹ S 9(1) of the Constitution.

²²⁰ Chekero and Ross *Idem* at 2.

²²¹ Limburg Principles on the Implementation of the International Covenant of Economic, Social

mistreatment or denial of healthcare access by the state and its employees directed to migrants or anyone else is inconsistent with the Constitution, meaning the state ought to ensure that everyone in South Africa is afforded this right equally.

3.7 INCREASED MEDICAL NEGLIGENT LITIGATION

While patients are meant to trust that health professionals should safeguard their lives against any harm caused intentionally or negligently when under their care, the current healthcare system of South Africa has experienced an increase of medical negligence litigation against them.²²² In March 2015, Dr Motsoaledi described such claims as reaching a “crisis” level of medical malpractice litigation.²²³ The South African Nursing Council is not exempt from these cases as it has reported a rise in misconduct cases against nurses indicating that the rights of patients and families are being violated.²²⁴ According to Van Wyk, South Africa shows a complete failure in the public healthcare sector with outcomes worse than that of some lower income countries.²²⁵ Van Wyk further indicates that this is due to the poor leadership and inadequate management, lack of vision, lack of clear philosophy and poor goal setting.²²⁶ The post- apartheid South Africa’s health outcomes remain below what is anticipated from the current health expenditure.²²⁷

and Cultural Rights 1977 in Economic, Social and Cultural Rights: A
Compilation of Essential Documents International Commission of Jurists 63.
<https://www.escrnet.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural> , Accessed 5, September 2020.

²²² Maphumulo and Bhengu 2019 *Curation Volume 5*.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ Maphumulo and Bhengu 2019 *Curation Volume 5*.

²²⁷ Ned L, Cloete L and Miji G “The experiences and challenges faced by rehabilitation community service therapists within the South African primary healthcare health system” 2017 *African Journal of Disability* 311. <https://ajod.org/index.php/ajod/article/view/311/703>, Accessed on 14 September 2020.

3.8 CONCLUSION

In conclusion even though the democratic South Africa has had almost three decades to restructure its health care system to align it with its constitutional demands, literature review reveal that millions of people are still affected and/ or suffer from preventable harm every day due to mismanagement, lack of a workable framework by the state, negligent staff members, lack of accountability by the state and corruption. Courts have over the past decade been flooded with medical litigation both in frequency and in size of the damages. Discrimination continues to be a problem amongst citizens, medical professionals and even state officials. Therefore, much work still needs to be done by the government and the society to address the issues of poor-quality service delivery. The biggest obstacle is corruption and lack of leadership skills which use up most of the country's resources, time and funds causing a long delay in the achievement of quality health care services.²²⁸

Progressive efforts have been made in achieving better healthcare despite the challenges highlighted in this chapter. Further research is needed to understand the causes and possible solutions of the health disparities. The National Health Insurance Bill is one progressive effort towards providing better healthcare which aims to provide equal healthcare to everyone within the borders of South Africa and do away with the gap between the private and public health care sectors. The next chapter will discuss the National Health Insurance Bill to determine its suitability to achieve better healthcare services to people in South Africa. Furthermore, reference to some of the countries which appear to have a better functioning healthcare system than South Africa, will be made to determine if lessons can be learnt from them.

²²⁸ Ned L, Cloete L and Miji G "The experiences and challenges faced by rehabilitation community service therapists within the South African primary healthcare health system" 2017 *African Journal of Disability* 311.

Chapter 4

THE NATIONAL HEALTH INSURANCE BILL IN A CORRUPT SOUTH AFRICA

4.1 INTRODUCTION

As stated throughout this study, legislation has been enacted to give effect to section 27 of the Constitution, however, implementation of the measures stated in such legislature remain problematic, resulting in the apartheid health inequalities not being addressed three decades into a democratic era. In this chapter, The National Health Insurance Bill is analysed to determine its suitability to bring change in a corrupt South Africa. The private healthcare sector consists of medical schemes or forms of voluntary health insurance which was initially designed with the intention to exclude black South Africans during the apartheid era.²²⁹ Black people were not allowed access into the private healthcare sector or medical schemes before 1970.²³⁰ They still find it difficult to afford access to the private healthcare sector in the post-apartheid-era due to lack of affordability, thus, the majority of the country's population only have access to public healthcare where they are treated differently to those who can afford to access private healthcare. This chapter analysis whether the National Health Insurance Bill can bridge the inequality gap between the private and public healthcare sectors.

On 26 July 2019, the National Health Insurance Bill was introduced in the National Assembly and published in the Government Gazette number 42598.²³¹ The Bill was drafted with the purpose of achieving equal healthcare access for everyone in South

²²⁹ Refer to chapter 3, heading 3.4 above.

²³⁰ *Ibid.*

²³¹ National Health Insurance Bill 42598, 11 of 2019.
https://www.gov.za/sites/default/files/gcis_document/201908/, Accessed 5 December 2020.

Africa regardless of race or socio-economic status, through the establishment of a National Health Insurance Fund which will be discussed below.²³²

The South African healthcare is not well structured as it is plagued by several challenges, which include corruption.²³³ A clear understanding must be provided of how the National Health Insurance Bill, as a state-owned medical scheme will achieve its objectives without being compromised by corruption and mismanagement of funds. It is argued that South Africa can learn from countries like Germany, on how to successfully implement cost effective universal health for a long period despite corruption and how its solidarity- based financing works.

4.2 Objective of the National Health Insurance Bill

The objective of the National Insurance Bill is to ensure that no one is deprived of the constitutional right of access to healthcare regardless of their socio- economic status; the formation of one public health fund comprising of adequate resources to plan for and meet the health needs of the entire population; and its ultimate goal to achieve universal coverage.²³⁴ This will require the government to focus on responding to healthcare needs; improving accessibility by building more primary healthcare institutions and hospitals especially in remote areas where mostly the vulnerable groups, such as the poor African people, reside; and allowing everyone equal utilisation of healthcare services by ensuring that money or affordability no longer becomes a determining factor in the type of healthcare service one receives, as private and public sectors will be done away with. Eventually the main objective of the National Health Insurance Bill is to lower or remove user fees for vulnerable groups, providing everyone with the same quality healthcare service at all times.²³⁵ Achieving this objective will depend on the support of the society as a whole, whereby both citizens and state officials need to be honest and professional

²³² National Health Insurance Bill 42598, 11 of 2019.
https://www.gov.za/sites/default/files/gcis_document/201908/, Accessed 5 December 2020.

²³³ Conmy *op cit* 3 and 5.

²³⁴ *Ibid.*

²³⁵ Towards a national health insurance system in Yemen- Part 1: Background and assessments, page 75, https://www.who.int/health_financing/countries/yemen_en1-6_9-objexp.pdf

in all their dealings. Therefore, National Health Insurance Bill will be based on two principles, namely, universality, allowing for everyone to access the same essential healthcare benefits regardless of their financial means or race. Secondly, social solidarity which will allow everyone regardless of their socio- economic status to benefit from a national system of healthcare.²³⁶

4.3 Implementation of the National Health Insurance Bill

In order for the National Health Insurance Bill to meet its purpose funding will be needed, therefore the creation of a single fund referred to as the National Health Insurance Fund (hereinafter referred to as the Fund) needs to be established through legislation whereby all these monies will be placed into.²³⁷ The Fund will buy services on behalf of the entire population and pay for everyone's health services.²³⁸ Such a system is termed a "single-payer" system,²³⁹ wherein everyone who needs healthcare will not have to pay the service providers directly, but rather the Fund will pay healthcare providers to deliver the service. The funding for the National Health Insurance will be through a combination of pre-payment taxes derived from general taxes and complemented by mandatory payroll and surcharge taxes.²⁴⁰ By so doing healthcare for the vulnerable groups who were previously discriminated will be guaranteed.

The National Health Insurance is undergoing three phases of implementation, whereby each phase lasts a period of five years.²⁴¹ The first phase commenced in 2012 which

²³⁶ Parliament of the Republic of South Africa, "The National Health Insurance Bill Project Details", <https://www.parliament.gov.za/project-event-details/54#:~:text=Why%20the%20NHI%20Bill%3F,as%20a%20fundamental%20human%20right3>, Accessed on 10 December 2020.

²³⁷ National Health Insurance Bill 42598, 11 of 2019. https://www.gov.za/sites/default/files/gcis_document/201908/, Accessed 5 December 2020.

²³⁸ National Health Insurance <https://www.gov.za/about-government/government-programmes/national-health-insurance-0>, Accessed on 27 January 2021.

²³⁹ *Ibid.*

²⁴⁰ Section 49 (2) a of the National Health Insurance Bill 42598, 11 of 2019.

²⁴¹ Marten R, McIntyre D, Travassos C, Shishkin S, Longde W, Reddy S and Vega J "An assessment of progress towards universal health coverage in Brazil, Russia, India, China and South Africa (BRICS)," 13 December 2014, Lancet Volume 384, 2168, <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2814%2960075-1> Accessed 27 December 2020.

involved piloting of different interventions in preparation for the implementation of the National Health Insurance.²⁴² Instead of funding from progressive taxation these activities were funded directly and indirectly through the National Health Insurance conditional grants and health infrastructure grants,²⁴³ such grants have been used in South Africa in order to transfer funding to provinces and municipalities for the purpose of achieving particular national government policy objectives, in this case being the National Insurance Bill.²⁴⁴ This phase focused on preparing primary healthcare for the National Health Insurance through the introduction of health system strengthening interventions in ten pilot districts across South Africa, namely, OR Tambo, Gert Sibande, Vhembe, Pixley ka Seme, Eden, Dr K Kaunda, Thabo Mafutsanyane, Tshwane, uMzinyathi and uMgungundlovu.²⁴⁵ The second phase focuses on the development of the National Health Insurance legislation, establishment of institutions that will form the foundation of the National Health Insurance Fund, purchasing personal healthcare services from emergency medical services.²⁴⁶ Lastly phase 3 which will commence in 2022 and will involve the mobilisation of additional resources such as fiscal revenue which will be allocated to the National Health Insurance Fund, selective contracting of the healthcare services from private providers, introduction of mandatory payment for the National Health Insurance through National Health Insurance specific taxes into prevailing tax policies and contracting of accredited private hospital services.²⁴⁷

²⁴² Evaluation of Phase 1 implementation of interventions in the National Health Insurance (NHI) pilot districts in South Africa, Evaluation Report, Final NDOH10/2017- 2018, July 2018, page 12, https://www.hst.org.za/publications/NonHST%20Publications/nhi_evaluation_report_final_14%2007%202019.pdf Accessed 27 December 2020.

²⁴³ Evaluation of Phase 1 implementation of interventions in the National Health Insurance (NHI) pilot districts in South Africa, Evaluation Report, Final NDOH10/2017- 2018, July 2018, page 12,

²⁴⁴ “2019-20 National Health Insurance Indirect Grant Health Facility Revitalisation Component Framework”, <https://vulekamali.gov.za/datasets/frameworks-for-conditional-grants-to-provinces/2019-20-national-health-insurance-indirect-grant-health-facility-revitalisation-component>, Accessed on 27 January 2021.

²⁴⁵ Evaluation of Phase 1 implementation of interventions in the National Health Insurance (NHI) pilot districts in South Africa, Evaluation Report, Final NDOH10/2017- 2018, July 2018, page 12,

²⁴⁶ *Ibid.*

²⁴⁷ Evaluation of Phase 1 implementation of interventions in the National Health Insurance (NHI) pilot districts in South Africa, Evaluation Report, Final NDOH10/2017- 2018, July 2018, page 12,

4.4 Suitability of the National Health Insurance Bill

Notwithstanding the fact that the National Health Insurance has the potential to significantly transform the South Africa healthcare system to a more equitable and affordable system, some of the National Health Insurance key challenges to achieving its vision needs to be articulated.

1. South Africa has been in a period of low economic growth stemming from the global financial crisis of 2008 causing the government to run at large deficits and debts.²⁴⁸ As a result the possibility of increased funding to the health sector has been limited, meaning the National Insurance Bill implementation may be delayed.²⁴⁹ According to the Consolidated General Report, corruption and mismanagement of state funds caused much loss in the country's financial status,²⁵⁰ had this not been a problem perhaps the healthcare system would have received more funds.
2. The success of the Fund also depends on medical scheme members giving up their membership and moving to the National Health Insurance and channeling their monies towards the Fund instead. However, due to corruption, mismanagement of state funds, state capture and the failing public entities within the government, medical scheme members may be reluctant to give up their medical schemes and move to the National Health Insurance and instead oppose the National Health Insurance. Such opposition due to mistrust in any government ventures has the potential to delay the implementation of the National Health Insurance through litigation or tax avoidance.²⁵¹

²⁴⁸ Blecher M, Daven J, Harrison S, Fanoie W, Ngwaru T, Matsebula T and Khanna N "National Health Insurance: vision, challenges and potential solutions" 2020 *South African Health Review* 31

[file:///C:/Users/Lenovo/Downloads/03SAHR_2019_NHIvisionchallengesandpotentialsolutionspublished27Jan20%20\(1\).pdf](file:///C:/Users/Lenovo/Downloads/03SAHR_2019_NHIvisionchallengesandpotentialsolutionspublished27Jan20%20(1).pdf) Accessed 27 December 2020.

²⁴⁹ *Ibid* 24.

²⁵⁰ See heading 3.3 above of chapter 3.

²⁵¹ Blecher *et al Idem* at 35.

3. According to the World Health Organization, Universal health coverage is defined as access to health services for all people who need it without financial hardship.²⁵² In most countries like Brazil and Germany which have moved towards the universal health coverage system, it has become apparent that technical skills and information systems for strategic purchases are required for its successful administration.²⁵³ Failure to adopt the aforesaid remains a challenge in the roll out of the National Health Insurance Bill in South Africa. South Africa currently operates its purchasing and provision function in an integrated manner without purchaser/ provider split introduced, little strategic purchasing and capitation payment methods have not been implemented²⁵⁴ and such is said to slow down the process of a universal health care system such as the National Health Insurance.
4. Another challenge that will impede the progress of National Health Insurance is the mistrust between the government and the private sector and the slow progress in building a mixed delivery platform such as capitation arrangements with independent general practitioners.²⁵⁵ The mistrust is because of corruption and mismanagement of state funds by the government.
5. Lastly one important challenge is the Covid- 19 pandemic which has affected or infected and changed everyone's lives not only in South Africa but around the world. The pandemic has caused many state and private hospitals to run out of beds due to the overflow of patients who have tested positive for the virus and need medical intervention, it has also required funds for the purchase of medicine, oxygen cylinders, beds, protective clothing, sanitizers, extending infrastructure and the employment of more healthcare workers. As a result of this crisis, part of the National Health Insurance's budget was given up in order to help fund the unexpected coronavirus.²⁵⁶ Financing of the Fund may therefore become a

²⁵² Universal Health Coverage, https://www.who.int/health-topics/universal-health-coverage#tab=tab_1, Accessed on 27 January 2021.

²⁵³ Blecher *et al* 35.

²⁵⁴ Blecher *et al* 35.

²⁵⁵ *Ibid.*

²⁵⁶ Coronavirus accelerates South Africa's NHI plans, August 2020, <https://sacoronavirus.co.za/2020/08/26/coronavirus-accelerates-south-africas-nhi-plans/> ,

challenge due to most funds being channeled towards the pandemic and this may result in a delay of implementing the National Health Insurance Bill. The Covid- 19 pandemic has illustrated how vulnerable the South African health system is, it further exposed the vulnerable current financing models and highlighted procurement challenges.²⁵⁷ An amount of R 500 000 000 000 was announced on 21 April 2020 towards the social support and economic relief fund due to Covid-19, this amount was partly funded by borrowing from the World Bank and International Monetary Fund.²⁵⁸ It is no surprise that once more even during a pandemic corruption and mismanagement of funds exists, whereby government officials used food parcels for their selfish interests instead of helping citizens suffering from the impact of the pandemic such as unemployment and poverty.²⁵⁹

From the above it is clear that corruption and mismanagement of funds is the common factor that will hinder the progress of the National Health Insurance. Corruption has been said to account for the waste of 10% of all healthcare expenditure in the country.²⁶⁰ Having a fund which will be state owned or managed by the state that is currently struggling with corruption makes the implementation process of the National Health Insurance even doubtful to many citizens.

According to the South African government, the National Health Insurance is viewed as a positive move for its healthcare system. The decision to come up with the National Health Insurance was inspired by the Constitution and the fact that healthcare is a human right, it should not depend on anyone's race or financial status. Although the government means well in adopting a Universal healthcare system, South Africa cannot make the

257 Accessed on 27 January 2021.
National Health Insurance Post Covid - 19, 26 August 2020,
<https://sacoronavirus.co.za/2020/08/26/national-health-insurance-post-covid-19-slideshow/> Accessed 27 January 2021.

258 De Villiers C, Cerbone D and van Zijl W "The South African government's response to COVID-19" 2020 *Journal of Public Budgeting* 8.
https://www.researchgate.net/publication/344031501_The_South_African_government's_response_to_COVID-19 Accessed on 27 January 2021.

259 Broadbent A, Combrink H and Smart B "Covid- 19 in South Africa" November 2020, Elsevier Public Health, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7510426/> Accessed on 27 January 2021.

Emergency Collection 100034
260 Sithole HL "An overview of the National Health Insurance and its possible impact on eye healthcare services in South Africa" 2015 74(1) *Afr. Vision Eye Health* 4.

mistake of concluding that corruption problems caused by the state officials will suddenly vanish once the National Health Insurance is implemented. Corruption and mismanagement of funds is a result of certain government officials' greed and dishonesty as seen in the Consolidated General Report which exposed wasteful spending by such leaders.²⁶¹ The implementation of the National Health Insurance will mean more funds will be channeled in the hands of these corrupt officials, increasing the chance of corruption and mismanagement of funds.²⁶² One may agree that the South African healthcare system is in need of the transformation that the National Health Insurance aims to bestow, but how will it avoid the reality of a corruption infested government, especially since the very same government will be in charge of the National Health Insurance Fund.²⁶³ Amado argues that corruption must be dealt with before implementation and a strict supervision over the running of the fund will be necessary.²⁶⁴ Without accountability and transparency throughout the implementation process and running of the National Health Insurance, corruption cannot be eliminated.²⁶⁵ South Africa is in need of an honest government which does everything in its power to ensure that people's rights are prioritised at all times, a government that will work towards enabling South Africa to achieve its potential, free from corruption and neglect.²⁶⁶ Once this is achieved then the National Health Insurance will become suitable for the country.

4.5 The Germany Healthcare system

The German Statutory Health Insurance has remained consistent over the past century despite political changes and corruption experienced by the country.²⁶⁷ The German

²⁶¹ See 3.3 above of chapter 3.

²⁶² Sithole *et al Idem* 5.

²⁶³ Sithole *et al Idem* 5.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ Passchier RV "Healthcare Delivery Exploring the barriers to implementing National Health Insurance in South Africa: The people's perspective" 2017 107(10) *South African Medical Journal* 837.

²⁶⁷ Altenstetter C "Insights from healthcare in Germany" 2003 90(1) *American Journal in Public Health* V 38. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447688/#_sec1title Accessed 5 December 2020.

healthcare system originates from Germany's Basic Law, which obliges its state to provide social services to all its citizens by ensuring sufficient needs based ambulatory and inpatient medical treatment in qualitative and quantitative terms.²⁶⁸ The German government assumes this duty itself or delegate it to state governments and institutions in the form of service guarantee contracts.²⁶⁹ Germany has had the most restriction- free and consumer- orientated healthcare system in Europe, allowing patients to select almost any type of care they wish whenever they want it.²⁷⁰ Germany was reported to have the healthiest healthcare systems in the world in 2017, due to its governmental health system keeping a record reserve of more than 18 000 000 000 pounds.²⁷¹

In 2019 Germany took ninth place in Transparency International's Corruption Perception Index, which is an index published annually by Berlin- based Transparency International since 1995 ranking countries by their levels of public sector corruption which is determined by expert assessments and opinion surveys.²⁷² In dealing with corruption, Germany has a strong institutional and legal anti- corruption framework. The German Criminal Code, section 299a considers, like South Africa, the giving, offering or promising as well as taking, demanding or accepting the promise of bribes and facilitation payments, as criminal offences.²⁷³ However the common problem is how to prove commission of corruption and securing convictions for transgressors. In dealing with this problem Germany does not have a central federal investigation authority dealing with bribery

²⁶⁸ Doring A and Paul F "The German Healthcare System" 2010 (1)4 *European Association for Predictive, Preventive and Personalised Medicine Journal*, V 2. file:///C:/Users/Lenovo/Downloads/The_German_Healthcare_System.pdf Accessed on 10 December 2020.

²⁶⁹ *Ibid.*

²⁷⁰ Bjornberg A, Health Consumer Powerhouse, Euro Health Consumer Index 2015 Report, page 9, http://www.healthpowerhouse.com/files/EHCI_2015/EHCI_2015_report.pdf Accessed on 10 December 2020.

²⁷¹ Healthcare in Germany, https://en.wikipedia.org/wiki/Healthcare_in_Germany#cite_note-13 Accessed on 10 December 2020.

²⁷² Helck T, Xylander K and Schauenburg T "Bribery and Corruption Germany", 4 December 2020, Global Legal Insights, Chapter 1, <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany> Accessed on 27 January 2021.

²⁷³ *Ibid.*

matters, but rather has about 120 public prosecutors' offices spread regionally over the whole country, who are competent to investigate criminal offences.²⁷⁴

Just like South Africa, the foundation for Germany's healthcare system is formalised in its Constitution, which gives its state an obligation to provide social services to its citizens.²⁷⁵ The Germany healthcare system is a dual public- private system wherein a larger portion of it is funded by statutory contributions which allow for free healthcare for everyone in the country.²⁷⁶ Germany's healthcare system is a contribution based social insurance model which is mainly funded by the public sector by way of social insurance payments covering the costs of state supervision and basic infrastructure. The overall healthcare system of Germany is organised around the principle of solidarity which entails that every member of a supportive society is entitled to assistance from other members of the society in the case of illness.

Compulsory health insurance was introduced for everyone in Germany from 1 January 2009.²⁷⁷ It was found that 90% of citizens were part of the statutory health insurance system, while 9% had private health insurance and 2% had company/trade insurance or were uninsured regardless of the legal obligation.²⁷⁸ Germany made it obligatory for individuals who had an income that was below a legally specified amount to join the statutory health insurance.²⁷⁹ The statutory health insurance expenditure is covered by premiums which are calculated according to earning power. Moreover, the statutory health insurance enters into service provision contracts with physicians and hospitals.²⁸⁰ Another profound aspect of the Germany healthcare system involves subsidiarity which implies that aid be provided by the larger entities to allow smaller entities in accomplishing their tasks, more specifically the universal system of healthcare resolves most aspects of

²⁷⁴ Helck *et al op cit* Chapter 1.

²⁷⁵ Doring A and Paul F "The German healthcare system" 2010 *European PMA Journal* 535. <https://www.researchgate.net/publication/233825453> Accessed on 28 December 2020.

²⁷⁶ *Ibid.*

²⁷⁷ Doring *et al Idem* 537.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

healthcare delivery by associations on local and regional levels without involving the federal sickness fund.²⁸¹

4.6 Lessons to learn from Germany healthcare system

While South Africa wishes to adopt the universal healthcare system some lessons can be taken from Germany which has managed to effectively implement such a system for many years. Firstly, the legal steps taken to combat corruption and mismanagement of funds, seem to be effective. Germany has managed to save lots of funds than report wasteful spending like South Africa, Germany is in the top ten of the Corruption Perception Index.

4.7 Conclusion

In conclusion this chapter analysed the suitability of the National Health Insurance to achieve its objective of affording all South African better access to healthcare. It was considered how corruption is likely to have a negative impact on the success of the Bill. Reference was made to Germany which has effective anti- corruption legislation enabling its healthcare to be cost effective. The fact that South Africa currently battles with a corrupt government with many cases of mismanagement of state funds, even during the Covid-19 pandemic, is a concern, considering that the National Health Insurance Fund will be run by the same government. Although the goals of the National Health Insurance are good and in line with the constitutional framework, a corrupt government will decrease its chances of success. One of the goals of the National Health Insurance was to achieve a measure of equality for everyone in respect of access to healthcare services. Such equality has not been achieved 6 years after the draft, because of the lengthy pilot plan which is set at 15 years but even after this period challenges of resources, funds and corruption should not be expected to magically disappear unless dealt with before

²⁸¹ Weide U “Law and the German Universal Healthcare System: A Brief Contemporary Overview” 2005 6(8) *German Law Journal* 1146.
www.germanlawjournal.com/pdf/Vol06No08/PDF_Vol_06_No_08_1143-1172_Developments_Weide.pdf Accessed on 28 December 2020.

implementing the draft Bill. The Bill in its current form does not thoroughly deal with all these challenges. The conclusion reached in this chapter is that corruption needs to be addressed by the country first before implementing the National Health Insurance to ensure that such a fund is utilised strictly for its purpose. The next chapter will make various recommendations on how best to improve the healthcare system of South Africa.

CHAPTER 5

RECOMMENDATIONS

5.1 INTRODUCTION

In this chapter recommendations are made to find a solution to the problematic healthcare system of South Africa. From the previous chapters it was made clear that the healthcare in South Africa has been compromised and any solutions that can be successfully implemented will mean fewer errors, reduced delays in care delivery, improved efficiency, and lower cost. Corruption, mismanagement of funds and mistreatment by healthcare workers in the healthcare sector, has caused the public to lose trust in the healthcare system, thus slowing down the urgency of the need for realistic solutions which will bring a positive transformation to the healthcare system.

The National Health Insurance Bill aims to solve many of the challenges faced by the South African healthcare system, however, once implemented it will not be considered as a solution for corruption, mismanagement of state funds and mistreatment by healthcare workers. Since 2012 the Bill has been viewed as a solution to the healthcare crisis due to its theoretic objectives and goals to improve the healthcare system. However, the implementation alone will not afford protection to the healthcare system against corruption, mismanagement of state funds and mistreatment by healthcare workers. Many policies and legislature related to health have been passed in South Africa yet the same struggles continue to negatively affect the healthcare system leading it into a crisis.

It is therefore clear that the National Insurance Bill will not stop corruption, mismanagement of state funds and mistreatment of patients. Accordingly, the healthcare crisis needs a solution that will prioritise mitigating the corruption and mismanagement of state funds. South Africa needs a system that looks at protecting funds that are channeled to the healthcare system and ensuring that a high level of accountability and transparency

is applied. A possible solution to the healthcare crisis will require external manpower and commitment to the fight against corruption, discrimination and injustice.

One proposed solution for corruption and mismanagement of state funds is first to adopt a monetary system that protects all monies designated to the healthcare sector, by ensuring that accountability and transparency are the order of the day. Secondly South Africa can adopt the Germany no tolerance to corruption approach discussed in the previous chapter. Thirdly in dealing with mistreatment by healthcare workers, found in health facilities especially the public health sector, strict adherence to the seven domains of the National Core Standards could be a possible solution. The three solutions are consequently discussed.

5.2.1 SAFE MONETARY SYSTEM

Due to the increasing cases of corruption and mismanagement of state funds by state officials, South Africa's government cannot be trusted with state funds. Thus, an effective measure would involve taking away full monetary handling responsibility from the government. This will mean instead of being included into the government account, funds meant for health purposes should rather be put into an independent healthcare guardian trust fund. Such a fund will be made to fall under the administration of an independent body elected by citizens and which will include members from the World Health Organization. The process of selection by the public will entail any citizen to apply who meets the requirements set by the members from the World Health Organisation, once a candidate applies, a screening and pre-selection will occur, followed by an interview, assessment, preview of references, background check and finally a decision will be made. This fund will be created to hold and administer funds whether through the South African budget allocation or sponsorships made towards health. The purpose of this fund will be to protect all health-related funds. The fund and its transactions will be strictly monitored and publicised allowing access by all citizens and ensuring transparency. This way every cent spent will be recorded and accounted for. Citizens will be allowed to receive an audit report of the fund on a quarterly basis. Such a fund will need to require strict transaction methods, such as requiring an investigation prior to authorizing any payments for health

products or services. This will ensure that tenders are not fraudulently acquired and ensure that everything is priced fairly and within market values to avoid mismanagement of funds and wasteful expenditure.

5.2.2 LOOKING TO GERMANY'S SOLUTION

South Africa can perhaps look at adopting the same laws as Germany which leave no room for mercy when dealing with corruption. Secondly, South Africa should, like Germany, consider making health insurance compulsory for the whole population, wherein coverage is expanded from the majority of the population to everyone.²⁸² This stance will ensure that everyone is registered in the health database and guaranteed equal healthcare services regardless of race and nationality. Thirdly, South Africa could learn from Germany's social health insurance financing model and give employers more responsibility and assume a more realistic taxation plan to fund the National Health Insurance.²⁸³

5.2.3 THE NATIONAL CORE STANDARDS

In dealing with the issue of mistreatment by healthcare workers to patients, including migrant patients; the Department of Health compiled the National Core Standards for health establishments in South Africa as part of quality assurance.²⁸⁴ It is believed that if these core standards are applied correctly by everyone then the quality of healthcare will be defined and the national framework will be available to certify health establishments

²⁸² Busse R, Blumel M, Knieps F and Barnighausen T, "Statutory health insurance in Germany: a health system shaped by 135 years of solidarity, self – governance, and competition", 2017, Germany and Health, Volume 390, *The Lancet*, page 883.
[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(17\)31280-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(17)31280-1/fulltext), Accessed 15 June 2021.

²⁸³ *Ibid.*

²⁸⁴ National Department of Health 2011, "Towards Quality Care for Patients: National Core Standards for Health Establishments in South Africa", page 2.
https://static.pmg.org.za/docs/120215abridge_0.pdf Accessed 20 February 2021.

as compliant with the standards. There exist seven domains in the national core standards which will be briefly explained in the ensuing paragraphs. The seven domains are;

1. Patient's Rights;
2. Patient's Safety, Clinical Governance and Care;
3. Clinical Support Services;
4. Public Health;
5. Leadership and Corporate Governance;
6. Operational Management; and
7. Facilities and Infrastructure.²⁸⁵

Patient's Rights looks at the hospitals and clinics from a patient's point of view in accordance with the "*Batho Pele*" principles²⁸⁶ and the Patient Rights Charter, which was created by the Department of Health to ensure that all South Africans have access to basic healthcare services by upholding, promoting and protecting all health rights.²⁸⁷

Patient's Safety, Clinical Governance and Care deals with minimising unintended harm, preventing or managing problems to both healthcare workers and patients. This domain ensures quality nursing and clinical care.²⁸⁸

Clinical Support Services deals with all essential services needed for clinical care and ensuring efficient availability of medicines.²⁸⁹

Public Health provides details of how health facilities should work with Non-Government Organisations and other healthcare providers together with local communities and certain

²⁸⁵ National Department of Health 2011, "Towards Quality Care for Patients: National Core Standards for Health Establishments in South Africa", page 3.

https://static.pmg.org.za/docs/120215abridge_0.pdf Accessed 20 February 2021.

²⁸⁶ Batho Pele means "People First", it is all about giving good customer service to the users of government services. There are 8 principles for Batho Pele, they are; Consultation, Service Standards, Courtesy, Access, Information, Openness and Transparency, Dealing with Complaints and giving best value <http://www.kznhealth.gov.za/bathopele.htm> Accessed on 20 February 2021.

²⁸⁷ National Department of Health 2011, "Towards Quality Care for Patients: National Core Standards for Health Establishments in South Africa", 4.

https://static.pmg.org.za/docs/120215abridge_0.pdf Accessed 20 February 2021.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

sectors to promote health and prevent avoidable illnesses or negligent behavior even during disasters like the COVID- 19 pandemic.²⁹⁰

Leadership and Corporate Governance deals with senior management providing strategic direction through proactive leadership with the support of the hospital board, clinic committee and the relevant supervising support structures.²⁹¹

Operational Management ensures delivery of safe and effective patient care which would include management of human resources, finances, assets information and record keeping.²⁹²

Facilities and Infrastructure deals with the requirements of hygiene and safety in all healthcare facilities and infrastructure.²⁹³

5.3 CONCLUSION

This study was been undertaken with the purpose of answering the question of what the impact of corruption and mismanagement of state funds by government officials has on the realisation of the right to access to healthcare in South Africa and secondly the effect health legislation without implementation has on patients who depend on public healthcare. Since cases of corruption and mismanagement of state funds by government officials has not declined during the post-apartheid era, where the most recent Consolidated Report showed a large percentage of state funds being classified as wasteful expenditure. Also, medical negligence cases have been on the rise in the past 5 years, finding cases where patients have lost their lives unnecessarily due to lack of care from healthcare workers. The South African healthcare system is flooded with several useful policies and legislation which promote the section 27 constitutional right to

²⁹⁰ National Department of Health 2011, "Towards Quality Care for Patients: National Core Standards for Health Establishments in South Africa", 4.

https://static.pmg.org.za/docs/120215abridge_0.pdf Accessed 20 February 2021.

²⁹¹ National Department of Health 2011, "Towards Quality Care for Patients: National Core Standards for Health Establishments in South Africa", page 4.

²⁹² *Ibid.*

²⁹³ *Ibid.*

access to quality healthcare, such as the National Health Insurance Bill, however, implementation of such laws cannot be possible with a corrupt government which often misuses funds targeted to the functioning of the healthcare sector.

Chapter 2 dealt with a historical analysis of the South African healthcare system. South Africa has a history that struggled with many inequalities where in all cases black people were made to feel less human even in the treatment received at healthcare facilities corruption and mismanagement of funds existed even during the apartheid era by the then government which ensured that white people maintained economic and health privilege. Even though the country is 27 years into democracy and case law has been developed to adhere to the Constitution which promotes equality for all, South Africa continues to have cases of corruption amongst government officials during a pandemic. As a result, it would be preferable that all monies be taken away from the hands of the government and made available to everyone for transparency purposes.

In chapter 3 the healthcare crisis in South Africa was analysed to expose the negative impact of corruption, mismanagement of state funds and negligent healthcare workers on the healthcare system. Progressive efforts in line with section 27 of the Constitution, have been made, however, equality has not been achieved due to the lack of accountability and corruption by state officials, causing monies meant for the healthcare system to be misused in most cases.

In chapter 4 the National Health Insurance Bill was assessed to determine whether it is the best platform to achieve equal access to quality healthcare in a corruption infested country. Indeed, the ideology of the National Health Insurance is a positive step towards ensuring a better affordable healthcare system for everyone in the Republic of South Africa. However, the National Health Insurance Bill like the other health legislature will not address the main obstacle of corruption and mismanagement of state funds, neither will it ensure that healthcare workers refrain from mistreating patients. Also, the COVID- 19 pandemic has required the country to channel a bulk of its funds to preventative measures, treatment and grants in order to assist the country in dealing with this dreadful disease. This will cause a delay in the implementation of the National Health Insurance Bill as it requires money to achieve its objectives. The National Insurance Bill will go a

long way towards protecting previously disadvantaged groups of society, however the country will need to firstly address the issue of corruption before its implementation to ensure that the goals are achieved. A brief preview of Germany and its healthcare laws was made to see how it has dealt with corruption and how South Africa may attempt to imitate Germany in a pursuit to achieve the constitutional goals of quality healthcare access for everyone.

In chapter 5 recommendations were made on how best the country can combat against corruption, mismanagement of state funds and mistreatment by healthcare workers to allow for the successful implementation of health policies and legislation such as the National Health Insurance Bill.

The conclusion reached in this study is that the right of access to healthcare should be granted protection against corruption. As a result, the objective is hindered due to the state's issues of corruption, meaning the right has not been protected, promoted, fulfilled and universal access to quality and comprehensive healthcare has been compromised. It is therefore concluded that with the assistance of the World Health Organization, South Africa needs to urgently adopt a method wherein all monies designated for health to be handled by an independent body to combat corruption. Once monies are kept transparent and correctly spent the healthcare system will have much more funds to enable the Department of Health to deliver the quality healthcare system envisaged by the Constitution and all policies and legislature will be implemented correctly, this includes the smooth operation of the National Core Standards.

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