

Healthcare & Pharmaceuticals

ALERT | 5 June 2024



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SOUTH AFRICA

The goals, timing and criticisms of the NHI Act



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The goals, timing and criticisms of the NHI Act

On 15 May 2024, President Cyril Ramaphosa signed the National Health Insurance Bill into law. The National Health Insurance Act 20 of 2023 (NHI Act) marks a pivotal moment in South Africa's healthcare landscape.

Although the NHI Act aims to provide comprehensive health coverage, it has ignited significant debate and controversy, especially concerning its funding and its effect on existing healthcare structures. Wrought with politics and policy, the NHI Act has simultaneously prompted celebration and hope, as well as condemnation and looming litigation. Although scant on details, this controversial legislation is complex to unpack.

In its key National Health Insurance (NHI) message the Department of Health (DoH) said:

"[I]f we can feel and act in unity about football and rugby, surely, we can do the same when it comes to matters of life and death, health and illness. National Health Insurance, known as NHI, is a chance for South Africans to join hands in a way that really counts. None of us would like a fellow human being to die, become disabled or live in pain just because he or she could not get decent healthcare. But this is happening in our country where poor people often have a second-rate healthcare while wealthier people can pay for good treatment. South Africans from all walks and life and all parts of our country have the power to change this tragic situation."

It is undisputed that access to healthcare in South Africa is inequitable and that the crisis requires urgent recalibration. Unfortunately, solving our healthcare difficulties and systemic complications appears to be considerably more challenging than acknowledging the problem and showing a simple will to change it.

In this alert, we unpack the aims of the NHI Act, the timing for the implementation of a national healthcare system and some of the criticisms of this new legislation.

A summary of the NHI Act

The NHI Act contemplates the establishment of a universal healthcare coverage system in which the NHI fund (Fund) will be the single purchaser and payer of healthcare services from healthcare providers in both the public and private sectors.

The NHI Act effectively aims to create one risk pool for most healthcare services or benefits delivered in South Africa through the establishment of the Fund. The Fund will pay for certain medical services that will be provided to registered users by registered healthcare service providers.

South Africans will be required to pay towards the Fund (and thus the NHI system) through a mandatory pre-payment system in exchange for healthcare services, which will be free at the point of care.

The Fund, an autonomous public entity, will be responsible for purchasing healthcare from registered public and private providers.

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The board of the Fund will consist of not more than 11 people who are all appointed by the Minister of Health (Minister). A board member cannot be employed by the state.

The Fund, in consultation with the Minister, will determine the nature of provider payment mechanisms.

Section 33 of the Act provides that:

*"[O]nce National Health Insurance has been fully implemented as determined by the Minister through regulations in the Gazette, medical schemes may only offer **complementary cover** to services not reimbursable by the Fund."*

Thus, the NHI envisages the continued existence of private medical schemes but disallows the coverage of services already covered by the Fund. One of the immediate concerns with this is that there will be insufficient resources to meet the needs of all South Africans, thus curtailing overall healthcare standards in South Africa. Allowances in relation to the continued role of medical schemes following implementation of the NHI Act will need to be determined.

Implementation of the NHI Act

In light of the various enabling regulations, directives and operational procedures required for the implementation of the NHI Act, a phased approach will be adopted in bringing the various sections of the NHI Act into force and effect.

It was estimated by the Minister, in his presentation of the NHI Act, that the establishment of the Fund will take approximately 6–12 months to complete following the relevant regulations being published.

While it is difficult to know when the Fund will become operative, we are still years away from the full implementation of the NHI Act.

Some of the considerations that need to be solved in the meantime relate to the potential limitations which the NHI Act may place on the existing role of medical schemes, as well as the ongoing role of private hospitals and healthcare professionals.

What are some of the criticisms?

The NHI Act has elicited strong criticism from some that, in its current form, it will not be able to achieve its noble goals.

Sources of funding

The potential cost of NHI and sources of finance for the Fund have raised controversy, with many critics saying the NHI system is simply unaffordable for South Africa. The DoH appears to envisage a consolidation and centralisation of the Government's various provincial and health department budgets, a 'shifting' of private sector medical scheme contributions, a potential raising of general taxes, and even the possibility of other new tax mechanisms.



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The concern is that the only 'viable' means of funding may be a substantial increase in taxes, with no assurance that overburdening taxes would or could indeed be directed towards improving access to healthcare, be it due to competing national priorities or mismanagement, fraud or corruption. Even the Government itself acknowledges the challenges faced with increasing taxes to produce revenue for use in the fiscus.

Scope of healthcare benefits

A further source of controversy is the lack of clarity on the nature and scope of the healthcare benefits to be offered under the NHI. A transparent benefit determination process is required to ensure that there is sufficient financing to make good on promised cover. Other than an express intention to commence with the purchasing of primary healthcare, details on the services to be accessed in terms of the NHI Act remain oblique.

Public sector challenges

A key concern that has been raised is whether the creation of the Fund will improve the service delivery in South Africa's public health sector. With approximately 85% of the population currently using the public sector, Government must focus its attention on improving crippling public sector infrastructure and access to quality preventative primary healthcare services (the latter is proven to reduce the burden on secondary and tertiary care services).

The NHI Act provides that only healthcare service providers and health establishments accredited by the Fund can deliver healthcare services purchased by the Fund. To be accredited by the Fund, a healthcare service provider or health establishment must, among other things, be successfully certified by the Office of Health Standards Compliance (OHSC). Practically, we understand that, to date, most public hospitals remain OHSC non-compliant. This suggests substantial investments will need to be made in the public sector infrastructure before the NHI can get off the ground.

Impact on the existing shortage of healthcare workers

South Africa already faces an increasing shortage of medical doctors and other healthcare practitioners, and the NHI Act has sparked concern that there may be a further exodus of qualified medical professionals given, among other things, that the NHI Act envisages all healthcare practitioners are to be remunerated by the state at a rate set by the Government.

Potential legal challenges

Certain stakeholders have confirmed an intention to attack the constitutionality of the NHI. Even if the Constitutional Court elects not to intervene at this stage, further objections may be brought in time as the NHI Act begins to be implemented in its various stages.

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Controversially, the NHI Act also seeks to limit asylum seekers and illegal foreigners from accessing services other than emergency medical services and services for notifiable conditions of public health concern.

Competition law considerations

The Health Market Inquiry (HMI), which conducted a detailed study of South Africa's private healthcare sector for just short of six years, concluded that there is indeed a need for structural reform and tasked the Government with many of these reforms. Despite the HMI's final report having been released in 2019, little of its package of interrelated recommendations have been implemented by the Government. However, the HMI did not recommend the removal of private medical scheme coverage. It has been argued that the NHI, in its current form, may result in threats to the sustainability and affordability of medical schemes.

Curiously, the NHI Act seeks to exempt the Fund from South Africa's competition legislation, which ordinarily applies to government-owned entities. From a theoretical anti-trust law perspective, the creation of a single Fund has the potential to cause competition law harm through the possible creation of monopsony buyer power and favourable or exclusive contracting arrangements with preferred providers (who may not necessarily be the most competitive providers).

Key takeaways

The DoH's statement quoted at the outset of this article elicits an emotional image of South Africans holding hands across colour and class lines in a panacea of healthcare equity. However, attention to the complex and delicate systemic and structural reforms must take precedence over simple idealism, or the gains may be ephemeral.

The funding of private hospitals and the remuneration of healthcare professionals will need to be carefully managed to ensure that South Africa retains its community of qualified, highly skilled healthcare professionals.

There will need to be thorough interrogation and consideration of the manner in which the NHI Act can be implemented so that it does not unduly impact the pockets and healthcare coverage of South Africans.

Yet, the reality of South Africans suffering and dying, only because they are impoverished, is a call to action. To this end, there has been successful past private and public sector collaboration, particularly in response to the COVID-19 pandemic. As we tread this new NHI path, destined to be beset with battles, whatever the outcome may be, the NHI Act may offer another opportunity for effective and sustainable public and private co-operation.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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