MEDICLINIC SUBMISSION ON THE LEGAL FRAMEWORK OF THE HEALTH MARKET INQUIRY

Introduction

1. The Health Market Inquiry has been instituted by the Competition Commission in terms of its powers under the Competition Act, 89 of 1998.

2. The rationale for the Inquiry has its roots in section 27 of the Constitution, which enshrines the right to health care services as a fundamental human right, and the Commission's concern that above-inflationary increases in private healthcare costs, prices and expenditure are attributable to features of the sector which prevent, distort or restrict competition.

3. Against this backdrop, the Panel presiding over the Inquiry is tasked with investigating the competitive functioning of the private healthcare market to determine whether there are features of this market which undermine competition and lead to increases in private healthcare prices and expenditure.[1]

4. In this submission we address the legal framework of the Inquiry, with reference to the Constitution and the Competition Act. As will appear from what follows, while the rationale for the Inquiry is grounded in the constitutional right of access to health care services, the focal point of the

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[1] Terms of Reference for Market Inquiry, GG, 29 November 2013, No. 37062 (Terms of Reference), p 80, paragraph 3 and p 86, paragraph 5

Inquiry is the competitive functioning of the private healthcare market.

The Constitution

5. In terms of section 27 of the Constitution,

   5.1 everyone has the right to have access to health care services;[2]

   5.2 the State is required to '*take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation'* of this right;[3] and

   5.3 no one may be refused emergency medical treatment.[4]

6. The Constitution also provides for a range of other rights which are integral to the enjoyment of health. These include: the rights of security of the person;[5] the right to equality;[6] the right to an environment that is not harmful to health or wellbeing;[7] the right to have access to adequate housing;[8] and every child's right to basic nutrition, shelter, basic healthcare services and social services.[9]

7. These rights both reflect, and must be interpreted in accordance with, the

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[2] Section 27(1)(a) of the Constitution
[3] Section 27(2) of the Constitution
[4] Section 27(3) of the Constitution
[5] Section 12 of the Constitution
[6] Section 9 of the Constitution
[7] Section 24(a) of the Constitution
[8] Section 26(1) of the Constitution
[9] Section 28(1)(c) of the Constitution

State's obligations under international law.[10] These obligations are concretised in the International Covenant on Economic, Social and Cultural Rights (the ICESCR),[11] which was ratified by South Africa in 2015.[12]

Section 27 of the Constitution

8. Section 27 of the Constitution gives rise to a range of obligations.

9. There is a specific positive obligation upon the State to achieve the progressive realisation of everyone's right of access to health care services,[13] and a specific negative obligation on public and private healthcare providers not to refuse emergency medical treatment to any

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[10] Section 39(1)(b) of the Constitution

[11] The ICESCR was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976

[12] Individual entitlements to health-conducive social amenities are addressed in article 12 of the ICESCR, and include a right to maternal, child and reproductive health services; a right to environmental health (including entitlements to healthy living and work environments, safe drinking water and adequate sanitation services); a right to public health protection through measures aimed at disease prevention, treatment and control; as well as a right to have access to healthcare facilities, goods and services. General Comment 14 of the United Nations Committee on Economic Social and Cultural Rights (UNCESCR) recognises the following core obligations:

"*(a) to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable and marginalised groups*;

(b) to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;

(c) to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and portable water;

(d) to provide essential drugs, as from time to time defined by the WHO Action Programme on Essential Drugs;

(e) to ensure equitable distribution of all health facilities, goods and services;

(f) to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population …"

[13] In *Soobramoney v Minister of Health (KwaZulu-Natal*) 1998 (1) SA 765 (CC) at para 11 the Constitutional Court noted that this obligation is dependent upon the resources available for this purpose, and that the corresponding rights are limited by reasons of the lack of such resources.

person.[14]

10. More generally, section 27(1)(a) may give rise to –

10.1 negative obligations upon public and private healthcare providers not to infringe individuals' right to health care services;[15] and

10.2 positive and negative obligations, in accordance with the rule of law, to comply with and not to undermine '*legislative and other measures'* introduced by the State to achieve the progressive realisation of the right of access to health care services.

11. Private healthcare providers' common law obligations to their patients may also be developed with reference to section 27(1)(a), in accordance with section 39(2) of the Constitution.

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[14] In *Soobramoney,* above, para 20 the Constitutional Court stated as follows: "*Section 27(3) itself is couched in negative terms – it is a right not to be refused emergency treatment. The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers a sudden catastrophe which calls for immediate medical attention…should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm."* Woolman et al, in *The Constitutional Law of South Africa,* 2nd Edition, Vol 4, at 56A-18 state: "*In the light of the split between private and public healthcare in South Africa, FCs27(3) arguably places an obligation on private healthcare providers to offer emergency medical treatment to individuals even if the people who are brought to these hospitals lack health insurance."*

[15] In *Governing Body of the Juma Musjid Primary School & Others v Essay NO and Others* [2011] ZACC 13 the Constitutional Court confirmed that private parties may have obligations not to interfere with the enjoyment of socio-economic rights, and that such obligations may be breached '*directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection*.'

The pivotal role of the State

12. The key legislative measure introduced by the State in compliance with its obligation under section 27(2) of the Constitution is the National Health Act, 61 of 2003 (the Health Act), the main object of which is to establish a framework for a national health system which encompasses '*public and private providers of health services'.*[16]

13. The healthcare provision obligations enacted in the Health Act fall predominantly upon public providers of health services. Significantly, the Act requires all health establishments and healthcare providers in the public sector to provide health services within the limits of available resources.[17]

14. It is only the obligation not to refuse emergency medical treatment which is imposed upon health care providers, health workers and health establishments in both the public and private sectors.[18]

The place of the Constitution in the Inquiry

15. The Panel is tasked with determining whether there are factors that prevent, distort or restrict competition in the private healthcare market, and whether there are ways in which competition may be promoted '*in the interest of a more affordable, accessible, innovative and good quality*

[16] Section 2(a)(i) of the Health Act.
[17] Section 3(2) of the Health Act
[18] Section 5 of the Health Act

private healthcare."[19]

16. Insofar as the Inquiry is concerned with private healthcare providers' compliance with constitutional obligations, its focus is on their obligation to comply with the Competition Act, as a legislative measure introduced by the State to promote and maintain competition as a means of, among other things, (a) promoting economic efficiency;[20] (b) providing consumers with competitive prices and product choices;[21] and (c) advancing the social and economic welfare of South Africans.[22]

17. It is in this sense that the Inquiry has its roots in the Constitution, but finds its powers, functions and objectives in the Competition Act.

The Competition Act

8 A '*market inquiry*' in terms of the Competition Act is a formal inquiry in respect of '*the general state of competition'* in '*a market for particular goods or services'.*[23]

9 The substantive requirements for the initiation of a market inquiry are that either (a) the Commission has reason to believe that any feature or combination of features of the market '*prevents, distorts or restricts competition within that market'*, or (b) the Commission is conducting the

[19] Terms of Reference, p 81, paragraph 3
[20] Section 2(a) of the Competition Act
[21] Section 2(b) of the Competition Act
[22] Section 2(c) of the Competition Act
[23] Section 43A of the Competition Act

market inquiry to achieve the purposes of the Competition Act.[24]

10 The Inquiry is accordingly to be conducted, and any recommendations made are to be formulated, through the prism of promoting and maintaining competition in the Republic.[25]

11 Recommendations made upon completion of a market inquiry may include recommendations for '*new or amended policy, legislation or regulations*', and '*recommendations to other regulatory authorities in respect of competition matters*'.[26] Again, the Inquiry is subject to the discipline of the Competition Act, and any recommendations made by the Panel must pertain to the state of competition in the private healthcare sector, with the aim of achieving economic efficiency, and providing consumers with competitive prices and product choices.[27]

12 What a market inquiry in terms of chapter 4A of the Competition Act does not envisage is investigation into matters of general policy in a sector which are unrelated to competition.[28]

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[24] Section 43B(1)(i) & (ii) of the Competition Act
[25] Sections 2, 21 and 43B of the Competition Act
[26] Section 43C(1) of the Competition Act
[27] As explained in the preamble to, and section 2 of the Competition Act
[28] For example, whether a system of national health insurance should be introduced.