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ATTORNEYS AT LAW

**THE RIGHTS OF ACCESS TO HEALTHCARE AND
INFORMATION IN THE CONTEXT OF THE HEALTH
MARKET INQUIRY**

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AGENDA

- **Introduction**
- **The manner in which the right of access to healthcare services may be relevant to the HMI**
- **Right of Access to Healthcare**
 - Nature, meaning and scope of the right
 - State's obligation
 - Implications for the private healthcare system (negative obligations and State regulation)
- **Right of Access to Information**
- **Conclusion**



INTRODUCTION

- What is the purpose of the Healthcare Market Inquiry (“**HMI**”)?
- What are the key outcomes expected of the HMI?
- How is section 27 relevant to the HMI’s purpose?



SCOPE OF THE INQUIRY

- **What is the statutory mandate of the HMI?**
 - Sections 43A to C of the Competition Act
 - Identify features of a market that prevent, distort or restrict competition
 - Promote the purposes of the Competition Act
 - Primary purpose: promote the maintenance of competitive markets
 - Promoting and maintaining competition leads to the attainment of other social goods (e.g. employment, social and economic welfare, and competitive prices), as identified in section 2 of the Competition Act
 - Terms of Reference are consistent with this statutory scheme
 - The scope of the inquiry and the findings of the HMI must be located within the framework of the Competition Act



SCOPE OF THE INQUIRY

- *“A market inquiry is thus a general investigation into the state, nature and form of competition in a market, rather than a narrow investigation of specific conduct by any particular firm.*
 - *The Commission is initiating an inquiry into the private healthcare sector because it has reason to believe that there are features of the sector that prevent, distort or restrict competition. The Commission further believes that conducting this inquiry will assist in understanding how it may promote competition in the healthcare sector, in furtherance of the purpose of the Act.”*
- (Terms of Reference)



SCOPE OF THE INQUIRY

- *“[m]arket inquiries are essentially ‘research projects conducted to gain in-depth understanding of how sectors, markets, or market practices are working.’ The purpose of the exercise is to determine whether the process of competition is working well or can be improved effectively in a market as a whole. Market inquiries provide a framework for identifying, analysing and, where appropriate, remedying sector-wide or market-wide competition problems.”*

(Chairperson, 16 April 2014)



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SCOPE OF THE INQUIRY

- *“[i]t is important to emphasise that the scope of our inquiry is limited by the Competition Act as well as the Terms of Reference, which sets out our core mandate.”*

(Chairperson, February 2016)

- *“[a]t the conclusion of the inquiry, we are required to answer the question whether there are features that prevent, distort or restrict competition in the private healthcare markets.”*

(Chairperson, April 2014)



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SCOPE OF THE INQUIRY

- **How is section 27 relevant to the HMI?**
 - Informative/contextual but not the permitted focus/purpose of the HMI
 - HMI is the inappropriate forum for considering whether or not this right (or other constitutional rights) have been violated
 - Social goods may be obtained by ensuring the promotion and maintenance of competitive markets, but the attainment of social goods by other means is not the purpose of the inquiry
 - Competition inquiry cannot be converted into a constitutional inquiry
 - Role of the competition authorities is not that of a price regulator
 - *Mittal Steel South Africa / Harmony Gold Mining Co.* (2009)



SCOPE OF THE INQUIRY

- **Where constitutional rights or social goods are not fully attainable through competitive markets there are many other appropriate means to assure their attainment**
 - Advocacy
 - Policy Development (White and Green Papers)
 - Public Participation in relation to legislation and regulation
 - Legislation directly giving effect to the right (e.g. the National Health Act)
 - Litigation challenging unconstitutional legislation or conduct



RIGHT OF ACCESS TO HEALTHCARE

Section 27 of the Constitution:

“(1) Everyone has the right to have access to ... [h]ealth care services, including reproductive health care

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.”



RIGHT OF ACCESS TO HEALTHCARE

- Socio-economic right
- Requires the State to achieve the progressive realisation of the right
- State held accountable for any failure to act reasonably in achieving the realisation of the right
- Section 27(1) and (2) to be read together
- No minimum core of services which the State is obliged to provide
 - *Government of the Republic of South Africa v Grootboom* (2001)
 - *Minister of Health v Treatment Action Campaign* (2002)
 - *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* (2004)
 - *Mazibuko v City of Johannesburg* (2010)



RIGHT OF ACCESS TO HEALTHCARE

“Social and economic rights empower citizens to demand of the State that it act reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights.”

Mazibuko v City of Johannesburg (2010)



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RIGHT OF ACCESS TO HEALTHCARE

- The right is only to be provided with access to services that the State is able to make available progressively and reasonably
 - *Mazibuko v City of Johannesburg (2010)*
 - *Minister of Health v Treatment Action Campaign (2002)*
 - *Government of the Republic of South Africa v Grootboom (2001)*
- Reasonable steps to be taken toward the progressive realisation of the right
 - *Mazibuko v City of Johannesburg (2010)*
 - *Minister of Health v Treatment Action Campaign (2002)*
- Limited by State's available resources
 - *Soobramoney v Minister of Health (KwaZulu-Natal) (1998)*
 - *Minister of Health v Treatment Action Campaign (2002)*



RIGHT OF ACCESS TO HEALTHCARE

“...as far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependants are concerned, 'the State is not obliged to go beyond available resources or to realise these rights immediately'.”

Minister of Health v Treatment Action Campaign (2002)



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RIGHT OF ACCESS TO HEALTHCARE

- Section 27(1) does not provide that everyone is entitled to demand access to healthcare, or that such demands may be made from private players rather than the State
- Section 27 entitles persons to have access to those services that the State is able to make available, within the State's resources (and not someone else's resources)
- International Covenant on Economic, Social and Cultural Rights
 - *Government of the Republic of South Africa v Grootboom* (2001)
 - *Jaftha v Schoeman; van Rooyen v Stoltz* (2004)
 - *Minister of Health v Treatment Action Campaign* (2002)
 - *Mazibuko v City of Johannesburg* (2010)



RIGHT OF ACCESS TO HEALTHCARE

*“the State faces huge demands in relation to access to education, land, housing, health care, food, water and social security. **These are the socio-economic rights entrenched in the Constitution, and the State is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them. In the light of our history, this is an extraordinarily difficult task. Nonetheless it is an obligation imposed on the State by the Constitution.”***

Minister of Health v Treatment Action Campaign (2002)



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RIGHT OF ACCESS TO HEALTHCARE

- Section 27(3) – no person may be refused emergency medical treatment
- Given effect by section 5 of the National Health Act

“[a] health care provider, health worker or health establishment may not refuse a person emergency medical treatment.”

- A “health establishment” includes both public and private medical institutions
- Bill of Rights Handbook:

“[t]he [section 27(3)] right does not extend to routine medical treatment and it does not guarantee free service. Emergency treatment may not be refused because of lack of funds, but payment for treatment may be sought after the treatment has been provided.”



RIGHT OF ACCESS TO HEALTHCARE

“Though illness strikes the rich and the poor alike, its impact on the poor is aggravated by harsh living conditions and what is frequently the extreme difficulty of getting access to health care and medication. Hence the duty on the state to take special measures to assist those who are the most vulnerable to disease and, simultaneously the most lacking in resources. The question, however, is not simply whether the objective of the regulation is worthy, which it clearly is, but whether it is reasonable. Put another way, the mere fact that it serves a rational purpose in pursuing a legitimate government aim, would not in itself be enough. It would have to pass the test of being reasonable.”

Minister of Health v New Clicks South Africa (2006)



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RIGHT OF ACCESS TO HEALTHCARE

- Negative obligation imposed on private entities
 - Private bodies may not prevent or impair the right of access in certain specific circumstances
 - *Minister of Health v Treatment Action Campaign (2002)*
 - Section 8(2) of the Constitution
 - *Governing Body of the Juma Masjid Primary School v Essay (2011)*
 - Right to basic education – section 29(1)(a)
 - *Maphango v Aengus Lifestyle Properties (2012)*
 - Right of access to housing – section 26(2)



RIGHT OF ACCESS TO HEALTHCARE

- Section 27 does not create any direct positive obligation on private individuals or entities
 - The positive obligation to progressively realise the right of access of healthcare in terms of section 27(1) and (2) does not apply horizontally
 - Right of access to emergency medical treatment in terms of section 27(3) does apply horizontally
- Section 27(2) obliges the State to realise the right of access to healthcare in a progressive manner by adopting reasonable legislative and other measures
- Focus of the State will be the expansion and improvement of the public healthcare sector, although it may reasonably regulate the private sector (e.g. National Health Act and Medicines Act)



RIGHT OF ACCESS TO HEALTHCARE

- There are other provisions within the National Health Act aimed at the promotion of social goals related to access to healthcare
 - Section 90(1)(v)
 - Sections 35 to 40
- To the extent that stakeholders allege that the State has failed in its constitutional obligations in terms of section 27, relief may be sought through the courts
- It is the courts which must consider to what extent –
 - the State has failed in its obligation to progressively realise access to healthcare, within its available resources; or
 - the State has failed to regulate private parties

This is not the role of the HMI



RIGHT OF ACCESS TO HEALTHCARE

- Constitutional constraints on the State's regulatory powers
 - In line with section 27(2) of the Constitution, the State should ensure reasonable regulation of the private healthcare sector that is not retrogressive, and which complies with the requirements of section 22 of the Constitution, and, in respect of regulations, that also complies with PAJA. Furthermore, the State is always constrained by the principle of legality when it operates in this regulatory space.



RIGHT OF ACCESS TO HEALTHCARE

Minister of Health v New Clicks South Africa (2006)

- Constitutional Court was called upon to consider the constitutionality of regulations, which, *inter alia*, controlled the retail prices of medicine
- Court found that certain of the regulations were unconstitutional
 - Violated the requirements for lawful, reasonable and procedurally fair administrative action
 - Reasonableness of the regulations received some comment
 - Pharmacies an essential component of the medicine distribution chain
 - If pharmacies went out of business, the accessibility of medicines would be impaired
 - Unconstitutional to set a dispensing fee that would cause pharmacies to go out of business, operate at a loss and destroy the viability of the profession

RIGHT OF ACCESS TO HEALTHCARE

Minister of Health v New Clicks South Africa (2006)

- Sachs J explained that in assessing reasonableness, it was particularly relevant whether Government was embarking on a new regulatory endeavour with significant effects on the private health care sector, and if it was, this created a heightened duty on the State
- Findings would apply equally to an endeavour by the State to regulate the private healthcare sector
- Even legislation or schemes with laudable aims must be fine-tuned to the economic realities of the industry that the Government seeks to regulate



RIGHT OF ACCESS TO HEALTHCARE

Affordable Medicines Trust v Minister of Health (2006)

- Where the regulation of the practice of a profession, viewed objectively, is likely to impact negatively on the choice of a profession, such regulation will limit the right freely to choose a profession guaranteed by section 22 of the Constitution, and must therefore meet the test under section 36(1) of the Constitution [that is it must be reasonable and justifiable]



RIGHT OF ACCESS TO HEALTHCARE

- **Impairment of access to healthcare**
 - State bears a positive obligation in terms of section 27(1) and (2)
 - Duty to ensure that its laws and policies contribute toward the progressive realisation of the right of access to healthcare services
 - State bears a negative obligation in terms of section 27(2)
 - Duty not to enact laws or policies that impede access to healthcare services
 - Duty similarly applies to private parties
 - *Government of the Republic of South Africa v Grootboom (2001)*



RIGHT OF ACCESS TO HEALTHCARE

- **Impairment of access to healthcare**
 - Any Government policy or legislation that has the effect of inhibiting the access that persons have secured for themselves to private healthcare, through contractual arrangements with private providers of healthcare, may violate the negative obligation created by the right of access to healthcare services
 - Would not constitute a reasonable measure by the State to progressively realise the right of access, but would rather amount to an unreasonable and retrogressive measure, in violation of section 27(2)
 - *Law Society of South Africa and Others v Minister for Transport and Another (2011)*
 - *Chaoulli v Quebec (2005) (Canada)*



RIGHT OF ACCESS TO INFORMATION

Section 32 of the Constitution:

“(1) Everyone has the right of access to –

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”



RIGHT OF ACCESS TO INFORMATION

- The Promotion of Access to Information Act, 2000 (“**PAIA**”) is the legislation enacted in terms of section 32(2)
 - *My Vote Counts NPC v Speaker of the National Assembly and Others (2016)*
- Section 32(1) places no direct obligation on the State or private parties outside of the legislation enacted in terms of section 32(2)
- The only relevant obligations are therefore those in terms of PAIA
- Any relief sought in terms of a party’s access to information would need to be applied for in terms of PAIA
- PAIA does make provision for access to information held by private parties in certain circumstances
- Other legislation (not giving effect to section 32) may provide for information to be provided by private parties, which legislation would need to be complied with